UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

THOMAS A. FOX,

Plaintiff,

v.

COUNTY OF SAGINAW, et al.

Defendants.

Case No. 19-cv-11887

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MOTION OF THE SAGINAW COUNTY, BAY COUNTY, GRATIOT COUNTY, MIDLAND COUNTY, ISABELLA COUNTY, TUSCOLA COUNTY, MONTMORENCY COUNTY, ALPENA COUNTY, OSCODA COUNTY, ARENAC COUNTY, CLARE COUNTY, GLADWIN COUNTY, GENESEE COUNTY, HURON COUNTY, JACKSON COUNTY, LAPEER COUNTY, LENAWEE COUNTY, OTSEGO COUNTY, ROSCOMMON COUNTY, SANILAC COUNTY AND ST. CLAIR COUNTY DEFENDANTS (COUNTIES, BY THEIR BOARDS, AND INDIVIDUALS) SEEKING DISMISSAL UNDER FED. R. CIV. P. 12(b)(1) AND (6)

NOW COME the moving Defendants, by and through their attorneys, **CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.**, by Allan C. Vander Laan, and hereby ask this Court to Dismiss the Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(1) and (6) for the reasons described in the accompanying brief.

Respectfully submitted,

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Dated: September 26, 2019

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BRIEF IN SUPPORT OF MOTION OF THE SAGINAW COUNTY, BAY COUNTY, GRATIOT COUNTY, MIDLAND COUNTY, ISABELLA COUNTY, TUSCOLA COUNTY, MONTMORENCY COUNTY, ALPENA COUNTY, OSCODA COUNTY, ARENAC COUNTY, CLARE COUNTY, GLADWIN COUNTY, GENESEE COUNTY, HURON COUNTY, JACKSON COUNTY, LAPEER COUNTY, LENAWEE COUNTY, OTSEGO COUNTY, ROSCOMMON COUNTY, SANILAC COUNTY AND ST. CLAIR COUNTY DEFENDANTS (COUNTIES, BY THEIR BOARDS, AND INDIVIDUALS) SEEKING DISMISSAL UNDER FED. R. CIV. P. 12(b)(1) AND (6)

TABLE OF CONTENTS

Table of Authorities ii

Questions Presented viii

Most Controlling Authority xii

Statement of Facts 1

Argument 2

I. THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(b)(1), BECAUSE THE TAX INJUNCTION ACT PRECLUDES SUBJECT MATTER JURISDICTION OVER THE PLEADED CLAIMS 2

II. ALTHOUGH NOT "JURISDICTIONAL," PRINCIPLES OF COMITY PRECLUDE EXERCISE OF JURISDICTION IN THIS CASE 4

III. THE PLAINTIFF'S CASE IS BARRED BY *RES JUDICATA* 6

IV. THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. (12(b)(6), BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED 8

Conclusion and Relief Requested 30

Certificate of Service 30

TABLE OF AUTHORITIES

Cases

Adair v. Michigan, 470 Mich. 105, 680 N.W.2d 386 (2004) 6, 7

Alkire v. Irving, 330 F.3d 802 (6th Cir. 2003) 13

Arbaugh v. Y&H Corp., 546 U.S. 500 (2006) 2

Austin v. U.S., 509 U.S. 602 (1993).....21

Bennis v. Michigan, 516 U.S. 442 (1996) 12

Biff's Grills v. Michigan State Highway Comm., 75 Mich. App. 154, 254 N.W.2d 824 (1977) 3, 26

Bigelow v. Michigan Dept. of Natural Resources, 970 F.2d 154 (6th Cir. 1992).....3

California v. Grace Brethern Church, 457 U.S. 393 (1982).....2

Cavanaugh v. McBride, 33 F. Supp. 3d 840 (E.D. Mich. 2014).....13

Citizens in Charge, Inc. v. Husted, 810 F.3d 437 (6th Cir. 2016) 10

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 15

City o Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003).....24

Coleman through Bunn v. District of Columbia, 70 F. Supp. 3d 58 (D.D.C. 2014).....3, 4

Conn v. Gabbert, 526 U.S. 286 (1999) 23

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 22

Direct Marketing Ass'n. v. Brohl, ___ U.S. ___, 135 S. Ct. 1124 (2015) 3, 4

Doe v. Clairborne County, Tenn., 103 F.3d 495 (6th Cir. 1996) 13

Dorman v. Township of Clinton, 269 Mich. App. 638, 714 N.W.2d 350 (2006) 3

Electro-Tech, Inc. v. HF Campbell Co., 433 Mich. 57, 445 N.W.2d 61 (1989) 26

Eyde v. Charter Township of Meridian, 118 Mich. App. 43, 324 N.W. 2d 775 (1982) 6, 7

Fair Assessment in Real Estate Ass'n., Inc. v. McNary, 454 U.S. 100 (1981).....5

Foster v. Michigan, 573 Fed. Appx. 377 (6th Cir. 2014) 14

Genesee County Drain Commissioner v. Genesee County, 321 Mich. App. 74, N.W.2d 313 (2017) 8

Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978) 14

Graham v. Connor, 490 U.S. 386 (1989) 23

Gray v. City of Detroit, 399 U.S. 612 (6th Cir. 2005).....15

Harbor Watch Condominium Ass'n. v. Emmett County Treasurer, 308 Mich. App. 380, 863 N.W.2d 745 (2014).....8, 11, 12, 16

Harlow v. Fitzgerald, 257 U.S. 800 (1982).....9, 12

Hart v. City of Detroit, 416 Mich. 488, 331 N.W.2d 438 (1982) 3, 26

Herro v. Bd. of County Rd. Commissioners, 368 Mich. 263 N.W.2d 271 (1962) 26

Hibbs v. Winn, 542 U.S. 88 (2004) 4

In re Certified Question, 447 Mich. 765, 527 N.W.2d 468 (1994) 27

In re Gillis, 836 F.2d 1001 (6th Cir. 1988) 6

Ingraham v. Wright, 430 U.S. 651 (1977).....20

Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) 14

Johnson v. Moseley, 790 F.3d 649 (6th Cir. 2015).....9

Johnson v. Turner, 125 F.3d 324 (6th Cir. 1997).....17

Johnson v. Vanderkooi, 502 Mich. 751 N.W.2d 785(2018) 8

Jones v. Bock, 549 U.S. 199 (2007).....9

Kammer Asphalt Paving Co., Inc. v. East China Township Schools, 443 Mich. 176, 504 N.W.2d 635 (1993).....28

Kentucky v. Graham, 473 U.S. 159 (1985).....13

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 16

Levin v. Commerce Energy, Inc., 560 U.S. 413 (2010) 4

Ligon v. City of Detroit, 276 Mich. App. 120, 739 N.W.2d 900 (2007) 3

Long v. Liquor Control Comm'n., 322 Mich. App. 60, 910 N.W.2d 674 (2017) 27

Ludwig v. Township of Van Buren, 682 F.3d 457 (6th Cir. 2012) 6

Mack v. City of Detroit, 467 Mich. 186, 649 N.W.2d 47 (2002).....28

Martin v. Murray, 309 Mich. App. 37, 867 N.W.2d 444 (2015).....27

Mathews v. Eldridge, 424 U.S. 319 (1976).....22

Mays v. Snyder, 323 Mich. App. 1, 916 N.W.2d 227 (2018) 8

Metropolitan Detroit Area Hospital Service, Inc. v. U.S., 634 F.2d 330 (6th Cir. 1980).....27

Michigan Education Employees Mut. Co. v. Morris, 460 Mich. 180, 596 N.W.2d 142 (1999) 29

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) 6

Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978) ...14

Mullenix v. Luna, ___ U.S. ___, 136 S. Ct. 305 (2015).....10

National Private Truck Counsel, Inc. v. Oklahoma Tax Commission, 515 U.S. 582 (1995).....5

Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67 (2nd Cir. 1998) 9

Pearson v. Callahan, 555 U.S. 223 (2009).....9, 10, 12, 13

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998).....19

Prawdzik v. Heidema Brothers, Inc., 352 Mich. 102, N.W.2d 523 (1958) 7

Puckett v. Lexington-Fayette Urban County Government, 833 F.3d 590 (6th Cir. 2016).....18

Raceway Park, Inc. v. Ohio, 356 F.3d 677 (6th Cir. 2004).....19

Rafaeli LLC v. Oakland County, No. 330696, 2017 WL 4803570 (Mich. Ct. App. Oct. 24, 2017).....12

Reichle v. Howards, 566 U.S. 658 (2012).....13

Riverview Health Institute LLC v. Medical Mutual of Ohio, 601 F.3d 505 (6th Cir. 2010).....8

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 18

Schindewolf v. City of Brighton, 107 F. Supp. 3d 804 (E.D. Mich. 2015) 13

Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000) 25

Sumpter v. Wayne County, 868 F.3d 473 (6th Cir. 2017) 10

Swanson v. Powers, 937 F.2d 965 (6th Cir. 1991).....11

Thomas v. Shipka, 818 F.2d 496 (6th Cir. 1987).....14

Timbs v. Indiana, ___ U.S. ___, 139 S. Ct. 682 (2019) 20, 21

Trentadue v. Buckler Lawn Sprinkler, 479 Mich. 378, 738 N.W.2d 664 (2007) 29

U.S. V. Bajakajian, 425 U.S. 321 (1998).....21, 22

U.S. v. Lawton, 110 U.S. 146 (1884) 4

U.S. v. Taylor, 104 US. 216 (1881).....4

Vereecke v. Hurron Valley School Dist., 609 F.3d 392 (6th Cir. 2010) 15

Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005).....2

Warthman v. Genowa Township Bd. of Trustees, 549 F.3d 1055 (6th Cir. 2008).....14

Washington v. Glucksberg, 521 U.S. 702 (1997).....25

Wilcoxon v. City of Detroit Election Commission, 301 Mich. App 619, 838 N.W.2d 183 (2013) 18

Statutes

28 U.S.C. §1341 2

28 U.S.C. §2403 .....1, 18

42 U.S.C. §1983 .....5, 14, 15

M.C.L. 78k(6) 19, 27

M.C.L. 211.78 27

M.C.L. 211.78(3)-(6), (8).....16

M.C.L. 211.78a(2).....16

M.C.L. 211.78c 17

M.C.L. 211.78e(1).....17

M.C.L. 211.78g(3) 23

M.C.L. 211.78h(1) and (2).....23

M.C.L. 211.78k(5) 23

M.C.L. 211.78k(6) 29

M.C.L. 211.78m(8) 1, 8, 11, 12, 13, 17, 24, 25, 28, 29

M.C.L. 213.51 26

M.C.L. 213.51a 27

M.C.L. 213.75 27

M.C.L. 750.478 18

Rules

Fed. R. Civ. P. 12(b)(1).....30

Fed. R. Civ. P. 12(b)(6).....8, 30

Fed. Civ. R. P. 5.1(b) 1, 18

QUESTIONS PRESENTED

I. DOES THE TAX INJUNCTION ACT, 28 U.S.C. §1341, PROHIBIT THIS COURT FROM EXERCISING SUBJECT MATTER JURISDICTION OVER THE PLAINTIFF'S CLAIMS?

Plaintiff will answer: "No."

Defendants answer: "Yes."

II. DO PRINCIPLES OF "COMITY" MANDATE DISMISSAL OF THE PLAINTIFF'S COMPLAINT?

Plaintiff will answer: "No."

Defendants answer: "Yes."

III. IS THE PLAINTIFF'S CASE BARRED BY "RES JUDICATA," FROM THE PRIOR JUDGMENT OF FORECLOSURE?

Plaintiff will answer: "No."

Defendants answer: "Yes."

IV. SHOULD THE PLAINTIFF'S "INDIVIDUAL CAPACITY" CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS BE DISMISSED ON THE GROUND OF "QUALIFIED IMMUNITY?"

Plaintiff will answer: "No."

Defendants answer: "Yes."

V. SHOULD THE PLAINTIFF'S "OFFICIAL CAPACITY" CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS BE DISMISSED AS REDUNDANT WITH THE PLAINTIFF'S CLAIMS AGAINST THE DEFENDANT COUNTY ENTITIES?

Plaintiff will answer: "No."

Defendants answer: "Yes."

VI. SHOULD THE PLAINTIFF'S CLAIMS AGAINST THE COUNTIES (*AND AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR "OFFICIAL CAPACITY"*) BE DISMISSED ON THE GROUND THAT THE STATUTES ENFORCED BY THE DEFENDANTS ARE POLICIES OF THE STATE OF MICHIGAN, NOT OF THE COUNTIES?

Plaintiff will answer: "No."

Defendants answer: "Yes."

VII. SHOULD THE PLAINTIFF'S FIFTH AMENDMENT CLAIMS BE DISMISSED ON THE BASIS THAT THE STATUTORY PROCEDURES FOLLOWED BY THE DEFENDANTS ARE NOT UNCONSTITUTIONAL "TAKINGS?"

Plaintiff will answer: "No."

Defendants answer: "Yes."

VIII. SHOULD THE PLAINTIFF'S EIGHTH AMENDMENT CLAIMS BE DISMISSED ON THE BASIS THAT THE ALLEGED ACTS OF THE DEFENDANTS ARE CATEGORICALLY OUTSIDE THE SCOPE OF THE "EXCESSIVE FINES" CLAUSE?

Plaintiff will answer: "No."

Defendants answers: "Yes."

IX. SHOULD THE PLAINTIFF'S "PROCEDURAL DUE PROCESS" CLAIM BE DISMISSED ON THE GROUND THAT THE PLAINTIFF HAS NOT BEEN DENIED PROCEDURAL DUE PROCESS?

Plaintiff will answer: "No."

Defendants answer: "Yes."

X. SHOULD THE PLAINTIFF'S "SUBSTANTIVE DUE PROCESS" CLAIM BE DISMISSED ON THE GROUND THAT THE DEFENDANTS HAVE NOT VIOLATED ANY SUBSTANTIVE DUE PROCESS PRINCIPLES?

Plaintiff will answer: "No."

Defendants answer: "Yes."

XI. SHOULD THE PLAINTIFF'S CLAIMS UNDER THE MICHIGAN CONSTITUTION BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER MICHIGAN LAW?

Plaintiff will answer: "No."

Defendants answer: "Yes."

XII. SHOULD THE PLAINTIFF'S "UNJUST ENRICHMENT" CLAIM BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER MICHIGAN LAW?

Plaintiff will answer: "No."

Defendants answer: "Yes."

MOST CONTROLLING AUTHORITY

Cases

Adair v. Michigan, 470 Mich. 105, 680 N.W.2d 386 (2004) 6, 7

Citizens in Charge, Inc. v. Husted, 810 F.3d 437 (6th Cir. 2016) 10

Fair Assessment in Real Estate Ass'n., Inc. v. McNary, 454 U.S. 100 (1981) 5

Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) 14

Johnson v. Turner, 125 F.3d 324 (6th Cir. 1997).....17

Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978).....14

National Private Truck Counsel, Inc. v. Oklahoma Tax Commission, 515 U.S. 582 (1995).....5

Prawdzik v. Heidema Brothers, Inc., 352 Mich. 102 N.W.2d 523 (1958) 7

Swanson v. Powers, 937 F.2d 965 (6th Cir. 1991).....11

Statute

28 U.S.C. §1341 2

STATEMENT OF FACTS

Pursuant to Michigan's General Property Tax Act (GPTA), particularly M.C.L. 211.78m(8), properties belonging to Plaintiff Thomas Fox (and the putative "class" members) were foreclosed and sold for property tax delinquencies, with sale proceeds in excess of the delinquency being retained by the government. Fox claims this was a "*taking*" violative of the Fifth Amendment and Michigan Constitution, an "*excessive fine*" under the Eighth Amendment, a violation of *substantive* and *procedural due process* under the Fourteenth Amendment and an "*unjust enrichment*." **(ECF No. 17, Pg ID 216-242, First Amended Complaint)**.

As described below, these claims are barred by lack of subject matter jurisdiction, comity and res judicata. The individual Defendants have immunity. Moreover, the Complaint fails to state cognizable claims.

The Plaintiff's claims are a *facial challenge* to the constitutionality of Michigan's GPTA. Judge Friedman recognized this in a case presenting identical claims, and he invited intervention by the Michigan Attorney General as required by 28 U.S.C. §2403 and Fed. R. Civ. P. 5.1(b). **(Ex A: Freed v. Thomas, Case No. 17-cv-13519; Ex B: Order for Certification; Ex C: Order Granting Intervention)**.

ARGUMENT

I. THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(b)(1), BECAUSE THE TAX INJUNCTION ACT PRECLUDES SUBJECT MATTER JURISDICTION OVER THE PLEADED CLAIMS.

Federal courts are courts of limited jurisdiction. ***Walburn v. Lockheed Martin Corp.***, 431 F.3d 966, 970 (6th Cir. 2005). "[W]hen a federal court concludes that it lacks subject matter jurisdiction, the court must dismiss the complaint in its entirety." ***Arbaugh v. Y&H Corp.***, 546 U.S. 500, 514 (2006).

The Tax Injunction Act mandates that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.
>
> 28 U.S.C. §1341.

Although the text expressly addresses only injunctive relief, "the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." ***California v. Grace Brethern Church***, 457 U.S. 393, 408 (1982). The only caveat in the statutory text is that the State must have a "plain, speedy and efficient remedy" through State procedures. Such a remedy is provided in Michigan.

Michigan courts recognize that the Fifth Amendment and Article X of the Michigan Constitution "prohibit the taking of private property for public use without

just compensation." ***Dorman v. Township of Clinton***, 269 Mich. App. 638, 645, 714 N.W.2d 350, 356 (2006). "Michigan recognizes the theory of inverse condemnation as a means of enforcing the constitutional ban on uncompensated takings of property." ***Biff's Grills v. Michigan State Highway Comm.***, 75 Mich. App. 154, 155-7, 254 N.W.2d 824, 826 (1977).

The Sixth Circuit has acknowledged that "Michigan has long recognized the doctrine of inverse condemnation." ***Bigelow v. Michigan Dept. of Natural Resources***, 970 F.2d 154, 158 (6th Cir. 1992). This remedy is available in the tax foreclosure context. See ***Ligon v. City of Detroit***, 276 Mich. App. 120, 124-6, 739 N.W.2d 900, 904-5 (2007), ***Hart v. City of Detroit***, 416 Mich. 488, 493-4, 331 N.W.2d 438, 440-1 (1982). Because Michigan affords means for aggrieved taxpayers to obtain relief through its own courts (e.g., inverse condemnation lawsuits), the Tax Injunction Act precludes exercise of jurisdiction by this Court over any demand by the Plaintiff for injunctive or declaratory relief.

Plaintiff Fox attempts to dodge the Tax Injunction Act by asserting that his claim regards "*what happens after the taxation process is completed,*" making reference to ***Coleman through Bunn v. District of Columbia***, 70 F. Supp. 3d 58 (D.D.C. 2014). **(ECF No. 17, Pg ID 221, First Amended Complaint, ¶ 13)**. But the ***Coleman*** case was decided before the Supreme Court decision in ***Direct Marketing Ass'n. v. Brohl***, ___ U.S. ___, 135 S. Ct. 1124 (2015), in which the

Supreme Court declared that the Tax Injunction Act prohibits challenges to a state's "*collection*" of taxes, including seizures and forfeiture of a delinquent taxpayer's property. ***Id.***, at 1130-1.

The Tax Injunction Act applies specifically against "plaintiffs who mounted federal litigation to avoid paying state taxes *or to recover amounts collected*." ***Hibbs v. Winn***, 542 U.S. 88, 106 (2004), *emphasis added*. Indisputably, Plaintiff Fox (and the putative "class") seek "to recover amounts collected" by the foreclosure sales - - i.e., the so-called surplus equity. Therefore, the Tax Injunction Act applies. [1]

II. ALTHOUGH NOT "JURISDICTIONAL," PRINCIPLES OF COMITY PRECLUDE EXERCISE OF JURISDICTION IN THIS CASE.

"The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction." ***Levin v. Commerce Energy, Inc.***, 560 U.S. 413, 421 (2010). "The doctrine reflects a proper respect for state functions,

[1] It should also be noted that the ***Coleman*** opinion relied heavily upon ***U.S. v. Lawton***, 110 U.S. 146 (1884). In that case, the controlling foreclosure statute itself expressly provided the foreclosed taxpayer with a property interest and entitlement to surplus proceeds, which is what the Court was enforcing. See ***U.S. v. Taylor***, 104 U.S. 216, 218 (1881) (*describing the statute at issue*). The ***Coleman*** opinion itself acknowledged this point. ***Coleman***, 70 F. Supp. 3d at 80. Interpretation of the Tax Injunction Act is not controlled by ***Coleman*** or ***Lawton***. Interpretation and application of the Tax Injunction Act is controlled by ***Direct Marketing Ass'n.***, which declares the Tax Injunction Act to apply to cases seeking "to recover amounts collected" through tax foreclosures.

. . . and a continuance of the belief that the national government will fare best if the states and their institutions are left to perform their separate functions in separate ways." ***Id.***, quoting ***Fair Assessment in Real Estate Ass'n., Inc. v. McNary***, 454 U.S. 100, 112 (1981).

In particular, the Supreme Court has "long recognized that principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration." ***National Private Truck Counsel, Inc. v. Oklahoma Tax Commission***, 515 U.S. 582, 586 (1995). The principle of comity "predated" the Tax Injunction Act and "was not restricted by its passage." ***Fair Assessment in Real Estate***, 454 U.S. at 110. Therefore, the doctrine applies not only to claims for injunctive and declaratory relief, but also to claims for monetary damages brought under 42 U.S.C. §1983. ***Id.***, at 116.

"[B]ecause of principles of comity and federalism, Congress never authorized federal courts to entertain damage actions under §1983 against state taxes when state law furnishes an adequate legal remedy." ***National Private Truck Counsel, Inc.***, 515 U.S. at 587. "[T]axpayers are barred by the principle of comity from asserting §1983 actions against the validity of state tax systems in federal courts."***Fair Assessment in Real Estate***, 454 U.S. at 116. Taxpayers "must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete." ***Id.***, at 116. In this context, "state remedies are plain,

adequate, and complete if they provide the taxpayer with a full hearing and judicial determination at which the taxpayer may raise any federal constitutional objections to the tax." ***In re Gillis***, 836 F.2d 1001, 1010 (6th Cir. 1988).

As described in the preceding section, Michigan provides a "plain, adequate, and complete" remedy for taxpayers. Michigan taxpayers can present both state and federal claims for a full hearing and judicial determination in the Michigan courts. Therefore, comity precludes exercise of jurisdiction over Plaintiff's claims.

III. THE PLAINTIFF'S CASE IS BARRED BY *RES JUDICATA*.

[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." ***Migra v. Warren City School Dist. Bd. of Educ.***, 465 U.S. 75, 81 (1984). Michigan follows "a broad approach to the doctrine of res judicata" which "bars not only claims already litigated but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." ***Adair v. Michigan***, 470 Mich. 105, 121, 680 N.W.2d 386, 396 (2004), ***Ludwig v. Township of Van Buren***, 682 F.3d 457, 460 (6th Cir. 2012).

Res judicata bars a plaintiff from "splitting" his cause of action. But it also bars a defendant in a prior action from subsequently attacking the prior judgment by raising as a claim (in a subsequent action) a defense that the defendant (now plaintiff) could have asserted in the prior case. ***Eyde v. Charter Township of Meridian***, 118

Mich. App. 43, 50, 324 N.W.2d 775 (1982). This is why ***Adair*** described res judicata in terms of "parties," rather than "plaintiff" or "defendant."

This scenario is illustrated by the Michigan Supreme Court opinion in ***Prawdzik v. Heidema Brothers, Inc.***, 352 Mich. 102, 89 N.W.2d 523 (1958). Akin to the foreclosure situation, the plaintiff in ***Prawdzik*** had been the defendant in a prior "ejectment" action. Having lost in the ejectment action, the ejectment defendant (now the plaintiff) then sued the prior plaintiffs (now defendants) in a second case - - wherein the prior ejectment defendant asserted, as his claim, an argument that could have been asserted as a defense in the ejectment case. ***Prawdzik***, 352 Mich. at 107, 89 N.W.2d at 526. The Michigan Supreme Court rejected the plaintiff's subsequent case, explaining that:

> They have already had their day in court. A disappointed or remorseful litigant cannot, simply by alleging new facts which were, or could have been, known to him at the time of the prior litigation, have another day in court.
>
> ***Prawdzik***, 452 Mich. at 109, 89 N.W.2d at 527.

As similarly observed by the Michigan Court of Appeals in ***Eyde***, *supra*:

> If a party fails in making a full presentation of his case, *whereby judgment has passed against him*, he cannot be permitted to make a better showing in a new suit.
>
> ***Eyde***, 118 Mich. App. at 50, 324 N.W.2d at 778, *emphasis added*.

The end result of the tax foreclosure the Plaintiff's property was fully known at the time the foreclosure action was litigated. The statutory preclusion of "refunds" and the mandate that counties and their treasurers handle foreclosure sale proceeds under the restrictive terms of M.C.L. 211.78m(8), were established law. See ***Harbor Watch Condominium Ass'n. v. Emmett County Treasurer***, 308 Mich. App. 380, 387, 863 N.W.2d 745, 749 (2014). Michigan courts indisputably hear and resolve claims and defenses brought by reference to the federal Constitution, the Michigan Constitution and common law. ***Johnson v. Vanderkooi***, 502 Mich. 751, 918 N.W.2d 785 (2018) ***Mays v. Snyder***, 323 Mich. App. 1, 78-84, 916 N.W.2d 227, 271-74 (2018) ***Genesee County Drain Commissioner v. Genesee County***, 321 Mich. App. 74, 908 N.W.2d 313 (2017) ("*unjust enrichment*"). Plaintiff Fox could have raised his present claims as defenses in the foreclosure litigation. Therefore, the judgment against Fox on the merits in that case poses a res judicata bar to his assertion of all the claims asserted by the Amended Complaint in this case.

IV. THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(b)(6), BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

"A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is designed to test the sufficiency of the complaint." ***Riverview Health Institute LLC v. Medical Mutual of Ohio***, 601 F.3d 505, 512 (6th Cir. 2010). "[D]ismissal pursuant to Rule 12(b)(6)

will be granted if the facts as alleged are insufficient to state a valid claim or if the claim shows on its face that relief is barred by an affirmative defense." ***Id***. "Immunity" is among these affirmative defenses. ***Jones v. Bock***, 549 U.S. 199, 2015 (2007), citing ***Pani v. Empire Blue Cross Blue Shield***, 152 F.3d 67 (2nd Cir. 1998).

A. The Plaintiff has failed to state a claim on which relief can be granted against the individual Defendants.

1. In their "individual capacity," the Defendants have "qualified immunity" against the Plaintiff's claims.

Assertion of claims against "individual officers in their individual capacities implicates qualified immunity." ***Johnson v. Moseley***, 790 F.3d 649, 653 (6th Cir. 2015). "[G]overnment officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald***, 257 U.S. 800, 818 (1982).

Qualified immunity invokes a two-pronged inquiry. Under one prong, the court must decide "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right." ***Pearson v. Callahan***, 555 U.S. 223, 232 (2009). Under the other prong, the court must decide "whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." ***Id***. "A

plaintiff must satisfy both inquiries in order to defeat the assertion of qualified immunity." ***Sumpter v. Wayne County***, 868 F.3d 473, 480 (6th Cir. 2017).

A right is "clearly established" only where the existing case law precedents demonstrate the existence of the right to be "beyond dispute," such that "every reasonable officer would have understood that what he is doing violates that right." ***Mullenix v. Luna***, ___ U.S. ___, 136 S. Ct. 305, 308 (2015). Moreover, qualified immunity "covers mistakes in judgment, whether the mistake is one of fact or one of law." ***Pearson***, 555 U.S. at 231.

In relevant context, the Sixth Circuit has observed that "the Supreme Court has never denied qualified immunity to a public official who enforced a properly enacted statute that no court had invalidated." ***Citizens in Charge, Inc. v. Husted***, 810 F.3d 437, 441 (6th Cir. 2016). As explained by the Sixth Circuit:

> When public officials implement validly enacted state laws that no court has invalidated, their conduct typically satisfies the court inquiry - - the objective reasonableness of an official's conduct - - that the immunity doctrine was designed to test. State officials swear to uphold the state and federal constitutions, and the presumption of constitutionality accompanies their enactments - - a presumption on which executive officials generally may depend in enforcing the legislature's handiwork.
>
> ***Id.*** at 441, *citations omitted*.

The Court further warned that "[a]ny other approach would place risky pressures on public officials to second-guess legislative decisions." ***Id.*** at 442. As the Court had stated in a previous decision:

> Government would come to a virtual standstill if executive officials concluded that their safest course of action was to ignore the laws of the state and to take no action for fear of liability. Reliance upon the presumptive validity of state law may be "the paradigm" of objectively reasonable conduct that the grant of immunity was designed to protect. The usual practice must therefore be that until judges say otherwise, state officers have the power to carry forward directives of the state legislature.
>
> ***Swanson v. Powers***, 937 F.2d 965, 969 (6th Cir. 1991) *citations omitted*.

By mandate of M.C.L. 211.78m(8), "[a] foreclosing governmental unit shall deposit the proceeds from the sale of property onto this section into a restricted account," and "[p]roceeds in that account shall be used only by the foreclosing governmental unit for the following purposes in the following order of priority." The statute then recites a list of uses (a) through (h), none of which permit refund of any proceeds to the foreclosed taxpayer. County treasurers "must" deposit the sale proceeds into restricted accounts and "may only use the proceeds according to the priorities set out" in the statute. ***Harbor Watch Condominium Ass'n. v. Emmet County Treasurer***, 308 Mich. App. 380, 387, 863 N.W.2d 745, 749 (2014).

Plaintiff Fox pleads that M.C.L. 211.78m(8) "*does not require the practices that Plaintiff complains of*" and "*can be fairly read to provide for Equity to be*

returned to the previous owner of a foreclosed property." **(ECF No. 17, Pg ID 225, First Amended Complaint, ¶ 37)**. This assertion defies the language of the statutory provision itself and the holding of ***Harbor Watch***.

No court has yet declared M.C.L. 211.78m(8) and its prohibition on refunds to be invalid. The only extant court opinion is ***Rafaeli LLC v. Oakland County***, No. 330696, 2017 WL 4803570 (Mich. Ct. App. Oct. 24, 2017). Relying on federal Supreme Court precedent, the court in ***Rafaeli*** held that a county's retention of all proceeds from a tax foreclosure sale is <u>not</u> an "unconstitutional taking." ***Rafaeli, LLC***, at *4, citing ***Bennis v. Michigan***, 516 U.S. 442, 452 (1996).

The Defendants acknowledge that the Michigan Supreme Court has granted leave for appeal of ***Rafaeli*** to address the constitutional question. ***Rafaeli, LLC v. Oakland County***, ___ Mich. ___, 919 N.W.2d 401 (Nov. 21, 2018). But qualified immunity applies, unless an official acts contrary to law that "was clearly established <u>*at the time*</u> *of the Defendants' alleged misco*nduct." ***Pearson***, 555 U.S. at 232, *emphasis added*. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." ***Harlow***, 457 U.S. at 818.

To date, nothing establishes enforcement of M.C.L. 211.78m(8) to be unlawful. The Michigan Court of Appeals held that the mandate of the statute is

constitutional. The Michigan Supreme Court may say otherwise. But if judges disagree on a constitutional question, it is unfair to deny immunity and impose liability upon an individual official "for picking the losing side of the controversy." ***Pearson***, 555 U.S. at 245, ***Reichle v. Howards***, 566 U.S. 658, 669-70 (2012).

Given the current state of the law, there has been no reason for county treasurers in Michigan to suspect that past or present enforcement of M.C.L. 211.78m(8) is unconstitutional. Therefore, the individual Defendant treasurers have qualified immunity against the Plaintiff's federal claims.

2. The "official capacity" claims against the individual Defendants should be dismissed as duplicative of the claims against the Defendant counties.

A claim seeking damages against a public official in his or her "official capacity" represents "only another way of pleading an action against the entity of which the officers is an agent." ***Kentucky v. Graham***, 473 U.S. 159, 165-6 (1985). In this light, an "official capacity" claim is properly (and routinely) dismissed as duplicative of the claim against the government entity that the official serves. ***Doe v. Clairborne County, Tenn.***, 103 F.3d 495, 509 (6th Cir. 1996), ***Alkire v. Irving***, 330 F.3d 802, 810 (6th Cir. 2003). ***Schindewolf v. City of Brighton***, 107 F. Supp. 3d 804, 827 (E.D. Mich. 2015), ***Cavanaugh v. McBride***, 33 F. Supp. 3d 840, 848-9 (E.D. Mich. 2014). Therefore, the Plaintiff's claims against the individual

Defendant treasurers in their "official capacity" should be dismissed as duplicative of the Plaintiff's claims against the Defendant counties.

B. Neither the Defendant counties nor the Defendant treasurers in their "official capacity," can be held liable for the consequences of Michigan's GPTA.

The vehicle for assertion of federal constitutional claims against a municipal entity (or against a municipal officer in "official capacity") is 42 U.S.C. §1983 - - as circumscribed by the Supreme Court in ***Monell v. Dept. of Social Services of City of New York***, 436 U.S. 658 (1978), and its progeny. The Plaintiff seeks to evade the strictures of ***Monell*** by the pretense that their Count II "taking" claim is a "direct" action under the Constitution, apart from §1983. **(ECF No. 1, Pg ID 13, Complaint, ¶¶ 46-47)**. The Sixth Circuit rejects so-called "direct" claims.

Four decades ago in ***Gordon v. City of Warren***, 579 F.2d 386 (6th Cir. 1978), the Sixth Circuit recognized such a claim. ***Id.***, at 391. But since the Supreme Court's contemporaneous decision in ***Monell***, *supra*, such "direct" action has been rejected as contrary to ***Monell***. See ***Foster v. Michigan***, 573 Fed. Appx. 377, 391 (6th Cir. 2014), ***Warthman v. Genowa Township Bd. of Trustees***, 549 F.3d 1055, 1062-3 (6th Cir. 2008), ***Thomas v. Shipka***, 818 F.2d 496, 500-1 (6th Cir. 1987), *vacated and remanded on other grounds*, ***Thomas v. Shipka***, 872 F.2d 772 (6th Cir. 1989). Indeed, in ***Jett v. Dallas Independent School Dist.***, 491 U.S. 701 (1989), the

Supreme Court itself held §1983 to be "the exclusive federal remedy" for the violation of constitutional rights by state governmental units. ***Id.***, at 733.

To maintain a §1983 claim against a Defendant counties (or the treasurer in their "official capacity"), the Plaintiff must demonstrate that some policy established by the *county* actually caused unconstitutional actions toward the Plaintiff. "Municipal liability must rest upon a direct causal connection between the policies or customs of the [municipality] and the constitutional injury to the plaintiff; respondeat superior or vicarious liability will not attach." ***Gray v. City of Detroit***, 399 U.S. 612, 617 (6th Cir. 2005), see also ***City of Canton, Ohio v. Harris***, 489 U.S. 378, 385 (1989). It is the Plaintiff's burden to present evidence to "(1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that [the plaintiff's particular injury was incurred due to the execution of that policy." ***Vereecke v. Huron Valley School Dist.***, 609 F.3d 392, 403 (6th Cir. 2010).

The Plaintiff's claims fail, because he cannot connect the alleged "taking" or "excessive fine" to a policy *of* the Defendant counties. By the Plaintiff's own recitation, the denial of a refund was caused by enforcement of *Michigan's* GPTA - - a State legislative enactment - - not a policy of the Defendant counties.

In recognizing the validity of §1983 claims against local governing units, the Supreme Court expressly limited the scope of such claims. As summarized:

> In short, a municipality can be sued under §1983, but it cannot be held liable unless a *municipal policy or custom* caused the constitutional injury.
>
> ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit***, 507 U.S. 163, 166 (1993), *emphasis added*.

Even assuming that the retention of "excess" proceeds from the sale of property following foreclosure is unconstitutional, the denial of refunds results from a Michigan legislative enactment that the counties and treasurers are obligated to follow. ***Harbor Watch Condominium Ass'n.***, 308 Mich. App. at 387, 863 N.W.2d at 749. There is a causal connection between *State* policy and the denial of refunds. But there is no connection to any policy of the counties themselves.

The Plaintiff seeks to evade this reality by alleging that the counties "*voluntarily enforce an unconstitutional statute*." **(ECF No. 17, Pg ID 220, 224-225, First Amended Complaint, ¶¶ 8, 32-36)**. But this characterization fails.

The only choice afforded to county boards is to handle tax foreclosures as the "foreclosing governmental unit" or to default the process to the state. M.C.L. 211.78(3)-(6), (8). But neither the County Board, nor the County Treasurer, could determine or alter the refund-denying procedures to be used.

Moreover, regardless of whether the State or a county is the "foreclosing governmental unit," the properties of delinquent taxpayers "shall be returned as delinquent for collection," M.C.L. 211.78a(2), and the *county treasurer* "shall send

notice" to the taxpayer, M.C.L. 211.78c and "shall prepare a list of all property subject to forfeiture for delinquent taxes," M.C.L. 211.78e(1). The property "shall" be subjected to foreclosure proceedings and sold, with no option for the county (or the state) to refund any sum to the foreclosed taxpayer. M.C.L. 211.78m(8). Even if the county chooses *not* to make itself or its treasurer the "foreclosing governmental unit," the *county treasurer* must still take the statutory steps to facilitate the State's sale of the property and the ensuing denial of any refund.

The controlling opinion of the Sixth Circuit in this regard is ***Johnson v. Turner***, 125 F.3d 324 (6th Cir. 1997). In that case, four plaintiffs brought suit alleging that the arrest and asset seizure provisions of the paternity and child support statutes of the State of Tennessee were unconstitutional. Citing a memorandum of a county judge directing court staff to follow the State procedures of which the plaintiffs complained, the plaintiffs sought monetary damages from the county. The Sixth Circuit dismissed the claim against the county stating that:

> The district court properly concluded that Judge Turner's memorandum that discusses the initiation of the attachment pro corpus is not a "policy" for the Child Support Bureau, but rather a general statement of state law as perceived by the juvenile court judge. . . . The Shelby County government could not have altered the state's statutes, nor could it have required Judge Turner to interpret those statutes differently or otherwise interfere with the means used by the juvenile court and its employees to carry out state law.
>
> ***Johnson***, 125 F.3d at 335-6.

Dismissal is likewise mandated in the present case.

Neither the individual treasurers nor the Defendant counties can change Michigan's GPTA. Contrary to the Plaintiff's absurd accusation **(ECF No. 17, Pg ID 225, First Amended Complaint, ¶ 39)**, the Defendants' actions under mandate of the GPTA were certainly not "*designed*" by the *Defendants* "*to intentionally or wantonly cause harm to Plaintiff*." Rather, there is a state statutory system that the Defendant treasurers and counties must follow - - or face criminal charge for dereliction of duty, M.C.L. 750.478, together with mandamus and legal liability for their failure to enforce the law. See ***Wilcoxon v. City of Detroit Election Commission***, 301 Mich. App. 619, 634-6, 838 N.W.2d 183, 191-2 (2013).

Again, what the Plaintiff presents is a *facial* challenge to the constitutionality of the *State* statute. This is why Judge Friedman, when confronted by the same claims, invited and authorized intervention by the Michigan Attorney General - - as required by 28 U.S.C. §2403 and Fed. R. Civ. P. 5.1(b).

C. The denial of "refunds" is not a "taking" under the Fifth Amendment.

The first question to be answered in any "taking" case is whether the plaintiff has a cognizable property interest in the property allegedly "taken." ***Puckett v. Lexington-Fayette Urban County Government***, 833 F.3d 590, 609 (6th Cir. 2016), ***Ruckelshaus v. Monsanto Co.***, 467 U.S. 986, 1000-1 (1984). "[T]here is no taking

if there is no private property in the first place." ***Raceway Park, Inc. v. Ohio***, 356 F.3d 677, 683 (6th Cir. 2004).

"Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." ***Phillips v. Washington Legal Foundation***, 524 U.S. 156, 164 (1998). Under the GPTA title to foreclosed property *vests in the county treasurer* when the redemption period expires - - i.e., 21 days after the judgment of foreclosure. M.C.L. 78k(6).

According to the documents attached by the Plaintiff to his complaint, the property of the named Plaintiff, Thomas Fox, was adjudged foreclosed by a court order entered February 21, 2017. **(ECF No. 1-2, Pg ID 23-27)**. The property was sold by quit claim deed seven months later on August 17, 2017. **(ECF No. 1-3, Pg ID 60)**. By the time of the sale, Plaintiff Fox no longer had any "property interest" in the foreclosed premises under state law. The same would be true for the putative "class" Plaintiffs. Because the Plaintiff did not have any property interest, they lack the predicate basis for a "taking" claim.

D. The denial of "refunds" is not an "excessive fine" under the Eighth Amendment.

The Plaintiff alleges that the Defendants' statutory denial of "refunds" constitutes an "excessive fine." This categorically fails.

The Supreme Court has explained that:

> The Eighth Amendment provides: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations in the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation. . . .
>
> ***Ingraham v. Wright***, 430 U.S. 651, 664 (1977).

Specifically, the court in ***Ingraham*** refused to apply the Eighth Amendment to the paddling of children - - despite such action being a punishment and potentially cruel - - because the children had not been convicted of crimes.

There are no allegations that the foreclosure and sale of any Plaintiff's property occurred in the context of a criminal prosecution or as a punishment following a criminal conviction. The actions of which the Plaintiff complains are categorically outside the scope of the Eighth Amendment.

In related litigation, other plaintiffs (represented by Fox's counsel) have argued that the recent federal Supreme Court decision in ***Timbs v. Indiana***, ___ U.S. ___, 139 S. Ct. 682 (2019) allows application of the Eighth Amendment to the context of a tax foreclosure and sale. This is manifestly false.

The ***Timbs*** decision does no more than declare that the Eighth Amendment excessive fines clause is "incorporated" by the due process clause of the Fourteenth Amendment to apply against the State's. But that was the *only* question decided by the court. ***Timbs***, 139 S. Ct. 686-7.

In fact, ***Timbs*** reaffirmed the prior decisions restricting application of the Eighth Amendment to the context of "punishment for some offense." ***Timbs***, 139 S. Ct. at 687, quoting ***U.S. v. Bajakajian***, 524 U.S. 321, 327-8 (1998) and ***Austin v. U.S.***, 509 U.S. 602, 609-10 (1993). The Court extended the *reach* of the Eighth Amendment to the States, but it did not expand the *scope* of the Amendment beyond the context of a putative sanction following conviction for a criminal offense.

The ***Austin*** petitioner "pleaded guilty" to drug offenses, and the United States filed "*an in rem action*" seeking forfeiture of the petitioner's home and business under statutes that authorize forfeiture of property used in drug offenses. ***Austin***, 509 U.S. at 604, 620. In *that* context - - where the *in rem forfeiture* is directly tied to criminal conviction of the person whose property is subject to forfeiture - - the Eighth Amendment applies because the forfeiture is effectively an additional *punishment*. As stated in ***Austin***, "[t]he excessive fines clause limits the government's power to extract payments, whether in cash or kind, as *punishment* for some offense." ***Id.***, at 609-10, *emphasis in original*. It is in *this* specific context of

a punitive sequelae to a criminal conviction that a civil forfeiture falls within the scope of the Eighth Amendment. ***Id.***, at 621-2.

Similarly, in ***U.S. v. Bajakajian***, the respondent had pleaded guilty to the criminal offense of illegally transporting currency. ***Bajakajian***, 524 U.S. at 324-5. The forfeiture could be deemed "punishment" of that convicted offender. ***Id***.

Neither tax foreclosure nor sale involves a criminal conviction. Neither is "punishment" for any "offense." The foreclosure and sale are a method of tax collection. Therefore, the Plaintiff fails to state an Eighth Amendment claim.

E. Plaintiff Fox has no basis for a "procedural due process" claim.

"Procedural due process" requires that a person be afforded notice and opportunity to be heard "at a meaningful time and in a meaningful manner" to contest government action depriving the person of a liberty or property interest. ***Mathews v. Eldridge***, 424 U.S. 319, 332-3 (1976). Whether procedures afforded to the individual are constitutionally sufficient requires balancing of (1) the private interest at stake, (2) the risk of erroneous deprivation of that interest and (3) the government's interest (including consideration of "burdens" that additional procedural requirements would entail. ***Id.***, at 335.

In this case, there is no allegation that Plaintiff Fox was denied notice or opportunity to be heard in the foreclosure litigation. That litigation was conducted in court before a judge, who entered the judgment of foreclosure after Plaintiff Fox

failed to exercise his statutory right of redemption. M.C.L. 211.78g(3), M.C.L. 211.78h(1) and (2), M.C.L. 211.78k(5).

Plaintiff Fox fails to plead how these procedures of the GPTA are inadequate to satisfy "procedural due process." His supposed distinction - - i.e., that he contests the retention of so-called excess proceeds "*after*" the foreclosure judgment - - is unavailing. As described above, Plaintiff Fox knew he would be denied any refund. He could have contested the matter during the foreclosure proceedings.

F. Plaintiff Fox has no basis for a "substantive due process" claim.

"[W]here another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under the explicit provision and not the more generalized notion of 'substantive due process.'" ***Conn v. Gabbert***, 526 U.S. 286, 293 (1999), citing ***Graham v. Connor***, 490 U.S. 386, 395 (1989). Plaintiff Fox's claim is for a supposed "taking" of property. If such occurred, he has an explicit textual source of constitutional protection in the Fifth Amendment. Therefore, his "substantive due process" claim fails.

But even assuming *arguendo* that a "substantive due process" claim is not precluded by the Fifth Amendment, the claim still fails. This is true with regard to both the individual treasurers and the counties.

Substantive due process protects individuals against "arbitrary action of government." ***County of Sacramento v. Lewis***, 523 U.S. 833, 865 (1998). But the

"criteria to identify what is fatally arbitrary differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue." ***Id.***, at 846.

With regard to the individual Treasurer Defendants, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." ***Id***. The conduct must be such that "shocks the conscience." ***Id.***, at 846-7.

Particularly relevant is ***City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation***, 538 U.S. 188 (2003), wherein the Supreme Court considered the circumstance of a city engineer, who delayed issuance of building permits in deference to a city charter provision providing that action could not be taken until a referendum on an ordinance had been decided. ***Id.***, at 192-3. "[I]n light of the charter's provision," the Court held that the delay in issuance of the permits was "eminently rational." ***Id.***, at 198-9. "[T]he city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct." ***Id.***, at 198.

The present situation of the Defendant treasurers - - i.e., following the restrictive mandates of M.C.L. 211.78m(8) - - is no different. As described above, individual government officials are not liable for complying with State law that no court has yet declared unconstitutional. In this case, the treasurers' refusal to offer refunds is "eminently rational." Compliance with established law cannot be found arbitrary or capricious and certainly does not "shock the conscience."

With regard to a governmental entity (as opposed to an individual official), government actions "that do not affect fundamental rights or liberty interests and do not involve suspect classifications" will be upheld against a substantive due process challenge "if they are rationally related to a legitimate state interest." ***Seal v. Morgan***, 229 F.3d 567, 575 (6th Cir. 2000). The list of "fundamental rights and liberty interests" is limited to marriage, child bearing, childrearing and bodily integrity. ***Id.***, at 574-5, citing ***Washington v. Glucksberg***, 521 U.S. 702 (1997). A person's property rights in real estate are not in this list. Therefore, the retention of proceeds mandated by M.C.L. 211.78m(8) must be upheld if "rationally related to a legitimate state interest." ***Id***.

Collection of taxes is, indisputably, a "legitimate state interest." In the context described above - - where the taxpayer has failed to redeem his property and judicially overseen forfeiture proceedings have resulted in vesting of "absolute" fee simple title in the government - - retention of all proceeds from sale is rationally related to the State's tax collection interest.

G. The Plaintiff's state-law claims for "inverse condemnation" and "violation of Michigan Constitution Article X" fail under Michigan law.

The Plaintiff's state-law claims are a confused example of "shotgun" pleading. The Plaintiff's Count III claim is labeled "*inverse condemnation*," while Count IV claim is labeled as "*violation of Michigan Const. Art. X, Sec. 2*." **(ECF**

No. 1, Pg ID 14, 16, Complaint, Counts III and IV). Both counts also reference Michigan's Uniform Condemnation Procedures Act (UCPA), M.C.L. 213.51 et seq. **(ECF No. 1, Pg ID 15, 16, Complaint, ¶¶ 56, 65)**.

As observed above, an "inverse condemnation" lawsuit is the *means* provided by Michigan law to enforce the prohibition on "takings" in the Michigan Constitution's Article X. ***Biff's Grill***, 75 Mich. App. at 156-7, 254 N.W.2d at 826. These are not distinct or separate claims.

Notably, the Plaintiff alleges "inverse condemnation" only against the Defendant counties and the treasurers in "official capacity" - - and for good reason. If a county or city is the author of a "taking," it can be sued for inverse condemnation. ***Electro-Tech, Inc. v. HF Campbell Co.***, 433 Mich. 57, 88-9, 445 N.W.2d 61, 75-6 (1989) (*city conditioning construction permit on dedication of land*), ***Hart v. City of Detroit***, 416 Mich. 488, 331 N.W.2d 438 (1982) (*city acquisition of land for urban renewal*), ***Herro v. Bd. of County Rd. Commissioners***, 368 Mich. 263, 118 N.W.2d 271 (1962) (*county construction of road causing flooding*). But there is no instance of an individual official being held liable for an unconstitutional "taking." It is the government, *as an entity*, that is liable to pay compensation for a "taking."

But no "taking" has occurred. Under the Michigan Constitution, as much as under the Fifth Amendment, a "taking" claim can arise only if the plaintiff has a "property interest" in whatever is allegedly taken. ***In re Certified Question***, 447

Mich. 765, 788, 527 N.W.2d 468, 478 (1994), ***Long v. Liquor Control Comm'n.***, 322 Mich. App. 60, 68, 910 N.W.2d 674, 679 (2017). As described above with regard to the Fifth Amendment, the judgment of foreclosure terminated the Plaintiff's "property interest," before the foreclosure sales. M.C.L. 78k(6).

The Plaintiff also apparently believes that Michigan's UCPA supersedes the GPTA with regard to procedures for foreclosure sales. This claim fails as a matter of statutory construction.

The Michigan legislature enacted the Uniform Condemnation Procedures Act in 1980 with specific reference to "the power of eminent domain." M.C.L. 213.51a et seq., *particularly* M.C.L. 213.75. The legislature enacted the current GPTA in 1999 to establish specific statutory procedures for the foreclosure and sale of tax delinquent properties. M.C.L. 211.78 et seq. The UCPA and the GPTA are independent statutory schemes applicable to completely different government actions. The statutes do not overlap.

Even if they did overlap, "[i]t is axomatic that when two statutes appear to control a particular situation, the more recent and more specific statute applies." ***Martin v. Murray***, 309 Mich. App. 37, 48-9, 867 N.W.2d 444, 450 (2015), ***Metropolitan Detroit Area Hospital Service, Inc. v. U.S.***, 634 F.2d 330, 334 (6th Cir. 1980). As between the UCPA and the GPTA, the GPTA is both more recent and more specific to the disposition of proceeds from tax foreclosure sales. There is

no basis for the Plaintiff to claim that the county treasurers should have followed the UCPA in the tax foreclosure context.

Moreover, Michigan law recognizes governmental immunity as an inherent "characteristic of government," and a governmental entity is immune from liability, unless a statutory exception applies. ***Mack v. City of Detroit***, 467 Mich. 186, 203, 649 N.W.2d 47, 56-7 (2002). A governmental entity can be liable for "inverse condemnation" for a "taking" prohibited by the Michigan Constitution. But Michigan law has never held government enforcement of M.C.L. 211.78m(8) to be a "taking," and no statute declares such enforcement to be an "exception" to immunity. Therefore, the Defendants are immune against the Plaintiff's claim.

H. The Plaintiff fails to state a cognizable "unjust enrichment" claim against the named Defendants.

The Plaintiff's "unjust enrichment" claim is pleaded in a cursory manner. Under Michigan law, "unjust enrichment" is an equitable remedy, "by which the law sometimes indulges the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received to ensure that exact justice is obtained." ***Kammer Asphalt Paving Co., Inc. v. East China Township Schools***, 443 Mich. 176, 185-6, 504 N.W.2d 635, 640 (1993). The plaintiff must show that the defendant has obtained from the plaintiff a "benefit it is inequitable that the defendant retain."

Michigan Education Employees Mut. Co. v. Morris, 460 Mich. 180, 198, 596 N.W.2d 142, 151 (1999).

A tax foreclosure sale takes place *after* the taxpayer has failed to redeem his property and *after* fee simply ownership of that property has vested *by judicial decree* in the foreclosing governmental unit. M.C.L. 211.78k(6). There is nothing "unjust" in a county or treasurer acting in accordance with the mandate of the state's legislatively prescribed procedures to foreclose property. There is nothing "inequitable" in the government's retention of all proceeds from sale of property to which it has fee simply title, by *judicial decree.*

Moreover, M.C.L. 211.78m(8) statutorily prohibits refund to the taxpayer of any so-called excess or surplus proceeds. Under Michigan law, "equity" cannot compel a remedy (i.e., refund of sale proceeds) that the Michigan legislature has expressly prohibited by law. ***Trentadue v. Buckler Lawn Sprinkler***, 479 Mich. 378, 406-7, 738 N.W.2d 664, 680 (2007) (*judges cannot "cast aside a plain statute in the name of equity," even if they might deem the statute unfair*).

CONCLUSION AND RELIEF REQUESTED

For the reasons described above, Plaintiff's claims cannot be sustained against the named Defendant Counties and Treasurers. Therefore, the Plaintiff's complaint should be dismissed in its entirety under Fed. R. Civ. P. 12(b)(1) and (6).

Respectfully submitted,

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Dated: September 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2019, I electronically filed the foregoing Motion Seeking Dismissal with Brief in Support with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: (none).

/s/ Allan C. Vander Laan
Allan C. Vander Laan

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

THOMAS A. FOX, for himself and all those similarly situated,

Plaintiffs,

v.

COUNTY OF SAGINAW, *et al.*,

Defendants.
_____/

Case No.: 19-cv-11887
Hon. Thomas L. Ludington

(JURY DEMANDED)

**** CLASS ACTION ****

PLAINTIFF'S RESPONSE TO MOTION OF THE SAGINAW COUNTY, BAY COUNTY, GRATIOT COUNTY, ISABELLA COUNTY, TUSCOLA COUNTY, MONTMORENCY COUNTY, ALPENA COUNTY, OSCODA COUNTY, ARENAC COUNTY, CLARE COUNTY AND GLADWIN COUNTY DEFENDANTS (COUNTIES, BY THEIR BOARDS AND INDIVIDUALS) SEEKING DISMISSAL UNDER FED. R. CIV. P. 12(b)(1) and (6)

QUESTIONS PRESENTED

I. DOES THE TAX INJUNCTION ACT, 28 U.S.C. §1341, PRECLUDE THIS COURT FROM EXERCISING JURISDICTION OVER PLAINTIFF'S CLAIMS?

Plaintiff answers: "No."
Defendants will answer: "Yes."

II. DO PRINCIPLES OF "COMITY" PRECLUDE THIS COURT FROM EXERCISING JURISDICTION OVER PLAINTIFF'S CLAIMS?

Plaintiff answers: "No."
Defendants will answer: "Yes."

III. DOES "RES JUDICATA" PRECLUDE PLAINTIFF FROM RAISING THE PRESENT CLAIMS?

Plaintiff answers: "No."
Defendants will answer: "Yes."

IV. SHOULD PLAINTIFF'S "INDIVIDUAL CAPACITY" CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS BE DISMISSED?

Plaintiff answers: "No."
Defendants will answer: "Yes."

V. SHOULD PLAINTIFF'S "OFFICIAL CAPACITY" CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS BE DISMISSED?

Plaintiff answers: "No."
Defendants will answer: "Yes."

VI. SHOULD PLAINTIFF'S CLAIMS AGAINST THE COUNTIES (AND AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR "OFFICIAL CAPACITY") BE DISMISSED?

Plaintiff answers: "No."
Defendants will answer: "Yes."

VII. HAS PLAINTIFF SUFFICIENTLY PLED A TAKINGS CLAIM?

Plaintiff answers: "Yes."
Defendants will answer: "No."

VIII. HAS PLAINTIFF SUFFICIENTLY PLED A CLAIM UNDER THE EIGTH AMENDMENT?

Plaintiff answers: "Yes."
Defendants will answer: "No."

IX. HAS PLAINTIFF SUFFICIENTLY PLED A PROCEDURAL DUE PROCESS CLAIM?

Plaintiff answers: "Yes."
Defendants will answer: "No."

X. HAS PLAINTIFF SUFFICIENTLY PLED A SUBSTANTIVE DUE PROCESS CLAIM?

Plaintiff answers: "Yes."
Defendants will answer: "No."

XI. HAS PLAINTIFF SUFFICIENTLY STATED A CLAIM UNDER THE MICHIGAN CONSTITUTION?

Plaintiff answers: "Yes."
Defendants will answer: "No."

XII. HAS PLAINTIFF SUFFICIENTLY PLED AN UNJUST ENRICHMENT CLAIM?

Plaintiff answers: "Yes."
Defendants will answer: "No."

TABLE OF MOST CONTROLLING AUTHORITY

RULES

Fed. R. Civ. P. 12(b)(6)..... *passim*

CASES

Dean v. Michigan Dep't of Nat. Res.,
399 Mich. 84 (1976) 8, 9, 10, 30

Knick v. Twp. of Scott, Pennsylvania,
139 S. Ct. 2162 (2019)..... *passim*

U.S. v. Lawton,
110 U.S. 146 (1884)..... 17, 19

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

BACKGROUND 2

STANDARD OF REVIEW 3

ARGUMENT 5

I. This Court Has Jurisdiction Over this Case 5

A. *Knick v. Twp. of Scott* Provides this Court with Jurisdiction 5

B. The Tax Injunction Act Does Not Divest this Court of Jurisdiction 5

C. The Principle of Comity Does Not Bar Jurisdiction 6

D. Plaintiff Lacks a Remedy Under Michigan Law 7

E. The Michigan Supreme Court Has Distinguished Between Claims Such as Plaintiff's and Tax Claims 8

II. Plaintiff's Case is not Barred by *Res Judicata* 9

III. Defendants are Not Immune from Plaintiff's Claim 10

A. Official Capacity 10

i. Plaintiff has stated an "official capacity" claim 10

ii. Defendants are not immune under *Monell* 11

B. County Treasurer in His Individual Capacity 15

IV. Plaintiff Has Stated Claims for the Deprivation of His Federal Constitutional Rights 17

A. Plaintiff Has a Protected Property Interest in His Equity 17

B. Plaintiff Has Stated an Eighth Amendment Claim 20

C. Plaintiff Has Stated a Procedural Due Process Claim 22

D. Plaintiff Has Stated a Substantive Due Process Claim 23

V. Plaintiff Has Stated a State-Law Claim for Inverse Condemnation and Violation of the Michigan Constitution Article X. 27

VI. Defendants Have Been Unjustly Enriched 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adair v. State,
470 Mich. 105 (2004) 9

Anderson v. Creighton,
483 U.S. 635 (1987).....16

Austin v. United States,
509 U.S. 602 (1993).....21

Bd. of Regents of State Colleges v. Roth,
408 U.S. 564 (1972).....23

Belle Isle Grill Corp v. City of Detroit,
256 Mich. App. 463 (2003) 29

Bennis v. Michigan,
516 U.S. 442 (1996).....21

Bittinger v. Tecumseh Prod. Co.,
123 F.3d 877 (6th Cir. 1997) 9

BMW of N. Am. v. Gore,
517 U.S. 559 (1996).....25

Bogie v. Town of Barnet,
260 A.2d 898 (1970).....18

Boots v. Vogel-Boots,
No. 309265, 2013 WL 440096 (Mich. Ct. App. Feb. 5, 2013).....20

Braley v. City of Pontiac,
906 F.2d 220 (6th Cir. 1990) 24, 27

Buckeye Community Hope Foundation v. City of Cuyahoga Falls,
263 F.3d 627 (6th Cir. 2001) 19

Carrier Corp. v. Outokumpu Oyj,
673 F.3d 430 (6th Cir. 2012) 4

Citizens in Charge, Inc. v. Husted,
810 F.3d 437 (6th Cir. 2016) 16

Cmty. Bank & Tr. v. United States,
54 Fed. Cl. 352 (2002).....18

Coleman through Bunn v. D.C.,
No. CV 13-1456 (EGS), 2016 WL 10721865 (D.D.C. June 11, 2016) . 19, 20

Coleman through Bunn v. Dist. of Columbia,
70 F. Supp. 3d 58 (D.D.C. 2014).....6

Cummings v. Dean,
913 F.3d 1227 (10th Cir. 2019) 16

Dean v. Michigan Dep't of Nat. Res.,
399 Mich. 84 (1976) 8, 9, 10, 30

Dean v. Olibas,
129 F.3d 1001 (8th Cir. 1997) 25

Direct Mktg. Ass'n. v. Brohl,
135 S. Ct. 1124 (2015).....7

Dorman v. Twp. of Clinton,
269 Mich. App. 638 (2006) 28

Dubin v. Co. of Nassau,
277 F. Supp. 3d 366 (E.D.N.Y. 2017).....22

Elder v. Twp. of Harrison,
489 F. App'x 934 (6th Cir. 2012).....9

Fair Assessment in Real Estate Ass'n., Inc. v. McNary,
454 U.S. 100 (1981).....7

Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.,
491 F.3d 320 (6th Cir. 2007) 3

Grand Traverse Cty. v. State,
450 Mich. 457 (1995) 14

Hagan v. Mickens,
589 B.R. 594 (W.D. Mich. 2018) 20

Hairston v. Franklin Cty. Sheriff's Office Ctr. Main Jail 1,
No. 2:17-CV-581, 2019 WL 2411392 (S.D. Ohio June 7, 2019) 12

Handy-Clay v. City of Memphis,
695 F.3d 531 (6th Cir. 2012) 3

Harbor Watch Condo. Ass'n v. Emmet Cty. Treasurer,
308 Mich. App. 380 (2014) 13

Harlow v. Fitzgerald,
457 U.S. 800 (1982).....17

Hart v. City of Detroit,
416 Mich. 488 (1982) 8

Hibbs v. Winn,
542 U.S. 88 (2004).....7

In re Certified Question,
447 Mich. 765 (1994) 18

Ingraham v. Wright,
430 U.S. 651 (1971)..... 20, 22

Jackson v. United States,
135 Fed. Cl. 436 (2017).....18

Jett v. Dallas Indep. Sch. Dist.,
491 U.S. 701 (1989).....10

Kentucky v. Graham,
473 U.S. 159 (1985)..... 10, 11

Klen v. City of Loveland, Colo.,
661 F.3d 498 (10th Cir. 2011).....23

Knick v. Twp. of Scott, Pennsylvania,
139 S. Ct. 2162 (2019)..... *passim*

Lake Cty. Auditor v. Burks,
802 N.E.2d 896 (Ind. 2004).....18

Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993).....12

Levin v. Commerce Energy, Inc.,
560 U.S. 413 (2010).....7

Ligon v. City of Detroit,
276 Mich. App. 120 (2007).....8

LRL Properties v. Portage Metro Hous. Auth.,
55 F.3d 1097 (6th Cir. 1995).....23

Lucas v. Forty-Fourth Gen. Assembly of State of Colo.,
377 U.S. 713 (1964).....24

Mathews v. Eldridge,
424 U.S. 319 (1976).....23

Miami Valley Mobile Health Servs., Inc. v. ExamOne Worldwide, Inc.,
852 F. Supp. 2d 925 (S.D. Ohio 2012).....11

Michigan S. R.R. Co. v. Branch & St. Joseph Ctys. Rail Users Ass'n,
287 F.3d 568 (6th Cir. 2002).....3

Mills v. Cty. of Lapeer,
No. 2:09-CV-14026-PDB, 2011 WL 669389 (E.D. Mich. Feb. 17, 2011).....6

Monell v. Dep't of Social Servs.,
436 U.S. 658 (1978).....11

Morris Pumps v. Centerline Piping, Inc,
273 Mich. App. 187 (2006) 29

Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n,
515 U.S. 582 (1995)..... 6, 7, 8

Nelson v. City of New York,
352 U.S. 103 (1956).....18

Newland v. Reehorst,
328 Fed. Appx. 788 (3d Cir. 2009).....15

People v. Harrison,
194 Mich. 363 (1916) 28

Prawdzik v. Heidema Brothers, Inc.,
352 Mich. 102 (1958) 10

Prince v. City of New York,
108 A.D.3d 114 (2013).....22

Puckett v. Lexington-Fayette Urban Cty. Gov't,
566 F. App'x 462 (6th Cir. 2014).....24

Raceway Park, Inc. v. Ohio,
356 F.3d 677 (6th Cir. 2004) 19

Romanski v. Detroit Entm't, L.L.C.,
428 F.3d 629 (6th Cir. 2005) 25

Riggins v. Goodman,
572 F.3d 1101 (10th Cir. 2009) 17

Smith v. Cliffs on the Bay Condo. Ass'n,
245 Mich. App. 73 (2001) 21

State Farm Mut. Ins. Co. v. Campbell,
538 U.S. 408 (2003).....26

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997).....7

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002).....17

Tavake v. Allied Ins. Co.,
No. CIV-S-11-3259 KJM, 2012 WL 1143787 (E.D. Cal. Apr. 4, 2012).....26

Thomas v. City of Chattanooga,
398 F.3d 426 (6th Cir. 2005) 11

Thomas Tool Servs. v. Town of Croydon,
761 A.2d 439 (2000).....18

Timbs v. Indiana,
139 S. Ct. 682 (2019).....20

Toms v. Taft,
338 F.3d 519 (6th Cir. 2003) 15

U.S. ex rel. Smith v. Gilbert Realty Co.,
840 F. Supp. 71 (E.D. Mich. 1993), ...21

United States v. Bajakajian,
524 U.S. 321 (1998).....22

United States v. Davis,
139 S. Ct. 2319 (2019).....14

Washington v. Glucksberg,
521 U.S. 702 (1997).....27

Wesley v. Campbell,
779 F.3d 421 (6th Cir. 2015) 15

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985).....5, 7

U.S. v. Lawton,
110 U.S. 146 (1884)..... 17, 19

Yashon v. Gregory,
737 F.2d 547 (6th Cir. 1984) 23

STATUTES

28 U.S.C. § 1341 6
MCL § 45.1 28
MCL § 205.51(c).....13
MCL § 205.51(d) 13
MCL § 211.119(1) 21
MCL § 211.78(3) 12
MCL § 211.78(6) 2, 12
MCL § 211.78m(8) 13
MCL § 600.5451(1)(m) 20

RULES

Fed. R. Civ. P. 12(b)(1).....1, 2
Fed. R. Civ. P. 12(b)(6)..... *passim*
Fed. R. Civ. P. 8(d)(2).....26

TREATISES

2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 29

CONSTITUTIONAL PROVISIONS

Mich. Const. Art. IX, § 25 14
Mich. Const. Art. X, § 2.....17
Mich. Const. Art. IX § 29 12
U.S. Const. amend. V.....17
U.S. Const. amend. VIII.....20

INTRODUCTION

Defendants took Plaintiff's home equity. As they have done with countless other delinquent taxpayers, they foreclosed on his property and seized it to auction off. Fair enough: Plaintiff does not challenge the tax or the foreclosure. But when Defendants sold Plaintiff's property, they took his equity in addition to the outstanding delinquency. They kept this windfall and deprived Plaintiff of the difference between the tax he owed and the far larger value of his foreclosed property. The United States Supreme Court has found that this practice constitutes an illegal taking, and it violates multiple other constitutional guarantees as well. Accordingly, Plaintiff has brought this claim on behalf of himself and other victims.

Now, these Defendants ask this Court to bar its doors. Their argument misstates how Plaintiff has pled his case, asks this Court to make factual findings at the case's outset, and seeks a premature adjudication on the merits. Ultimately, Defendants' argument revolves around a central, flawed premise: that Michigan's General Property Tax Act (the "Tax Act") permits the conduct at issue here and vests Defendants with unfettered title to foreclosed properties, thus giving them free rein to take the equity as they please. But Plaintiff is not challenging his taxes, his tax delinquency, or even his foreclosure. He is challenging Defendants' conduct after the conclusion of the taxation process. He alleges that he retains a property interest in his equity after his property's foreclosure. While Defendants ask this Court to make premature factual findings,

Plaintiff and his fellow victims deserve their day in court.

BACKGROUND

This case involves what happens after the taxation process is completed, and equity remains *after* each county is paid in full for all delinquent taxes, interest, penalties, and fees. ¶ 13.[1] Plaintiff Thomas A. Fox was the owner of residential property in Gratiot County (the "Property"), ¶ 16, which, like the other Defendant Counties, has affirmatively elected to administer the tax foreclosure process, instead of allowing the state to administer it. ¶ 33. *See also* MCL § 211.78(6).

As of the auction sale, the Property had an outstanding tax delinquency of $3,091.23. ¶ 18. Defendants seized ownership of the Property on or about February 21, 2017. ¶ 19. At this time, the property had a fair market value of at least $50,400.00. ¶ 20. Defendants later sold the Property at a tax auction on or about August 16, 2017, for $25,500.00. ¶ 21. The Property had equity – that is, the difference between what the Property was worth and the tax delinquency that Plaintiff owed. ¶¶ 23-24. Plaintiff had a property interest in this equity. ¶¶ 52, 63, 71. But Defendants seized it and failed to return it. ¶ 25. The Defendants retained the entire value of the sales proceeds even though the sales proceeds were $22,408.77 *more* than the amount of the tax delinquency. Throughout, they neither initiated a condemnation action nor afforded Plaintiff any process to seek the equity's return. ¶¶ 27, 30.

[1] "¶" refers to paragraphs in the Plaintiff's First Amended Complaint (ECF No. 17).

STANDARD OF REVIEW

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(1) for a lack of subject matter jurisdiction; based on *res judicata*; and under Fed. R. Civ. P. 12(b)(6), for failing to state a claim upon which relief can be granted.

Under Rule 12(b)(6), the Court and the moving party must accept the Plaintiff's pleadings as true. *See Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). Yet Defendants continually ask this Court to make factual determinations throughout their Motion. This is grossly premature.

Rule 12(b)(1) allows dismissal for "lack of jurisdiction over the subject matter." "Where subject matter jurisdiction is challenged pursuant to 12(b)(1),…[t]he plaintiff will survive the motion to dismiss by showing 'any arguable basis in law' for the claims set forth in the complaint." *Michigan S. R.R. Co. v. Branch & St. Joseph Ctys. Rail Users Ass'n*, 287 F.3d 568, 573 (6th Cir. 2002).

Such a motion may attack the court's subject matter jurisdiction either facially or factually. Facial challenges address only the legal sufficiency of the allegations in the complaint. In that context, all reasonable inferences are drawn in Plaintiff's favor, just as in the case of a Rule 12(b)(6) motion. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A claim cannot be dismissed upon a facial attack if there is "any arguable basis in law for the claim made." *Musson Theatrical v. FedEx*, 89 F.3d 1244, 1248-49 (6th Cir. 1996) (Rule 12(b)(1) dismissal

erroneous where plaintiff asserted unrecognized claim supported by "reasoned arguments why a cause of action should exist.")

Rule 12(b)(1) factual challenges, on the other hand, invite the court to "weigh the conflicting evidence to arrive at the factual predicate that subject-matter [jurisdiction] does or does not exist." *Gentek*, 491 F.3d at 330. But such factual attacks are reserved only for those cases where "the facts necessary to sustain jurisdiction do not implicate the merits of the plaintiff's claim." *Id*. If the factual "attack on subject-matter jurisdiction also implicates an element of the cause of action, then the district court should *find that jurisdiction exists* and deal with the objection as a direct attack on the merits of the plaintiff's claim." *Id*. (emphasis in original; quotation marks omitted). *See also Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir. 2012).

Here, Defendants' Rule 12(b)(1) argument is premised upon the Tax Injunction Act and the non-jurisdictional doctrine of comity. The only factual issue that would bear on these doctrines is Defendants' substantive argument that Michigan's tax law had deprived Plaintiff of any protected property interest in his equity. Therefore, Defendants' jurisdictional argument is, at best, just as premature as their factual arguments. In any event, as discussed below, neither doctrine applies here.

ARGUMENT

I. This Court Has Jurisdiction Over this Case

A. *Knick v. Twp. of Scott* Provides this Court with Jurisdiction

A takings claim can be brought in federal court as soon as the property is taken. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019). *Knick* held that "no matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it," *id.* at 2170, and "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." *Id.* at 2172 (overturning *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). Defendants fail to address this decisive authority.

Notwithstanding *Knick's* clear and controlling language, Defendants challenge the Court's jurisdiction based on the Tax Injunction Act and the principle of comity. These arguments fail under *Knick* – this is a takings case, and this Court has jurisdiction over takings cases. But even without *Knick*, they fail on their own terms.

B. The Tax Injunction Act Does Not Divest this Court of Jurisdiction

The Tax Injunction Act (the "TIA") provides that "district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such

State." 28 U.S.C. § 1341. But this case does not involve the levy, collection, or assessment of a state "tax." *See Coleman through Bunn v. Dist. of Columbia*, 70 F. Supp. 3d 58, 62-63 (D.D.C. 2014). Rather, Plaintiff challenges the disposition of his equity after Defendants foreclosed and seized his property. Thus, this case is akin to *Mills v. Cty. of Lapeer*, No. 2:09-CV-14026-PDB, 2011 WL 669389 (E.D. Mich. Feb. 17, 2011) (Unpublished cases attached as **Ex. 1**.) In *Mills*, the county foreclosed on plaintiffs' property for nonpayment of taxes, evicted them, and seized the personal property on the premises. *Id.* at *1. While both the District Court and the Sixth Circuit denied plaintiffs' claims, both courts proceeded to exercise jurisdiction without question. And for good reason: again, the post-collection disposition of taxpayer property is simply not within the TIA's ambit.

In addition, the TIA only applies to injunctions and equivalent declaratory judgments. The TIA is expressly an anti-"Injunction" act, concerning jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection of any tax..." 28 U.S.C. § 1341. *See also Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586-87 (1995).[2] Here, Plaintiff does not seek an injunction.

C. The Principle of Comity Does Not Bar Jurisdiction

The doctrine of tax comity has its origins from *Fair Assessment in Real Estate*

[2] Defendants' *Hibbs v. Winn* merely provides that the TIA bars damages for the amount of a disputed assessment. Again, though, Plaintiff here neither seeks to enjoin taxation or contest an assessment. *Hibbs v. Winn*, 542 U.S. 88, 106 (2004).

Ass'n., Inc., which found that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts" unless the state court "remedies" are not "plain, adequate, and complete." *Fair Assessment in Real Estate Ass'n., Inc. v. McNary*, 454 U.S. 100, 116 (1981). Since then, the doctrine has been consistently narrowed. For example, the doctrine has been reduced to "nonjurisdictional" status, *Direct Mktg. Ass'n. v. Brohl*, 135 S. Ct. 1124, 1134 (2015), the same status given to the *Williamson County* doctrine before it was ultimately abrogated. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997). Moreover, comity is invokable "only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Hibbs v. Winn*, 542 U.S. 88, 107 n.9 (2004); *but see Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010).[3] Plaintiff here has done no such thing. Thus, this nonjurisdictional concept does not divest Plaintiff of the right to bring a *Knick* taking claim for a seizure of property outside of the tax collection process.

D. Plaintiff Lacks a Remedy Under Michigan Law

Defendants' claim that Plaintiff has an adequate state court remedy fails for multiple reasons. *First*, Defendants argue that Plaintiff has a state court remedy because he can bring an inverse condemnation action, citing *Ligon v. City of Detroit*,

[3] Defendants cite *Nat'l Private Truck*, 515 U.S. 582 (1995), to argue that comity applies to injunctions as well as damage claims. But given Defendants' TIA argument, any such prohibition would be duplicative. In any event, neither applies here.

276 Mich. App. 120, 126 (2007) and *Hart v. City of Detroit*, 416 Mich. 488, 494 (1982). But elsewhere, Defendants argue that Plaintiff *cannot* bring such a claim. Defs.' Br. at 6-7, 26-27. Defendants cannot have it both ways.

Second, Defendants argue that Plaintiff can bring its federal claims in state court. This too is belied by their argument elsewhere that Plaintiff cannot bring such claims. Defs.' Br. at 2-6, 19. In any event, the fact that a state court might entertain a claim under § 1983 by definition cannot establish an adequate *state* remedy. *Nat'l Private Truck Council Inc.*, 515 U.S. at 587-88. Ultimately, Defendants' argument simply proves Plaintiff's point. Under their theory, Plaintiff has no possible state court redress for the injury he has suffered.

E. The Michigan Supreme Court Has Distinguished Between Claims Such as Plaintiff's and Tax Claims

In *Dean v. Michigan Dep't of Nat. Res.*, 399 Mich. 84 (1976), a state agency executed a tax foreclosure and sold the property for more than the tax delinquency. Like the Plaintiff here, the taxpayer sued for unjust enrichment. *Id.* at 93. The trial court summarily dismissed the claim on collateral estoppel and res judicata grounds finding it to be an impermissible attack on the judgment of foreclosure. *Id.* The Supreme Court reversed, finding that "the subject matter of that judgment, i.e. the validity of the taxes of the state and the delinquency of plaintiff in the payment of those taxes, is completely independent of the subject matter of plaintiff's instant suit for restitution due to the unjust enrichment of the state." *Id.* at 94. Likewise, here,

Plaintiff's claim is "completely independent" of any tax adjudication or underlying foreclosure. Even if *Knick* did not afford this Court clear jurisdiction – and, to be clear, it does – Defendants' arguments fail.

II. Plaintiff's Case is not Barred by *Res Judicata*

The underlying foreclosure of Plaintiff's property does not have a *res judicata* effect on this case. In order for *res judicata* to apply as set forth by the Sixth Circuit:

> a claim will be barred by prior litigation if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.

Bittinger v. Tecumseh Prod. Co., 123 F.3d 877, 880 (6th Cir. 1997).

Here, number (3) does not apply. The issue of the equity's disposition was never litigated in the foreclosure action.[4] And the Plaintiff was not required to raise the then-hypothetical issue in order to later protest Defendants' violation of his constitutional rights. *See, e.g.*, *Elder v. Twp. of Harrison*, 489 F. App'x 934, 937 (6th Cir. 2012) (because "constitutional claims…were not yet ripe" at the time of the earlier case, they were not "barred by res judicata"). Nor does number (4) apply. Again, this case is not "identical" to the foreclosure action; it is entirely distinct.

Thus, in *Dean*, 399 Mich. 84 (1976), Michigan's Supreme Court rejected

[4] Unlike the Plaintiff in this suit, the plaintiffs in *Adair v. State*, 470 Mich. 105 (2004) did, in fact, try to litigate the same issues in both lawsuits.

Defendants' theory. Like the Plaintiff here, that "plaintiff [did not], nor, apparently has she at any time disputed that she was delinquent in the payment of her property taxes...She is not, contrary to the opinion of the trial court, collaterally attacking the judgment of the [foreclosure] Court," and, as here, "the events out of which plaintiff's claim of unjust enrichment arises," which was as here the government's retention of excess auction proceeds, "occurred subsequent" to the foreclosure. *Id*.[5]

III. Defendants are Not Immune from Plaintiff's Claim

A. Official Capacity

i. Plaintiff has stated an "official capacity" claim

Defendants next argue that the Court should make premature factual determinations in order to dismiss Plaintiff's claims based on various specie of immunity. These arguments fail. Courts recognize both "personal" and "official capacity" claims against public officials under § 1983.[6] "On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citations omitted). "More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a moving force behind the deprivation; thus, in an official-capacity suit the

[5] To the contrary, in *Prawdzik v. Heidema Brothers, Inc.*, 352 Mich. 102 (1958), the plaintiff sought the same relief from the same cause of action.
[6] Defendants' *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) limited its holding to cases brought under § 1981. *Id.* at 733.

entity's 'policy or custom' must have played a part in the violation of federal law. *Id.* (citations quotations, and quotation marks omitted). While there may be "no…need to bring official-capacity actions against local government officials," because "local government units can be sued directly for damages and injunctive or declaratory relief," *Id.* at 167 n.14 (citations omitted), courts nonetheless recognize the distinction between "official capacity" suits and claims against governmental entities themselves. *Id.* The Plaintiff is entitled to plead multiple alternative theories under Rule 8(d)(2). *See, e.g., Miami Valley Mobile Health Servs., Inc. v. ExamOne Worldwide, Inc.*, 852 F. Supp. 2d 925, 939–40 (S.D. Ohio 2012).

ii. Defendants are not immune under *Monell*

Defendants are not immune under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). As the Sixth Circuit has clarified in *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005), there are several avenues a Plaintiff may take to prove the existence of a municipality's illegal policy or custom sufficient to defeat *Monell* immunity, including "the municipality's legislative enactments or official agency policies…actions taken by officials with final decision-making authority," and "a custom of tolerance or acquiescence of federal rights violations." At the very least, again, Defendants' argument reflects a premature effort to argue facts. For example, in *Hairston v. Franklin Cty. Sheriff's Office Ctr. Main Jail 1*, "the Court concluded an issue of fact remained as to whether [Defendant] had an unofficial policy or

custom…such that [it] could be held liable under *Monell*," and that even "the existence of a written policy governing" the issue does not "preclude the existence of a contradictory unwritten policy or custom" thus precluding "summary judgment," let alone dismissal on the pleadings. *Hairston v. Franklin Cty. Sheriff's Office Ctr. Main Jail 1*, No. 2:17-CV-581, 2019 WL 2411392, at *4–5 (S.D. Ohio June 7, 2019), *report and recommendation adopted sub nom. Hairston v. Franklin Cty. Sherriff's Office Ctr. 1 Main Jail*, No. 2:17-CV-581, 2019 WL 3416154 (S.D. Ohio July 29, 2019). **Ex. 1.**

Here, Plaintiff alleges that Defendants made an affirmative decision to adopt the practices at issue as a "custom or practice" in at least two respects. *First*, they could have declined to administer the foreclosure and post-foreclosure processes set forth in the Tax Act. Under MCL § 211.78(3) and (6), the act of foreclosure by the county is entirely voluntary, and it can perform it or allow the state to do so.[7] Defendants decided to administer the system for themselves. ¶¶ 19, 21.[8]

Second, they could have administered the Tax Act so as to return the equity to the foreclosed taxpayer after the auction. This is not only permitted by the statute; it is indeed the only proper interpretation of the statute because the alternative analysis requires a finding that the statute is unconstitutional.

[7] A county's foreclosure of forfeited property is voluntary and is not required of units of local government for purposes of Mich. Const. Art. IX § 29. MCL § 211.78(6).
[8] As Defendants' own *Leatherman* case says, "unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983." *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993).

Defendants claim that MCL § 211.78m(8) requires them to allocate all of the sales proceeds according to a defined statutory scheme.[9] Defs.'s Br. at 11, Page Id. 447. But while the statute provides that "[a] foreclosing governmental unit shall deposit the proceeds from the sale of property under this section into a restricted account" to be allocated according to the process, it does not define "proceeds from the sale of property." In particular, it does not clarify whether they are "gross proceeds," that is, the total amount of money received from the sale, or "net proceeds," meaning the money from the auction net of the funds that must be returned to the foreclosed owner.

Common usage suggests that "proceeds" means the proceeds that satisfy the tax delinquency. For example, under Michigan's General Sales Tax Act, "'[g]ross proceeds' means sales price," and "[s]ales price" determines "the measure subject to sales tax" except for enumerated adjustments. MCL § 205.51(c)-(d). But in none of these specific inclusions or exclusions did the Legislature even bother to clarify that "gross proceeds" excludes the amount of change given to a customer. *See* MCL § 205.51(d)(viii)-(xiv). Because *of course* the term "proceeds" does not include the

[9] Defendants rely on *Harbor Watch* to support this 'requirement,' but the Court merely held that the foreclosing government was not liable for condominium assessments during the time it held title. *Harbor Watch Condo. Ass'n v. Emmet Cty. Treasurer*, 308 Mich. App. 380, 385, 863 N.W.2d 745, 748 (2014). While the Court did find that such payments would fall outside the statutory mechanism for disposing of auction proceeds, again, the term "proceeds" excludes the overpayment.

amount by which someone is overpaid.

Indeed, under the doctrine of "constitutional avoidance," statutes must be interpreted, if possible, to avoid unconstitutional effect. *See United States v. Davis*, 139 S. Ct. 2319, 2332 (2019) *and cases cited therein*. Thus, because the Defendants can at the very least plausibly read the Tax Act to avoid an unconstitutional injury, they must do so.

Beyond the issues in this case, Defendants' argument presupposes that the Tax Act is wildly inconsistent with the property taxation authority set forth in Michigan's constitution. Article IX Section 3 of the Michigan Constitution requires "the uniform general ad valorem taxation of real and tangible personal property." Under this provision, "it is…necessary that a county or city tax be uniform throughout that county or city." *Grand Traverse Cty. v. State*, 450 Mich. 457, 478 (1995) (citation omitted). Yet, Defendants claim that, under the Tax Act, they are required to effectively assess a one-hundred percent tax on certain properties, such as Plaintiff's. Put another way, the equity seizure cannot be a "tax" because it would be entirely inconsistent with this constitutional requirement.[10] Again, at the very least, as discussed above, the doctrine of constitutional avoidance requires them and the Court to read the Tax Act to avoid such a constitutionally absurd result.

[10] Similarly, the Headlee Amendment requires voter approval for all increases in the property tax rate after its enactment in 1978. *See* MI Const. Art. IX, § 25. None of the Defendants' voters approved an increase of the tax rate for any parcel to 100 percent.

B. County Treasurer in His Individual Capacity

The Treasurers' qualified immunity arguments fail. As an initial matter, they are again premature. It is "generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015). *See also Newland v. Reehorst*, 328 Fed. App'x. 788, 791 n.3 (3d Cir. 2009) ("it is generally unwise to venture into a qualified immunity analysis at the pleading stage as it is necessary to develop the factual record").

Even beyond this threshold issue, the Treasurers' arguments fail. The Sixth Circuit "evaluates qualified immunity claims using a three-part inquiry." *Toms v. Taft*, 338 F.3d 519, 524 (6th Cir. 2003) (citations omitted). "First, [the court] determine[s] whether the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred." *Id.* "Second, [the court] determine[s] whether the right that was violated was a clearly established right of which a reasonable person would have known." *Id.* "Finally, [the court] determine[s] whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Id.* For the right to be "clearly established," the "contours of the right must be sufficiently clear that a reasonable

official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Here, qualified immunity does not apply for multiple reasons. *First*, the Treasurer's conduct violated a "a clearly established right of which a reasonable person would have known" and, relatedly, it "was objectively unreasonable in light of the clearly established constitutional rights." As discussed below, the United States Supreme Court has found Defendants' conduct unconstitutional. *Second*, the Treasurer misinterpreted the statute: as discussed above, he could have read it in a manner consistent with the Michigan and United States Constitutions and was forbidden from reading it a manner to violate them.[11]

Third, if the Treasurer did *not* misinterpret the statute, then his conduct was not "discretionary," and the doctrine is, therefore, inapplicable. "Qualified immunity only shields an official in the exercise of his or her discretion." *Cummings v. Dean*, 913 F.3d 1227, 1241 (10th Cir. 2019) (citations omitted).[12] "Under the qualified immunity doctrine, 'government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate

[11] Defendants' reliance on *Johnson v. Turner*, 125 F.3d 324 (6th Cir. 1997) is inapposite. Plaintiff does not contend that the Defendants should alter the state's statutes, but that they failed to properly interpret an act according to the law.

[12] *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437 (6th Cir. 2016) expressly rejects blanket immunity to public officials and affirms their independent obligation to follow the Constitution. *Citizens in Charge*, 810 F.3d at 442. Nothing in the earlier Fourth Circuit case of *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991) disturbs this.

clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.'" *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) (alteration in original) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Yet, the Treasurer claims that he had no choice but to allocate the resulting sales proceeds without refunding the equity to Plaintiff. But if that is the case, then his conduct was not discretionary, and qualified immunity does not apply.

IV. Plaintiff Has Stated Claims for the Deprivation of His Federal Constitutional Rights

A. Plaintiff Has a Protected Property Interest in His Equity

Plaintiff has plead a facially unconstitutional taking. The government cannot seize property without paying just compensation. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 307 n.1 (2002). *See also* Mich. Const. 1963, Art. X, § 2; U.S. Const. Amend. V. Plaintiff has alleged that he had a property interest in his equity, and that Defendants seized it. ¶¶ 23-25, 52, 63, 71.

The Supreme Court has found that seizures such as alleged here are facially unconstitutional. *See United States v. Lawton*, 110 U.S. 146, 150 (1884). In *Lawton*, the federal government defended a tax auction process similar to the Defendants' here. The Supreme Court found that:

> [t]o withhold the surplus from the owner would be to violate the fifth amendment to the constitution and deprive him of his property without due process of law or take his property for public use without just compensation. If he affirms the propriety of selling or taking more than enough of his land to pay the tax and

> penalty and interest and costs, and applies for the surplus money, he must receive at least that.

Id.[13] *See also Thomas Tool Servs. v. Town of Croydon*, 761 A.2d 439 (2000) (following *Lawton*); *Bogie v. Town of Barnet*, 260 A.2d 898 (1970) (same); *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004).

In the face of all of this, Defendants claim that they were free to take Plaintiff's equity because they secured "title" to Plaintiff's property upon foreclosure, and he, therefore, lacked any protected interest in his equity. This argument fails for several reasons.[14] *First*, it raises an entirely premature factual issue. Plaintiff has alleged that he retained a property interest in his equity. *See, e.g.*, ¶¶ 52, 63; *see also* ¶¶ 16-25 (discussion of equity valuation, ownership, and seizure). At the very least, again, this raises a factual issue that cannot be disposed of on the pleadings. *See, e.g.*, *Cmty. Bank & Tr. v. United States*, 54 Fed. Cl. 352, 361 (2002) (no summary judgment in taking case because of "genuine issues of material fact" regarding nature of property interest in federal reserve account, as well as the nature of any deprivation); *Jackson v. United States*, 135 Fed. Cl. 436, 468 (2017) (no summary judgment in takings case due to "genuine issues of material fact regarding the property interest conveyed.") *Second*,

[13] The Supreme Court implicitly reaffirmed *Lawton* in *Nelson v. City of New York*, 352 U.S. 103 (1956). While *Nelson* found that a Takings Clause violation regarding the retention of equity will not arise when a tax-sale statute provides an avenue for recovery of the equity, it left open the door to such claims where, as here, there is no such mechanism. *See Id.* at 109.

[14] Defendants' *In re Certified Question*, 447 Mich. 765 (1994) concerned property interests in a state insurance agency fund, as opposed to real property equity.

Defendants' argument is at odds with *Lawton* and its progeny. *Third*, it improperly conflates "title" with the more flexible constitutional concept of "property interest." *See Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627, 642 (6th Cir. 2001) (reversed on other grounds) (Court found a property interest in zoning permit).[15] *Fourth*, Defendants' argument begs the question. They effectively argue that they could not have taken Plaintiff's interest in his equity upon the auction – because they had already taken his equity when they foreclosed on the property's title. In terms of constitutional injury, this is a distinction without a difference.[16]

Indeed, Defendants' challenge to Plaintiff's alleged property interest amounts to little more than an *ipse dixit* contention that the foreclosure erased it. But a more substantial challenge would also fail. For example, *Coleman through Bunn v. D.C.*, No. CV 13-1456 (EGS), 2016 WL 10721865 (D.D.C. June 11, 2016), considered whether the District of Columbia's analogous equity seizure was a taking. **Ex. 1.** The Court found that the issue turned on whether the District's law afforded a property interest in equity. *Id.* at *2–3. The Court found such an interest because the District's courts had recognized equity as property for purposes of a "marital property" analysis,

[15] Defendants' *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) concerned the allocation of racing proceeds, in contrast to Plaintiff's interest in his equity which, in the absence of the foreclosure, would be unquestioned.

[16] Perhaps, Defendants are trying to lay the groundwork to argue that, if the taking occurred upon foreclosure, then it was part of the "taxation process" and, therefore, this Court lacks jurisdiction under the TIA and doctrine of comity. For all the reasons discussed in Section I¸ *supra*, any such argument would fail.

and because the District's bankruptcy code afforded an exemption for home equity. *Id.* at *2 (citations omitted). Likewise, Michigan courts have treated equity as property in considering whether it is "marital property." *See Boots v. Vogel-Boots*, No. 309265, 2013 WL 440096, at *9 (Mich. Ct. App. Feb. 5, 2013) (discussing cases and finding that "equity in the marital home was marital property.") **Ex. 1.** And Michigan provides for an explicit "homestead" exemption from bankruptcy estates. MCL § 600.5451(1)(m). *See also Hagan v. Mickens*, 589 B.R. 594, 596 (W.D. Mich. 2018) (homestead exemptions protect "home equity.") Thus, at the very least, "at this stage of the proceedings" it is premature to conclude "that plaintiff do[es] not have a property interest in the surplus equity." *Coleman*, 2016 WL 10721865, at *3. **Ex. 1**.

B. Plaintiff Has Stated an Eighth Amendment Claim

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added). It is incorporated against the states through the Fourteenth Amendment. *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019).

Defendants argue that they are immune from Eighth Amendment liability because, they say, the Amendment only applies to crimes, not *in-rem* civil forfeitures, citing *Ingraham v. Wright*, 430 U.S. 651 (1971). But the *Ingraham* limitation is no

longer good law.[17] In *Austin v. United States*, 509 U.S. 602, 624 (1993), the Supreme Court expanded the applicability of the "excessive fine" limitations to encompass those "in kind" punishments like *in-rem* civil forfeitures. *Austin* explains "the question is not…whether [a statutory] forfeiture…is civil or criminal, but rather whether it is punishment." *Id*. at 610 (emphasis added). Thus, excessive fine prohibition "cuts across the division between the civil and the criminal law." *Id.* (quotation and citation omitted).[18] Here, Defendants' seizing of private equity to pay past due tax as owed is an *in-rem* forfeiture in Michigan. *Smith v. Cliffs on the Bay Condo. Ass'n*, 245 Mich. App. 73, 75 (2001) (a foreclosure for failure to pay taxes "is a proceeding in rem") (quoting *Thompson v. Auditor General*, 261 Mich. 624, 652 (1933)).

Under *Austin*, courts have applied the Eighth Amendment to civil penalties generally. For example, in *U.S. ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74 (E.D. Mich. 1993), the Court found that statutory civil penalties under the False Claims Act constituted excessive fines in a *qui tam* – and thus inherently civil – action. "The fine appears to qualify as punishment, given its [dis]proportional

[17] Failure to pay property taxes is a potentially criminal act. *See* MCL § 211.119(1) ("person who willfully neglects or refuses to perform a duty imposed upon that person by this act…is guilty of a misdemeanor").

[18] Defendants' *Bennis v. Michigan*, 516 U.S. 442 (1996), which permitted the forfeiture of a vehicle involved in criminal activity, does not permit Defendants to take Plaintiff's equity. *See Rafaeli*, No. 330696, 2017 WL 4803570, at *5–6 (Oct. 24, 2017) (Shapiro, J, concurring) ("this case bears little, if any, relation to *Bennis*, and that it is a mistake to conclude that *Bennis* addresses, let alone controls, the issues in this case").

relationship to the excessive rent charged" as a result of the false claims, "and the relator makes no claim that it constitutes compensation. That this matter is civil and not criminal is not dispositive." *Id*. (citation omitted). *See also Dubin v. Co. of Nassau*, 277 F. Supp. 3d 366, 402-03 (E.D.N.Y. 2017) (excess fine upon ticket issuance); *Prince v. City of New York*, 108 A.D.3d 114, 966 N.Y.S.2d 16 (2013) (excess recycling removal fine).

Third, under *Ingraham* and its progeny, courts look to whether a fine is proportionate to the costs of a payor's conduct in determining whether it is remedial – and thus outside of the Eighth Amendment – or punitive – and thus subject to the Amendment. *Ingraham*, 430 U.S. at 691 n.9. *See also United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense"). Here, there is no proportionality *at all* between the tax owed and the equity taken. In Plaintiff's case, the equity was more than eight times the amount of the outstanding tax liability. Under Defendants' theory, they could retain unlimited auction proceeds based on a *de minimus* tax liability. Again, Plaintiff has done more than enough to plead this issue.

C. Plaintiff Has Stated a Procedural Due Process Claim

As discussed above, Plaintiff has alleged a constitutionally protected interest in his equity. *See, e.g.*, ¶¶ 52, 63, 71, 73, 80. Defendants cannot secure a factual determination to the contrary on the pleadings. *See, e.g.*, *Yashon v. Gregory*, 737 F.2d

547, 553 (6th Cir. 1984) (summary judgment is inappropriate on issue of property interest for a § 1983 claim because "genuine issues of material fact remain concerning the property interest claim and the plaintiff is entitled to discovery on that question"); *Klen v. City of Loveland, Colo.*, 661 F.3d 498, 512 (10th Cir. 2011).

Accordingly, Defendants were required to afford Plaintiff procedural due process before depriving him of his equity. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). They failed to provide any such procedures. ¶¶ 25-26. This was a straightforward violation of Plaintiff's procedural due process rights. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount.").

Faced with this strong *prima facie* case, Defendants offer one main defense. They argue that the Tax Act's foreclosure process afforded Plaintiff sufficient due process. But, again, the issue here is what happens after foreclosure and final seizure – not what happened on the other side of that critical line.

D. Plaintiff Has Stated A Substantive Due Process Claim

Claims for violation of substantive due process violations generally fall into two categories: "The first type includes claims asserting denial of a right, privilege, or immunity secured by the Constitution or by federal statute other than procedural claims.'" *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir. 1995) (quotation omitted). "The other type of claim is directed at official acts which

may not occur regardless of the procedural safeguards accompanying them. The test for substantive due process claims of this type is whether the conduct complained of 'shocks the conscience' of the court." *Id*.

Here, Plaintiff has pled a strong prima facie case under both avenues. The right to own property is a "fundamental right" under the Constitution. *Lucas v. Forty-Fourth Gen. Assembly of State of Colo*., 377 U.S. 713, 736 (1964) (quotation omitted). As discussed above, Plaintiff has alleged a protected property interest, and Defendants cannot compel this Court to make a factual finding to the contrary at the case's outset. Plaintiff has also sufficiently alleged that Defendants' conduct forthrightly deprived Plaintiff of his right to own his property by destroying it. Likewise, the conduct at issue clearly "shocks the conscience" as evidenced by the multiple courts that have reviewed the conduct and, regardless of their ultimate willingness to exercise jurisdiction, found their consciences shocked. *See, e.g., Wayside Church*, 847 F.3d at 823–24 (Kethledge, J, *in dissent*) (noting "the gross injustice…caused by the kind of governmental action on display here" and that, "[i]n some legal precincts [Defendants'] sort of behavior is called theft.")[19]

[19] Admittedly, *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) found that it was "problematic" to "[a]pply[ ] the 'shock the conscience' test in an area other than excessive force," and the court "doubt[ed] the utility of such a standard outside the realm of physical abuse." But "[t]he 'shocks the conscience' test has also been applied sparingly in the zoning context to refer to official conduct that is 'arbitrary in the constitutional sense.'" *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 566 F. App'x 462, 472 (6th Cir. 2014) (citations omitted). The conduct here fits that bill.

In addition to and independent of these bases for its claim, Defendants allegedly violated Plaintiff's due process rights by imposing the equivalent of an unreasonable punitive damage. "The due process clause of the Fourteenth Amendment prohibits the imposition of 'grossly excessive' punitive damages." *Dean v. Olibas*, 129 F.3d 1001, 1006 (8th Cir. 1997) (citing *BMW of N. Am. v. Gore,* 116 S.Ct. 1589, 1592 (1996) (quotation omitted)).

"In *BMW*, the Supreme Court held that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 1007 (citing *BMW*, 116 S.Ct. at 1599)."[T]he second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* (citing *BMW*, 116 S.Ct. at 1601). Under *BMW*, the Sixth Circuit thus assesses three "guideposts": "the degree of reprehensibility of the defendant's conduct, the punitive award's ratio to the compensatory award, and sanctions for comparable misconduct." *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 643 (6th Cir. 2005) (citing *BMW*, 116 S.Ct. at 1589). Here, there is nothing reprehensible about Plaintiff's conduct. He suffered a downturn and fell behind on his taxes. And there is no proportionate relationship between the amount of the tax delinquency and the amount of equity.

Moreover, while "[t]he Supreme Court has declined to establish a single test for determining whether an award of punitive damages violates the Constitution," *Dean*,

129 F.3d at 1006, it stated in *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Here, the ratio of the equity seizure to the actual tax liability that Plaintiff owed was at least eight, based on the auction price as opposed to the property's much higher market value, and because Defendants' practice is to seize all of the auction sales results regardless of the tax liability amount, the ratio is theoretically limitless. This facially violates property owners' due process. And, again, given the lack of a bright-line test, this is another fact-sensitive issue that cannot be resolved at this stage of the case.

Defendants have three responses. *First*, they claim that Plaintiff's substantive due process claim fails because it is superseded by the takings claim. But Plaintiff is entitled to plead in the alternative. *See* Fed. R. Civ. P. 8(d)(2). Indeed, here, Defendants argue strenuously that Plaintiff has failed to assert a takings claim. And Courts routinely permit plaintiffs to plead both takings and substantive due process claims. *See, e.g., Tavake v. Allied Ins. Co.*, No. CIV-S-11-3259 KJM, 2012 WL 1143787, *8-9 (E.D. Cal. Apr. 4, 2012). **Ex. 1**. *Second*, Defendants claim that the conduct here was not arbitrary, citing *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003). But the issue in *Cuyahoga Falls* was whether it was reasonable to withhold an engineering permit while the relevant ordinance was

subject to a pending referendum. The government did not simply destroy a real property interest. Once again, at the very least, Plaintiff has alleged a property interest in his equity. *Third*, Defendants claim that Plaintiffs cannot bring a substantive due process claim against the County Defendants because he lacked a sufficiently protected interest in the property they destroyed. But as discussed above, Plaintiff has alleged a property interest in his equity, and indeed such an interest is well-established.[20] If it violates substantive due process to deprive a person of a "property interest" in a permit, *see, e.g.*, *Tri-Corp Mgmt. Co. v. Praznik*, 33 F. App'x 742, 747 (6th Cir. 2002), then outright destroying a property interest in real estate is a violation as well.

V. Plaintiff Has Stated a State-Law Claim for Inverse Condemnation and Violation of the Michigan Constitution Article X.

Under Michigan's Uniform Condemnation Procedures Act (the "Condemnation Act"), just compensation is required when property has been taken, and an owner:

> may bring an inverse condemnation action seeking just compensation for a de facto taking, when the state fails to follow [condemnation] procedures. While there is no exact formula to establish a de facto taking, there must be some action by the

[20] Defendant cites *Washington v. Glucksberg*, 521 U.S. 702 (1997), to suggest that individuals' property rights are not fundamental rights. But *Washington* never disavowed property-based substantive due process rights, instead noting that such rights must be balanced against other considerations, noting, for example, that there is no fundamental constitutional interest in slave ownership. *Id.* at 722-23. And even if Plaintiff lacked a fundamental interest in his property, no such interest is required for a "shocks the conscience" or "excessive punitive damage" claim. *See, e.g.*, *Braley*, 906 F.2d 200 ("shocks the conscience" claims usually do not involve property at all).

> government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property.

Dorman v. Twp. of Clinton, 269 Mich. App. 638, 645 (2006) (quotations and citations omitted). Here, as described above, Plaintiff has alleged that Defendants took his property. The parties do not dispute that Defendants failed to undertake condemnation procedures. Accordingly, Plaintiff has pled a *prima facie* claim for inverse condemnation.

Defendants respond with three arguments, none of which have merit. *First*, they claim that Plaintiff lacked a "property interest" in the equity in his property. As discussed above in Section IV, this is incorrect. At most, this is a factual issue on which Defendants cannot prevail at this point. *Second*, Defendants claim that the "Tax Act either operates independently of, or supersedes, the Condemnation Act. But the two statutes can be read together. *See People v. Harrison*, 194 Mich. 363, 370–71 (1916) ("If two statutes can be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they should be read together, and both will have effect," quoting Lewis' Sutherland on Statutory Construction (2d Ed.) § 267). Indeed, if Defendants are correct that the Condemnation Act does not apply if a different statute touches on the taking-related conduct, then the Condemnation Act would be effectively mooted, as nearly all government action is based on some statutory authorization. *See, e.g.*, MCL § 45.1 *et seq* (statutes governing counties). Moreover, as

discussed above, the Tax Act does not require the conduct at issue here, and the Defendants' conduct is a taking regardless.

Third, they claim that they are protected by governmental immunity. While they concede that a takings claim is an exception to governmental immunity,[21] they claim that the doctrine nonetheless excuses their conduct. This is a tautological say-so, and it fails for the same reasons as explained throughout: Plaintiff alleged a protected property interest in his equity, and Defendants took it.

VI. Defendants Have Been Unjustly Enriched

Plaintiff has pled an unjust enrichment claim. "In order to sustain the claim of unjust enrichment, plaintiff must establish (1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp v. City of Detroit*, 256 Mich. App. 463, 478 (2003) (citation omitted). *See also Morris Pumps v. Centerline Piping, Inc*, 273 Mich. App. 187, 195 (2006). If officials seize property for delinquent taxes, "they are bound, by an implied contract in law,…to render back the overplus." 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, *452. In *Garcia*, the Court discusses the history of situations such as this. *Garcia*, 782 F.3d at 739-40. It found that, if the entire value of the property is seized even though substantial equity existed

[21] Indeed, if governmental immunity were a defense to state law takings claims, it would swallow the doctrine whole. What sort of entity other than a governmental entity could be sued for a taking?

in the property, a windfall was received; the Court of Chancery as far back as the sixteenth century realized the government could not seize a windfall by taking the entire value of a property far in excess of the tax owed. *Id*.

Michigan has adopted this well-established principle. As discussed above, in *Dean*, 399 Mich. 84, the Michigan Supreme Court permitted a plaintiff such as this Plaintiff to pursue an unjust enrichment claim because "the events out of which plaintiff's claim of unjust enrichment arises occurred subsequent to the default judgment" of foreclosure "and the sale of the property by the State for a profit." *Id.* at 94-95. Thus, the state's "title" to the property did not deprive plaintiff of her restitution claim. *Id.* Likewise, Plaintiff here has stated a claim for unjust enrichment. Any argument to the contrary is ultimately one more effort to prematurely argue facts.

CONCLUSION

For all the reasons set forth above, the Court should deny Defendants' Motion.

Date: October 17, 2019

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2019, I electronically filed the foregoing document using the ECF system which will send notification of such filing to all attorneys of record.

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