UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

v

COUNTY OF SAGINAW, et al,

Defendants.
_____/

Case No. 1:19-cv-11887
Hon. Thomas L. Ludington
Mag. Judge Patricia T. Morris

DEFENDANTS COUNTY OF MACOMB AND LAWRENCE ROCCA'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)(1)&(6)

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DEFENDANTS COUNTY OF MACOMB AND
LAWRENCE ROCCA'S MOTION TO DISMISS AND BRIEF IN SUPPORT
PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

UNITED STATES DISTRICT COURT
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DEFENDANTS COUNTY OF MACOMB AND LAWRENCE ROCCA'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

Defendants, the County of Macomb and Lawrence Rocca, the Macomb County Treasurer, by and through their attorneys, the Office of Macomb County Corporation Counsel, by Assistant Corporation Counsels Peter Jensen, Frank Krycia and Aaron Thomas move to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for the reasons stated in the accompanying brief in support of this motion.[1] Counsel for the

[1] Pursuant to Fed. R. Civ. P. 10(c), Defendants herein adopt by reference Defendants' Motion to Dismiss and Brief in Support thereof, ECF Nos. 11, 22, and 23 and all exhibits attached thereto, as well as the Defendants' replies, ECF Nos. 29, 30 and 31, and all exhibits referenced therein.

Macomb County Defendants conducted a conference with Plaintiff's counsel through email exchange seeking concurrence with this motion which was denied by Plaintiff's counsel.

Defendants, the County of Macomb and Lawrence Rocca request that this Court enter an order (i) granting Defendants' motion to dismiss; (ii) dismissing all of Plaintiff's claims with prejudice; (iii) awarding Defendants their costs and fees, including attorney fees, incurred in having to defend this action; and (iv) granting any other relief this Court deems necessary or appropriate.

/s/ Frank Krycia
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DATED: November 19, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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DEFENDANTS COUNTY OF MACOMB AND LAWRENCE ROCCA'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

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STATEMENT OF ISSUES PRESENTED

I. Whether this Court lacks subject matter jurisdiction pursuant to the Tax Injunction Act, 28 U.S.C. §1341, because Plaintiff has a plain, speedy and efficient remedy in State court?

II. Whether the principle of comity precludes subject matter jurisdiction of Plaintiff's §1983 claims where Plaintiff has a plain, adequate and complete remedy in State courts?

III. Whether Plaintiff has failed to state a claim for violations of the US Constitution when Defendants acted in accordance with a State-law statutory mandate and foreclosed on Plaintiff's property through judicial proceedings during which Plaintiff was given notice that complies with due process?

IV. Whether Plaintiff failed to state a procedural due process claim where adequate notice and a meaningful opportunity to be heard in a state tax foreclosure case are not challenged and were provided?

V. Whether Plaintiff failed to state a substantive due process claim because the claims arise under the language of the Fifth Amendment and Plaintiff has not otherwise pled any action that "shocks the conscience" or deprivation of a fundamental right unrelated to a legitimate state interest?

VI. Whether Plaintiff failed to state a claim for unjust enrichment when property that is no longer owned by Plaintiff due to a valid tax foreclosure judgment is sold and Defendants are statutorily prevented from returning alleged "excess" funds?

VII. Whether Defendants are entitled to governmental immunity for following a state-law mandate?

VIII. Whether Defendant County Treasurer is entitled to qualified immunity for the claims against him in his personal capacity?

STATEMENT OF FACTS

Plaintiff brought this suit for a money judgment for the alleged surplus proceeds from a tax foreclosure sale. Plaintiff also claims this is a class action on behalf of similarly situated individuals and entities.

Plaintiff alleges that he lost title to a vacant parcel of land in Gratiot County through a tax foreclosure judgment, the property was subsequently sold by the Gratiot County Treasurer for more than was owing on the taxes and that he has a right to recover the surplus. See R 17, PID 222-223. The tax foreclosure judgment was entered on February 21, 2017 in the Gratiot County Circuit Court. R 1-2. Plaintiff had nine properties in the judgment. In this case, Plaintiff only alleges there was a surplus on one parcel, 109 South Court in Alma, Michigan. R 17, PID 222. The judgment also shows there was a state tax lien on this parcel. R 1-2, PID 53.

The foreclosure judgment was for the 2014 property taxes which Plaintiff failed to pay. The amount owing on the 2014 taxes as of the time of the judgment was $3,091.23. R 1-2, PID 31. The judgment provided that all existing interest in the parcel, with a few exceptions that do not apply here, would be extinguished and fee simple title will vest absolutely in the Gratiot County Treasurer if Plaintiff did not redeem the parcel by March 31, 2017. R 1-2, PID 24. Plaintiff chose not to redeem the subject parcel and the

Gratiot County Treasurer sold it at auction in August 2017 for $25,500. R 17, PID 222.

The foreclosure and sale were conducted pursuant to Michigan's Tax Reversion Act, MCL 211.78, et seq. The Judgment was authorized by MCL 211.78k and the sale was required by MCL 211.78m. The Gratiot County Treasurer distributes auction proceeds pursuant to MCL 211.78m(8) which provides that after all taxes, expenses and costs are paid for all properties foreclosed on, any surplus remaining goes to the general fund of the county. MCL 211.78m(8)(h).

While Plaintiff has eight counts in the complaint, as amended, each count alleges that Plaintiff retained a right to the alleged equity in the subject property after the foreclosure judgment was rendered and was entitled to the "surplus" proceeds from the auction of the subject property. Plaintiff did not raise these issues in the tax foreclosure proceedings and instead chose to file this suit in this Court. Based on Plaintiff's concession that he is not challenging the validity of the foreclosure proceedings and judgment, it is undisputed that Plaintiff was given due process in the foreclosure hearing and the judgment of foreclosure is valid. The Macomb County Defendants now move to dismiss this case pursuant to Rule 12(b)(1) and (6).

ARGUMENTS

I. Standard of Review.

A Rule 12(b)(1) motion for lack of subject matter jurisdiction challenges the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). "A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis." *Id.* However, a "factual attack challenges the factual existence of subject matter jurisdiction." *Id.* In that case, "the district court has broad discretion over what evidence to consider and may look outside the pleadings to determine whether subject-matter jurisdiction exists." *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015). "[T]he plaintiff bears the burden of proving that jurisdiction exists." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004).

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of a plaintiff's pleading. Under Rule 12(b)(6), a complaint must "contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544; 127 S. Ct. 1955, 1965 (2007) (emphasis added) (internal citation omitted). A "plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* "[T]hat a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of all the elements of a cause of action, supported by mere conclusory statements do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662; 129 S. Ct. 1937, 1949 (2009). The court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1950 (internal quotation marks and citation omitted). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.*

II. The Tax Injunction Act and the Principle of Comity Apply To This Case.

This Court is bound to follow the Sixth Circuit's published decision in *Wayside Church v. Van Buren County*, 847 F.3d 812 (6th Cir. 2017). In *Wayside Church*, a factually and legally indistinguishable case, the majority held that plaintiff's takings claims were unripe because an adequate remedy exists in Michigan courts. In that case, the majority held that

aggrieved former property owners may take any claims concerning insufficient notice to the Michigan Court of Claims and any constitutional claims to the appropriate circuit court. 847 F.3d at 818-22. And because Michigan courts can hear such claims, the federal courts are prevented from doing so by the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity. *Id.* at 822-23. After making these determinations the Sixth Circuit in *Wayside Church* remanded the case to the district court "with instructions to dismiss the action for lack of subject matter jurisdiction." *Id.* at 823.

The Michigan Supreme Court has created a remedy for property owners that lost their equity in tax foreclosed property that were not given due process in the tax foreclosure. In *In re Petition by Wayne County Treasurer*, 478 Mich. 1, 10-11; 732 N.W.2d 458 (2007), the Court held the provision in the Tax Reversion Act which limited recovery for a due process violation in the tax foreclosure to money damages to be unconstitutional which then allowed property owners who were denied due process in the foreclosure to set aside the judgment of foreclosure and redeem the taxes to get their property back, thereby redeeming their equity in the property.

More recently, in *Rafaeli v. Oakland County*, 503 Mich. 909; 919 N.W.2d 401 (2018) the Supreme Court granted leave to determine whether MCL 211.78m(8)(h) violates either the Takings Clause of the United States

Constitution, U.S. Const., Am. V, or the Takings Clause of the Michigan Constitution, Const. 1963, Art. 10, § 2, or both, by requiring county treasurers to retain the proceeds from the sale of tax foreclosed property that exceeded the amount of the tax delinquency. This is the exact issue Plaintiff raises in this case and it is being litigated in state court in another case.

Regardless of what label Plaintiff has put on his claims, they are within the scope of the Tax Injunction Act as Plaintiff is challenging Defendants' actions under Michigan's Tax Reversion Act, specifically, Defendants' compliance with MCL 211.78m(8). Plaintiff could have raised this challenge in the foreclosure action, or pursuant to *Wayne County*, could have challenged it later if he could show his due process rights were violated. Also, the mere fact that the Court in *Rafaeli* granted leave on this issue establishes that Michigan meets the requirements for invocation of the Tax Injunction Act, as found in *Wayside Church* as Plaintiff has a plain, speedy and efficient remedy in Michigan courts.

III. Plaintiff Has Failed To Allege Viable Taking Claims Under The Fifth and Fourteenth Amendments.

In Count I of the First Amended Complaint, (hereinafter "Complaint"),

Plaintiff alleges that Defendants unlawfully took Plaintiff's property through the tax foreclosure judgment without just compensation, thereby violating the Fifth Amendment as applied to the states under the Fourteenth Amendment and 42 U.S.C. §1983. Count II attempts to allege a direct taking pursuant to the Fifth and Fourteenth Amendment.

Michigan is not the only state that allows the foreclosing government entity to retain the "surplus" from a tax foreclosure. The Second Circuit Court of Appeals in *Miner v. Clinton County*, 541 F.3d 464, 474-475 (2nd Cir. 2008) found that a New York tax foreclosure procedure that provided due process and did not require the surplus from the foreclosure sale to be returned to the former owner was constitutional:

> The District Courts in both cases properly dismissed plaintiffs' claims for a share of any surplus. The retention of any surplus from a tax auction is constitutional because there was no violation of plaintiffs' right to due process related to the notices of foreclosure. *See Nelson v. City of New York,* 352 U.S. 103, 110, 77 S. Ct. 195, 1 L. Ed. 2d 171 (1956) ("[N]othing in the Federal Constitution prevents [foreclosing on a property and retaining a surplus from a tax auction] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.").
> Regarding their equal protection claims, the record does not support a conclusion that Clinton County has discriminated against plaintiffs on an impermissible basis compared to similarly situated tax payers. *See Bizzarro,* 394 F.3d at 86. The evidence offered to show that the County harbored

> an impermissible, profit-driven motive is merely a recitation of the amounts retained in tax foreclosure proceedings in the last several years. Proof that the County routinely retains the surplus from tax sales--a practice which the Supreme Court approved over fifty years ago in *Nelson*--does not indicate a discriminatory intent.

The United States Supreme Court, in *Nelson*, further found that to the extent such statutes are constitutional but may have harsh results, "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not the courts, unless some constitutional guarantee is infringed." 352 U.S. at 111. The Court in *Nelson* also distinguished *United States v. Lawton*, 110 U.S. 146 (1884), which is relied upon by Plaintiffs in this case, noting that in *Lawton* the state statute provided that the surplus from a tax sale belonged to the owner and the Court only considered interpretation of the state statute. 352 U.S. at 109-110.

Michigan's Tax Reversion Act provides a procedure for former owners to recover the lost equity in their property if certain conditions are met. MCL 211.78l provides that an owner of property that loses the property in tax foreclosure and who claim that they did not receive any notice required under the Act can maintain an action in Michigan's Court of Claims for monetary damages in an amount that shall not exceed the fair market value of the property on the date of the foreclosure judgment minus

any taxes, interest, penalties, and fees owed on the property as of that date. The Plaintiff in this case has not pursued this remedy apparently because he concedes that he had notice of the tax foreclosure.

Plaintiff also could have addressed this issue to the County Treasurer at the show cause hearing required by MCL 211.78j or to the judge at the judicial foreclosure hearing pursuant to MCL 211.78k. The Macomb County Treasurer has extended the redemption period to allow a party to complete a sale of the property. The tax foreclosure judgment for Plaintiff's property, R 1-2, shows that the Gratiot County Treasurer extended the redemption deadline on several parcels. Plaintiff had over two years from the time the taxes went delinquent to the time that the redemption period expired to pay these taxes or to sell the property and pay the taxes with the proceeds and keep the "equity" and chose to do nothing. Under these circumstances, *Nelson* applies and Plaintiff has not shown any constitutional infirmities with Michigan's tax collection process.

Defendants also would be immune from §1983 liability for these claims as *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978) does not apply because the policy regarding distribution of tax foreclosure auction proceedings is governed by state law, MCL 211.78m(8) and not county policy. See *Johnson v. Turner*, 125 F.3d 324 (6th Cir.

1997). To the extent Plaintiff's claims are against the defendant treasurers in their individual capacity, the treasurers would have qualified immunity as they were following well established state law. *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 441 (6th Cir. 2016).

IV. Plaintiff Does Not Have A Valid State Law Condemnation Claim.

Plaintiff's state law claim for inverse condemnation, Count III, and violation of the Michigan Constitution, Article X, Section 2, Count IV, allege claims against the County and its Treasurer in his official capacity and cite the Uniform Condemnation Procedures Act, (UCPA), MCL 213.51 et seq. as the basis for the claims. R 17, PID 233-235.

Inverse condemnation occurs when property is taken for a public purpose without formal condemnation proceedings. *Hart v. Detroit*, 416 Mich. 488; 331 N.W.2d 438 (1982). It is undisputed that Defendants did not pursue formal condemnation proceedings under the UCPA since the Defendant Treasurers acquire property through a valid judgment of tax foreclosure in accordance with the Tax Reversion Act.

Plaintiff claims the taking occurred when Defendants distributed the auction proceeds pursuant to MCL 211.78m(8) which occurred after the tax foreclosure judgment vacated all of Plaintiff's interest in the property

pursuant to MCL 211.78k(5) when Plaintiff did not redeem the property. One who asserts an uncompensated taking claim must first establish that they had a vested property right at the time of the alleged taking. *Fun 'N Sun RV v. State (In re Certified Question)*, 447 Mich. 765, 788; 527 N.W.2d 468 (1994).

Plaintiff had the opportunity to raise this issues in state court and does not get another chance in this Court. "The preclusion doctrines of res judicata and collateral estoppel serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *William Beaumont Hosp. v. Wass*, 315 Mich. App. 392, 398; 889 N.W.2d 745, 749-750 (2016) (quotation marks and citation omitted). Res judicata applies if "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v. Michigan*, 470 Mich. 105, 121; 680 N.W.2d 386 (2004). Generally, for collateral estoppel to apply, three elements must be satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of

estoppel." *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 682-684; 677 N.W.2d 843 (2004) (quotation marks, citation, and brackets omitted). "Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v. Orion Twp.*, 269 Mich. App. 527, 530; 711 N.W.2d 438 (2006). Unlike res judicata, which precludes relitigation of claims, see *Bennett v. Mackinac Bridge Auth.*, 289 Mich. App. 616, 629; 808 N.W.2d 471 (2010), collateral estoppel prevents relitigation of issues, *Ditmore v. Michalik*, 244 Mich. App. 569, 577; 625 N.W.2d 462 (2001).

The Michigan Tax Foreclosure Judgment is binding on Plaintiff as he did not timely challenge it. Plaintiff's reliance on *Dean v. Dep't. of Natural Resources*, 399 Mich. 84; 247 N.W.2d 876 (1976) is not applicable in this case. *Dean* was decided under the former tax collection procedure where the county just sold tax liens and the buyers of the lien, or the state if there were no buyers, would obtain title to the property if the owners did not timely redeem. The plaintiff in *Dean* claimed that she timely redeemed the property after the circuit court entered the judgment. 399 Mich. at 88-89. Despite this, the state sold the property for more than the amount owing on

the taxes. The court determined that the preclusion doctrines did not apply because there was a fact issue as to whether the plaintiff timely redeemed after the judgment was entered. 399 Mich. at 94-95.

As noted in the current statute, the foreclosure judgment does not become final until after the time to redeem passes and there is no redemption. MCL 211.78k(6), which provides that the foreclosing government unit's title shall not be held invalid unless timely post-judgment proceedings are commenced or the treasurer cancels the foreclosure for specified reasons. Plaintiff does not allege that he timely redeemed the subject property from the tax foreclosure judgment nor does he claim he filed timely post-judgment proceedings or that the treasurer cancelled the foreclosure.

This provision and MCL 211.78l, which provides a remedy for a monetary damage claim as an "exclusive" remedy confirm that the Tax Reversion Act governs this dispute, not the UCPA. Plaintiff also cannot claim inverse condemnation because he lost his interest in the subject property prior to the alleged taking. If Plaintiff attempts to correct these deficiencies by rephrasing these claims as sounding in tort, Defendants would be immune pursuant to MCL 691.1407(1) and (5) as to the Defendant Treasurers. Accordingly, Counts III and IV should be dismissed

pursuant to Rule 12(b)(6).

V. The Eighth Amendment Does Not Apply Because The Failure To Pay Taxes Is Not A Criminal Offense.

Plaintiff's Eighth Amendment claim should be dismissed as a matter of law as the tax foreclosure proceedings are not criminal proceedings. The Eighth Amendment has been limited to excessive fines and punishment arising from criminal convictions. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

Plaintiff improperly contends that this restriction no longer applies. Plaintiff cites *Austin v. United States*, 509 U.S. 602 (1993), but that case involved a drug forfeiture proceeding that the court found within the Eighth Amendment because of its punitive effect to the related criminal conviction. *Id*. at 621-622. Likewise, *Timbs v. Indiana*, ___ U.S. ___; 139 S. Ct. 682 (2019) merely extends the Eighth Amendment to drug forfeiture proceedings arising from state criminal proceedings.

Plaintiff was not charged with a crime. He just chose not to pay his taxes. The tax foreclosure proceedings were not part of criminal proceedings. Accordingly, Plaintiff's Eighth Amendment claim must be dismissed as a matter of law.

VI. Plaintiff Has Failed To State A Claim For Procedural Due Process.

In Count VI Plaintiff alleges that Defendants violated his procedural due process rights by failing to provide for any procedure for Plaintiff to secure a refund of his equity from the foreclosure auction. R 17, PID 237.

Plaintiff, however, does not dispute that he was given due process during the tax foreclosure proceedings during which he had the opportunity to redeem his property by paying the lawfully assessed taxes, interest and fees to preserve his equity. Before a state may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner notice and opportunity for hearing appropriate to the nature of the case. *Jones v. Flowers*, 547 U.S. 220, 223 (2006). Due process in tax foreclosures does not require actual notice of the proceedings. Defendants are required to provide notice reasonably calculated to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. *Id*. at 226. Michigan law, MCL 211.78i, has notice requirements that are followed by Defendants and comply with the Supreme Court's requirements in *Jones*.

Plaintiff does not contest, and therefore admits, that he was given due process in the tax foreclosure proceedings. Plaintiff had the opportunity

to redeem the property, sell it or take a loan out on it to pay the taxes before the redemption period expired. The notices to Plaintiff clearly provided that Plaintiff would lose all interests in the property if it was not timely redeemed. Plaintiff also failed to address this issue with the county treasurer at the show cause hearing or the judicial tax foreclosure hearing. Plaintiff has failed to state a claim for procedural due process.

VII. Plaintiff Has Failed To State A Claim For Substantive Due Process.

Plaintiff cannot maintain a substantive due process claim because his alleged taking claim is specifically addressed in the Fifth Amendment. Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims. *Davis v. Pickell*, 939 F. Supp. 2d 771, 777 (E.D. Mich. 2013).

In any event, Plaintiff has failed to plead a viable substantive due process claim. Substantive due process "prevents the government from engaging in conduct that shocks the conscience...or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (internal quotations and citations omitted). To state

such a claim, a plaintiff must allege that he has a constitutionally protected interest which has been deprived by arbitrary and capricious state action which shocks the conscience. *County of Sacramento v. Iweis,* 523 U.S. 833, 846-847 (1998).

Individuals' property rights are not "fundamental rights and liberty interests" articulated by the U.S. Supreme Court. See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Seal v. ,* 229 F.3d 567, 574-575 (6th Cir. 2000). While losing equity in property for failing to pay taxes may seem harsh, such action has long been the law in Michigan. *See, e.g., Meltzer v. Newton*, 301 Mich. 541; 3 N.W.2d 875 (1942), *James A. Welch Co. v. State Land Office Bd.*, 295 Mich. 85; 294 N.W. 377 (1940); *Krench v. State*, 277 Mich. 168; 269 N.W. 131 (1936).

As noted in *Nelson*, the alleged "harsh" result from the loss of property from the refusal to pay taxes does not violate the Constitution and it is up to the state legislature to address this issue. 352 U.S. at 110-111. Plaintiff has failed to state a claim for a violation of substantive due process.

VIII. Plaintiff Has Failed To State A Claim For Unjust Enrichment.

As previously noted, Plaintiff lost all rights to the subject property

when he failed to redeem it by paying the taxes found to be owing in the judgment of tax foreclosure within the time to redeem under Michigan statute as stated in the judgment of tax foreclosure.

Unjust enrichment occurs when one has and retains money or benefits which in justice and equity belong to another. *McCreary v. Shields*, 333 Mich. 290, 294; 52 N.W.2d 853 (1952). Plaintiff, however, lost all rights to the subject property by not timely redeeming the property after entry of the tax foreclosure judgment. Pursuant to Michigan law, the Defendant Treasurers hold fee simple title to tax foreclosed properties at the time they are sold pursuant to MCL 211.78m.

The failure to timely pay property taxes creates a great burden on local governments. As a practical matter, the properties that are not redeemed tend to have issues which affect their value as otherwise the owners would have redeemed them. In fact, many properties do not sell for the amount owing which is why the legislature created a final no minimum bid auction. MCL 211.78m(5). With a limited exception, property owners are not responsible for a deficiency if the property sells for less. See MCL 211.89a which allows the City of Detroit to pursue a deficiency from the tax foreclosure auction so a deficiency is an actual loss.

The Tax Reversion Act does not look at the sales individually. MCL

211.78m(8) provides that the proceeds shall be applied to all outstanding taxes and then all costs for collecting the taxes and maintaining the property pending the sale. Only after these expenses are paid would any surplus be transferred to the county's general fund. MCL 211.78m(8)(h).

County treasurers get no benefit from selling properties for more than the taxes. They are paid a salary and their compensation is not linked to auction results. Counties would only get a benefit if the auction proceeds exceeded all costs of the foreclosure. A court ruling that would modify MCL 211.78m(8)(h) would shift the cost of tax collection on to the taxpayers that timely pay their taxes. This would be a decision for the legislature, not the courts. In any event, the fact that an individual parcel of property may sell for more than the taxes does not establish unjust enrichment.

Plaintiff also does not have clean hands in presenting this claim. It is well settled that "one who seeks equitable relief must do so with clean hands." *Attorney General v. PowerPick Players' Club of Mich., LLC*, 287 Mich. App. 13, 52; 783 N.W.2d 515 (2010). Plaintiff only refers to the 2014 taxes. By the time the property was sold, the 2015 and 2016 taxes were owing. Plaintiff also failed to account for the state tax lien. Such a plaintiff should not be allowed to pursue a claim in equity. Plaintiff's claims for unjust enrichment should be dismissed.

CONCLUSION

WHEREFORE, Defendants, the County of Macomb and Lawrence Rocca request that this Court enter an order (i) granting Defendants' motion to dismiss; (ii) dismissing all of Plaintiff's claims with prejudice; (iii) awarding Defendants their costs and fees, including attorney fees, incurred in having to defend this action; and (iv) granting any other relief this Court deems necessary or appropriate.

Respectfully submitted,

/s/ Frank Krycia
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DATED: November 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing pleading was served upon the parties and/or counsel of record herein by electronic means or first class U.S. Mail.

/s/ Frank Krycia
FRANK KRYCIA (P35383)
Assistant Corporation Counsel

DATED: November 19, 2019

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
Mag. Judge Patricia T. Morris

**** CLASS ACTION ****

PLAINTIFF'S RESPONSE TO DEFENDANTS COUNTY OF MACOMB AND LAWRENCE ROCCA'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1) AND (6)

QUESTIONS PRESENTED

I. DOES *KNICK V. TWP. OF SCOTT* PROVIDE THIS COURT WITH JURISDICTION OVER PLAINTIFF'S CLAIMS?

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

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

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

III. HAS PLAINTIFF SUFFICIENTLY PLED A TAKINGS CLAIM?

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

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

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

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

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

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

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

VII. HAS PLAINTIFF SUFFICIENTLY PLED MICHIGAN STATE-LAW CLAIMS?

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

VIII. HAS PLAINTIFF SUFFICIENTLY PLED AN UNJUST ENRICHMENT CLAIM?

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

IX. SHOULD PLAINTIFF'S CLAIMS BE DISMISSED BECAUSE DEFENDANTS ARE IMMUNE?

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

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INTRODUCTION

Counties throughout this district, after foreclosing on tax-delinquent parcels and auctioning them off, keep all of the proceeds, improperly taking equity in real estate even if it vastly exceeds the delinquent tax bill. This is an uncompensated taking. Plaintiff Thomas Fox ("Plaintiff") was one of the victims of this practice. He has brought this claim on behalf of himself and other victims. Now, these Defendants ask this Court to bar its doors, claiming that this case is a challenge to the property's foreclosure. But Plaintiffs' claims do not challenge his foreclosure, his tax delinquency, or his taxes. He is challenging Defendants' conduct after the conclusion of the taxation process. And 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

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

$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 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 Gratiot 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.

STANDARD OF REVIEW

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(6), for a failure to state a claim upon which relief can be granted, and under Fed. R. Civ. P. 12(b)(1) for a lack of subject matter jurisdiction. Under Rule 12(b)(6), the Court must accept Plaintiff's pleadings as true. *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). Yet Defendants ask this Court to decide facts throughout their Motion.

As to Rule 12(b)(1), "[w]here subject matter jurisdiction is challenged … [t]he plaintiff will survive the motion to dismiss by showing 'any arguable basis in law' for the claims set forth in the complaint." *Mich. 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, and all reasonable inferences are drawn in the plaintiff's favor, just as under Rule 12(b)(6). *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007).

Rule 12(b)(1) factual challenges invite the court to "weigh the conflicting evidence to arrive at the factual predicate that subject-matter [jurisdiction] does or does not exist." *Id*. But such factual considerations 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 omitted). *See also Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir. 2012). Defendants' Rule 12(b)(1) argument is premised upon the Tax Injunction Act and the non-jurisdictional doctrine of comity. These arguments raise the same issues as Defendants' substantive argument that Michigan's tax law had deprived Plaintiff of any protected property interest in his equity. They are thus, at best, premature.

ARGUMENT

I. This Court Has Jurisdiction Over This Case

A. *Knick v. Twp. of Scott* Provides This Court With Jurisdiction

Federal takings claims ripen "as soon as the government takes [the] property without paying for it." *Knick v. Tsp. of Scott, Penn.*, 139 S.Ct. 2162, 2170 (2019). "[B]ecause 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. There is no "exhaustion requirement for § 1983 takings claims," and no longer any rule that "a property owner must pursue state procedures for obtaining compensation before bringing a federal suit." *Id.* at 2173. Thus, federal courts have inherent jurisdiction over takings claims such as this.

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

Defendants are incorrect that the Tax Injunction Act ("TIA") bars this Court's jurisdiction. 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 Plaintiff here does not challenge the levy or assessment of a tax, or even his foreclosure. *See Coleman through Bunn v. Dist. of Columbia*, 70 F. Supp. 3d 58, 62-63 (D.D.C. 2014). Rather, he challenges the disposition of his equity *after* Defendants foreclosed upon and seized his property.[2] Thus, this case is akin to *Mills v. Cty. of*

[2] Defendants assert that "[b]ased on Plaintiff's concession that he is not challenging the validity of the foreclosure proceedings and judgment, it is undisputed that Plaintiff was given due process in the foreclosure hearing," and that because Plaintiff is not "contest[ing]" the foreclosure, he "therefore admits[] that he was given due process in

Lapeer, No. 2:09-CV-14026-PDB, 2011 WL 669389 (E.D. Mich. Feb. 17, 2011) (Unpublished cases attached as **Ex. A**.) In *Mills*, the county foreclosed on plaintiffs' property for nonpayment of taxes and evicted them. *Id.* at *1. While both the District Court and the Sixth Circuit denied plaintiffs' claims, both proceeded to exercise jurisdiction without question.[3] The post-collection disposition of taxpayer property is simply not within the TIA's scope.

Similarly, Defendants argue that *In Re Petition by Wayne County Treasurer,* 478 Mich. 1 (2007), gives Plaintiff a remedy in Michigan courts. Plaintiff appreciates Defendants' concession that "pursuant to *Wayne County*, [Plaintiff] could have challenged" Defendants' conduct after the foreclosure proceeding "if he could show his due process rights were violated," which he can as set forth throughout. Defs' Br, ECF No. 66 at PageID.868. But *Wayne County* concerned the foreclosure itself, not a post-foreclosure equity taking. Defendants also assert that the granting of leave to determine if the takings clause was violated in *Rafaeli, LLC v. Oakland County*, 503 Mich. 909 (2018), bars Plaintiff's claims because, they say, it affords Plaintiff a state

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the tax foreclosure proceeding." Defs' Br at PageID.864 and 877. This is not so. Rather, those issues are simply outside this case.

[3] The District Court rejected what it saw as the Magistrate's apparent conclusion that the plaintiffs had a protected property interest in a tenancy. *Mills*, 2011 WL 669389, at *11 ("Although not explicit in the Magistrate Judge's Report, he apparently concluded that because Plaintiffs were tenants at sufferance, Plaintiffs had a property interest," and had further "concluded that it was clearly established at the time of eviction that procedural due process requires pre-eviction judicial process").

court remedy. But again, under *Knick*, state court remedies are no longer relevant to takings claims such as this. In addition, while Plaintiff is hopeful that the Michigan Supreme Court will decide the pending appeal of *Rafaeli* in accordance with his positions in this case, the actual, present *Rafaeli* decision found for the defendants. *Rafaeli, LLC v. Oakland County*, 2017 WL 4803570 (Mich. Ct. App. Oct. 24, 2017).[4]

C. *Wayside Church* Does Not Divest This Court of Jurisdiction

Defendants claim that this Court is bound by *Wayside Church v. Van Buren Cty.*, 847 F.3d 812 (6th Cir. 2017) *cert. denied sub nom.*, 138 S. Ct. 380 (2017), and, therefore, must decline to exercise jurisdiction over this case. But the Supreme Court's ruling in *Knick* means that *Wayside* does not divest this Court of jurisdiction for several reasons.[5] *First*, *Wayside* predated *Knick*'s "guarantee" of federal jurisdiction over takings claims like those at issue here.

Second, *Wayside* expressly relied upon *Williamson Cty.* in finding a lack of jurisdiction. *Wayside*, 847 F.3d at 818 (citing *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, (1985), *overruled by Knick*). Prior to *Knick*, under *Williamson Cty.*, a takings plaintiff needed to establish

[4] In addition, the TIA only applies to injunctions and equivalent declaratory judgments. 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). Here, Plaintiff does not seek an injunction.

[5] Defendants' claim that *Wayside* is "legally indistinguishable" from this case is wrong. *Wayside* involved just two class claims, each arising under the Fifth Amendment, and was pursued against a putative defendant class. This matter, in contrast, seeks relief under eight separate legal theories (some sounding purely in takings, but many of which do not) against named defendants.

an exhaustion of state law remedies before a federal court would have jurisdiction over that claim. *Knick*, 139 S. Ct. at 2173. But *Knick* explicitly overruled *Williamson Cty. Knick*, 139 S. Ct. at 2172. And the *Wayside* Court based its decision on the takings analysis of *Williamson Cty. Wayside Church*, 847 F.3d at 822-23.[6]

Third, as Defendants note, *Wayside* premised its TIA and its comity analyses on the availability of state courts to hear any notice or constitutional claims that the plaintiff could have raised. Defs' Br. at PageID.866 (citing *Wayside*, 847 F.3d at 818). But Defendants claim elsewhere that Plaintiff cannot assert a constitutional challenge or inverse takings claim anywhere under preclusion principles. Defs' Br. at PageID.873. Defendants cannot have it both ways.[7]

D. The Principle of Comity Does Not Bar Jurisdiction

Neither the doctrine of comity, nor its passing mention in *Wayside*, precludes this Court from adjudicating this case. *Fair Assessment in Real Estate Ass'n., Inc. v. McNary*, 454 U.S. 100, 116 (1981) did find 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." But the Supreme Court has since narrowed the doctrine and reduced it to "nonjurisdictional" status. *Direct Mktg. Ass'n. v. Brohl*, 135 S. Ct. 1124, 1134 (2015).

[6] *Wayside*'s TIA and comity analyses were also *dicta*, *Wayside*, 847 F.3d at 822-23, and "dicta does not bind." *Williams v. Anderson*, 460 F.3d 789, 811 (6th Cir. 2006).
[7] *Knick* specifically held that the availability of a state court inverse condemnation action does not bar access to the federal forum. *Knick*, 139 S.Ct. at 2167.

And for all the reasons that *Wayside* does not establish application of the TIA here, neither does it establish the application of comity.

II. Defendants are Not Immune From Plaintiff's Claims

Defendants are not immune under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). *See Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005) (multiple exemptions from immunity). At the least, Defendants' argument is an effort to argue facts. *See 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 & recom. adopted sub nom.*, 2019 WL 3416154 (S.D. Ohio July 29, 2019) (denying summary judgment as defendant had "not identified undisputed facts").

Nor does qualified immunity bar Plaintiff's claim against the Treasurer. 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). Moreover, if the Treasurer is correct that he was required to seize the equity by statute,[8] then his conduct was not "discretionary," and the doctrine is inapplicable. *Cummings v. Dean*, 913 F.3d 1227, 1241 (10th Cir. 2019) ("Qualified immunity only shields an official in the exercise of his or her discretion") (citations omitted).[9]

[8] As Plaintiff explained in his responses to earlier Motions to Dismiss, the statute does not so require. *See, e.g.*, Pl.'s Resp. at PageID.637-638.

[9] *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 442 (6th Cir. 2016), expressly rejects blanket immunity to public officials and affirms their independent obligation to follow the Constitution.

III. Plaintiff States a Federal Takings Claim

Plaintiff has pled 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.

Defendants argue that Plaintiff's takings claims are invalid because jurisdictions in other states also take equity and refuse to return it. Defs' Br. at PageID 869-70 (citing *Miner v. Clinton Cty., N.Y.*, 541 F.3d 464 (2nd Cir. 2008)). In *Miner*, the court rejected plaintiffs' argument that the nature of the underlying foreclosure precluded equity seizure, declined to find a violation of the plaintiffs' due process rights during the foreclosure process, and resolved their related surplus equity claim with minimal analysis. *Id.* at 474-475 (citing *Nelson v. City of New York*, 352 U.S. 103 (1956)).[10] Indeed, some states have cited *Nelson* to find that equity seizure is constitutionally permissible. *See Ritter v. Ross*, 207 Wis. 2d 476 (Ct. App. 1996)*; Reinmiller v. Marion Cty., Or.*, 2006 WL 2987707 (D. Or. Oct. 16, 2006). But, *Nelson* was premised on the fact that the challenged system afforded property owners a "timely action to redeem or to recovery any surplus" equity. *Nelson*, 352 U.S. at 110. As *Nelson* explained, "we do not have here a statute which absolutely precludes an owner

[10] The *Miner* Court only considered due process defects during the foreclosure proceedings. *Id.* at 469. It did not consider a takings claim. *Id.* at 474.

from obtaining the surplus proceeds of a judicial sale," *id.*, while Defendants here argue in effect that they administer just such a process. Thus, while Defendants may have afforded Plaintiff a procedure to challenge the foreclosure itself, they provided no process for accomplishing the return of seized equity. ¶ 25.

The Supreme Court has found that such takings are unconstitutional. *See United States v. Lawton*, 110 U.S. 146 (1884). In *Lawton*, the federal government defended a tax auction process similar to the Defendants' here. The 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. at 150. Courts in several states have agreed. *See Thomas Tool Servs. v. Town of Croydon*, 145 N.H. 218, 220 (2000); *Bogie v. Town of Barnet*, 129 Vt. 46, 49-50 (1970) (following *Lawton*); *Lake Cty. Auditor v. Burks*, 802 N.E.2d 896, 899–900 (Ind. 2004). *See* also ¶¶ 52, 63; & ¶¶ 16-25 (discussion of equity valuation, ownership, and seizure).

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 thus, he lacked any protected interest in his equity. Defs' Br. At PageID.872. This argument fails for several reasons. *First*, it raises an entirely premature factual issue. Plaintiff

has alleged that he retained a property interest in his equity. This raises at least 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 takings case because of "genuine issues of material fact" regarding nature of property interest in federal reserve account); *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*, this argument is at odds with *Lawton* and its progeny. *Third*, 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.

IV. Plaintiff Pleads State-Law Claims

Under Michigan's Uniform Condemnation Procedures Act (the "Condemnation Act"), just compensation is required for taken property, and an owner may file "an inverse condemnation action seeking just compensation for a de facto taking[] when the state fails to follow [condemnation] procedures." *Dorman v. Twp. of Clinton*, 269 Mich. App. 638, 645 (2006) (citations omitted). "While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting [its] use." *Id.* Here, Plaintiff alleged that Defendants took his property, and there is no dispute that

Defendants failed to undertake condemnation procedures. Accordingly, Plaintiff has pled a *prima facie* claim for inverse condemnation.

Defendants respond with several meritless arguments. *First*, they claim that Plaintiff lacked a "property interest" in the equity in his property. As discussed above, at most, this is a factual issue on which Defendants cannot prevail at this point. 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*, 2016 WL 10721865, considered whether the District of Columbia's analogous equity seizure was a taking. 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, 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.") 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.

Second, Defendants argue that Plaintiffs should have raised any state claims in the foreclosure in state court. But the underlying foreclosure does not have a preclusive effect on this case, whether through issue preclusion (collateral estoppel) or claim preclusion (res judicata). Indeed, elsewhere in their brief, Defendants assert that Plaintiff "could have challenged" Defendants' conduct "later," that is, after the foreclosure proceeding, "if he could show his due process rights were violated." Defs' Br at PageID.868. This is at odds with their *res judicata* and collateral estoppel arguments.

In any event, neither applies. As set forth in *Monat v. State Farm Ins. Co.*:

> Collateral estoppel bars relitigation of an issue in a new action arising between the same parties … when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined … for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel.

Monat v. State Farm Ins. Co., 469 Mich. 679, 682-684, (2004) (quotation, citation, and brackets omitted). Here, the issue of the equity's disposition was never litigated in the foreclosure action. Therefore, numbers (1) and (2) do not apply.

Res judicata, "claim preclusion," applies where: (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies. *Bennett v. Mackinac Bridge Auth.*, 289 Mich. App. 616, 630 (2010). Here, Defendants are incorrect that "Plaintiff had an opportunity to raise [the issues in this case] in state court" during the foreclosure proceeding. Defs' Br, ECF No. 66 at PageID.873. Plaintiff could not have raised the then-hypothetical, un-ripe question of his equity's disposition 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").

Thus, in *Dean v. Michigan Dep't of Nat. Res.*, 399 Mich. 84 (1976), the Michigan Supreme Court rejected Defendants' theory. In *Dean*, a state agency executed a tax foreclosure and sold the property for more than the tax delinquency. Like 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 foreclosure judgment. *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.

Defendants acknowledge *Dean* but argue that it was superseded by statute. *See* MCL 211.78 *et seq*. But Defendants fail to cite a statute that authorizes equity seizure. And even if they did, it is hard to see how such authorization would affect a preclusion argument. Defendants also claim that *Dean* is distinguishable because the plaintiff there made a prelitigation effort to redeem her equity. But Plaintiff here could not do so because Defendants afforded no such procedure, as they concede when they argue that they did not need to provide one. Defs' Br. at PageID.864.[11] Any effort to redeem would have been a futile gesture.

Defendants argue that the Tax Act, MCL 211.78k(6) and 211.78*l*, provides the "exclusive" remedy for this dispute, not the Condemnation Act. But Defendants misread and misapply the statute. First, MCL 211.78*l* applies only to a plaintiff who claims they "did not receive any notice required under" the Tax Act, that is, notices regarding the taxing or foreclosure themselves. Plaintiff asserts no such claims. Second, MCL 211.78*l* is intended to limit what *may be recovered* in a claim that alleges a lack of some "notice required under this act," not the availability of the claims themselves. Thus, the text speaks not in terms of causes of action, but in terms

[11] To be sure, even if there was such a provision (and there is not), it would not pass constitutional muster for all the reasons discussed throughout.

of potential recovery: "monetary damages," but not "possession of the property." Plaintiff is not seeking to recover possession.

V. Plaintiff Has Stated an Eighth Amendment Claim

The Eighth Amendment 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. Defs' Br. at PageID.876 (citing *Ingraham v. Wright*, 430 U.S. 651 (1971)).[12] But *Austin v. United States*, 509 U.S. 602, 624 (1993) expanded the applicability of the "excessive fine" clause to encompass "in kind" punishments like *in rem* civil forfeitures. "[T]he question is not…whether [a statutory] forfeiture…is civil or criminal, but rather whether it is punishment." *Id*. at 610. Thus, the excessive fine prohibition "cuts across the division between the civil and the criminal law." *Id.* (citation omitted). In Michigan, Defendants' seizing of private equity to pay past due tax as owed is an *in rem* forfeiture. *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)).

[12] Failure to pay property taxes is a potentially criminal act. *See* MCL § 211.119(1).

Moreover, under *Austin*, courts have also 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 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). *Austin* and its progeny go well beyond any forfeiture to impose Eighth Amendment scrutiny generally on civil penalties.

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. Plaintiff's equity was more than eight

times the amount of the outstanding tax liability, and under Defendants' theory, they could retain unlimited auction proceeds based on a *de minimus* tax liability.[13]

VI. Plaintiff Has Stated a Procedural Due Process Claim

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. *See, e.g.*, *Yashon v. Gregory*, 737 F.2d 547, 553 (6th Cir. 1984) (summary judgment is inappropriate 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, citing *Jones v. Flowers*, 547 U.S. 220 (2006). While *Jones* also involves tax delinquency, it is distinguishable because it only analyzes the type of notice due when

[13] Defendants claim that "Plaintiff chose not to pay his taxes." By definition, though, the Eighth Amendment applies to the guilty.

initiating a foreclosure. But, again, the issue here is what happens after foreclosure and final seizure – not what happened on the other side of that critical line.

VII. Plaintiff Has Stated a Substantive Due Process Claim

There are generally two types of substantive due process claims. The first "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 "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*.

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). 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 deprived Plaintiff of his right to own his property by destroying it. The conduct here "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.[14] *See, e.g.*, *Wayside*, 847 F.3d at 823–24 (J. Kethledge, dissenting) (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.").

Defendants 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)). "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the [] conduct." *Id.* at 1007 (citing *BMW*, 116 S.Ct. at 1599). "[T]he second … indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted." *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). Plaintiff's inability to stay current on his taxes is not "reprehensible," and there is no proportionate relationship between the amount of tax delinquency and the equity.

[14] Unlike in *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998), the conduct here does "not comport with traditional ideas of fair play and decency." *Id.* at 847.

Moreover, while the "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, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Here, the ratio of the equity seizure to the actual tax liability that Plaintiff owed was at least eight-to-one, based on the auction price as opposed to the property's much higher market value. And under Defendants' argument, the ratio is theoretically limitless.

Defendants have several responses. *First*, they state that Plaintiff's substantive due process claim fails because the takings claim is specifically addressed by the Fifth Amendment. But Plaintiff is entitled to plead in the alternative. *See* Fed. R. Civ. P. 8(d)(2). Indeed, 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).

Second, Defendants claim that Plaintiffs cannot bring a substantive due process claim because he lacked a sufficiently protected interest in the property they destroyed.[15] But as discussed above, Plaintiff has alleged a property interest in his

[15] Defendants cite three pre-*Dean* cases for the proposition that a tax sale divests a property owner of the title to the property. *Meltzer v. Newton*, 301 Mich. 541 (1942); *James A. Welch Co. v. State Land Office Bd.*, 295 Mich. 85 (1940); and *Krench v.*

equity, and indeed such an interest is well-established.[16] 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.

VIII. Defendants Have Been Unjustly Enriched

In order to succeed on a "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 Blackstone, COMMENTARIES ON

State, 277 Mich. 168 (1936). But, again, regardless of any interest remaining in the "title," Plaintiff maintains a property interest in the equity and has so alleged. Defendants' pre-*Dean* cases do not discuss surplus equity or takings claims.

[16] *Washington v. Glucksberg*, 521 U.S. 702 (1997), 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 v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) admittedly 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 LAWS OF ENGLAND, *452. In *Garcia v. Fed. Nat. Mortg. Ass'n*, 782 F.3d 736, 739 (6th Cir. 2015), the Court found that, if the entire value of the property is seized even though substantial equity existed 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 in *Dean*, the Michigan Supreme Court permitted a similar 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.* Any argument to the contrary is ultimately one more effort to prematurely argue facts.

Defendants also raise multiple public policy arguments. They discuss the burden that any failure in the tax process places on local governments. This is obviously a legitimate consideration for public entities, but it does not excuse Defendants' unjust retention of funds to which they are not entitled. They also argue that properties from which equity is seized effectively cross-subsidize tax collection deficiencies elsewhere, and that an end to equity seizure might increase the tax burden on "the taxpayers that timely pay their taxes." Defs' Br, ECF No. 66 at PageID.881. But this proves too much. Under Defendants' reasoning, they could confiscate funds

from any number of sources, and it would never constitute unjust enrichment because some other members of the public would benefit from lower taxes or higher spending.

Similarly, the defense of "unclean hands" is inapplicable. As discussed above, it is unjust for governments to collect and keep "windfall" taxes. Yet, under Defendants' theory, they could simply ignore the rights of delinquent taxpayers because, by definition, such taxpayers allegedly lack clean hands. While Plaintiff's unjust enrichment claim is not a constitutional claim, such a "blank check" to violate rights is offensive to the Constitutional order.

CONCLUSION

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

Date: December 10, 2019

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

/s/ E. Powell Miller
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