IN THE

Supreme Court of Florida

Case No.: SC21-159
Eleventh Circuit Court of Appeals Case No.: 19-10474

STEVEN J. PINCUS,
Plaintiff/Appellant,

v.

AMERICAN TRAFFIC SOLUTIONS, INC.,
Defendant/Appellee.

On Certified Questions from the
United States Court of Appeals for the Eleventh Circuit

ANSWER BRIEF OF APPELLEE AMERICAN TRAFFIC SOLUTIONS, INC.

Joseph H. Lang, Jr.
Kevin P. McCoy
David R. Wright
CARLTON FIELDS, P.A.
4221 West Boy Scout Blvd., Suite 1000
Tampa, FL 33607
Telephone: (813) 223-7000
jlang@carltonfields.com
kmccoy@carltonfields.com
dwright@carltonfields.com

Counsel for Defendant/Appellee American Traffic Solutions, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS[1]

A. Nature of the case.

A vehicle registered to Appellant Steven J. Pincus ("Pincus") drove through a red light in 2018 in the City of North Miami Beach, Florida ("the City"). Pincus received a notice of violation ("NOV") and chose to pay the penalty rather than challenge the violation. He also chose to pay the penalty using his credit card, a convenient method that incurred a concomitant convenience fee of $7.90. Notably, he was not compelled to use his credit card, but rather opted against paying with a check or money order, both of which were allowed methods that did not involve a convenience fee. (*See* R. 129-30 at ¶¶ 22-28).

That violation and Pincus's subsequent choice to incur the convenience fee by paying with his credit card has turned into this federal case. Pincus filed a class action in federal court alleging that Appellee American Traffic Solutions, Inc. ("ATS") violated three Florida statutes in assessing and collecting the convenience fee. (R.

[1] Appellee American Traffic Solutions, Inc. will cite the record as provided by Appellant Steven J. Pincus in his Appendix to the Initial Brief in the same manner that Appellant cited the record: "(R. [page number])." All emphasis is supplied unless otherwise noted.

125-138). Pincus seeks to pursue a private remedy for those alleged violations (the statutes in question do not expressly provide for private rights of action) using the vehicle of common law unjust enrichment.

The federal district court dismissed his complaint and he appealed to the Eleventh Circuit Court of Appeals. In turn, the Eleventh Circuit certified questions of state law to this Court with the observation that, "for Pincus to prevail on any of his counts, he must prevail on the statutory interpretation issue underlying that count and the two common law issues." *Pincus v. Am. Traffic Sols., Inc.*, 986 F. 3d 1305, 1311 (11th Cir. 2021).

In this brief, ATS sets forth why Pincus should not prevail on his alleged statutory violations or common law issues.

B. Statement of the case.

Pincus filed this putative class action against ATS in the Southern District of Florida. (R. 124). The Complaint brought three unjust enrichment claims, each premised on a putative violation of an underlying statute. Count I alleged a violation of section 316.0083(b)4., Florida Statutes. Count II alleged a violation of section 318.121, and Count III alleged a violation of section 560.204. (R. 133-37).

ATS moved to dismiss with prejudice, Pincus responded, and ATS replied. (R. 256, 276, 304). The district court granted ATS's motion and dismissed the Complaint with prejudice on January 14, 2019. (R. 330). Because the Complaint was dismissed at the outset, no class has yet been certified. Pincus appealed to the Eleventh Circuit Court of Appeals. (R. 349).

The appeal was fully briefed and argued in the Eleventh Circuit. The Eleventh Circuit issued an opinion on February 2, 2021. *Pincus*, 986 F. 3d 1305. The panel observed that "[e]ach count of Pincus's unjust enrichment claim turns on the proper application of Florida statutory and common law." *Id.* at 1309. The panel therefore concluded that, "[a]fter careful review, we find an

absence of guiding precedent on these questions of state law—questions that may have sweeping implications for dozens of municipal traffic enforcement regimes across Florida and for the development of Florida's common law." *Id.* The Eleventh Circuit therefore certified the following questions to this Court:

> (1) Did ATS violate Florida law when it imposed a five percent fee on individuals who chose to pay their red light traffic ticket with a credit card? In particular:
>
> > a. Does the challenged fee constitute a "commission from any revenue collected from violations detected through the use of a traffic infraction detector" under Fla. Stat. § 316.0083(1)(b)(4)?
> >
> > b. Was the fee assessed under Chapter 318 and therefore subject to § 318.121's surcharge prohibition?
> >
> > c. Was ATS a "money transmitter" that was required to be licensed under Fla. Stat. § 560.204(1)?
>
> (2) If there was a violation of a Florida statute, can that violation support a claim for unjust enrichment? In particular:
>
> > a. Does Pincus's unjust enrichment claim fail because the statutes at issue provide no private right of action?
> >
> > b. Does Pincus's unjust enrichment claim fail because he received adequate consideration in exchange for the challenged fee when he took

> advantage of the privilege of using his credit card to pay the penalty?

Id. at 1320-21. The panel further explained that "[t]his appeal raises three questions of Florida statutory law and two questions of Florida common law." *Id.* at 1311. That is, "[t]he statutory interpretation questions arise because each count of Pincus's unjust enrichment claim was premised on an alleged violation of a different Florida statute." *Id.* And "[t]he common law questions concern the scope of Florida's unjust enrichment cause of action and therefore affect each of Pincus's counts identically." *Id.* The Eleventh Circuit realized that, "for Pincus to prevail on any of his counts, he must prevail on the statutory interpretation issue underlying that count and the two common law issues." *Id.* In that respect, the panel explained that,

> [e]ven if Pincus sufficiently alleged a statutory violation supporting each count, those counts can survive a motion to dismiss only if they are not barred by Florida's law of unjust enrichment, which raises two open questions. First, does Florida law allow unjust enrichment actions premised on violations of statutes that supply no private right of action? Second, under Florida law was Pincus's unjust enrichment claim precluded because Pincus received adequate consideration in exchange for the fee?

Id. The proceeding in this Court ensued.

C. Statement of the facts.

The City contracts with ATS for equipment and administrative services as part of the City's red light safety camera program.[2] (R. 128 at ¶¶ 16-17, R. 139-151). ATS's cameras image potential red light violations at intersections throughout the City. (R. 176 at ¶¶ 1.5, 1.10-1.11, R. 178 at ¶¶ 1.23-1.24). Those images are then transmitted to law enforcement for a probable cause decision. (R. 179 at ¶ 3.3; R. 185 at ¶ 7.2, R. 196-204, R. 246 at ¶ 1). If appropriate, law enforcement issues an NOV. (R. 246 at ¶ 1, *see also* R. 179 at ¶ 3.3). After an officer issues an NOV, ATS administratively processes the citation, which includes mailing the NOV and facilitating payment processing for violator payments made to the City. (R. 185 at ¶ 7.2, R. 197 at ¶ 1.2.2). All payments belong to the City. (R. 185 at ¶¶ 7.2-7.3).[3]

---

[2] ATS and the City first entered into their contractual relationship in 2008. (R. 141-73). The contract was materially amended in March 2013 in accordance with the Mark Wandall Traffic Safety Act. (R. 174-206). ATS cites to the controlling contract (*Id.*), as amended (R. 241-42, R. 246).

[3] The processes used in these programs comply with Florida law. *See Jimenez v. State*, 246 So. 3d 219 (Fla. 2018) (upholding red light safety camera program administered by ATS for the City of

There are three options by which violators can pay their civil penalty: online, by phone, or by mail. (R. 255). For online and phone payments, the City authorizes ATS to charge the violator a convenience fee up to 5% of the civil penalty. (R. 197 at ¶ 1.1.11, R. 241 at ¶ 2). There is no convenience fee if a violator mails a check or money order. (R. 255).

On February 17, 2018, a vehicle registered to Pincus drove through a red light in violation of sections 316.074(1) and 316.075(1)(c)1. (R. 254-55). The NOV issued by the City informed Pincus of the $158 civil penalty. (R. 129-30 at ¶¶ 22-23, R. 254-55). It also informed Pincus that he could pay the civil penalty or contest the NOV. (R. 255). As to payment, the NOV advised Pincus he could "[p]ay with [his] Visa or MasterCard at www.Violationinfo.com" or he could "mail [his] check or money order with th[e] coupon to" the address listed on the coupon. (R. 254). If he elected the latter method, Pincus was to "[m]ake [his] check or money order payable to [the City]." (R. 254). These payment methods are the methods required under the contract. (R. 185 at ¶ 7.2).

Aventura; disapproving *City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014)).

Notably, on the back side of the NOV, Pincus was advised: "[t]here is a convenience/service fee for" online and telephonic payment. (R. 255). There is no convenience fee for payment submitted by check or money order through the mail. (*Id.*).

Pincus paid the civil penalty using his credit card. (R. 130 at ¶ 28). Consistent with the Contract and the express terms he was provided, Pincus was charged a separate 5% convenience fee, which equated to $7.90. (*Id.*). The civil penalty and convenience fee appeared on Pincus's credit card statement as two separate transactions. (*Id.*). Pincus does not allege he was charged more than the amount he was told he would be charged if he elected to pay using his credit card. Nor does he allege that ATS did anything other than what the parties agreed it would do.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit has certified three statutory questions and two common law questions to this Court. In doing so, the panel noted the potential far-reaching impact of this case:

> the statutory issues raised by this case—which will determine whether a vendor may add a surcharge to red light camera penalties in exchange for permitting individuals to pay their penalties by credit card—may affect millions of Floridians and dozens of Florida's municipal traffic enforcement regimes. Resolution of the common law issues may also reverberate throughout Florida, affecting Florida's unjust enrichment law across diverse contexts.

Pincus, 986 F. 3d at 1320. Of course, such potentially breathtaking impacts are unjustified by Pincus's claims.

As to the statutory questions, this Court's analysis should begin and end with the plain language of the statutes. Pincus's allegations of statutory violations do not survive that plain-language analysis.

And as to the common law questions, Pincus's invitation to this Court to allow private enforcement of these statutes (which contain no express private right of action) ignores the traditional limitations on the common law claim of unjust enrichment and is

completely unwarranted on these facts, especially where Pincus chose to pay the non-compulsory convenience fee.

The plain language of section 316.0083(1)(b)4., which prohibits "a commission from any revenue collected from violations detected through the use of a traffic infraction detector," means an individual cannot receive any portion of the $158 penalty. If the Legislature wanted to prevent non-compulsory convenience fees from being added to the $158 penalty assessed under section 316.0083, it knew how to do so. But it chose not to do so; rather, the Legislature limited section 316.0083(1)(b)4. to preventing subtractions from the penalty. This restriction protects the $158 penalty amount, which has been fully allotted to various government funds through section 316.0083(1)(b)3.b.

As for section 318.121, while that section does limit additions to a penalty, the plain language of the section is expressly limited to penalties assessed under Chapter 318. The statutes are clear that the $158 penalty is assessed under section 316.0083—which is under Chapter 316, not Chapter 318—when enforcement is by red light safety camera. Section 318.121 is inapplicable in this case.

The money transmitter statute in chapter 560 provides express exemptions from its licensing requirements. For that reason, the City's agent is exempt. ATS administers a comprehensive red light safety camera program for the City as its red light safety camera vendor. In his initial brief and in the record, Pincus repeatedly asserts that ATS is the agent of the City. The necessary consequence of that position is that ATS cannot violate the money transmitter statute in this case.

Even if Pincus could establish any of these alleged statutory violations (which he cannot), his effort to enforce the statutes as a private attorney general is misplaced. In particular, unjust enrichment claims cannot be based on alleged wrongs such as a statutory violation. They must be premised on enrichments that are unjust independently of alleged wrongs. Here, the sole basis for the unjust enrichment claims is the allegation that ATS violated three statutes. This is not a proper use of the unjust enrichment cause of action, but rather a transparent attempt to create the private right of action that the Legislature did not provide.

Pincus does not cite a single Florida appellate decision that allows this use of an unjust enrichment claim. And the illegal

exaction cases he cites are completely inapposite because they do not address non-compulsory payments and are not even unjust enrichment cases.

Finally, even if an unjust enrichment claim otherwise might be stated (it cannot be), the cause of action does not work here because Pincus actually received adequate consideration in exchange for the non-compulsory convenience fee he paid. Existing black-letter law and published appellate decisions establish that a claim for unjust enrichment cannot be maintained in such circumstances.

STANDARD OF REVIEW

The standard of review in this context of certified questions from the Eleventh Circuit Court of Appeals on issues of Florida law is *de novo*. *See Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388, 390 (Fla. 2013) (applying *de novo* standard of review in answering certified questions of statutory interpretation from Eleventh Circuit Court of Appeals); *Osborne v. Dumoulin,* 55 So. 3d 577, 581 (Fla. 2011) (recognizing in the present posture of answering a question certified by the Eleventh Circuit that "[t]he determination of the meaning of a statute is a question of law and thus is subject to *de novo* review"); *see also Holmes Reg. Med. Ctr., Inc. v. Allstate Ins. Co.*, 225 So. 3d 780, 783 (Fla. 2017) (stating, in a case involving a certified question from a Florida District Court of Appeal addressing the Florida law of equitable subrogation, "[b]ecause the certified question presents a pure issue of law, the standard of review is *de novo.*").

ARGUMENT

I. The convenience fee does not violate Florida law.

The precise words the Legislature chose to use in the statutes at issue should decide this case because its words matter. *Gabriel v. State*, No. SC19-2155, 2021 WL 1310352, *2, *4 (Fla. Apr. 8, 2021); *In re A.W.*, 816 So. 2d 1261, 1263 (Fla. 2d DCA 2002); *Klonis v. State, Dep't of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000).

The plain language of those statutes demonstrate that the convenience fee did not violate Florida law. "A court's determination of the meaning of a statute begins with the language of the statute." *Halifax Hosp. Med. Ctr. v. State*, 278 So. 3d 545, 547 (Fla. 2019) (citing *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018)). If the language of the statute is clear, "the statute is given its plain meaning, and the court does not 'look behind the statute's plain language for legislative intent or resort to rules of statutory construction.'" *Id.* (quoting *City of Parker v. State*, 992 So. 2d 171, 176 (Fla. 2008)).

A. The convenience fee does not violate section 316.0083 because the convenience fee was not taken from the civil penalty.

Pincus alleges that, when he paid his penalty with a credit card, the non-compulsory convenience fee constituted a commission or fee under section 316.0083(1)(b)4.[4] (R. 133-34).

Section 316.0083(1)(b)4. states that "[a]n individual may not receive a commission from any revenue collected from violations detected through the use of a traffic infraction detector." Because the statute does not define "commission," the district court looked to the term's plain meaning. (R. 340 n.3); *see Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013) (ordinary definitions "may be derived from dictionaries." (citation omitted)); *People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1146 (11th Cir. 2018) (citations omitted); *see also Alberts v. Royal Caribbean Cruises, Ltd.*, 834 F.3d 1202, 1204 (11th Cir. 2016) ("Although '[m]ost common English words have a number of dictionary definitions, one should assume the contextually appropriate ordinary meaning' . . . ." (citation omitted)).

[4] Notably, Pincus did not allege the convenience fee violated section 318.18(15)(d). (R. 133-34).

The federal district court looked at the Oxford English Dictionary definition ("a sum, typically a set percentage of the value involved, paid to an agent in a commercial transaction") and the Merriam-Webster definition ("[A] fee paid to an agent or employee for transacting a piece of business or performing a service. *Especially*: a percentage of the money received from a total paid to the agent responsible for the business") and concluded that the convenience fee does "not constitute a commission on revenue collected." (R. 340 nn. 3, 4).

ATS also presented the definition from Black's Law Dictionary in its Eleventh Circuit brief, which Pincus ignores, which says a commission is "[a] fee paid to an agent or employee for a particular transaction, usu. as a percentage of the money received from the transaction." (10th Ed. 2014). Applying the common meaning of "commission," section 316.0083(1)(b)4. means an individual may not receive a fee for a particular transaction from any revenue collected from violations detected through the use of a traffic infraction detector.

Notwithstanding, Pincus argues the convenience fee is a commission because it is a percentage of the penalty. (Appellant's

Br. at 16-17). He further argues it does not matter that the convenience fee was not taken out of the penalty. (Appellant's Br. at 17-19).

Yet, section 316.0083(1)(b)4. does not simply say an individual may not receive a commission. Instead, it says an individual may not receive a commission "*from any revenue collected from violations detected through the use of a traffic infraction detector*." § 316.0083(1)(b)4., Fla. Stat. In other words, an individual cannot receive any portion of the $158 penalty as a commission, which makes sense because section 316.0083(1)(b)3.b. allocates all of the $158 to various funds. Thus, section 316.0083(1)(b)4. operates to ensure the allocations made by section 316.0083(1)(b)3.b. are funded; it does not grant Pincus free use of ATS's payment facilitation services. This construction gives meaning to all clauses of the statute. *See Edwards v. Thomas*, 229 So. 3d 277, 284-85 (Fla. 2017); *United States v. Fuentes-Rivera*, 323 F.3d 869, 872 (11th Cir. 2003).

To the extent Pincus addresses this clause, he says that "any revenue" must include both the revenue collected in penalties and monies collected by ATS when violators choose to pay the

convenience fee. (Appellant's Br. at 19). Of course, Pincus admits that the convenience fee was in addition to the civil penalty, and in fact was charged as a separate transaction on his credit card. (R. 130 at ¶¶ 23-24, 28). It would be a strange commission indeed that (i) does not create, contribute to, or change the amount due to the City by the person owing the fine; (ii) is based on an event that arises only after the amount owed to the City is determined; and (iii) arises solely from a choice that is wholly within the discretion of the person paying the fine to the City. This is not the definition or common understanding of a commission. To the contrary, it strains credulity to suggest that monies collected for a non-compulsory convenience fee would be "revenue collected from violations detected through the use of a traffic infraction detector." § 316.0083(1)(b)4., Fla. Stat.

The convenience fee is not collected as a penalty for a "violation[] detected through the use of a traffic infraction detector," *id.*, but rather for the convenience of using a credit card. The fact that Pincus chose a method of payment that was more convenient than mail (and made a separate payment for that convenience) does not convert it to a commission received from the fine revenue.

Because no part of the convenience fee came out of the $158 in revenue collected for his violation, ATS did not receive any revenue collected from violations detected through the use of a red-light camera.[5]

B. Section 318.121 does not apply because the penalty was assessed under section 316.0083.

Pincus asserts that ATS violated section 318.121, Florida Statutes. That section reads as follows:

> Notwithstanding any general or special law, or municipal or county ordinance, additional fees, fines, surcharges, or costs other than the court costs and surcharges assessed under s. 318.18(11), (13), (18), (19), and (22) may not be added to the civil traffic penalties assessed under this chapter.

The federal district court disagreed and ruled that "[t]he fine paid by Plaintiff can only be considered to have been assessed under Chapter 316." (R. 343). For that reason, the district court ruled that no statutory violation of section 318.121 occurred because the

[5] Although Pincus alleged the convenience fee constituted both a commission and a "fee or remuneration based upon the number of violations detected," *see* section 316.0083(1)(b)4., the federal district court found he waived the latter argument. (R. 339 n.2). Pincus did not challenge that finding in the Eleventh Circuit, nor does he argue in his brief before this Court that the convenience fee constitutes a fee or remuneration based upon the number of violations detected.

court "did not find that the penalty was 'assessed under' Chapter 318." (R. 342). The plain language of the statute shows that the district court was correct.

As the "legislature is presumed to know the meaning of words," *State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004) (citation omitted), courts "must presume that the Florida Legislature stated in Chapter[s] [316 and 318] what it meant, and meant what it said." *Klonis*, 766 So. 2d at 1189 (citation omitted).

Florida codified how its traffic laws are to be enforced. *See* § 316.640, Fla. Stat. Relevant here, the City enforces traffic laws through its police department, and the police department may employ a traffic infraction enforcement officer ("TIEO") to do so. §§ 316.640(3)(a), (5)(a), Fla. Stat. A TIEO

> who observes the commission of a traffic infraction or . . . an illegally parked vehicle may issue a traffic citation for the infraction when . . . he or she has . . . grounds to believe that an offense has been committed which constitutes a noncriminal traffic infraction as defined in s. 318.14. *In addition*, any such [TIEO] may issue a traffic citation under s. 316.0083.

§ 316.640(5)(a), Fla. Stat. Thus, a TIEO can issue a traffic citation through Chapter 318 *or* Chapter 316.

When enforcement is through Chapter 318, the civil penalty is

imposed under section 318.14(2). The amount of the penalty imposed under that section is determined by section 318.18, which sets the penalty as $158 and provides a distribution schedule for the penalties collected. § 318.18(15)(a)(3), Fla. Stat. Additionally, a penalty imposed under section 318.14(2) carries an administrative fee of $12.50 and an assessment of $10. §§ 318.18(18), (19), Fla. Stat.

But when enforcement is done by means of a red light safety camera, Chapter 316 governs. The TIEO must send an NOV within 30 days of the violation and the NOV must specify that the violator is required to pay a penalty of $158. § 316.0083(1)(b)1.a., Fla. Stat. "Notwithstanding any other provision of law," the violator can "pay the penalty pursuant to the notice of violation." § 316.0083(1)(b)1.c., Fla. Stat.

The penalty listed in the NOV is "assessed and collected" by the municipality pursuant to section 316.0083(1)(b)2. The amount of the penalty "assessed and collected" by the municipality is set at $158 by section 316.0083(1)(b)3.b. That section also prescribes how the penalties are to be distributed by the municipality. Notably, the penalty assessed under section 316.0083 does not include the

administrative fee or the assessment that accompany a penalty assessed under section 318.14(2).

Other provisions of Chapters 316 and 318 demonstrate that penalties assessed for photo-enforced red light violations are assessed under section 316.0083. Section 316.0083(5)(e) states that, if an NOV is upheld after a hearing, the violator must "pay the penalty previously *assessed under* paragraph 1(b)" of section 316.0083. Section 316.00831—titled "Distribution of penalties collected under s. 316.0083(1)(b)" no less—prescribes that a municipality that "*impose[s] a penalty under s. 316.0083(1)(b)* and collects any such penalty" must hold and remit a portion of that penalty to the Department of Revenue as required under section 316.0083. Finally, section 318.18 itself recognizes that the penalty assessed for a photo-enforced red light violation is assessed under section 316.0083. § 318.18(22), Fla. Stat. ("In addition to *the penalty prescribed under s. 316.0083* for violations *enforced under s. 316.0083* . . .).

Despite the plain language of the statutes, Pincus makes three arguments in this Court that section 318.121 applies. First, he argues that the text of section 318.121 supports his position.

(Appellant's Br. at 21-23). Second, he argues that his fine was not assessed exclusively under Chapter 316. (Appellant's Br. at 24-26). Third, he argues that absurd results will ensue if section 318.121 does not apply. (Appellant's Br. at 25-26). None of his arguments is correct.

As to his first argument, it is of no moment that section 318.121 expressly carves out the potential mandatory surcharge authorized by section 318.18(22), which mandatory surcharge relates to Chapter 316 fines. If anything, it is notable that section 318.18(22) expressly acknowledges that the relevant penalty is assessed under Chapter 316: "In addition to the penalty prescribed under s. 316.0083 . . . ."

Moreover, the context of the exceptions listed in section 318.121 explains why that section is inapposite to the convenience fee at issue in this case, even if it applied. Subsections 318.18(11), (13), (18), (19), and (22) all address compulsory charges that a violator would have no option not to pay. Here, the convenience fee is entirely optional and a violator can satisfy the penalty without paying the convenience fee by simply mailing in the payment.

In any event, the convenience fee is not "added" to the penalty to increase the penalty amount. Nobody has to pay the convenience fee as part of the penalty. That is, the violator does not incur the convenience fee because the violator is issued an NOV. The violator chooses to pay the convenience fee in order to obtain the convenience of using a credit card. It is not compulsory. The convenience fee is implicated only when the violator, in his or her sole discretion, chooses to pay with a credit card.

As to his second argument, Pincus's contention that the penalty was not assessed exclusively under Chapter 316 lacks any textual support in the statutes. While expounding upon the unremarkable proposition that the various Chapters of the Florida Motor Vehicle Code are interconnected in some abstract manner to promote uniformity, (Appellant's Br. at 24), he offers no textual support for the specific proposition that his fine was actually "assessed" under Chapter 318. Of course, he boldly avers that "[a]ll civil traffic penalties are 'assessed' under Chapter 318." (Appellant's Br. at 24). Conspicuously absent from that sentence is a citation. That silence is deafening.

As to his third argument, Pincus's theory of absurdity is that

local governments could add all manner of surcharges to section 316.0083 penalties if section 318.121 does not apply to stand guard. He paints a picture of "local governments and their confederates" concocting a host of compulsory add-on charges. (Appellant's Br. at 26). This is fanciful and exaggerated. The convenience fee at issue here is non-compulsory and it is entirely within the power of the violator to choose whether to opt for the convenience of using a credit card or, rather, to pay with check or money order. There is simply no suggestion in this case that Chapter 316 would allow local governments to add *any* compulsory charges to the statutorily-authorized penalty. Pincus's imagined parade of horribles is unlikely to be realized through non-compulsory surcharges that a violator can choose to avoid.

At bottom, section 318.121 prohibits additional fees from being added to penalties assessed under Chapter 318. The penalty assessed against Pincus was assessed under section 316.0083(1)(b). Section 318.121 simply does not apply.

C. ATS does not violate section 560.204, the "money transmitter" statute.

Pincus alleges that ATS violated section 560.204, the money

transmitter statute. Not so.

A person may not engage in a money services business "unless the person is licensed or exempted from licensure under this chapter," *i.e.*, Chapter 560. § 560.125(1), Fla. Stat.; *see also* § 560.204(1), Fla. Stat. The "state or any political subdivision of th[e] state" "are exempt from the provisions of" Chapter 560. § 560.104(3), Fla. Stat. The term "political subdivision" includes cities. § 1.01(8), Fla. Stat. Thus, the City is exempt from the licensure requirement.

ATS is the red light safety camera vendor for the City and operates pursuant to a contract that controls the services ATS provides to the City. (R. 128 at ¶¶ 16-17). Pincus himself has repeatedly urged ATS's status as the City's agent. Indeed, in opposing ATS's motion to dismiss, Pincus said: "when alleged violators pay civil penalties to ATS, in reality they are paying the City, not ATS itself," (R. 283); "ATS acts as a division of the City," (R. 283); ATS acts "as a surrogate of the City" when processing payments, (R. 284); and ATS acts "as a government official for the purpose of accepting civil penalty payments," (R. 285). In fact, Pincus asserts that ATS is the City's agent in his brief in this Court.

(Appellant's Br. at 35 n. 5). Because Pincus's theory is that ATS is an agent of the City, ATS is exempt.

But even if not exempt, there would still be no violation. To be a money transmitter, "a corporation must (1) 'receive' currency (2) 'for the purpose of transmitting' it." *Pincus v. Speedpay, Inc.*, 741 Fed. App'x 720, 721 (11th Cir. 2018). Pincus contends that when he paid the penalty to ATS, in reality he had paid the City. (R. 283). Accepting Pincus's position means it was impossible for ATS (the City's agent) to receive Pincus's penalty for the purpose of transmitting it to the City because (1) Pincus says "the City has appointed ATS to fill this role as if it were a division of the City itself" (R. 289) and therefore (2) receipt by ATS constitutes receipt by the City, as a matter of Florida law, *see Phan v. Deutsche Bank Nat'l Tr. Co.*, 198 So. 3d 744, 748 (Fla. 2d DCA 2016) (when an agent holds property on behalf of the principal, the principal has constructive possession).

Pincus argues that the statutory exemption in section 560.104(3) does not apply to vendors. For this argument, Pincus attempts to create much space between the City and ATS, characterizing ATS as "a foreign company under contract with the

City." (Appellant's Br. at 29). Yet, when it suits Pincus to make the City and ATS one and the same, he asserts that "ATS acts as a division of the City." (R. 283).

Because it serves as the red light safety camera vendor to the City and administers a comprehensive program for the City, ATS is entitled to the same exemption that the City has in these circumstances. ATS is standing in the shoes of the City. The doctrine of *expressio unius est exclusio alterius* is not to the contrary. (*See* Appellant's Br. at 29). It is not plausible to suggest that the Legislature must specifically name every official, employee, and agent of a local government when it provides an exemption to the local government. Pincus cites no authority that applies the doctrine of *expressio unius est exclusio alterius* in such a manner.

Pincus also offers strong rhetoric in response to our argument that "receipt by ATS constitutes receipt by the City, as a matter of Florida law," calling it "preposterous" and "legal obfuscation at its worst." (Appellant's Br. at 30). These strong words apparently stand in for legal authority or a response to the *Phan* case (which was cited in our Eleventh Circuit brief), both of which are noticeably absent in Pincus's brief.

II. An unjust enrichment claim cannot be based on the alleged statutory violations and, in any event, Pincus received adequate consideration in exchange for the challenged convenience fee.

The statutes at issue in this case do not expressly provide a private right of action. Pincus seeks to circumvent the Legislature's choice to omit a private right of action by using an unjust enrichment claim as a proxy. That proposed expansion of the unjust enrichment cause of action has sprawling ramifications and is out of line with the traditional scope and application of that cause of action.

Unjust enrichment is a cause of action that creates a remedy for inequitable enrichments. It is not a cause of action that fills in to provide a vehicle for tort or contract wrongs and damages when those causes of action fall short in a particular case.

Consequently, in the case of an alleged statutory violation where the Legislature has not provided a private right of action, unjust enrichment cannot be stretched to fill the void. This precise point is addressed by the Restatement (Third) of Restitution and Unjust Enrichment:

> If the defendant's conduct is wrongful by reason of statute or regulation, the combination of wrongdoing by

> the defendant and resulting injury to the claimant does not necessarily mean that the defendant's conduct is an actionable wrong to the claimant. Whether the claimant has a private right of action for conduct made wrongful by statute can be a complex and highly controversial question of local law. *If the statute that makes the challenged conduct wrongful confers no private right of action, a would-be plaintiff may not circumvent this legislative omission by styling his action one for unjust enrichment instead of damages.*

Restatement (Third) of Restitution and Unjust Enrichment, § 44 Reporter's Note a.

In fact, unjust enrichment claims can be premised only on "enrichments that are unjust independently of alleged wrongs." *State of Fla., Office of Attorney Gen., Dep't of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1309 (S.D. Fla. 2005) (quoting *Flint v. ABB, Inc.*, 337 F.3d 1326, 1330 n.2 (11th Cir. 2003)) (alteration and internal quotation mark omitted). That is, the "paradigm examples of unjust enrichment are mistaken transfers." *Id.* Thus, "as soon as a claimant relies on a wrong to supply the unjust factor . . ., the right on which the plaintiff relies arises from that wrong, not from unjust enrichment." *Id.* (citation, alteration, and internal quotation mark omitted). Courts dismiss unjust enrichment claims premised solely on wrongful conduct. *See, e.g.*,

Taxinet, Corp. v. Leon, No. 16-24266-Civ-Moreno, 2018 WL 3405243, at *7 (S.D. Fla. July 12, 2018); *Electrostim Med. Servs., Inc. v. Lindsey*, No. 8:11-cv-2467-T-33TBM, 2012 WL 1560647, at *3-4 (M.D. Fla. May 2, 2012); *Tilton v. Playboy Entm't Grp., Inc.*, No. 8:05-cv-692-T-30TGW, 2007 WL 80858, at *3 (M.D. Fla. Jan. 8, 2007).

In *Tilton*, plaintiff alleged defendants illegally distributed a film depicting her on spring break. 2007 WL 80858 at *1. She alleged a number of statutory claims and one for unjust enrichment. *Id.* Defendants sought dismissal of the unjust enrichment claim on the grounds that it was premised solely on the statutory violations. *Id.* at *3. The court agreed, noting "liability in unjust enrichment has nothing to do with fault." *Id.* at *3 (internal citation omitted).

Pincus attempts to distinguish *Tilton*, (Appellant's Br. at 37-38), but does so by examining its alternative holding. That is, the *Tilton* court also ruled that the plaintiff did not confer a benefit on the defendant. 2007 WL 80858 at *3. That alternative holding does nothing to undermine the court's holding that

> Plaintiff has improperly based her claim for unjust enrichment upon the wrongful conduct of Defendants. Plaintiff's right of recovery, if any, for

> the alleged wrongful conduct of Defendants arises from a violation of statutory law. Since the law of unjust enrichment is concerned solely with enrichments that are unjust independently of alleged wrongs, Plaintiff's unjust enrichment claims must be dismissed.

Id. Pincus ignores this independent holding and chooses not to grapple at all with *Flint*, *Tenet Healthcare Corp.*, *Taxinet*, and *Electrostim Med. Servs.* (which were also cited in our Eleventh Circuit brief) that stand for the same proposition.

Pincus's unjust enrichment claims rest on the notion that an alleged statutory violation renders ATS's retention of the convenience fee inequitable. (R. 134-37). Simply put, Pincus attempts to expand common law unjust enrichment to privately enforce alleged statutory violations when the Legislature chooses to omit an express private right of action. For the reasons explained above, that is not consistent with the traditional contours of a claim for unjust enrichment.

A. Illegal exaction cases are not based on common law unjust enrichment and are otherwise inapposite to the facts alleged in this case, where Pincus chose to pay the non-compulsory convenience fee.

Perhaps recognizing the hurdles he faces in stating a proper claim for unjust enrichment, Pincus pivots to a line of cases that

allows refunds or disgorgements of illegal taxes or other charges in certain circumstances. (Appellant's Br. at 32-36). Pincus fails to mention the critical distinctions that make this line of cases completely inapposite here.

For instance, not a single Florida appellate decision cited by Pincus in this section of his brief involves an unjust enrichment claim. *See Bill Stroop Roofing, Inc. v. Metropolitan Dade County*, 788 So. 2d 365 (Fla. 3d DCA 2001); *Broward County, Fla. Bd. of Cty. Comm'rs v. Burnstein*, 470 So. 2d 793 (Fla. 4th DCA 1985); *City of Miami v. Fla. Retail Fed'n, Inc.*, 423 So. 2d 991 (Fla. 3d DCA 1982); *Ves Carpenter Contractors, Inc. v. City of Dania*, 422 So. 2d 342 (Fla. 4th DCA 1982); *Broward County v. Mattel*, 397 So. 2d 457 (Fla. 4th DCA 1981); *City of Jacksonville v. Jacksonville Maritime Ass'n*, 492 So. 2d 770 (Fla. 1st DCA 1986); *City of Miami Beach v. Jacobs*, 315 So. 2d 227 (Fla. 3d DCA 1975); *Coe v. Broward County*, 358 So. 2d 214 (Fla. 4th DCA 1978). None of these cases examines or endorses the use of an unjust enrichment claim as a vehicle to seek a refund of an illegal tax or charge. In fact, none of these cases even mentions the concept of "unjust enrichment."

Further, the very premise of an illegal exaction case is that the

tax or charge was compulsory. Every Florida appellate decision cited by Pincus in this section of his brief (as listed in the preceding paragraph) involved a compulsory tax or charge.

Not so here. The convenience fee is not compulsory. Pincus chose to pay the convenience fee in order to use his credit card to pay his penalty. He chose not to write a check or send a money order, options that do not include a convenience fee. The illegal exaction cases simply do not apply to non-compulsory payments.

Moreover, Pincus's invocation of the federal *Parker* litigation is off the mark. *See Parker v. Am. Traffic Sols., Inc.,* No. 14-Civ-24010-Moreno, 2015 WL 4755175 (S.D. Fla. Aug. 10, 2015). The *Parker* class action lawsuit alleged that the plaintiffs paid fines as a result of red light safety camera programs that plaintiffs contended were void *ab initio*. *Id.* at *2, *4. Of course, that case was dismissed altogether in July 2018 after this Court's decision in *Jimenez* made clear that the red light safety camera programs at issue were authorized.

It bears emphasis that the excerpt from the *Parker* order cited by Pincus, (Appellant's Br. at 32-33), was directed to the local governments' sovereign immunity argument as to damages related

to the compulsory penalties. To be clear, the *Parker* court did not characterize the non-compulsory convenience fee as an illegal exaction.

At bottom, the illegal exaction line of cases is not implicated by the facts of this case and is not threatened by a decision in this case that an unjust enrichment claim may not be maintained to privately enforce an alleged statutory violation relating to a non-compulsory convenience fee.

B. Common law unjust enrichment should not be recognized by this Court as a vehicle for a private remedy on the facts alleged in this case.

Despite the Legislature's choice to not provide an express private right of action for any of the statutes at issue, Pincus argues that he may proceed with his unjust enrichment claims because nothing in the statutes expressly limit the common law. He cites *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990), for the proposition that, "[u]nless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." But that is not the question at hand.

Rather, the question is whether the contours of a common law unjust enrichment claim fits these facts in the first instance. Specifically, may a claim for unjust enrichment be maintained where a plaintiff has not alleged any injury that would exist independent of the purported statutory violations? In other words, is an unjust enrichment claim a one-size-fits-all proxy for a private right of action for any alleged statutory violation?

The answer to this question must be no. Otherwise, such an expanded and expansive concept of an unjust enrichment claim would create an army of private attorneys general to police the Florida Statutes in courtrooms around the state without input from, or coordination with, the executive agencies responsible for the consistent implementation and enforcement of the Legislature's enactments. This would create chaos.

The cavernous divide between what Pincus proposes and what currently exists in the law is evidenced by his inability to cite a single Florida appellate court decision that allows an unjust enrichment claim to be used to privately enforce an alleged statutory violation in this way. (*See* Appellant's Br. at 36-39).

In fact, Pincus's not-so-modest proposal inevitably would lead

to a slew of unjust enrichment claims seeking solely to privately enforce alleged statutory violations where this Court has previously declined to allow that result. *See, e.g., QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 552 (Fla. 2012) (an insured cannot bring a claim against an insurer for failure to comply with the language and type-size requirements established by section 627.701(4)(a)); *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994) (declining to recognize a private remedy solely for a statutory violation of chapter 489). In such future cases, as in this present case, the plaintiff would be seeking to use an unjust enrichment claim to enforce an alleged statutory violation despite having alleged no injury that would exist independent of the purported statutory violation. That should not be allowed.

Beyond Pincus's failure to cite a single Florida appellate court decision allowing an unjust enrichment claim to be used to privately enforce an alleged statutory violation in these circumstances, he also ignores some federal court decisions (which were included in our Eleventh Circuit brief) that explore these issues.

For example, in *Buell v. Direct General Insurance Agency, Inc.*,

plaintiffs bought insurance from Direct General through unlicensed agents, which slid other products into the policies. 267 Fed. App'x 907, 909 (11th Cir. 2008). Plaintiffs asserted common law claims on the theory that the contracts were unlawful due to the sliding and the unlicensed sales agents. *Id.* The district court dismissed the common law claims "because plaintiffs may not evade the Florida legislature's decision to withhold a statutory cause of action for violations of the pertinent provisions . . . by asserting common law claims based on such violations." *Id.*

The *Buell* court noted that Florida "look[s] to whether the statute was intended to create a private remedy." *Id.* It also noted as "highly probative evidence" of the Legislature's intent that the Legislature created a private cause for certain violations but not others. *Id.* The court also specifically rejected plaintiffs' argument that the availability of a statutory remedy should be irrelevant because Florida common law makes restitution available where a contract's subject matter is illegal on the basis that such an argument "runs afoul" of *Murthy*, 644 So. 2d at 985. *Buell*, 267 Fed. App'x at 910. Finally, the court noted the statutory provisions did not expressly or impliedly provide that a violation thereof renders

the contract unenforceable. *Id.*

Later, in *State Farm Fire & Casualty Co. v. Silver Star Health and Rehab*, 739 F.3d 579, 582 (11th Cir. 2013), the Eleventh Circuit did allow such a claim to proceed. There, Silver Star was a chiropractic clinic and some of its patients were insured by State Farm. State Farm sued Silver Star for, *inter alia*, unjust enrichment on the theory that Silver Star was not entitled to monies paid by State Farm because it failed to comply with the Florida Health Care Clinic Act's license requirement. *Id.*

After losing in the district court, Silver Star appealed and argued State Farm did not have a judicial remedy because the statute did not say a violation of the licensing requirement could be determined by a court. *Id.* at 583. The Eleventh Circuit disagreed because the provision at issue stated "[a]ll charges . . . made by or on behalf of" an unlicensed clinic "are unlawful charges, and therefore are noncompensable and unenforceable." *Id.* (citation omitted). Once the court decided that charges by an unlicensed clinic were unlawful, noncompensable, and unenforceable under the statute, the court said the unjust enrichment claim could be maintained. *Id.* at 584.

In allowing the use of an unjust enrichment claim as a vehicle in *Silver Star*, the Eleventh Circuit apparently overlooked its own decisions in *Flint*, *Buell* (not mentioned in *Silver Star*), and *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2001) (discussed in the next section of this brief). For those reasons, ATS suggests that *Silver Star* should not be followed. This Court has not hesitated to respectfully part ways with the Eleventh Circuit when warranted. *See Krol v. FCA US, LLC*, 310 So. 3d 1270, 1272 (Fla. 2021).

In turn, although bound by the *Silver Star* approach, most of the federal district courts that have examined these issues have refused to allow an unjust enrichment claim to proceed.[6]

In *Hucke v. Kubra Data Transfer Ltd., Corp.*, the federal district court thoroughly examined *Buell*, *Silver Star*, and *Murthy*, as well as the language of Florida's money transmitter statute. 160 F. Supp. 3d 1320, 1323-27 (S.D. Fla. 2015). Specifically as to *Murthy*, where homeowners brought claims for negligent performance of a

[6] *But see Pincus v. Speedpay, Inc.*, No. 15-80164-Civ-Marra, 2015 WL 5820808 (S.D. Fla. Oct. 6, 2015). For the reasons explained by the courts in *Hucke* and *Cross*, *Pincus* was wrongly decided.

contract, discharge of a fraudulent lien, and violation of Florida's minimum building codes against the qualifying agent *qua* general contractor, the court stated:

> *Murthy* stands for the proposition that, "where a defendant has injured a plaintiff in a way that gives rise to a common law claim (in *Murthy*, performed construction work in a negligent fashion), the mere fact that the defendant might also have violated a statute without any private right of action does not preclude a plaintiff from asserting its existing common law claims." . . . However, "[n]othing in *Murthy* stands for the proposition that a plaintiff may assert a common law claim" where "Plaintiff has not alleged any injury that would exist independent of the purported statutory violations." *Id. Buell* considered the latter situation, which *Murthy* simply did not address.

Hucke, 160 F. Supp. 3d at 1325-26. The court then went on to review the plain language of section 560.204. And based on that review, the court concluded a violation of section 560.204 cannot support an unjust enrichment claim because the statute is enforced by the state. *Id.* at 1327.

Next, in *Cross v. Point and Pay, LLC*, 274 F. Supp. 3d 1289 (M.D. Fla. 2017), the court examined *Buell* and *Silver Star*, and determined those two cases "used the same approach—examining the underlying statute to determine whether the agreements were enforceable. Those courts merely came to opposite conclusions

because the statutes provided opposite directives." *Id.* at 1294-95. Based on the reconciled rule, the *Cross* court examined the language of section 560.204, and held that a plaintiff cannot bring an unjust enrichment claim based on a violation of section 560.204 because that section does not render agreements with an unlicensed money transmitter unenforceable. *Id.* at 1296.

Finally, in *State Farm Mutual Automobile Insurance Co. v. Performance Orthopaedics & Neurosurgery, LLC*, 278 F. Supp. 3d 1307 (S.D. Fla. 2017), the unjust enrichment claim was based on an alleged statutory violation. *Id.* at 1229. Given the binding *Silver Star* approach to analyzing these issues, the district court noted that an unjust enrichment claim based on a statutory violation is not per se barred. In that procedural posture, the court examined the statutory language at issue and compared that language to the statutes at play in *Silver Star* and *Buell*. *Id.* at 1229-30. Unlike the statute in *Silver Star*, the statutes in *Performance Orthopaedics* did not provide that charges violative of the statutes were unlawful, noncompensable, or unenforceable. *Id.* at 1330. Thus, *Buell*'s rationale applied and no private remedy existed. *Id.*

Thus, even if unjust enrichment could serve as a vehicle to

enforce an alleged statutory violation in some circumstances, it should be unavailable in this case because the statutes at issue evince no legislative intent that a private remedy should exist.

Specifically, there is nothing in section 316.0083(1)(b)4 or section 318.121 to indicate a legislative intent that a non-compulsory convenience fee should be deemed void, deemed unenforceable, or subject to a private remedy.

In fact, chapter 316 establishes significant responsibility in the Department of Highway Safety and Motor Vehicles for oversight and enforcement of red light safety camera programs. For instance, sections 316.0083(4)(a), (b) read as follows:

> (4)(a) Each county or municipality that operates a traffic infraction detector shall submit a report by October 1, 2012, and annually thereafter, to the department which details the results of using the traffic infraction detector and the procedures for enforcement for the preceding state fiscal year. The information submitted by the counties and municipalities must include statistical data and information required by the department to complete the report required under paragraph (b).
>
> (b) On or before December 31, 2012, and annually thereafter, the department shall provide a summary report to the Governor, the President of the Senate, and the Speaker of the House of Representatives regarding the use and operation of traffic infraction detectors under

> this section, along with the department's recommendations and any necessary legislation. The summary report must include a review of the information submitted to the department by the counties and municipalities and must describe the enhancement of the traffic safety and enforcement programs.

The department's role promotes statewide uniformity and allows for recommendations for corrective legislation when needed. Piecemeal enforcement by private attorneys general on a jurisdiction-by-jurisdiction basis would undermine the department's efforts in those respects.

Similarly, neither section 560.204, nor any other provision of the money transmitter statute, says a contract with an unlicensed money transmitter is unlawful, noncompensable, or unenforceable. Indeed, the Legislature made a deliberate choice by giving the Office the power to seek an order of restitution while limiting private persons to injunctive relief. §§ 560.113(3), 560.125(3), Fla. Stat. The Legislature made a second, deliberate choice. Namely, a license is required to engage in the business of a money services business, which includes a money transmitter, or in the business of a deferred presentment provider. § 560.125(1), Fla. Stat.; *see also* §§ 560.103(12), (22) (defining deferred presentment provider and

money services business); 560.402(3) (defining a deferred presentment transaction), Fla. Stat. But it is only in the situation of an unlicensed deferred presentment provider that the Legislature elected to void an unlicensed deferred presentment transaction. § 560.125(1), Fla. Stat. It is also only an unlicensed deferred presentment provider who cannot collect, receive, or retain any money relating to an unlicensed deferred presentment transaction. *Id.*

Those two choices are "highly probative evidence" of the Legislature's intent to not create a private remedy for a violation of section 560.204(1) with respect to a money transmitter. *See Buell*, 267 Fed. App'x at 909; *Performance Orthopaedics*, 278 F. Supp. 3d at 1330. Allowing Pincus to use an unjust enrichment claim to obtain a refund of his convenience fee would directly contradict the Legislature's choice to exclude private persons from the ability to do so.

For all of the foregoing reasons, a common law unjust enrichment claim cannot be maintained where Pincus has not alleged any injury that would exist independent of the purported statutory violations. This is especially true because the statutes at

issue evince no legislative intent that a private remedy should exist.

C. Pincus received adequate consideration in return when he chose to pay the non-compulsory convenience fee.

The claims for unjust enrichment in this case fail for yet another reason. Specifically, when Pincus paid the convenience fee for using his credit card, he received the convenience that he sought. When, as here, a defendant gives adequate consideration in exchange for the benefit conferred by a plaintiff, a claim for unjust enrichment fails. *Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1333 (M.D. Fla. 2015). Stated differently, where a person receives what he bargained for, a claim for unjust enrichment cannot exist. *N.G.L. Travel Assocs. v. Celebrity Cruises, Inc.*, 764 So. 2d 672, 675 (Fla. 3d DCA 2000).

In *Asencio v. Wells Fargo Bank, N.A.*, 905 F. Supp. 2d 1279 (M.D. Fla. 2012), plaintiff brought claims for unjust enrichment against a bank to obtain a refund of the $7.50 the bank charged plaintiff to cash a check. *Id.* at 1280. Plaintiff claimed this fee violated section 532.01, Florida Statutes. *Id.* The court dismissed the claims because the fee was paid in exchange for a service and "when a defendant has given adequate consideration to someone for

the benefit conferred, a claim of unjust enrichment fails." *Id.* at 1280-81 (citing *Baptista*, 640 F.3d 1194).

In the face of these authorities, Pincus attempts to distinguish the *Baptista* case and ignores the others. (*See* Appellant's Br. at 45-46). He says that the Eleventh Circuit's ruling must be read in the light of its alternative ruling that the statute at issue was preempted by federal law. Therefore, he says, the Eleventh Circuit was saying only that the unjust enrichment claim failed because the fee at issue was lawful. Of course, there would have been no reason for the Eleventh Circuit to rule on the consequence of the adequate consideration, if there were no basis for an unjust enrichment claim in the first place. Context dictates the Eleventh Circuit was ruling that, *even if the fee at issue violated the statute*, an unjust enrichment claim would not lie if adequate consideration were provided.

ATS asserts that the proper reading of *Baptista* is obvious on the face of that opinion. But if there was any question whatever about *Baptista*'s meaning, it was put to rest shortly thereafter by the Eleventh Circuit's decision in *Pereira v. Regions Bank*, 752 F.3d 1354, 1358 n.6 (11th Cir. 2014). In *Pereira*, the Eleventh Circuit

relied on *Baptista* for the point that, *even if there were a statutory violation*, the unjust enrichment cause of action fails if there is adequate consideration:

> *And even if they were not preempted*, *Baptista* explains why their unjust enrichment claims necessarily fail:
>
> > "When a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails." *Am. Safety Ins. Serv., Inc. v. Griggs*, 959 So. 2d 322, 331– 32 (Fla. Dist. Ct. App. 2007). Here, [the payee] requested to have the check cashed immediately upon presentment to [the bank], and in return, [the bank] requested a . . . fee. [The payee] agreed to the fee. If [the payee] had chosen to deposit the check in [his] own account and wait for processing, no fee would have been levied. The fee was only levied because [the bank] conferred an additional benefit on [the payee], that is, immediate payment of the check. Because [the payee] cannot show that [the bank] failed to give consideration . . . [his] claim for unjust enrichment fails as a matter of law.
>
> *Baptista*, 640 F.3d at 1198 n.3.

752 F.3d at 1358 n.6. This understanding was then confirmed again by the Fifth District Court of Appeal in *Braham v. Branch Banking and Trust Co.*, 170 So. 3d 844, 848 (Fla. 5th DCA 2015). In *Braham*, the Fifth District determined that section 655.85 is not preempted by federal law and that no private remedy exists to

enforce the alleged statutory violation. It concluded as follows:

> Finally, Appellant's claim for unjust enrichment fails for three distinct reasons. First, the check was an express contract between the maker and Appellant, the obligations on which are discharged under the Uniform Commercial Code or under simple contract principles. See § 673.6011(1), Fla. Stat. (2012). The existence of an express contract negates an action under an unjust enrichment theory. *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008) (unjust enrichment claim precluded by existence of express contract between parties concerning same subject matter). Second, because Appellant accepted the bank's varied terms, thereby absolving the bank of liability under the Uniform Commercial Code, his claim for unjust enrichment must fail. And third, because the bank immediately paid the check in exchange for the fee, Appellant cannot claim that it was unjustly enriched. *See Pereira v. Regions Bank*, 752 F.3d 1354, 1358 n. 6. (11th Cir. 2014) (no claim for unjust enrichment where bank provided service of immediately cashing check in exchange for fee).

170 So. 3d at 848.

The record establishes Pincus received what he bargained for. He used an electronic method to pay his civil penalty by credit card. (R. 130 at ¶ 28). He did so knowing he would be charged a convenience fee. (R. 254-55). There is no allegation that ATS charged Pincus more than what was disclosed, that ATS did not process his payment, or that Pincus did not receive the convenience

he paid for.

Pincus also argues that the non-compulsory convenience fee should be viewed as something other than an optional convenience, simply because it is related to the mandatory penalty. (Appellant's Br. at 40-41). Yet, the "civil penalty" is not at issue; this case is about only the non-compulsory convenience fee.

Pincus was fully entitled to pay by check or money order without any convenience fee. He chose to use the convenience of paying by credit card. There is nothing compulsory about the convenience fee and there is no legal basis to suggest that he had a right to pay with a credit card without incurring the convenience fee.

Experience counsels that convenience fees for using credit cards are a fact of modern life. Notably, and contrary to Pincus's suggestion (Appellant's Br. at 42), state agencies, the judicial branch, and units of local government actually are authorized by the Legislature to allow credit card payments with convenience fees. *See* § 215.332, Fla. Stat.

Finally, Pincus advances an argument that is premised on the existence of a contract. (Appellant's Br. at 43). If that premise were

true here, that itself would be determinative that his unjust enrichment claim must fail. *See, e.g.*, *Braham*, 170 So. 3d at 848 ("The existence of an express contract negates an action under an unjust enrichment theory.").

Notwithstanding, Pincus cites a line of cases that disallows enforcement of illegal contracts and argues that the same result should obtain here because of the alleged statutory violations. *See S.E.C. v. Kirkland*, 521 F. Supp. 2d 1281 (M.D. Fla. 2007); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003); *Vista Designs, Inc. v. Silverman*, 774 So. 2d 884 (Fla. 4th DCA 2001); *Fabricant v. Sears Roebuck*, 202 F.R.D. 310 (S.D. Fla. 2001); *Steinberg v. Brickell Station Towers*, 625 So.2d 848 (Fla. 3d DCA 1993); *Pidcock v. Sunnyland Am., Inc.*, 854 F.2d 443 (11th Cir. 1988); *In re Ripon City*, 102 F. 176 (5th Cir. 1900).

These cases are completely inapposite in the context of unjust enrichment. *Baptista*, *Pereira*, and *Braham* make this clear.

The claim of unjust enrichment is concerned only with inequitable enrichments, not with contractual or tort wrongs and damages. It is not equitable to require disgorgement by the defendant once counter-performance has occurred.

The rule set forth in *Baptista*, *Pereira*, and *Braham* is fully consistent with black-letter law. Specifically, § 32(2) of the Restatement (Third) of Restitution and Unjust Enrichment, states in relevant part that, "**[t]here is no unjust enrichment if the claimant receives the counterperformance specified by the parties' unenforceable agreement**." (bolded black-letter text in original). Illustration 22 to this section of the Restatement examines the precise point:

> 22. Tenant sues former Landlord seeking restitution of rent paid for the occupancy of Blackacre under an expired lease, on the ground that Landlord failed to register Blackacre as rental property as required by ordinance. There is no claim that Landlord failed to perform his obligations under the lease. The regulatory illegality might or might not have afforded Tenant a defense to Tenant's obligation to pay rent, but these facts present a different question. Tenant has no claim to restitution of rent previously paid because Landlord has not been unjustly enriched.

Pincus paid the exact convenience fee that was disclosed, ATS processed his payment, and Pincus received the convenience he paid for. Pursuant to *Baptista*, *Pereira*, *Braham*, and the Restatement, no claim for unjust enrichment can be maintained in these circumstances.

CONCLUSION

For all of the reasons explained above, this Court should answer the Eleventh Circuit's certified questions 1(a), (b), and (c) in the negative and rule that ATS did not violate Florida law when it imposed a five percent fee on individuals who chose to pay their red light traffic ticket with a credit card. As to certified questions 2(a) and (b), this Court should rule that no unjust enrichment claim can be maintained in the circumstances of this case and answer those two certified questions in the affirmative.

May 12, 2021. Respectfully submitted,

/s/*Joseph H. Lang, Jr.*
Joseph H. Lang, Jr.
Florida Bar Number: 059404
Kevin P. McCoy
Florida Bar Number: 036225
David R. Wright
Florida Bar Number: 119453
CARLTON FIELDS, P.A.
4221 West Boy Scout Blvd., Suite 1000
Tampa, FL 33607
Telephone: (813) 223-7000
jlang@carltonfields.com
kmccoy@carltonfields.com
dwright@carltonfields.com
kathompson@carltonfields.com
tpaecf@cfdom.net

Attorneys for Defendant/Appellee American Traffic Solutions, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief was filed with the Clerk of Court and served via Florida Courts ePortal email on the following this 12th day of May, 2021.

Bret L. Lusskin, Esq.
BRET LUSSKIN, P.A.
20803 Biscayne Blvd., Suite 302
Aventura, Florida 33180
blusskin@lusskinlaw.com

Scott D. Owens, Esq.
SCOTT D. OWENS, P.A.
3800 S. Ocean Drive, Suite 235
Hollywood, Florida 33019
scott@scottdowens.com

Keith J. Keogh, Esq.
KEOGH LAW, LTD
55 West Monroe Street, Suite 3390
Chicago, Illinois 60603
keith@keoghlaw.com

Attorneys for Plaintiff/Appellant

/s/ Joseph H. Lang, Jr.
Joseph H. Lang, Jr.
Florida Bar Number: 059404

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045 and 9.210, counsel for Defendant/Appellee American Traffic Solutions, Inc. hereby certifies that the foregoing answer brief complies with the applicable font and word-count requirements because it is written in 14-point Bookman Old Style and contains 10,357 words, excluding those parts exempted by Rule 9.045(e).

/s/ *Joseph H. Lang, Jr.*
Joseph H. Lang, Jr.
Florida Bar Number: 059404

May 12, 2021.