MEMORANDUM

Agenda Item No. 13(A)(2)

TO:	Honorable Chairman Joe A. Martinez and Members, Board of County Commissioners	**DATE:**	May 3, 2011
FROM:	R. A. Cuevas, Jr. County Attorney	**SUBJECT:**	Resolution authorizing the Mayor or Mayor's designee to execute the settlement agreement settling all claims and counterclaims between Miami-Dade County, on the one hand, and Fiscal Operations, Inc., Fiscal Funding, Inc., Calvin Grigsby, and John Tiddes, on the other hand

The accompanying resolution was placed on the agenda by the County Attorney.

R. A. Cuevas, Jr.
County Attorney

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Memorandum

MIAMI-DADE COUNTY

Date: May 3, 2011

To: Honorable Chairman Joe A. Martinez and
Members, Board of County Commissioners

From: R. A. Cuevas, Jr.
County Attorney

Alina T. Hudak
County Manager

Subject: Resolution approving the partial settlement of the lawsuit: *Metropolitan Dade County v. Fiscal Operations, Inc., et al,* Circuit Court Case No. 97-15083 CA 40 ("Lawsuit")

Recommendation

We hereby recommend execution of the attached settlement agreement, partially settling the action styled Metropolitan Dade County v. Fiscal Operations, Inc., et al. No. 97-15083 CA 40 ("Lawsuit"). The attached settlement agreement would settle all claims and counterclaims between the County, on the one hand, and Fiscal Operations, Inc., Fiscal Funding, Inc., Calvin Grigsby, and John Tiddes (collectively the "Fiscal Parties"), on the other hand. The County's claims against its former Seaport Director Carmen Lunetta would remain pending for trial.

The complaint by the County and the Counterclaim by the Fiscal Parties were filed in 1997, following termination of Fiscal Operations in connection with the operation of the cranes at the Port of Miami. Under the proposed settlement, the parties would exchange mutual releases, and divide an escrow fund in the approximate amount of $390,000 ("Escrow Fund") that was deposited by third parties, and has been in dispute and held in escrow since the initial stages of the dispute. Pursuant to the Settlement Agreement the funds would be divided with $345,000 being paid to Fiscal Operations, and the remaining funds – approximately $45,000 – being paid to the County. This division was calculated by having the County and Fiscal Operations divide the fund evenly with each receiving $195,000.00. The County then essentially agrees to reimburse the defendants in the amount of $150,000 for equipment and parts, purchased by the defendants for approximately $1.2 million, but valued in the amount of $890,000 at the time Fiscal Operations was banned from the Port and the equipment and parts were turned over by the County to the successor crane operator.

Background

In 1988, in connection with the County's purchase of gantry cranes for the Port of Miami, the County entered into a restated and amended operating agreement with Fiscal Operations, a subsidiary of Fiscal Funding, Inc. owned by Calvin Grigsby (the "Operating Agreement"). Under the terms of the Operating Agreement, Fiscal Operations was to operate and maintain the gantry cranes, collect revenues from users, and remit payments to the County. Fiscal Operations was obligated to submit yearly operating and maintenance budgets to the County. The County later was to approve the budget after making any modifications deemed by the County to be appropriate and reasonable. The Operating Agreement contained no express requirement for the deposit of crane fees in segregated trust accounts.

Commencing in the year 1997, a number of irregularities were identified by the County in connection with the use of gantry crane revenues. Fiscal Operations used crane revenues for a large series of expenditures wholly unrelated to crane operation, use or maintenance. Some of the expenditures were directed by the Port Director, such as political contributions, cars and employment in manner circumventing County personnel rules and practices. Some benefited the Port or the County either directly or indirectly. Some of the expenditures were directed by Mr. Grigsby strictly for his personal benefit such as Super Bowl tickets, payments to the symphony and expenses for his boat.

The Port Director resigned in the wake of these events.

On January 16, 1998, the Audit and Management Services Department of the County issued an audit report with detailed findings of the irregularities in the handling of the Operating Agreement. It recommended that the County immediately sever its relationship with Fiscal Operations.

The County terminated Fiscal Operations in 1998, banning the company from Port Facilities. The County turned over operation of the facilities to a successor operator. The County sued Fiscal Operations. The Fiscal Parties counterclaimed against the County.

The Courts

In 1998, Mr. Lunetta, and Mr. Grigsby were charged by the federal government with the theft of the crane revenues from an entity, the County, which received federal funds. A federal trial was held commencing April 1999, lasting approximately one month. The Court received testimony from dozens of witnesses and reviewed thousands of pages of documents.

In June of 1999, the Court entered a judgment of acquittal. It found that the government had presented "substantial evidence of greed and public corruption, the placement of private interests over those of the public. Accountability was non-existent; financial controls were ignored, indeed disdained." (See attached opinion). However, it concluded

as a matter of law that the crane funds were not owned by the County at the time they were spent by Fiscal within the meaning of the federal statute.

In reaching that conclusion, the Court found that Fiscal Operations was not required to maintain the funds in a segregated account, was allowed to, and did, commingle the funds with other funds of Fiscal Operations, and controlled the use of the funds with the knowledge of the County. It also found that the financial statements and tax returns of Fiscal showed the crane user fees as revenues of Fiscal Operations. At the same time, the Port's and County's audited financial statements reflected only the net revenues received from Fiscal, and did not report the gross crane user fees as income to the Port.

The civil action between the parties, now spanning fourteen years, has involved substantial discovery, including the deposition of the parties and all major witnesses, and the filing of numerous dispositive motions. Recently, on January 31, 2011, the Court ruled on a number of these dispositive motions filed by both the County and Fiscal Operations.

With respect to the County, the Court granted the County's motion for summary judgment based on sovereign immunity, and dismissed all of the tort counts in the Lawsuit, including those alleging defamation of Mr. Grigsby by County officials. The Defendants have appealed this order, however, and that appeal currently is pending in the Third District Court of Appeal. The County has moved to dismiss that appeal on jurisdictional grounds. Nonetheless, the Court has let Fiscal Operations' counterclaim for breach of contract stand, and the County faces the possibility of a judgment exceeding $10 million, plus prejudgment interest, on that counterclaim. In addition, Fiscal Operations has a pending counterclaim for tax indemnification against the County for its settlement of a claim with the Internal Revenue Service for approximately $700,000 plus prejudgment interest, attorneys' fees, and costs.

With respect to the dispositive motions filed by the Fiscal Parties, using the federal criminal case as well as several state law court decisions as precedent, the Court dismissed the County's claims for conversion and civil theft against, among others, Mr. Grigsby and Mr. Tiddes personally. The Court also dismissed the portion of the County's breach of contract claim alleging the misappropriation of County owned funds by Fiscal Operations, essentially leaving the County with breach of contract and breach of fiduciary duty claims against Fiscal Operations for (1) submitting inflated budgets (budgets which were, nonetheless approved by the Port Director), (2) a claim for deficient maintenance of the cranes, (3) a claim for crane revenues which were owed but not paid, and (4) the failure of Fiscal Operations to repay a deferred debt valued at approximately $23 million at the time the lawsuit was filed. While these claims could result in a judgment in excess of $30 million, it should be noted that the largest component of the claim is for the deferred debt. In this regard, it should be further noted that the Operating Agreement provides that the deferred debt is cancelled if the County terminates the Operating Agreement (which the County did do). While the County has challenged the enforceability of this provision, the issue remains an issue to be decided at

trial. Significantly too, Fiscal Operations has no assets, and any judgment against Fiscal Operations would, as a practical matter, likely be worthless.

The County also has pending claims for Malicious Interference with an Existing Business Relationship and Civil Conspiracy against Fiscal Operations, Calvin Grigsby and John Tiddes. But the damages with respect to the malicious interference claim consist of the funds paid by third parties into the Escrow Fund referenced above. The bases for the Conspiracy claim are theft, conversion, and misuse of County owned revenues, claims and issues which have been essentially decided against the County.

After numerous delays related to a number of different reasons the case currently is set for trial commencing on May 31, 2011. The trial is expected to last for three to four weeks. Significant costs will be attendant to the trial in the form of transcripts, exhibits and expert witness fees. In anticipation of the trial, the Court ordered the parties to mediation in a last ditch effort to settle the case after the passage of time.

The mediation was held on April 18, 2011 before a mediator appointed by mutual agreement, Mr. George Knox. Mr. Knox was chosen for his extraordinary competence as a practitioner, and with particular relevance to this case for his sound judgment, outstanding ethics and intimate understanding of government. Mr. Knox also mediated this dispute on November 2, 2011. Mr. Knox recommended that the County and the Fiscal Parties adopt the attached settlement, and put an end to thirteen years of litigation between them.

The County's claims against Carmen Lunetta remain pending and will be taken to trial unless a mutually agreeable settlement can be reached between the County and Mr. Lunetta. Mr. Lunetta has no counterclaims against the County.

<u>The Recommended Settlement</u>

The settlement is recommended as essentially a walk away by both the County and the Fiscal Parties at no real cost to the County. The Escrow Fund was deposited by third parties, and would be divided with Fiscal Operations receiving $345,000 and the County receiving the remaining balance of approximately $45,000. This division of funds was calculated by having the Escrow Fund of $390,000 divided equally between the County and Fiscal Operations, yielding shares of $195,000 each. The Escrow Fund has been held since the outset of the litigation in a separate interest bearing escrow account pending resolution of the dispute. The funds were deposited by the third parties, stevedoring companies, in order for those third parties to be dismissed from the Lawsuit. The additional payment of $150,000 to Fiscal Operations from the County's portion of the divided funds to Fiscal Operations is on account of parts and inventory taken over by the County at the time of transition to a new operating company. The amount represents a liquidation of value actually received by the County at that time. In any event the amount is less than the amount received by the County from the Escrow Fund. Therefore, the

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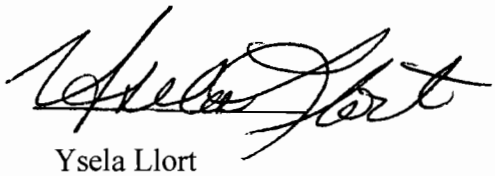
settlement would result in no actual cash payment by the County, and will have a positive impact to Port funds.

Among other reasons, the settlement is recommended because of the factual and legal difficulties presented by this controversy, which extends to over fourteen years in litigation. These include (1) the need to convince a jury to distance the County as an entity from those high ranking County officers who, at the time, had knowledge and direct control of the facts now claimed as the basis for the County's rights, and (2) the fact that certain legal issues have been resolved against the County, most notably the ownership of crane user fees at the time of collection, and the dismissal of the claims against Mr. Grigsby and John Tiddes personally for civil theft and conversion. Further, given the passage of time, it is doubtful that the County could recover any, much less substantial, damages from Fiscal Operations, so that there is likely to be no real economic benefit to the County even in the event of a favorable judgment. In contrast, the County faces a counterclaim which could result in a judgment in excess of $10 million plus prejudgment interest, which would be substantial given the length of time that the Lawsuit has remained pending.

The County's claims against its former Seaport Director, Carmen Lunetta, for breach of fiduciary duty, civil theft, and fraud would proceed forward to trial unless a mutually agreeable resolution can be reached. Mr. Lunetta has no pending counterclaims against the County, and the time, costs, risk and expense of that trial will be substantially less than a trial including the Fiscal Parties.



Ysela Llort
Assistant County Manager

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JUN 7 1999
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 98-353-Cr-Middlebrooks

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARMEN LUNETTA,
CALVIN GRIGSBY; and
NEAL HARRINGTON,

Defendants.

ORDER ON MOTIONS FOR JUDGMENT OF ACQUITTAL

I. Introduction

Federal courts have limited jurisdiction. Our system of federalism, the relationship between the authority of the federal government and the states, requires federal judges to ensure that criminal prosecutions remain within the constraints of the Constitution and the parameters established by Congress.

This case presents a difficult application of these principles. The Government has presented substantial evidence of greed and public corruption, the placement of private interests over those of the public. Accountability was non-existent; financial controls were ignored, indeed disdained.

It is also evident that misconduct went beyond these Defendants to past and present elected and appointed officials who viewed the Port of Miami ("the Port" or "seaport") as a place

to obtain under-the-table loans, political contributions, jobs for relatives and friends, and favors of all kinds. The Defendants, as well as politicians of every stripe, used Fiscal Operations, Inc. ("Fiscal Operations" or "Fiscal") and its collection of crane user fees as a punch bowl, into which they could dip at will.

However, under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of some law. It is essential that there be evidence from which a jury could find the defendant guilty beyond reasonable doubt of the particular offense against the federal criminal law with which a defendant has been charged.

This prosecution was brought pursuant to a federal law that prohibits theft or misapplication of monies from programs receiving federal funds. The essence of the Indictment is its charge that the Defendants stole or misapplied funds owned by Miami-Dade County ("the County").

I have concluded, after viewing the evidence presented in the light most favorable to the Government, that the funds misappropriated in this case were not owned by the County within the meaning of 18 U.S.C. § 666. Judgment of Acquittal must therefore be entered in favor of the Defendants for this reason.

II. The Statute -- 18 U.S.C. § 666

This prosecution is brought under a federal statute entitled, "Theft or bribery concerning programs receiving Federal funds." 18 U.S.C. § 666. This statute has been described by the Supreme Court as being designed to extend federal bribery prohibitions to state and local officials receiving federal funds. *See Salinas v. United States*, ___ U.S. ___, 118 S. Ct. 469, 474, 139 L. Ed. 2d 352 (1997).

Section 666 provides in pertinent part as follows:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists --
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof --
>
> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that --
>
> (i) is valued at $5,000 or more, and
>
> (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency;
>
> * * *
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(a)(1)(A)(i)(ii)(b) (1994).

In order to successfully prosecute an individual for a violation of § 666, therefore, the Government must prove, beyond a reasonable doubt, that: (1) the individual was an agent of an organization, State or local government, or government agency that (2) received over $10,000 in benefits under a Federal program, and that the individual (3) embezzled, stole, obtained by fraud knowingly converted, or intentionally misapplied (4) at least $5,000 that was (5) owned by or under the control of the organization, government, or agency.

III. The Indictment

The Superseding Indictment ("Indictment") contains ten counts, but each is based on the prohibition of 18 U.S.C. § 666. Count 1 charges a conspiracy between Carmen Lunetta

("Lunetta") and Calvin Grigsby ("Grigsby") "to embezzle, steal, convert, misdirect, misapply and otherwise divert Miami-Dade County revenues without authority and permission of the County through a series of financial transactions for their own personal use and the use of others." (Indictment at 4, ¶ 3.)

Counts 2, 3, 4, 6, and 7 charge that Mr. Lunetta and Mr. Grigsby, being agents of the County, "did knowingly and intentionally embezzle, steal, obtain by fraud, misapply and otherwise without authority convert to the use of any person other than the rightful owner, that is, Miami-Dade County, revenues which were owned by Miami-Dade County and under the care, custody and control of Fiscal Operations." (*See, e.g.*, Indictment at 8, ¶ 2.)

Count 5 charges Mr. Lunetta and Neal Harrington ("Harrington") with violation of 18 U.S.C. § 666 and alleges that Mr. Lunetta, as an agent of the County, "did knowingly and intentionally embezzle, steal, obtain by fraud, misapply and otherwise without authority convert to the use of any person other than the rightful owner, that is Miami-Dade County, property that is valued at $5,000 or more, that is approximately $196,824.00 in revenues which were owed to and owned by Miami-Dade County." (Indictment at 10, ¶ 3.)

Counts 8 and 9 contain money laundering charges directed against Mr. Grigsby and Mr. Lunetta. These counts allege that the transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of the specified unlawful activity. The unlawful activity is alleged to be the theft and intentional misapplication of money from a local government receiving federal funds, in violation of 18 U.S.C. § 666. (Indictment at 12-13.)

Count 10 charges Mr. Lunetta with a violation of 18 U.S.C. § 1957 for engaging in a monetary transaction with proceeds of unlawful activity by depositing $84,985.00 from a bank account in Puerto Rico to a bank account in Miami derived from a theft and intentional misapplication of funds in violation of 18 U.S.C. § 666. (Indictment at 13-14.)

IV. Facts Presented by the Government

A. The Miami-Dade Seaport

The seaport is an agency of the County. It is considered a "proprietary" agency since it is not supported by County tax revenues but depends upon user fees paid by those who use the Port. (Tr. of 5/24/99, at 257.) In 1978, Mr. Lunetta was appointed as the director of the seaport and he served in this capacity until 1997, when he was removed from his post in the wake of events which serve as the basis for this prosecution.

B. The 1982 Agreement Between the County and Fiscal Operations

In 1982, as part of Mr. Lunetta's efforts to develop the seaport, Dade County sought to acquire two gantry cranes to assist in the loading and unloading of vessels. The cranes were intially seen as necessary to the development of the Port and not as a revenue source. The County sought proposals for financing of the cranes, and one of the proposals came from Calvin Grigsby, a San Francisco lawyer and investment banker.

Under the tax laws then applicable, tax benefits would be available to a private entity which owned or operated the cranes that would not be available if the County owned and operated the cranes. Moreover, because County contracts required no-strike provisions, union stevedoring companies were considered unlikely to participate if the County operated the cranes.

For these reasons, a structure was developed whereby a private Chicago company would

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purchase the cranes through financing provided by municipal bonds; another private company, Fiscal Operations, a subsidiary of Fiscal Funding, Inc., a company owned by Calvin Grigsby, would operate and maintain the cranes.

The County and Fiscal Operations executed an Operating Agreement in May, 1982, which granted Fiscal "the right and responsibility to provide heavy lift gantry crane rental services to stevedore companies which engage in unloading and loading vessels at the Seaport." Paragraph 13, entitled, "Participation in Revenues," provided that "[t]he County shall not participate in any revenues . . . earned by the Operating Company from the performance of gantry crane rental services or for any other services rendered by the Operating Company to its customers . . . ."

The parties did not believe that revenues from the crane user fees would be sufficient to pay the costs of crane operations and payments of rent pursuant to the equipment lease, thereby repaying the bondholders. Therefore, the County, as part of the contract, agreed "to advance such excess costs of operation" (cost advances) to Fiscal Operations.

Significantly, the 1982 Agreement contained provisions omitted in the subsequent 1988 Agreement specifying how the funds would be held. In order to protect bondholders and the parties, the Agreement created segregated "special funds" and stated that the monies in each of the funds "shall be held in trust by the County . . ." as paying agent for Fiscal Operations.

C. <u>The 1988 Restated and Amended Operating Agreement</u>

In 1988, the County purchased the first two gantry cranes and was in the process of purchasing three additional cranes. In connection with the purchase of the cranes, Fiscal Operations and the County executed a restated and amended Operating Agreement (the "1988

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Agreement").

Pursuant to the 1988 Agreement, the County hired Fiscal Operations "as an independent contractor, and not as an employee, agent, partner or joint venturer of the County, to perform the duties set forth herein and to manage and operate the Project to provide on behalf of the County . . . heavy lift gantry crane rental services to stevedore companies which engage in unloading and loading vessels within the Port." (1988 Agreement at 3, ¶ 5.)

In return for these services, Fiscal Operations was authorized to "retain from User Fees collected . . . (i) the Management Fee, monthly in advance on the Closing Date and on the first day of each calendar month during the term of this Agreement and (ii) the Excess Usage Fee, if any . . . ." *Id.*

"Management Fee" was defined in the definitions contained in Exhibit B to the 1988 Agreement as follows:

> Management Fee shall mean for any Calculation Period . . . an amount not less than either (i) the total Annual Budget for such fiscal year (which shall include a general administration charge of not less than $100,000) divided by 12, which amount is deemed by the Operating Company and the County to be sufficient to pay all costs and expenses incurred by the Operating Company in the performance of its duties and obligations hereunder (other than Extraordinary Expenses) during such Calculation Period in full, or (ii) such other amount as the County and Operating Company may mutually agree upon from time to time.

(1988 Agreement, Ex. B at 4.)

For purposes of the Management Fee, "Calculation Period" was defined to mean each calendar month during the term of the Agreement. (1988 Agreement, Ex. B at 1.)

The 1988 Agreement required Fiscal Operations "on or before the Closing Date and on

May 1 of each year thereafter" to "submit to the County its operating and maintenance budget, prepared in accordance with generally accepted accounting procedures . . . ." The County was to "approve such budget after making any modifications thereto, as the County shall deem appropriate and reasonable." (1988 Agreement at 3, ¶ 5.) The Agreement further stated, "The Operating Company may submit, and the County may approve, subject to modifications as provided above, an amended or supplemental Annual Budget for the remainder of the then current Fiscal Year and the Annual Budget so amended or supplemented shall be treated as the Annual Budget under the provisions of this Section." (1988 Agreement at 3-4, ¶ 5.)

Paragraph 13 of the 1988 Operating Agreement states as follows:

> 13. Operating Company as Collection Agent. The Operating Company, as agent of the County, shall collect (promptly and in a commercially reasonable manner) on the County's behalf all fees derived from users, as established by the County in accordance with all applicable rules, regulations and tariffs, of the Project or any portion thereof ("User Fees"). The Operating Company shall perform such duties to the best of its ability and with due skill, care and diligence but at least in accordance with normal debt collection industry standards. In accordance with Section 5 above, on a monthly basis the Operating Company shall retain from User Fees, the Management Fee, and shall, on or before the 10th business day of each month during the term of this Agreement, pay to the County any and all User Fees in excess of the amounts retained by the Operating Company as provided in this Agreement, such payment to be made in the manner outlined in written instructions to the Operating Company from the County. The County may from time to time by written notice change the manner in which such payments are to be made.

(1988 Agreement at 8, 9, ¶ 13.)

In short, under the 1988 Agreement, Fiscal Operations was to collect, on behalf of the County, fees from the stevedoring companies for use of the cranes and remit to the County those fees in excess of budgeted expenses. Unlike the 1982 Agreement, the 1988 Agreement contained

no requirement for a segregated trust account for the deposit of funds.

D. The Conduct of the Parties

The parties did not follow the provisions of the 1988 Agreement. Budgets were not submitted to the County in May of the preceding year as required by the Agreement. Payments of crane user fees in excess of 1/12 of the approved annual budget were not made monthly.

While the 1988 Agreement required Fiscal Operations to keep accurate books and records, showing separately and in detail its operations at the Port, with the form of the records subject to the approval of the Port Director and the Finance Director for the County, it appears this was never done.[1] "Adequate and acceptable records" of Fiscal's operations and financial statements, certified by an independent certified public accountant, were not submitted. (Tr. of 5/11/99, at 244-45).

Instead, budgets were presented to Mr. Lunetta and Port personnel just prior to each fiscal year. Expenses unrelated to the operations of the gantry cranes were directed by both Mr. Grigsby and Mr. Lunetta. Examples of this included Super Bowl tickets, payments to the San Francisco Symphony, financial support for the campaign to keep the Oakland Raiders in Oakland-Alameda County, expenses for Mr. Grigsby's boat and private legal fees, and payments of a Fiscal Operations employee's American Express bills for lingerie and other personal items.

Numerous personnel were ordered placed on Fiscal's payroll by Mr. Lunetta. Some of these individuals were friends and relatives of elected politicians. Some performed services

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[1]The evidence presented by the Government reflected no oversight by the Finance Director for the County despite the contractual provisions contemplating the involvement of that official.

benefiting the Port and the County, but unrelated to the gantry cranes. Others, according to the testimony, only appeared to pick up their paychecks. The Fiscal Operations' payroll was viewed as a mechanism to evade the County's personnel rules and practices.

Cars were provided by Fiscal Operations for numerous individuals, including Mr. Lunetta, and were charged against the crane user fees. Contributions to politicians were made by employees of Fiscal Operations at the direction of Mr. Lunetta and were reimbursed by Fiscal Operations.

Ms. Lee, a manager from Management and Auditing Services, Dade County's internal auditors, suggested that Mr. Lunetta's ability to direct expenditures by Fiscal Operations and place employees on its payroll showed Mr. Lunetta's control over the funds and led her to conclude that the County "owned" the revenues. However, the evidence also showed that Mr. Lunetta had similarly directed expenditures and put employees on Fiscal Operations' payroll during the period when the parties operated under the 1982 Agreement, under which it was clear that the County could not participate in crane user revenues.

The County Commission also directed expenditures by Fiscal Operations. In 1994, the Port acquired a computer system designed to facilitate movement of containers at the Port. Despite the fact that Fiscal Operations did not have access to the computer system, which had no direct relationship to the operation of the gantry cranes, the County Commission, by resolution, amended the Operating Agreement to direct Fiscal Operations to pay approximately $800,000 annually for the costs of operation of the system. (DL 3A, 33B; Tr. of 5/10/99, at 38.)

The expenses charged against crane user fees had a significant effect upon net revenues. Moreover, there were often substantial delays in payments by the stevedoring companies.

Consequently, payments to the County were never made on a monthly basis as contemplated by the 1988 Agreement. Instead, payments were sporadically made when crane revenues exceeded expenses.

Invoices for the crane user fees were payable to Fiscal Operations at its San Francisco address. When received, the funds were placed in Fiscal's bank account and were commingled with funds belonging to Fiscal Operations. Invoices to the stevedoring companies contained Fiscal's name and address, not the County's; and when a stevedoring company went bankrupt, Fiscal made a claim in bankruptcy court for unpaid user fees. While the County also made a claim in that case for wharfage and other amounts due the County, its claim did not include crane user fees. (Tr. of 5/10/99, at 168.)

Tax returns filed by Fiscal Operations reflected the crane user fees as gross income of Fiscal Operations. Similarly, the financial statements of Fiscal Operations included the user fees as part of gross revenues.

The County's financial statements did not list the user fees as income to the County. Only the net revenue, the revenue paid to the County by Fiscal Operations after payment of expenses, appeared on the County's audited financial statements prepared by the County's auditors, Coopers and Lybrand.

I. Buccione's Restaurant

Mr. Lunema sought investors for a Miami restaurant known as Buccione's. In 1990, in a confusing series of transactions, $50,000 from Fiscal Operations found its way to Buccione's[2]

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[2]Before closing, Buccione's, in addition to its Italian food, made other contributions to Miami political and legal lore. *See United States v. Massey*, 89 F.3d 1433 (11th Cir. 1996).

and was recorded in Fiscal's books as a marketing expenditure. (Tr. of 5/5/99, at 224-240; Govt. Ex. 20 A-H.)

2. The Teele "Loan"

In May, 1993, John Lacapra, an attorney for the cruise industry and president of the Florida Ports Council, was called by Mr. Lunetta and asked to make a loan to Dade County Commission Chairman Arthur Teele. Mr. Lunetta volunteered to arrange for Mr. Lacapra to "make some money" so that he would have the funds to make the loan. Mr. Lacapra declined.

Subsequently, Mr. Lunetta asked Mr. Lacapra if he would act as an intermediary so that a company that used the Port could make the loan.

Mr. Lacapra agreed to do so and gave Mr. Lunetta wiring instructions to a Puerto Rico law firm. Fiscal Operations wired $85,000 to the Puerto Rico law firm. The transfer was classified as marketing and public relations on Fiscal's books. Checks were prepared by the law firm payable to Mr. Teele's attorneys and were delivered to Mr. Lacapra in Miami.

Mr. Lacapra then met with Mr. Teele, who told Mr. Lacapra that he was in serious trouble and desperately needed a loan. Mr. Teele said he would pay 10% interest, and promised that the loan would be repaid in six months. The loan was never repaid.

3. The Lunetta House "Purchase"

In early 1994, Mr. Lunetta approached Fred Darden about purchasing Mr. Lunetta's house. Mr. Darden was not interested in purchasing a house since he was living in a condominium close to the Port. However, Mr. Lunetta continued to press him to make the purchase.

During a meeting in Miami between Messrs. Grigsby, Lunetta, and Darden, the purchase

of the house by Mr. Darden was again raised. Mr. Darden was convinced that the house might give him a good tax benefit if he bought the house as a rental property.

There was no negotiation of price for a house that Mr. Darden ultimately saw with his own eyes on only one occasion. There was no closing, and Mr. Darden never received a deed. Mr. Lunetta's sister and father moved into the house. Mr. Darden was given $1200 a month in rent, although he had asked for $1500. He never saw a lease.

Mr. Darden was given a check from Fiscal Funding to pay a down payment for the house to Mr. Lunetta. He was also given a $30,000 raise from Fiscal Operations which he believed was to allow him to purchase the house.

E. Receipt of Federal Funds

The County is a major recipient of federal funds. The total federal funds made available during the years of 1990 to 1997 were as follows:

1990	$	173,004,435
1991		195,983,805
1992		271,180,562
1993		421,517,682
1994		498,194,946
1995		502,167,316
1996		451,890,209
1997		418,692,444

(Tr. of 5/25/99, at 127-28.)

Moreover, the Port itself received federal funds. From 1992 to 1996, the Port received $10,755,756 in federal funds, primarily from the Army Corps of Engineers, in connection with a major dredging project at the Port. Additionally, in 1993, $98,000 was received by the Port from FEMA in connection with Hurricane Andrew cleanup. In total, the Port's financial statements

reflect the following federal funds were received:

1994	$	10,461,153
1995		3,165,415
1996		6,582,084
1997		522,230

(Ex. 159(e)(f)(g)(i))[3]

V. Analysis

A. Standard of Review

In considering a motion for judgment of acquittal made at the close of the Government's case, a Court must determine whether viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, a reasonable jury could have concluded that the Government had proven all the elements of the crime beyond a reasonable doubt. *United States v. Barfield*, 999 F.2d 1520, 1522 (11th Cir. 1993). When an indictment alleges several counts, a defendant may gain partial judgment of acquittal as to individual counts. *United States v. Thomas*, 987 F.2d 697, 703 (11th Cir. 1993). In this particular instance, as the counts alleged in the indictment other than those implicated by the motions for judgment of acquittal are all predicated on a violation of 18 U.S.C. § 666, a partial judgment of acquittal on the counts alleging a violation of 18 U.S.C. § 666 would operate as a full judgment of acquittal.

B. Federal Jurisdiction

The Defendants argue that federal jurisdiction does not exist in this case because the crane user fees were payments made by stevedoring companies and did not include federal or

[3]There appears to be a discrepancy among the Port documents as to the amount actually received by the seaport during the years covered by the Indictment. However, for the purposes of this Rule 29 motion, we assume that these figures are the correct figures.

local funds. As such, they argue, any theft of the user fees posed no threat to any federal program.

In *Salinas v. United States*, the Supreme Court examined the jurisdictional nexus required under § 666, and concluded that a theft or bribe need not affect federal funds to support a conviction under the statute. *Salinas, supra*, 118 S.Ct. at 475. It was sufficient that the prosecutors showed that the bribe constituted "a threat to the integrity and proper operation of the federal program," *id.*, in that case, a program involving the federal support of a state penal institution housing Federal prisoners.

In a pre-*Salinas* opinion, the Eleventh Circuit presaged the holding of the Supreme Court when it held that § 666 does not require a prosecutor to "trace the flow of federal funds and assistance to any particular project." *United States v. Paradies*, 98 F.3d 1266, 1288 (11th Cir. 1996), *cert. den.*, 118 S.Ct. 598 (1997). In that case, the Eleventh Circuit upheld the § 666 conviction of individuals charged with making and receiving a bribe in exchange for the granting of concessionaire rights at an airport. The Eleventh Circuit rejected the argument that the government was required to trace federal funds to the airport concession program itself, implicitly finding that the government merely had to show that the airport, run by a municipal government, received federal funds amounting to more than $10,000 in any twelve-month period. *Id., see also, United States v. Simas*, 937 F.2d 459 (9th Cir. 1991) (showing that rapid-area transit system received $10,000 in federal funds sufficient to uphold § 666 conviction for bribery involving janitorial services subproject of transit system).

In *United States v. Grassl*, 143 F.3d 348 (7th Cir.), *cert. den.*, 119 S. Ct. 185 (1998), the Seventh Circuit reached a similar conclusion in upholding a prosecution predicated on the

bribery of a town official who reimbursed his friends' medical bills from a town general assistance program. Writing for the panel, Judge Frank Easterbrook explained why it made sense to hold that a prosecutor need only show that a local government received federal funds and not the particular governmental program affected by the illegal activity: "money is fungible, and its effect transcends program boundaries. The general assistance program has more to spend on welfare (or dangle as a lure for bribes) if the federal government meets some of the Township's other expenses." *Grassi*, 143 F.3d at 350.

In this case, the Government has presented sufficient evidence that the County received substantial federal assistance in the form of grants to help pay for the deepening and widening of the Port. The federal government was committed to pay 35% of the cost of the dredging. However, since the federal payments were forthcoming only when the work was done, the County was forced to advance funds for the dredging out of its revenues and then seek reimbursement from the federal government.

As a result of these advances, the Port's construction fund ran a deficit that also caused its operations fund to be in deficit. In fact, this deficit was one of the factors that caused the County to scrutinize Fiscal Operations. The facts of this case vividly illustrate Judge Easterbrook's observation about the fungibility of money. Had the County received the revenues to which it was entitled, the deficit that threatened the Port's operations and construction program would have been ameliorated at least in the amount of such revenues. Under the Supreme Court's construction in *Salinas*, the facts of this case do not extend federal power beyond its proper

bounds.[4]

C. The "Owned By" Element of § 666

The statute prohibits theft or misapplication of property "owned by, or . . . under the care, custody or control . . ." of the organization, government or agency. The Indictment charges theft or misapplication of "revenues which were owned by Miami-Dade County . . . ." (emphasis added). The crux of this case is whether the crane revenues in the care and control of Fiscal Operations were "owned" by the County.[5]

The Government's theory of prosecution is that Defendants Grigsby and Lunetta stole or misapplied money owned by the County from the bank account of Fiscal Operations, a private company with a contract to operate and maintain gantry cranes, collect fees for use of the cranes on behalf of the County, and remit a portion of those monies to the County, after deducting compensation and expenses. In the case of Mr. Harrington, the Government's theory is that at the direction of himself and Mr. Lunetta, money owed by Continental Stevedoring, a user of the gantry cranes, was not paid to Fiscal, thereby depriving the County of the revenues, if any, it would have received after deduction of Fiscal's compensation. Since we find that under established principles of law, the terms of the contract, and the conduct of the parties, the County

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[4]Our determination that jurisdiction exists is related to interpretation of the ownership requirement of § 666. *See* Section V.C., *infra*. A construction extending application of § 666 beyond its plain meaning to apply to cases where no federal interest is implicated would present constitutional concerns. *See United States v. Lopez*, 514 U.S. 549, 566, 115 S. Ct. 1624, 1633 (1995).

[5]During the opening days of trial, the prosecution stated: "We will show by their conduct in this case that they [the Defendants] knew what they were dealing with were County funds. Exactly. And if we can't do that we lose." (Tr. 4/28/99 at 137).

had only an expectation of payment rather than ownership of monies, the essential "owned by" element of § 666 cannot be met.

In interpreting a statute, the first step is always to look at its language. "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, in Collected Legal Papers 207 (1920), *quoted in Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397, 71 S. Ct. 745, 751 (1951) (Jackson, J. concurring). Penal statutes are to be construed strictly and a person should not be held criminally liable for an act that is not clearly proscribed. *See United States v. Campos-Serrano*, 404 U.S. 293, 297, 92 S. Ct. 471, 474 (1971).

"Own" is defined by Black's Law Dictionary as follows: "to have a good legal title; to hold as property; to have a legal or rightful title to; to have; to possess." (6th ed. 1990). In its *Salinas* decision, the Supreme Court did not address the meaning of "own" as set forth in § 666. In fact, there are no federal cases whatsoever that address the meaning of "own" as set forth in § 666. We therefore look to cases applying statutes proscribing theft or embezzlement of federal property for guidance.

In *United States v. Mason*, 218 U.S. 517, 31 S. Ct. 28 (1910), the Supreme Court considered the indictment of a court clerk charged with embezzlement and conversion of public monies for failing to remit to the treasury funds collected as an officer of the United States. Liability could only be determined, according to the Court, after a consideration of the history of the clerk's relation to the funds and the laws defining the rights and duties of the office.

Initially, clerks were not required to render any accounting of their fees. Fees received by the clerks were their own property to be recovered "in like manner as the fees of the officers of

the states respectively for like services." In 1841, by statute, clerks were limited in the amount they were entitled to retain. Clerks were required to make verified returns setting forth the monies collected and identifying necessary office expenses. They were required to pay into the Treasury any surplus of fees over expenses. The object of the statute, explained the Court, was to limit the amount which the clerk was to retain and to require an accounting, an audit of expenses, and a payment of the surplus.

In 1846, a general statute entitled, "An Act to Provide for the Better Organization of the Treasury and for the Collection, Safe-Keeping, Transfer, and Disbursement of the Public Revenue" was enacted. The Act required "all public officers of whatever character" to "keep safely, without loaning, using, depositing in banks, or exchanging for other funds . . . all the public money collected by them."

Over time, the statutes relating to the Treasury were amended and supplemented. For example, in 1849, an Act was passed entitled, "An Act Requiring All Monies Receivable from Customs and from All Other Sources to be Paid Immediately into the Treasury, Without Abatement or Reduction, and for Other Purposes." This Act provided that the gross amount of all money received from whatever source for the use of the United States "shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatsoever." 216 U.S. at 525. This provision, however, was never applied to the clerks of court who continued to receive, hold and use the fees subject to the duty to account for the fees they received.

The defendant in *Mason* was a clerk of the federal court who was indicted for converting

monies he had received for his own use and for failure to pay to the United States the monies which were alleged to be part of the surplus.

The prosecution argued that the fees were attached to the office and were received in an official capacity. The Court found that argument unavailing, pointing out that the fees were attached to the office prior to the statute of 1841, when they belonged to the clerk without any duty to account for any of them.

The Court affirmed dismissal of the indictment, stating:

> [T]he duty to pay the surplus shown by the return or audit is not governed by the statutes relating to embezzlement . . . . The amount with which the clerk is chargeable upon his accounting is not the 'public money' or the 'money or property of the United States' within the meaning of their provisions. The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is made, the clerk is not trustee, but debtor. Any other view must ignore not only the practical construction which the statutes governing the office have received, but their clear intent.

218 U.S. at 531 (citation omitted).

Mason offers substantial guidance here. Like the clerk of court prior to 1841, Fiscal Operations under the 1982 Agreement was entitled to keep the crane user fees as its own, and the County disclaimed any interest in the fees. Under the 1988 Agreement, Fiscal Operations was entitled to keep budgeted expenses as part of its management fee. The money in Fiscal's bank accounts was not treated in the fashion required by general statutes governing public funds.[6]

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[6]Article VIII, Section 1(b) of the Florida Constitution provides that "[t]he care, custody and method of disbursing county funds shall be provided by general law." Section 136.03, Fla. Stat. provides that all persons "having, receiving or collecting any money" payable to the County

Subsequently, the Court decided *United States v. Johnston*, 268 U.S. 220, 45 S. Ct. 496 (1925). There, the Court reviewed a conviction of a boxing promoter who had failed to pay taxes collected as part of the price of admission to matches. Justice Holmes, in typically succinct fashion, affirmed reversal of the conviction on the embezzlement count:

> [I]t seems to us that under this law the person required to pay over the tax is a debtor and not a bailee. The money paid for the tax is not identified at the outset but is paid with the price of the ticket that belongs to the owner of the show. We see no ground for requiring the ticket office of a theatre to create a separate fund by laying aside the amount of the tax on each ticket and to keep it apart, either in a strong box or as a separate deposit in a bank. Reports are required only once a month, which does not look as if the Government were dealing with these people otherwise than with others answerable for a tax. Further argument seems unnecessary upon this point.

268 U.S. at 226.

As was the case in *Johnston*, Fiscal Operations was not required to segregate crane revenues from their other funds. Amounts due to the County were not placed in any separate fund. Neither the Port financial personnel nor the County's independent auditors reflected crane user fees on the Port financial statements or County audits. The County did not deal with Fiscal Operations as if it was holding County funds or was answerable for amounts other than operating income less expenses.

Several decisions of the Courts of Appeal considering 18 U.S.C. § 641, the modern act

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shall deposit the funds into qualified depositories. Section 219.02(2), Fla. Stat. requires that "all public money shall be kept separate in the depository and not be commingled with personal funds."

proscribing theft or embezzlement of federal funds, are also persuasive.[7] *See United States v. Klingler*, 61 F.3d 1234 (6th Cir. 1995); *United States v. Hartec Enterprises, Inc.*, 967 F.2d 130 (5th Cir. 1992); and *United States v. Lawson*, 925 F.2d 1207 (9th Cir. 1991).

In *United States v. Klingler, supra*, the Sixth Circuit reversed the conviction of a customs broker who failed to remit to the United States monies she had received from her clients to pay

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[7]Congress enacted § 666 in 1984 as part of the Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, Title II, § 1104(a), 98 Stat. 2143, in response to several cases where prosecution under the theft of federal property statute, 18 U.S.C. § 641, failed because the Government could not show that it owned the property stolen at the time of the theft where such property had been transferred to a state or local government or other organization under a federal program. *See, e.g., United States v. Del Toro*, 513 F.2d 656 (2d Cir.), *cert. den.*, 423 U.S. 826, 96 S. Ct. 41 (1975).

The legislative history of § 666 explains Congress's attempt to close these loopholes:

> [Section 666] is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving federal monies that are disbursed to private organizations or state and local governments pursuant to a Federal program.
>
> * * *
>
> Federal financial assistance can be prosecuted under the general theft of Federal property statute. 18 U.S.C. § 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the federal government clearly retains a strong interest in assuring the integrity of such program funds.

S. Rep. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.A.N. 3510. "Thus, as is evident from the circumstances surrounding its adoption, § 666's manifest purpose is to safeguard finite federal resources from corruption and to police those with control of federal funds." *United States v. Rooney*, 37 F.3d 847, 851 (2d Cir. 1994).

customs duties. The Court held that the duties never became money of the United States as required by Section 641. 61 F.3d at 1234. "Clearly, an intention that money be delivered to the United States is insufficient to make it government property." *Id.* at 1240.

The Government argues that this case differs from *Klingler* because under paragraph 13 of the Operating Agreement, Fiscal Operations was to act as an agent for the County in collecting the crane revenues. This, it is argued, provides the County a greater interest than a normal debtor/creditor relationship. However, this argument is the same argument made unsuccessfully to the Supreme Court in *Mason* that because the clerk of court was a public officer, the money must be public money. It is also similar to contentions rejected by the Fifth Circuit in *United States v. Hartec Enterprises, Inc., supra.*

In *Hartec*, Hartec and its company president were convicted of theft of government property. The company had a contract with the government to fabricate wire mesh panels. The government had made periodic payments under the contract. Without permission of the government, the company declared a number of the panels as scrap and sold them. The government claimed that sale of the panels was conversion of government property, arguing that a title-vesting provision of the Federal Acquisition Regulations, incorporated into the contract, effectively transferred ownership of the panels to the government because the panels were manufactured with materials paid for through progress payments.[5] The critical point on appeal was the nature of the government's interest. Reviewing the inconsistent treatment courts had

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[5]Federal Acquisition Regulation 52.232-16 stated in part: "Title to the property shall vest in the government. The vestiture shall be immediately upon the date of this contract for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract."

accorded the title-vesting clause, the Fifth Circuit found that in a criminal setting, the coupling of the inconsistent judicial interpretations of the Federal provision along with the government ownership element of § 641 did not provide the defendant with adequate notice that he could be criminally liable for sale of the wire mesh panels. 867 F.2d at 133.

The government next argued that even if its interest in the property was more properly categorized as a security interest, the convictions could still be upheld because the government retained sufficient control over the property to support a theft action. There was credible evidence in that case that Hartec's president had reason to believe that the government retained control over the wire mesh panels. One of Hartec's employees had told the president that the panels belonged to the government while another advised the president to consult with the government before selling the panels.[9] Without reaching the issue of whether a security interest was sufficient to satisfy the statutory element, the court held that the government did not indict the defendants on the theory that the government exercised sufficient control to constitute theft of government property. 867 F.2d at 134.

Similarly to *Hartec*, the Government in this case contends that a single provision of a contract, which it claims is ambiguous, (Tr. of 4/28/99, at 132), imposes criminal liability by effectively transferring ownership of funds in Fiscal Operations bank account to the County. Under the facts of this case, the Government's strained interpretation of the collection of fees

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[9]Unlike *Hartec*, the employees of Fiscal Operations called by the Government testified that they regarded the revenues in Fiscal Operations accounts to be owned by Fiscal. (Tr. of 4/29/99, at 99; Tr. of 5/3/99, at 168; Tr. of 5/20/99, at 113). One former employee appearing at first blush to have a contrary view, testified that he believed that Fiscal Operations owed the money to the County. (Tr. of 5/19/99, at 33.) As we shall discuss later, that one is owed money by another does not create an ownership interest.

provision of the 1988 Agreement is insufficient to show ownership of unsegregated and not specifically identifiable monies. Moreover, an argument that an interest less than ownership resulted in control of the fees by the County is precluded by the Indictment, which alleges ownership by the County, but custody and control by Fiscal Operations.

In *United States v. Lawson*, 925 F.2d 1207, the defendant, an auctioneer, was hired by the Small Business Admistration (SBA) to conduct auctions to dispose of property and equipment from businesses that defaulted on SBA loans. *Id.* at 1209. The contracts between Lawson and the SBA made no mention about who owned the proceeds but required Lawson to conduct the auctions in a commercially reasonable manner. *Id.* at 1209 n. 2. Lawson failed to remit the proceeds to the SBA, admitting that it was his practice "to rob Peter to pay Paul," using the proceeds from more recent auctions to pay off older accounts. He was indicted for conversion of funds obtained through sale of government property by "using the money . . . to pay off other consignees of auctioned property, rather than to pay back the SBA." *Id.* at 1209-1210.

The Ninth Circuit affirmed dismissal of the indictment, holding that under California law, an auctioneer is not required to remit the actual proceeds from auction but rather the auctioneer must remit the amount of the proceeds. *Id.* at 1210.

The Court stated:

> When a party is allowed to commingle funds and merely is required to pay the amount of net auction proceeds to the seller, his status is more properly seen as a debtor rather than a bailee. Unlike the situation prior to sale, where Lawson was responsible for the actual pieces of property that he held for the SBA, after the auction Lawson could use money from any source, so long as he paid the proper amount.

925 F.2d at 1210 (citation omitted).

Here, as in *Lawson*, there was no requirement that the crane user fees be kept in a separate trust account for the County. The funds were kept in Fiscal Operations' account, and were commingled with Fiscal's other funds. Under the contract, Fiscal Operations was to retain budgeted expenses and its administrative fees, remitting any excess to the County. These circumstances lead to a conclusion that Fiscal Operations is more properly seen as a debtor rather than a bailee.

In urging us not to apply the rationale of these cases, the Government essentially argues that since Fiscal Operations under the 1988 Agreement acts as a collection agent for the County in collecting crane revenues, the monies in Fiscal's accounts are owned by the County. However, this conflation of agency and ownership ignores established principles of agency, the terms of the 1988 Agreement, the manner in which both Fiscal and the County treated and reported the revenues, and Florida law pertaining to obligations under a contract.

The Restatement (Second) of Agency recognizes that a collection agent who is authorized to place monies collected in the agent's own account becomes a debtor to the principal for amounts due under the agreement. *See* Restatement (Second) of Agency § 72 cmt. e (1958) ("An Agent is ordinarily authorized to deposit money received in a bank, or other safe depository, but not in his own name, unless he is authorized to become a debtor for the amount collected"). *See also* § 398 cmt. c (1958) ("If the funds are properly mingled, the inference is that the agent becomes a debtor to the amount received for the principal . . . ." *See also In re Morales Travel Agency*, 667 F.2d 1069, 1071-72 (1st Cir. 1981) (holding that in bankruptcy context money collected by travel agency from sale of airline tickets was not the property of the airline for purposes of determining priority in bankruptcy proceeding despite contract language that money

collected "shall be property of the carrier," where contract did not require travel agency to keep funds separate or place restrictions on use of money).

Not only was Fiscal Operations allowed to place the crane revenues in its own bank accounts, and allowed to commingle the revenues with its other funds, but under the 1998 Agreement, it was entitled to retain budgeted expenses and its administrative fee. Under operation of the contract, these funds certainly do not belong to the County and contradict the assertion that user fees are County funds. The Government's reliance on the first sentence of paragraph 13, while ignoring the remainder of that paragraph and paragraph 5, violates principles of contract interpretation. *See American Express Financial Advisors, Inc. v. Makarewicz*, 122 F.3d 936, 940 (11th Cir. 1997) ("Under Florida law, the terms of the contract should control where the rights and interests of the parties are definitely and clearly stated."); *Florida Polk County v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 (11th Cir. 1999) ("[P]rovisions of a contract should be construed so as to give every provision meaning").

The assertion that the crane user fees are owned by the County is also contradicted by the financial reporting of both Fiscal Operations and the County. The financial statements and tax returns of Fiscal Operations both before the 1988 Agreement and throughout the period covered by the Indictment consistently showed the crane user fees as revenues of Fiscal Operations. The Port's financial statements and the County's audited financial statements reflected only the net revenues received from Fiscal Operations. The County sent invoices to Fiscal Operations for the net revenues due after deduction of operating expenses.

Finally, we look to Florida law in examining the rights of the parties.[18] Ownership does not exist in a vacuum. Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972).

It is considered axiomatic under Florida law that a person cannot be convicted of theft of his own property. *Brennan v. State*, 651 So.2d 244, 246 (Fla. 3d DCA 1995). Moreover, a co-owner of property cannot be held guilty of stealing the property except in the very unique situation where an owner takes goods from one who has a special property right in them and a right to withhold them from the owner. *Hinkle v. State*, 355 So. 2d 465, 467 (Fla. 3d DCA) (holding that even though joint owner of certificate of deposit had contributed all the funds and claimed she never authorized withdrawal of funds no criminal liability could exist), *appeal dismissed*, 359 So.2d 1220 (Fla. 1978). A claim for breach of a contract to pay money which is not specifically identifiable cannot be the subject of conversion or theft. *Rosen v. Marlin*, 486 So. 2d 623, 625-26 (Fla. 3d DCA), *rev. den.*, 494 So.2d 1151 (Fla. 1986); *Advanced Surgical Technologies, Inc. v. Automated Industries, Inc.*, 777 F.2d 1504 (11th Cir. 1985). Review of Florida law offers no support for the Government's theory of prosecution. Indeed, the Government may have shown that Dade County was owed some portion of the crane user fees. But "[o]rthographic similarity notwithstanding, there is a great difference between money owed and money owned." *In re Underground Storage Tank Technical Services Group, Inc.*, 212 B.R.

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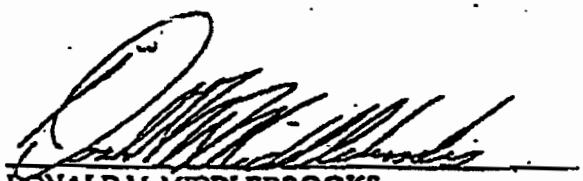
[18]The 1988 Agreement is governed by Florida law. Federal courts look to state law to define ownership interest in the absence of a unique definition in a federal statute. *United States v. Shotts*, 145 F.3d 1289, 1295 (11th Cir. 1998); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996). *See also United States v. Lawson, supra.*

crane user fees alleged to have been stolen.[12]

VI. Conclusion

For the foregoing reasons, the Defendants' motions pursuant to Fed. R. Crim. P. 29(a) are GRANTED. Judgment of acquittal shall be entered on all counts of the Superseding Indictment.

DONE and ORDERED at Miami, Florida, this 7th day of June, 1999.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies provided to counsel of record.

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[12]While its legal theory with respect to the ownership requirement is flawed, the prosecution served important values. The disinfectant of a searching inquiry and public trial is in itself an antidote for public corruption. Much of what happened at the Port could have been prevented by financial controls and oversight. Those who sought benefits and favors to which they were not entitled should examine their behavior and be held accountable by the public.

MEMORANDUM

(Revised)

TO: Honorable Chairman Joe A. Martinez and Members, Board of County Commissioners

DATE: May 3, 2011

FROM: R. A. Cuevas, Jr. County Attorney

SUBJECT: Agenda Item No. 13(A)(2)

Please note any items checked.

_____ **"3-Day Rule" for committees applicable if raised**

_____ **6 weeks required between first reading and public hearing**

_____ **4 weeks notification to municipal officials required prior to public hearing**

_____ **Decreases revenues or increases expenditures without balancing budget**

_____ **Budget required**

_____ **Statement of fiscal impact required**

✓ **Ordinance creating a new board requires detailed County Manager's report for public hearing**

_____ **No committee review**

_____ **Applicable legislation requires more than a majority vote (i.e., 2/3's ____, 3/5's ____, unanimous _____) to approve**

_____ **Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required**

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 13(A)(2)
5-3-2011

RESOLUTION NO. _____

RESOLUTION AUTHORIZING THE MAYOR OR THE MAYOR'S DESIGNEE TO EXECUTE THE SETTLEMENT AGREEMENT SETTLING ALL LEGAL CLAIMS AND COUNTERCLAIMS BETWEEN MIAMI-DADE COUNTY, ON THE ONE HAND, AND FISCAL OPERATIONS, INC., FISCAL FUNDING, INC., CALVIN GRIGSBY, AND JOHN TIDDES, ON THE OTHER HAND

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by this reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board approves the terms of and authorizes the Mayor or the Mayor's designee to execute the Settlement Agreement between Miami-Dade County, on the one hand, and Fiscal Operations, Inc., Fiscal Funding, Inc., Calvin Grigsby, and John Tiddes, on the other hand, substantially in the form attached to this resolution and the accompanying memorandum.

The foregoing resolution was offered by Commissioner , who moved its adoption. The motion was seconded by Commissioner and upon being put to a vote, the vote was as follows:

Joe A. Martinez, Chairman
Audrey M. Edmonson, Vice Chairperson

Bruno A. Barreiro	Lynda Bell
José "Pepe" Díaz	Sally A. Heyman
Barbara J. Jordan	Jean Monestime
Dennis C. Moss	Rebeca Sosa
Senator Javier D. Souto	

The Chairperson thereupon declared the resolution duly passed and adopted this 3rd day of May, 2011. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By:_____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

Richard C. Seavey

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made and entered into this 21st day of April, 2011, by and between the following, sometimes referred to hereafter collectively as the "Parties" and individually as a "Party": Miami-Dade County, Florida (f/k/a Metropolitan Dade County, Florida) (the "County"), Fiscal Operations, Inc. ("Fiscal Operations"), Fiscal Funding, Inc. ("Fiscal Funding"), Calvin B. Grigsby ("Grigsby"), and John Tiddes ("Tiddes").

Whereas, the County, Fiscal Operations, Fiscal Funding, and other third parties entered into a number of agreements in connection with a commercial transaction occurring in or about May 1982 including, but not limited to, an Operating Agreement dated May 1, 1982 (collectively "1982 Agreements");

Whereas, the County and Fiscal Funding entered into a Ground Lease dated July 31, 1984 ("Ground Lease");

Whereas, a wholly owned subsidiary of Fiscal Operations, Inc. known as Fiscal Management, Inc. entered into an agreement dated June 15, 1985 ("1985 Agreement"), and a License Agreement dated June 15, 1985 ("License Agreement");

Whereas, there is a Contract of Sale dated as of November 1, 1988 between Dade County and the Connecticut Bank and Trust Company, National Association in which the County purchased gantry cranes 1 and 2 at the Port of Miami (the "Contract of Sale");

Whereas, the County, Fiscal Operations, Fiscal Funding and other third parties entered into a number of agreements in connection with a commercial transaction occurring on or about November 1988, including, but not limited to, a Restated and Amended Operating Agreement dated as of November 1, 1988 (collectively the "1988 Agreements") (collectively with the 1982 Agreements, the Ground Lease, the 1985 Agreement, the License Agreement, the Contract of Sale, the 1988 Agreements and any other agreement between any of the Parties referred to as the "Agreements");

Whereas, there is currently pending in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida (the "Court"), Case No. 97-15083 CA40, an action entitled *Metropolitan Dade County Florida v. Fiscal Operations, Inc., et al* (the "Lawsuit") asserting claims by the County against Fiscal Operations, Fiscal Funding, Grigsby, Tiddes, and Carmen Lunetta;

Whereas, Fiscal Operations, Fiscal Funding, Grigsby and Tiddes have asserted counterclaims and cross-claims in the Lawsuit;

Whereas, pursuant to previous orders of this Court in the Lawsuit, third party defendants were permitted to deposit funds into Court ("Escrow Fund") in order to be dismissed from the Lawsuit, and the Escrow Fund totaled $390,079.91 as of April 7, 2011;

Whereas, on or about March 3, 2011, Fiscal Operations, Fiscal Funding, Grigsby and Tiddes filed a Petition for Certiorari in the Third District Court of Appeal, Case No. 3D11-556 and, alternatively, a Notice of Appeal, Case No. 3D11-0590 (collectively the "Appeals");

Whereas, the Parties, each of whom is represented by counsel, recognize their respective rights and obligations, and are desirous of settling – fully and finally – the Lawsuit as well as any and all claims and counterclaims which were or could have been brought in the Lawsuit and Appeals, or which were, could have been, or could be brought in connection with the Agreements;

Whereas, prior to signing this Agreement, each Party had an opportunity to and in fact has had counsel review this Agreement and explain that Party's rights and obligations under and the legal effect of this Agreement; and

Whereas, the Parties have signed this Agreement of their own free will and volition, with the full recognition and understanding of their rights and obligations under and the legal effect of this Settlement Agreement;

Now Therefore, for and in consideration of the following covenants and agreements, or other valuable consideration, the receipt and sufficiency of which are hereby acknowledged and conclusively established, the Parties covenant and agree as follows:

1. **Recitals**: The foregoing recitals are true and correct and incorporated herein.

2. **Nothing In This Agreement To Act As Admission**: Neither this Agreement nor anything in it shall act as or constitute an admission by any Party that any Party, or any of their respective past or present officers, directors, shareholders, agents, employees, independent contractors, agents, accountants or attorneys, committed any wrongful act, or violated or breached the terms of any agreement or duty owed, whether statutory or otherwise to any other Party.

3. **Settlement of Lawsuit Between the Parties**: In settlement of the Lawsuit between the Parties to this Settlement Agreement, including but not limited to any and all claims, counterclaims and cross-claims which were or could have been asserted in the Lawsuit, and any and all claims which could have been, or could in the future be, asserted in connection with the Agreements:

(a) Within five (5) business days from the effective date of the Resolution by the Miami-Dade County Board of County Commissioners approving this Settlement Agreement, (1) Fiscal Operations, Fiscal Funding, Grigsby and Tiddes shall withdraw and dismiss the Appeals with prejudice, each party to bear its own costs and attorneys' fees, and (2) the Parties Agree to file in the Lawsuit a Stipulation for Entry of Partial Final Judgment and Dismissal ("Stipulated Judgment") in the form attached hereto as Attachment A, in which the Parties stipulate to dismiss all claims, counterclaims, and cross claims between the Parties in the Lawsuit with prejudice, with each party bearing its own costs and fees, and to entry of a partial final judgment dividing the Escrow Fund

in the amounts set forth on Exhibit A with $45,079.91 being paid to Miami-Dade County and $345,000.00 being paid to Fiscal Operations, Inc., and in consideration for part of the portion of the Escrow Fund paid to Fiscal Operations, Inc., vesting title in all parts, inventory, tangible assets, intangible assets, equipment and all other property in dispute in the Lawsuit shall rest with Miami-Dade County. Additionally, to the extent not disposed of by the Stipulated Judgment, the Parties, through their respective counsel in the Lawsuit, shall also prepare and file with the Court, in accordance with Rule 1.420 of the Florida Rules of Civil Procedure, a stipulation of dismissal of all claims, counterclaims and cross claims between the Parties with prejudice (along with a proposed Order of Dismissal With Prejudice), with each side to bear its own attorneys' fees and costs, and with the Court reserving jurisdiction for the purpose of enforcing this Agreement and the Stipulated Judgment.

(b) After the entry of the Stipulated Judgment, the Parties agree to file any motions, proposed orders, or other documents necessary to effectuate the division of the Escrow Fund as provided in the Stipulated Judgment.

4. **Mutual Release**: the Parties hereby remise, release, acquit, satisfy and forever discharge each other (including each of their respective past and present parent, subsidiaries, affiliates or predecessor entities, and any and all of their respective past and present officers, directors, agents, attorneys, accountants, insurers, servants, employees, and shareholders, and their respective heirs and personal representatives, all of the foregoing hereinafter collectively referred to as the "Party Releasees"), of and from any and all, and all manner of, claims, actions, causes of action, suits, debts, sums of money, accounts, reckonings, contracts, controversies, agreements, promises, damages, and demands whatsoever, in law or in equity, which any Party had or now has, or which any successor or assign of any Party hereafter can, shall or may have, against the Party Releasees, for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this Settlement Agreement, whether known or unknown, direct or indirect, vested or contingent. Without limiting the generality of the foregoing, the Parties' release also specifically includes the release of any and all claims, rights, and causes of action, of any type or kind whatsoever, which were or could have been raised or asserted in the Lawsuit or in any separate action filed in any court arising out of or relating (directly or indirectly) to the Agreements. Nothing in this Agreement shall prohibit Fiscal Operations, Inc., Fiscal Funding, Inc., Calvin Grigsby and/or John Tiddes from attempting to engage in business with the County, provided such Defendant is in conformity with all applicable statutes, laws, ordinances, administrative orders and rules which govern any person or entity attempting to engage in such business. Notwithstanding the foregoing, the Parties do not release each other from the terms and conditions of this Settlement Agreement.

5. **Attorneys' Fees**: The Parties agree that each of them will be responsible for paying their own attorneys' fees, costs and expenses arising out of or connected with the Lawsuit and Appeals, including but not limited to the preparation and execution of this Settlement Agreement. The Parties do not agree to pay any other Party's attorneys' fees in connection with enforcement of this Settlement Agreement.

6. **Paragraph Headings**: The headings of the paragraphs of this Agreement are inserted only for the purpose of convenience of reference, and the Parties recognize and agree that these headings may not adequately or accurately describe the contents of the paragraphs which they head. Such headings shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning, or intent of the provisions of this Agreement or any part or portion thereof, nor shall they otherwise be given any legal effect.

7. **Parties**: This Settlement Agreement, as well as the obligations created and the benefits conferred hereunder, shall be binding on and inure to the benefit of the Parties as well as their personal representatives, heirs, past and present representative officers, directors, agents, attorneys, accountants, insurers, employees, and any subsidiary, affiliated and parent corporations, collateral corporations, or other business entities controlled directly or indirectly by the Parties. Each Party hereby represents and warrants, with respect to any and all claims and counterclaims which were or could have been asserted in the Lawsuit against the other Party, that: (a) no other person or entity is entitled to assert any such claims or counterclaims against, or to recover any monetary, declarative, injunctive, equitable, or any other form of relief from, the opposing Party; and (b) no Party has assigned, transferred, hypothecated, or in any other way disposed of all or any portion of any of claims or counterclaims which were or could have been asserted in the Lawsuit against the opposing Party.

8. **Authority:** Each person signing this Agreement on behalf of a Party represents and warrants that he or she has full power and authority to enter into this Agreement and to fully, completely, and finally settle the Lawsuit, including but not limited to any and all claims and counterclaims which were or could have been asserted in the Lawsuit.

9. **Neutral Reference**: Each Party agrees that if any inquiry is made by third persons with respect to any other Party that each Party shall make only the statement that the "matter has been resolved amicably between the parties."

10. **Governing Law and Venue**: This Agreement shall be enforceable and construed according to the laws of the State of Florida without regard to its conflict of laws provisions. The Parties agree that any action to enforce this Agreement shall be brought in the Court in the Lawsuit.

11. **Entire Agreement**: The Parties acknowledge that this Agreement contains the full and complete agreement between and among them, and that there are no oral or implied agreements or understandings not specifically set forth herein. Each Party acknowledges that no other Party, or agent or attorney of any other Party, or any person, firm, corporation or any other entity has made any promise, representation, or warranty, whatsoever, express, implied, or statutory, not contained herein, concerning the subject matter hereof, to induce the execution of this Agreement. Each signatory also hereby acknowledges that he or she has not executed this Agreement in reliance on any promise, representation, or warranty not contained herein. The Parties further agree that no modifications of this Agreement may be made except by means of a written agreement signed by each of the Parties. Finally, the Parties agree that the waiver of any breach of this Agreement by any Party shall not be a waiver of any other subsequent or prior breach. From time to time at the request of any of the Parties to this Agreement, without further

consideration and within a reasonable period of time after request hereunder is made, the Parties hereby agree to execute and deliver any and all further documents and instruments and to do all acts that any of the Parties to this Agreement may reasonably request which may be necessary or appropriate to fully implement the provisions of this Agreement.

12. **Further Action**: Each of the Parties hereto agrees to execute and deliver all documents, provide all information and take or forbear from all such action as may be reasonable necessary or appropriate to achieve the purposes of this Settlement Agreement, including, but not limited to, jointly filing any motions necessary to obtain the division of the Escrow Fund, each party to bear its own costs and fees.

IN WITNESS WHEREOF, the parties by their duly authorized officials have executed this Agreement the day first above written.

Fiscal Operations, Inc.

BY: _____
Name: Calvin Grigsby
Title: President

Fiscal Funding, Inc.

BY: _____
Name: Calvin Grigsby
Title: President

Calvin B. Grigsby

BY: _____
Calvin B. Grigsby

John Tiddes

BY: _____
John Tiddes

MIAMI-DADE COUNTY
BOARD OF COUNTY COMMISSIONERS

BY: _____
County Mayor or Designee

229
230 DATE OF EXECUTION: _____
231
232
233 ATTEST:
234
235 _____
236 Deputy Clerk
237
238 **APPROVED AS TO FORM & LEGAL SUFFICIENCY:**
239 MIAMI-DADE COUNTY ATTORNEY
240
241
242 By: _____
243

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 97-15083 CA 32

METROPOLITAN DADE COUNTY,

Plaintiff,

v.

FISCAL OPERATIONS, INC., FISCAL FUNDING CO., INC., CALVIN GRIGSBY, JOHN TIDDES, CARMEN J. LUNETTA,

Defendants,
_____/

FISCAL OPERATIONS, INC., FISCAL FUNDING CO., INC., CALVIN GRIGSBY, and JOHN TIDDES,

Counter/Claimants,

v.

METROPOLITAN DADE COUNTY,

Counter/Defendant.
_____/

JOINT STIPULATION FOR ENTRY OF JUDGMENT AND DISMISSAL

Pursuant to the Florida Rules of Civil Procedure, including Rule 1.420, the parties Miami-Dade County, Florida (the "County"), Fiscal Operations, Inc. ("Fiscal"), Fiscal Funding Co., Inc. ("Fiscal Funding"), Calvin Grigsby ("Grigsby), and John Tiddes ("Tiddes") (collectively, the "Settling Parties") hereby stipulate to (1) the entry of a Partial Final Judgment in the form attached hereto, and (2) the dismissal of all claims, counterclaims and cross-claims between the Settling Parties in this action in their entirety with prejudice, each Settling Party bearing its own costs and fees.

INSERT SIGNATURE BLOCKS FOR COUNSEL

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 97-15083 CA 32

METROPOLITAN DADE COUNTY,

Plaintiff,

v.

FISCAL OPERATIONS, INC., FISCAL FUNDING CO., INC., CALVIN GRIGSBY, JOHN TIDDES, CARMEN J. LUNETTA,

Defendants,

_____/

FISCAL OPERATIONS, INC., FISCAL FUNDING CO., INC., CALVIN GRIGSBY, and JOHN TIDDES,

Counter/Claimants,

v.

METROPOLITAN DADE COUNTY,

Counter/Defendant.

_____/

PARTIAL FINAL JUDGMENT FOR DIVISION OF ESCROWED FUNDS AND DISMISSAL OF ALL CLAIMS, COUNTERCLAIMS, AND CROSS CLAIMS BETWEEN METROPOLITAN DADE COUNTY, FISCAL OPERATIONS, INC., FISCAL FUNDING, INC., CALVIN GRIGSBY AND JOHN TIDDES WITH PREJUDICE

Pursuant to the Stipulation of Miami-Dade County (f/k/a Metropolitan Dade County), Fiscal Operations, Inc., Fiscal Funding, Inc., Calvin Grigsby and John Tiddes (collectively the "Settling Parties") in this action pursuant to Rule 1.420 of the Florida

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Rules of Civil Procedure, and the terms of the Settlement Agreement attached hereto as Exhibit A:

IT IS ADJUDGED that:

(1) The funds in the amount of $390,079.91 currently held by the Court in Escrow through the Director of Finance of Miami-Dade County in City National Bank Account Numbers ending in 4575 and 1094 (the "Escrow Accounts") – pursuant to previous orders of this Court, including orders dated October 26, 1998, March 16, 2001, June 18, 2003 and July 7, 2003 allowing third-party defendants to be dismissed from the action with prejudice following the deposit of funds into the Court, and Escrow Agreements dated May 14, 2001 and March 19, 1999 – shall be divided and paid to the County and Fiscal Operations, Inc. by check as follows:

$45,079.91 shall be paid to Miami-Dade County; and

$345,000.00 shall be paid to Fiscal Operations, Inc.

In the event that there are additional funds in the Escrow Accounts at the time the funds are divided due to interest accrued, those funds shall be divided between Miami-Dade County and Fiscal Operations, Inc. in the same ratio as the two payments above. All Parties shall bear their own attorneys fees and costs.

(2) Title to any and all parts, inventory, tangible assets, intangible assets, equipment and all other property in dispute in this Lawsuit shall rest with Miami-Dade County.

(3) All claims, counterclaims and cross-claims asserted by any Settling Party in this action are dismissed with prejudice, each party to bear its own costs and fees.

(4) The claims of Miami-Dade County against Defendant Carmen Lunetta shall remain pending before this Court.

Before and after the entry of Final Judgment in this action, the Court shall still retain jurisdiction of this matter for the purposes of entering any orders necessary to enforce this Partial Final Judgment and the terms and conditions of the Settlement Agreement.