IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BENJAMIN COLEMAN, through his Conservator, ROBERT BUNN, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:13-cv-01456-EGS
DISTRICT OF COLUMBIA,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiffs Benjamin Coleman and the Estate of Jean Robinson, by undersigned counsel, respectfully submit this Opposition to Defendant the District of Columbia's Motion for Judgment on the Pleadings.

PRELIMINARY STATEMENT

As this Court explained in its opinion denying the District's motion to dismiss, Plaintiffs' claims rest upon a basic issue: whether Plaintiffs have "a property interest in [their] equity and, if so, whether an unconstitutional taking of that property has been alleged." *Coleman ex rel. Bunn v. District of Columbia* (*Coleman I*), No. 13-1456 (EGS), 2014 U.S. Dist. LEXIS 137526, at *50 (D.D.C. Sept. 30, 2014). That property interest, as the Court noted, "could conceivably be created by some other legal source" apart from the tax-sale statute. *Id.* In such a circumstance, "failure to provide an avenue for recovery of the equity would appear to produce a result" in which "[p]roperty to which an individual is legally entitled has been taken without recourse." *Id.*

Plaintiffs have now established that independent sources of D.C. law recognize a property interest in home equity. The District's seizure and transfer to private parties of that equity, over and above the amount of the underlying tax obligation, establishes a plain and abusive violation of the Due Process and Takings Clauses.

The District attempts to evade the issue in this case by reciting its previously unsuccessful arguments. The District posits that the tax-sale foreclosure judgment is a "forfeiture proceeding" that "divest[s] property without compensation and result[s] in an instantaneous transfer of title." Mot. for J. on the Pleadings 18, ECF No. 46 ("District Mot."). So long as the District provides "notice and a hearing," "a property owner may forfeit all rights to his or her property for failure to pay taxes." *Id.* at 17. Thus the District again argues that the property owner has no basis to challenge the seizure and transfer of the surplus equity post-

foreclosure – no matter how the equity is taken – because the foreclosure strips the owner of any interest in the equity. *Id.* at 19.

The District argues that Plaintiffs do not have a property interest because the District took it. This argument, like the District's other assertions, would sanction unlimited abuses of government power. The District's circular logic would deprive the protections embodied in the Fifth Amendment of all meaning. The government cannot simply declare property forfeited through the very act challenged as unconstitutional in order to make an end run around the Constitution. For this reason, the Supreme Court has firmly stated that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). As much as the District may attempt to obfuscate the issue, it is the taking of the surplus equity caused by the foreclosure that Plaintiffs challenge, and what the Court contemplated, as the unconstitutional taking. *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *50 (a taking occurs where "[a] property interest in equity . . . [is] created by some other legal source" but "the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus").

Plaintiffs have now answered the straightforward question left open by the Court following the resolution of the motion to dismiss: They have a property interest in the surplus equity under D.C. law, and the seizure and transfer of that interest to private parties violated the Fifth Amendment. The Court accordingly should deny the District's motion for judgment on the pleadings.

ARGUMENT

A motion pursuant to Federal Rule of Civil Procedure 12(c) is appropriately granted only "when, at the close of the pleadings, no material issue of fact remains to be resolved, and [the

movant] is *clearly entitled* to judgment as a matter of law." *McNamara v. Picken*, 950 F. Supp. 2d 125, 127 (D.D.C. 2013) (emphasis added; internal quotation marks omitted). "When evaluating a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), courts employ the same standard that governs a Rule 12(b)(6) motion to dismiss." *Id.* Accordingly, a court "must treat the complaint's factual allegations as true, even if doubtful in fact," but "need not accept as true legal conclusions set forth in a complaint." *Id.* at 128 (internal quotation marks omitted). Under this standard, a court "must construe the complaint liberally in plaintiff's favor and grant plaintiff the benefit of all reasonable inferences deriving from the complaint." *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *12. "Accordingly, a court must accept the plaintiff's well-pleaded factual allegations to the extent that they plausibly give rise to an entitlement to relief," and may "only grant judgment on the pleadings if it appears, even accepting as true all inferences from the complaint's factual allegations, that the plaintiff cannot prove any set of facts entitling him to relief." *McNamara*, 950 F. Supp. 2d at 128 (internal quotation marks and citation omitted).

I. PLAINTIFFS HAVE A PROPERTY INTEREST IN THEIR SURPLUS EQUITY.

A. D.C. Law Recognizes a Property Interest in Surplus Equity.

At the time of the foreclosure of their rights of redemption, and at any other time before it was taken, Plaintiffs had a property interest in their home equity under D.C. law, including an interest in all surplus equity that the District seized and transferred as a result of the foreclosure. As this Court previously noted, "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." *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *51 (internal quotation marks omitted).

Here, various D.C. statutes and case law establish that a property interest in home equity is "firmly embedded in the common law" of the District of Columbia. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165 (1998). D.C. law confirms that the District's seizure of Plaintiffs' surplus equity "produce[d] a result" in which "[p]roperty to which an individual is legally entitled has been taken without recourse." *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *50. The law follows common sense: Property owners value, estimate, sell, lend, and encumber home equity as their own property.

The D.C. Court of Appeals has recognized that home equity is a property interest subject to distribution as marital property. *Lewis v. Lewis*, 708 A.2d 249, 254 (D.C. 1998) (the trial court "erred in distributing the parties' marital property" because it failed to take into account "the parties' equity in the home"); *Gore v. Gore*, 638 A.2d 672, 676 (D.C. 1994) ("Under these circumstances, the trial judge was not precluded from distributing as marital property the entire equity in the Rittenhouse street home").

District of Columbia bankruptcy law further supports recognition of this property interest. Specifically, the District's statutory homestead exemption states that the "following *property*" of heads of households, including "the debtor's aggregate interest in real property used as the residence of the debtor," is "free and exempt from distraint, attachment, levy, or seizure and sale on execution or decree of any court in the District of Columbia." D.C. Code § 15-501(a)(14) (emphasis added); *see also In re McDonald*, 279 B.R. 382, 388 (Bankr. D.D.C. 2002) (a debtor may exempt "the full amount of equity in her residence" under D.C. Code § 15-501(a)(14)).

More generally, home equity also satisfies commonly recognized definitions of property. "Property" has been defined to "denote legal relations between persons with respect to a thing," which may include "an object having physical existence or it may be any kind of an intangible

such as a patent right or a chose in action." Restatement (First) of Property ch. 1, intro. note (1936). Home equity is such an intangible "thing" over which the homeowner has a "right," "privilege," "power," and "immunity" – all elements of legal relations between persons. *Id.*; *see also id.* §§ 1-4 (defining "right," "privilege," "power," and "immunity"). The Supreme Court has recognized on numerous occasions that property interests in intangibles similar to home equity exist under state law. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialman's lien is a compensable property interest); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589-602 (1935) (the impairment of a real estate lien amounted to "the taking of substantive rights in specific property"); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) ("That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court").

The District itself concedes that D.C. law recognized Plaintiffs' property interest at the time of the foreclosures: "Plaintiffs clearly had a property interest in their home equity and a property interest in their fee simple title to their properties." District Mot. 5; *see also id.* at 17 ("The equity of a debtor in realty is a significant property interest entitled to due process protection" (internal quotation marks omitted)). Because there is no dispute then that home equity was taken, the District's concession that home equity is a property interest disposes of the only remaining question in this case.[1]

[1] Not surprisingly, the District fails to produce any authority denying Plaintiffs' property interest. Rather, the District relies on inapposite case law concerning property interests in government benefits in asserting that Plaintiffs must establish that they have an "objectively reasonable expectation that they are entitled to any surplus equity after a tax-sale foreclosure." District Mot. 5-6 (citing *Johnson v. District of Columbia*, No. 03-2548 (GK), 2006 U.S. Dist. LEXIS 61792, at *14 (D.D.C. Aug. 30, 2006) ("the 'independent source' underlying a property interest *in a particular benefit* must be clear enough to provide a citizen with an objectively reasonable expectation that he is entitled to that benefit" (emphasis added; internal quotation marks omitted))).

B. Plaintiffs' Property Interest in Their Home Equity Is Neither Defined Nor Created by the Statute that Took It.

With no authority to support the proposition that home equity is not property, the District sidesteps the relevant legal question and claims that "the issue in this case is not whether home equity is a property interest, but whether there is a property interest in any surplus equity *following a tax-sale foreclosure judgment*." District Mot. 10 (emphasis added). The District contends that the "tax-sale statute is a forfeiture proceeding" that "divest[s] property without compensation and result[s] in an instantaneous transfer of title." *Id.* at 18. Because Plaintiffs have forfeited their property, they no longer have an interest in any surplus equity and thus cannot challenge the retention of that equity as an unconstitutional taking. *Id.* at 19 ("Plaintiffs did not have a property interest in the surplus equity after the foreclosure judgment").

But the divestment is precisely what Plaintiffs assert, and what the Court recognized, as the unconstitutional taking. *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *50 (a taking occurs where "[a] property interest in equity . . . [is] created by some other legal source" but "the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus"). In other words, the District contends that there is no property interest because the District *took* it. The District's argument that "no case and no principle of law in the District of Columbia . . . gives property owners an objectively reasonable expectation that they are entitled to any surplus equity after a tax-sale foreclosure" would strip the constitutional protections in the Due Process and Takings Clauses of any meaning. What matters in this case, and any other, is the property interest that Plaintiffs had at the time of the taking, not whether any property interest was "reinstated" after the taking. The District's emphasis on post-foreclosure rights is thus inappropriate and would permit unlimited and unrestrained government takings.

At bottom, the District's reasoning is premised on the absurd notion that an individual does not have a property interest, and therefore cannot assert a takings claim, because the very statute that effects the taking has divested her of that interest. Courts have soundly dismissed this "circular reasoning" in the past. *Devines v. Maier*, 665 F.2d 138, 142-43 (7th Cir. 1981) (rejecting argument that leaseholders forcibly evicted under housing relocation law lacked a property interest "because state law made continued occupancy of the buildings illegal": "The state may not severely limit or otherwise destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulation and therefore never existed"); *see also Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 32 (1st Cir. 2002) (en banc) (rejecting argument that "tobacco companies have no property interest in their ingredient lists once a law requires them to submit that information to the state" where that law constituted the taking: "Specific laws simply cannot destroy property interests. In fact, this is precisely what the Takings Clause is designed to prevent: a State, by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent" (internal quotation marks omitted)).

In fact, the District's logic is directly contrary to the Supreme Court's holding in *Webb's Fabulous Pharmacies*. The statute at issue in that case provided that all interest accruing on the deposit of an interpleader fund should "be deemed income of the office of the clerk of the circuit court." *Webb's Fabulous Pharmacies, Inc.*, 449 U.S at 155 n.1. If the District were correct, the Court should have concluded that there was no property interest in the accrued interest precisely because the statute defined the interest as the court's property. And in fact the Florida Supreme Court offered this reasoning in finding that the taking was constitutional:

> The Florida Supreme Court . . . proceeded on the theory that without the statute the clerk would have no authority to invest money held in the registry, that in some way the fund assumes temporarily the status of "public money" from the time it is deposited until it leaves the account, and that the statute "takes only what it creates." Then follows the conclusion that the interest "is not private property."

Id. at 163. The Supreme Court however rejected this position, concluding instead that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. In the same way, the District may not recharacterize Plaintiffs' surplus equity as the property of another simply because it was seized by the District and transferred to that private party.

For this reason, the District's citation of *Foskey v. Plus Properties, LLC*, 437 B.R. 1 (D.D.C. 2010), is misplaced. The plaintiff in *Foskey* did not raise any challenge to the validity of the District's tax-sale statute, much less a takings claim. *Id.* at 3 n.1 ("Foskey does not challenge the validity of the tax sale at issue"). Rather, the plaintiff, who had filed for bankruptcy, argued that he remained the rightful owner of a property that had been subject to a tax-sale foreclosure prior to his bankruptcy petition. *Id.* at 5. But Plaintiffs here challenge the underlying validity of the tax-lien foreclosures, presenting a constitutional claim that the *Foskey* court never had a reason to address. While the *Foskey* court may have concluded for purposes of bankruptcy law that the foreclosure divested the plaintiff of his equitable interest in the property, that ruling is immaterial to the issue of whether the divestiture was even constitutional.[2]

The District further mischaracterizes the Court's summary of the Plaintiffs' argument that they have "no objection to the Foreclosure Judgment," but instead object "to the District's

[2] It is not apparent from the *Foskey* opinion that the plaintiff even had surplus equity in his home such that the tax-sale foreclosure would have implicated the constitutional concerns at issue in this case.

independent taking of [their] **surplus equity**." District Mot. 5 (quoting *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *27). The District asserts that this language amounts to a concession that the focus of this case is whether a property interest exists in post-foreclosure surplus equity. *Id.* But one has nothing to do with the other. As this Court recognized, the fact that the private party could properly foreclose does not mean that the seizure and transfer of the surplus equity without just compensation was constitutional. *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *34 ("Mr. Coleman's claim for compensation for the taking of his surplus equity in the property survives *Rooker-Feldman* because he does not challenge the Foreclosure Judgment, but the District's allegedly unconstitutional enforcement of the statute providing for a taking of his surplus equity"). These foreclosures were not (as the District contends) lawful forfeitures, but instead constituted unlawful takings of the surplus equity without just compensation in violation of the Fifth Amendment.

Accordingly, the District's attempt to distinguish Plaintiffs' authority is misguided. The District states in particular that nothing in the *Lewis* and *Gore* decisions "indicates that the D.C. Court of Appeals had created a property interest, much less a compensable property interest, in the surplus proceeds of a tax-sale foreclosure." District Mot. 11. The key issue in this case is whether Plaintiffs had a property interest *at the time of the taking (namely, the foreclosure)*, and *Lewis* and *Gore* establish that they did.

The District's contention that Plaintiffs lack "any additional rights or interests beyond the tax-sale statute," District Mot. 9, is incorrect. As the District itself admits, "Plaintiffs clearly had a property interest in their home equity and a property interest in their fee simple title to their properties" prior to the tax-sale foreclosure judgments. *Id.* at 5. This interest, as discussed above, stems from independent principles of D.C. law that embody commonly recognized tenets

of property law, and it existed long before Plaintiffs' properties ever became subject to the tax-sale process. As such, it was neither created by, nor dependent upon, the District's tax-sale statute. Plaintiffs' rights and interests were thus infringed when the District seized and transferred the portion of this property interest to which the District was not constitutionally entitled.

The Court's denial of the District's motion to dismiss confirms that Plaintiffs' property interest is independent of the tax-sale statute. The Court expressly acknowledged the absence of a relevant statutory provision: "The question Mr. Coleman's case presents is: *What if the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus?*" *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *50 (emphasis added). The Court held that a property interest "could conceivably be created by some other legal source" and accepted the possibility that Plaintiffs' interests could be "based on principles of D.C. law and decisions of the D.C. Court of Appeals." *Id.* at *50-51. Plaintiffs have now come forth with those principles and decisions demonstrating a property interest in their home equity.

Nor does any of the District's authority suggest that Plaintiffs' property interests are defined by the District's tax-sale statute. District Mot. 7-9 (citing *Craland, Inc. v. State*, 263 Cal. Rptr. 255 (Cal. Ct. App. 1989); *Associated Estates, LLC v. Caldwell*, 779 A.2d 939 (D.C. 2001); *McCulloch v. District of Columbia*, 685 A.2d 399 (D.C. 1996); *Robinson v. District of Columbia*, 372 A.2d 1005 (D.C. 1977)). None of these cases are relevant here as each case discusses the rights of *tax-lien purchasers*.[3] Unlike the property owners, these purchasers' rights and interests

[3] *Craland, Inc.*, 263 Cal. Rptr. at 256, 261 (tax-lien purchaser seeking rescission of purchase after discovering property defects; holding that purchaser had no remedy under the statute for the state's failure to disclose the defects); *Caldwell*, 779 A.2d at 941-42, 945-47 (tax-lien purchaser seeking recovery of post-foreclosure improvements made to the property following judgment voiding the deed; holding that "in the absence of statutory authorization, a tax sale purchaser

in the property at issue are expressly created by and dependent upon the tax-sale statute. *E.g.*, *Robinson*, 372 A.2d at 1008 ("Thus, in the absence of statutory provisions, the tax certificate purchaser assumes the risks involved and has no remedy against the taxing authorities. Rights and liabilities under tax sale proceedings rest entirely upon the statutes involved" (citations omitted)). Tax-lien purchasers stand in a fundamentally different position than owners who have a *preexisting* interest in the property. As the court in *McCulloch* recognized, "[t]he law may, and does, take into account the variant postures of the participants in this little melodrama." *McCulloch*, 685 A.2d at 402 (recognizing that "[t]he private purchaser's tax sale perspective is entirely different" from the District's in the tax-sale process).

The District's reliance on *Mamo v. District of Columbia*, 934 A.2d 376 (D.C. 2007), is likewise misguided. Apart from the fact that *Mamo* concerned issues "[o]utside of the tax-sale statute context," District Mot. 9, nothing in that decision suggests that a property interest must be statutorily based to be cognizable under the Fifth Amendment, and the District's own case law establishes the contrary. *E.g.*, *Phillips*, 524 U.S. at 165 (noting that the rule that "interest follows principal" "has become firmly embedded in the common law of the various States"). Likewise, well-settled precedent confirms that Plaintiffs had a cognizable property interest in their home equity under D.C. law independent of the tax-sale statute.

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ordinarily is not entitled to be reimbursed for its maintenance and improvement expenditures when its tax deed is declared invalid"); *McCulloch*, 685 A.2d at 400-04 (tax-lien purchasers seeking fair market value of properties where District, *inter alia*, permitted redemption or canceled the tax sales despite District's assurances that tax deeds would be issued; holding that purchasers' remedies were specified by the statute, including reimbursement plus interest); *Robinson*, 372 A.2d at 1007-09 (tax-lien purchaser seeking recovery of property's full market value after tax sale was rescinded following delayed redemption of the property; holding that purchaser was only entitled under the statute to repayment of amount paid for the tax certificate).

Finally, the District's contention that recognition of Plaintiffs' property interest in the surplus equity "would severely undermine the integrity of the District's tax-sale process," District Mot. 8, 13, is not an appropriate justification for unconstitutional conduct. If Plaintiffs "have interests under state property law that have traditionally been recognized and protected from governmental expropriation, and if, over their objection, the Government chooses to occupy or otherwise acquire those interests, the Fifth Amendment compels compensation." *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (en banc).

II. THE DISTRICT'S TAKING AND TRANSFER OF THE PLAINTIFFS' SURPLUS EQUITY WITHOUT JUST COMPENSATION WAS UNCONSTITUTIONAL.

A. By Seizing and Transferring Plaintiffs' Surplus Equity to Private Parties Without Just Compensation, the District Has Violated the Fifth Amendment.

There is no longer any serious question that the taking in this case was unconstitutional. Again, in its decision on the District's motion to dismiss, the Court identified the key issue in this case as "whether Mr. Coleman has a property interest in his equity and, if so, whether an unconstitutional taking of that property has been alleged." *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *50. Assuming that a property interest in the equity is "created by some other legal source," the Court held that a "failure to provide an avenue for recovery of the equity would appear to produce a result identical to *Lawton*: Property to which an individual is legally entitled has been taken without recourse." *Id.* The District now concedes, and relevant authority confirms, that Plaintiffs have a property interest in their home equity under D.C. law. The tax-sale statute's failure to provide an avenue for the recovery of that equity thus amounted to a taking of property, to which Plaintiffs were legally entitled, without recourse.

Plaintiffs have likewise satisfied the remaining elements of their claims: "that [their] property was 'taken'; that [they were] provided no 'just compensation'; and that the taking was

not for a 'public purpose.'" *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *51. In foreclosing Plaintiffs' right of redemption, the District seized Plaintiffs' property and transferred it to the private tax-lien purchasers. There is no public purpose for this transfer to private parties. Since this nation's earliest years, it has been recognized that a law like the District's tax-sale statute that "takes property from A. and gives it to B" is "contrary to the great first principles of the social compact." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). "It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Id.* Moreover, there could be no public purpose for these takings because the tax-sale statute provides for recoveries sufficient for the collection of unpaid real estate taxes. In the end, the District cannot conceal the fact that this statute amounts to an arbitrary abuse of government power.

Even assuming the District could offer a public purpose for the seizure of surplus equity, the Fifth Amendment nevertheless mandates that the District offer just compensation – no matter how great its need for recovering outstanding tax obligations. *Radford*, 295 U.S. at 602 ("For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation").

B. None of the District's Additional Authority Indicates that the Tax-Sale Statute Is Constitutional.

1. The District Has Not Offered Any Case Law Supporting Its Theory of Property Rights.

The District's case law discussing tax-sale statutes from other jurisdictions is entirely distinguishable, and fails to establish the constitutionality of the District's own tax-sale statute. The District relies on four state court cases purportedly holding that "there is no property interest in the surplus equity absent a statutory provision or state constitution creating such a right."

District Mot. 11-12 (citing *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me. 1974); *Kelly v. City of Boston*, 204 N.E.2d 123 (Mass. 1965); *Sheehan v. Cnty. of Suffolk*, 490 N.E.2d 523 (N.Y. 1986); *Ritter v. Ross*, 558 N.W.2d 909 (Wis. Ct. App. 1996)). These cases do not support the District's argument and, to the extent relevant, rely on a misreading of Supreme Court decisions already rejected by this Court.

To begin, neither *Mandarelli*, *Kelly*, nor *Sheehan* affirmatively found that home equity is not a property interest under relevant state law. *Kelly* itself pertained to an issue of statutory interpretation, and therefore did not address any constitutional claim regarding the retention of surplus equity. *Kelly*, 204 N.E.2d at 124-26 (rejecting claim for surplus equity based on the language of a statutory redemption provision and an "equity and good conscience" theory).

And in *Sheehan*, the court addressed a challenge to a statute under which the plaintiffs were granted an opportunity to recover the property following the expiration of the redemption period. *Sheehan*, 490 N.E.2d at 524 ("the taxpayers were allowed nine additional months within which to redeem the properties"). The court premised its decision on an abandonment theory, emphasizing the "lengthy redemption period" and concluding that "[i]t is not unjust for a legislative body to declare that once a taxpayer has *abandoned* rights in property after such a period has expired, the taxing authority may take a deed in fee." *Id.* at 526 (emphasis added). The District's statute does not provide any "abandonment" procedures. And unlike the District's tax-sale statute, the plaintiffs in *Sheehan* were not absolutely precluded from recovering their property following the expiration of the redemption period; the case therefore did not raise the same constitutional concerns. *See Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *43-44 (the Supreme Court's decision in *Nelson v. City of New York*, 352 U.S. 103 (1956), was

distinguishable because the statute did not "absolutely preclude[] an owner from obtaining the surplus proceeds of a judicial sale" (internal quotation marks omitted)).

By contrast, the court's decision in *Ritter* upholding the retention of surplus equity was based on the court's explicit finding that home equity is not a property interest under Wisconsin law. *Ritter*, 558 N.W.2d at 912-13 ("We have not been referred to any applicable provision of the Wisconsin Constitution, and we see nothing in chapter 75, STATS., either directing or relating in any way to distribution of surplus funds after a tax sale"); *see also Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *50 n.12 (distinguishing *Ritter* and noting that "[t]he Wisconsin Court of Appeals 'consider[ed] whether the [plaintiffs] had a property interest in the excess proceeds of the foreclosure sale' and, upon concluding that they did not under Wisconsin law, denied their Takings Clause claim" (quoting *Ritter*, 558 N.W.2d at 912-13)). Judicial interpretations of Wisconsin law have no bearing on the scope of D.C. property law.

Additionally, *Mandarelli*, *Sheehan*, and *Ritter* themselves are premised on a flawed interpretation of Supreme Court case law. In all three cases, the courts asserted that the Supreme Court's decision in *Nelson* and its summary affirmance of *Balthazar v. Mari Ltd.*, 301 F. Supp. 103 (N.D. Ill. 1969), precluded a claim under the Takings Clause as long as procedural due process was satisfied.[4] The courts further distinguished the Supreme Court's earlier decision in

[4] *Mandarelli*, 320 A.2d at 31 (citing *Nelson* and *Balthazar* for the proposition that "the retention of the surplus by the taxing authority was not violative of constitutional rights, where the city had taken adequate steps to notify the landowner and the latter failed to act seasonably"); *Sheehan*, 490 N.E.2d at 526 (citing *Nelson* and *Balthazar* and noting that "[s]tatutes which allow a State to retain the excess collected upon the public sale of property have been sustained where they provide for a lengthy redemption period"); *Ritter*, 558 N.W.2d at 912-13 & n.7 ("We conclude that, under *Spurgias*, *Nelson*, and similar cases, the Ritters' claim under the Takings Clause resolves into a question of the adequacy of the County's notice under traditional due process considerations").

United States v. Lawton, 110 U.S. 146 (1884), based on the fact that "a proper construction of the pertinent statutory tax legislation mandated" in that case a return of the equity.[5]

The Court rejected this interpretation of the Supreme Court's rulings in its decision on the motion to dismiss. The Court drew "two clear principles from the Supreme Court's decisions in *Lawton* and *Nelson*":

> *Nelson* makes clear 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 surplus equity. *Lawton* makes clear that a Takings Clause violation will arise when a tax-sale statute grants a former owner an independent property interest in the surplus equity and the government fails to return that surplus.

Coleman I, 2014 U.S. Dist. LEXIS 137526, at *49-50 (citation omitted). In addition, the Court concluded that the summary affirmance in *Balthazar* did not bar Plaintiffs' claims. *Id.* at *47-48. Rather, Plaintiffs' case presents a distinct constitutional question:

> The question Mr. Coleman's case presents is: What if the tax-sale statute does not provide a right to the surplus and the statute provides no avenue for recovery of any surplus? *A property interest in equity could conceivably be created by some other legal source.* In that circumstance, failure to provide an avenue for recovery of the equity would appear to produce a result identical to *Lawton*: Property to which an individual is legally entitled has been taken without recourse. The issue, then, is whether Mr. Coleman has a property interest in his equity and, if so, whether an unconstitutional taking of that property has been alleged.

Id. at *50 (footnote omitted; emphasis added). The Court specifically held that Plaintiffs' claims could proceed notwithstanding *Mandarelli* and *Ritter* because those decisions did not address the same constitutional issue implicated by Plaintiffs' claims. *Id.* at *48, 50 n.12 (distinguishing

[5] *Mandarelli*, 320 A.2d at 31; *see also Sheehan*, 490 N.E.2d at 526 ("In *Lawton*, the Federal statute under which the property was sold required return of any surplus. Obviously, in the face of such a statute, payment of any excess to the former owner was required and *Nelson v City of New York* expressly distinguished *Lawton* on that basis" (citation omitted)); *Ritter*, 558 N.W.2d at 912 n.6 (distinguishing *Lawton* because "the Court determined that the statutory framework of the applicable tax legislation required any excess proceeds to be returned to the taxpayer").

Mandarelli and *Ritter* and noting that *Ritter* only grasped the proper interpretation of *Nelson* "*in part* when it held that where the government retain[s] the entire amount of the sale proceeds, the Takings Clause comes into play only if the state constitution or tax statutes create [a property interest in the surplus]" (emphasis added; internal quotation marks omitted)).

The *Thomas Tool Services* and *Bogie* decisions are not to the contrary. As the District acknowledges, both cases "held that their state constitutions create a property interest in the surplus proceeds." District Mot. 12; *see also Thomas Tool Servs., Inc. v. Town of Croydon*, 761 A.2d 439, 441 (N.H. 2000) (citing Part I, Article 12 of the New Hampshire Constitution); *Bogie v. Town of Barnet*, 270 A.2d 898, 900 (Vt. 1970) (citing Chapter I, Article 2 of the Vermont Constitution). Accordingly, the courts had no need to look for an alternative source in state law. Though the District of Columbia does not have a constitution, alternative sources of D.C. law likewise create a property interest in home equity, the taking of which without just compensation violates the Fifth Amendment. These are precisely the "other legal source[s]" that the Court identified as having the ability to create a property interest in home equity despite the absence of a relevant constitutional or statutory provision.[6]

2. The District's Survey of State Law Does Not Support Its Property Right Theories.

The District's fifty-state survey of tax-sale legislation similarly fails to support the constitutionality of the District's own statute. As noted by the District, thirty-two states' tax-sale statutes "provide some right to the surplus equity proceeds after a tax-sale foreclosure." District Mot. 12; *id.* Ex. A. These statutes are thus distinguishable for the same reason that *Nelson* is not

[6] As the court in *Thomas Tool Services* noted, the District's citation to *Spurgias v. Morrissette*, 249 A.2d 685 (N.H. 1969), is "misplaced" because *Spurgias* "did not address the takings issue." *Thomas Tool Servs., Inc.*, 761 A.2d at 441-42.

controlling – they do not absolutely preclude a homeowner's recovery of the surplus equity. *Coleman I,* 2014 U.S. Dist. LEXIS 137526, at *43-44 ("Mr. Coleman's view of *Nelson* is correct. The Supreme Court clearly held open the question presented by Mr. Coleman when it noted '[b]ut we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale.' The subsequent language cited by the District does not foreclose Mr. Coleman's claim because D.C. provides no action to recover any surplus. Mr. Coleman's claims, therefore, are not foreclosed by *Nelson*." (citation and footnote omitted)).

As for the remaining eighteen states, none of those tax-sale statutes state that home equity is not a property interest under the applicable state law. Moreover, these statutes raise constitutional issues of their own. To the extent that these statutes involve the state directly foreclosing on home equity,[7] they too may violate the Takings Clause. And where, as here, the statute authorizes the state to transfer the property (including the right to foreclose) to a private third party,[8] a straightforward violation of due process occurs. *Webb's Fabulous Pharmacies,*

[7] *E.g.*, Idaho Code Ann. § 63-1006(1) (directing the county tax collector to "issue and record a tax deed in favor of the county" upon the failure of the property owner to answer or defend the notice of pending issue of tax deed); Me. Rev. Stat. tit. 36, § 943 ("The filing of the tax lien certificate in the registry of deeds shall create a tax lien mortgage on said real estate to the municipality in which the real estate is situated having priority over all other mortgages, liens, attachments and encumbrances of any nature, and shall give to said municipality all the rights usually incident to a mortgagee, except that the municipality shall not have any right of possession of said real estate until the right of redemption shall have expired"); Or. Rev. Stat. § 275.090 (enumerating the "powers and duties with respect to all lands acquired by the county by foreclosure of delinquent tax liens").

[8] *E.g.*, Ariz. Rev. Stat. Ann. § 42-18201 ("At any time beginning three years after the sale of a tax lien but not later than ten years after the last day of the month in which the lien was acquired pursuant to section 42-18114, if the lien is not redeemed, the purchaser or the purchaser's heirs or assigns, or the state if it is the assignee, may bring an action to foreclose the right to redeem"); Del. Code Ann. tit. 9, § 8728 ("If the owner of the property or the owner's legal representatives fail to redeem the property as provided in this subchapter, the purchaser of the property . . . may present a petition to the Superior Court setting forth the appropriate facts in conformity with this subchapter and pray that the Superior Court make an order directing the Sheriff, then in office, to

Inc., 449 U.S. at 164 ("To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power").

Statutes like the District's that so completely strip individuals of their home equity no matter how small the tax owed are incompatible with the values enshrined in the Fifth Amendment. The infringement of these values is particularly egregious in the District's case where its tax-sale statute has become a device for preying on its most vulnerable citizens.

III. THE TAX-SALE STATUTE IS NOT A CONSTITUTIONAL FORFEITURE AS APPLIED TO SURPLUS EQUITY.

A. The District's Theory of the Case Would Set a Dangerous Precedent and Is Unsupported by the Case Law.

The District's contention that its tax-sale statute constitutionally "divest[s] property without compensation and result[s] in an instantaneous transfer of title," District Mot. 18, is no different than the argument discussed above that the District can define away a property interest by the statute that takes it, and is similarly unfounded and alarming. *Philip Morris, Inc.*, 312 F.3d at 32; *Devines*, 665 F.2d at 142-43. The District asserts that it can seize what is concededly a property interest; transfer the portion of that property that is unnecessary for the satisfaction of the underlying tax obligation to another private party; and do so without a public purpose or providing just compensation so long as it accords the property owner with procedural due

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execute, acknowledge and deliver a deed conveying the title to the property to the petitioner"); La. Rev. Stat. Ann. § 47:2121(C)(1) ("A tax sale confers on the tax sale purchaser, or on the political subdivision to which the tax sale property is adjudicated, only tax sale title. If the tax sale property is not redeemed within the redemptive period, then at the termination of the redemptive period, tax sale title transfers to its holder ownership of the tax sale property, free of the ownership and other interests, claims, or encumbrances held by all duly notified persons").

process. *Id.* at 17 ("There is no dispute that after notice and a hearing a property owner may forfeit all rights to his or her property for failure to pay taxes").

Such a proposition would eviscerate the Fifth Amendment. And it would contravene over two hundred years of Supreme Court precedent preventing a state from redefining its citizens' property interests without just compensation. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) ("Moreover, the government does not have unlimited power to redefine property rights"); *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164 ("a State, by *ipse dixit*, may not transform private property into public property without compensation"); *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid"); *Calder*, 3 U.S. (3 Dall.) at 388 ("It is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A. and gives it to B").

What is more, the District's theory of the case contravenes this Court's opinion on the motion to dismiss. In that motion, the District made the same flawed argument that it is reasserting now:

> when a property owner forfeits his rights to that property by failing to pay taxes and redeem that property in a timely manner, the state may keep any excess value of the property without paying just compensation. The government is not taking the property for public use, the property owner is forfeiting his interest in the property.

District Reply to the Mot. to Dismiss 14-15, ECF No. 10. The Court rejected that reasoning, holding instead that, if a "property interest in equity" were "created by some other legal source," the "failure to provide an avenue for recovery of the equity" would result in a situation in which "[p]roperty to which an individual is legally entitled has been taken without recourse." *Coleman*

I, 2014 U.S. Dist. LEXIS 137526, at *50. Plaintiffs have now established that a property interest in surplus equity exists under D.C. law, and the tax-sale statute's failure to provide an avenue for the recovery of that equity violates due process and is an unconstitutional taking.

The District attempts to justify its blatantly unconstitutional practices by citing to a hodgepodge of cases, none of which address the relevant issue of whether the taking of surplus equity is constitutional. The District first offers *Gray Properties, Inc. v. Tobriner*, 357 F.2d 829 (D.C. Cir. 1966) (per curiam), for the proposition that a tax deed "vests in the holder a new and complete title to the property in fee simple." District Mot. 15 (quoting *Gray Props., Inc.*, 357 F.2d at 830). But *Gray Properties* concerned the claim of a *tax-sale certificate assignee* challenging the District's issuance of a tax deed to a third-party purchaser before the assignee could pay the outstanding taxes. *Gray Props., Inc.*, 357 F.2d at 830. The court's statement that "the tax deed expunges all other interests in the property and vests in the holder a new and complete title to the property in fee simple" thus referred to the rights of the assignee in relation to the third-party purchaser, not the rights of the original property owner. *Id.* Moreover, the court at no point found that the seizure of surplus equity in a property is constitutional, or even that surplus equity in the particular property at issue existed at all.

Likewise, the court in *Albertson v. Leca*, 447 A.2d 383 (R.I. 1982), never addressed a constitutional claim for surplus equity. Instead, *Albertson* reversed the lower court's refusal to permit the property owners to redeem their property, despite their financial ability to do so, because they were not "capable of appropriately managing the property." *Id.* at 384-85, 389-90 (because "equity abhors a forfeiture, as well as the general policy of courts to favor redemption," a court "must allow redemption to one who is ready, willing, and able to redeem"). The court

never discussed the constitutionality of foreclosures on surplus equity, nor did it have the need to do so because the property owners in the case had the opportunity to redeem their property.[9]

The New Jersey cases that the District cites are equally distinguishable.[10] In *Reconstruction Finance Corp. v. Haag*, 40 A.2d 801 (N.J. 1944), the court addressed whether a statute of limitations for actions on bonds secured by mortgages that were extinguished by the foreclosure of a prior mortgage applied to tax-sale foreclosures. *Id.* at 802-03. In finding that the statute did not apply in the tax-sale foreclosure context, the court focused on statutory language requiring "*surplus moneys arising from the foreclosure*" – an element that was absent from New Jersey's tax-sale foreclosure scheme. *Id.* The purpose of this discussion was thus to distinguish tax-sale foreclosures from general mortgage foreclosures, not to pass judgment on the constitutionality of taking surplus equity.

Similarly, the court in *In re Varquez*, 502 B.R. 186 (Bankr. D.N.J. 2013), focused on a narrow question regarding the distinction between tax-sale foreclosures and mortgage foreclosures for purposes of federal bankruptcy law. *Id.* at 190-93. The court analyzed whether a tax-sale transfer could establish the reasonably equivalent value of a property in the same way as a mortgage foreclosure sale. *Id.* at 192-93. In finding that a tax-sale transfer could not establish property value, the court emphasized that, under New Jersey's tax-sale statute, "at the point of the entry of a judgment of foreclosure, there is no sale, forced or otherwise." *Id.* at 192.

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[9] The court in *Albertson* even acknowledged that the District's interest only extends as far as the recovery of the underlying tax obligation. *Albertson*, 447 A.2d at 389 ("The necessary reason of tax takings is to secure payment of public revenues. Once a purchaser of property at a tax sale has paid the tax collector, however, the government's interest is fully satisfied").

[10] The same is true for *Delmond v. Board Investors Co.*, 74 N.E.2d 376 (Ohio Ct. App. 1947), which the District cites in passing without further discussion. District Mot. 17. The questions before the court in *Delmond* related "solely to whether or not the advertisement and sale of the lands followed the procedure outlined" in the relevant statutes, *Delmond*, 74 N.E.2d at 378, not to whether the taking of surplus equity was constitutional.

The court, however, did not address the constitutionality of such a foreclosure where excess equity is involved.

Finally, the Supreme Court decisions on which the District relies focused on distinct issues that do not bear on the present dispute. Though the Court acknowledged in *Jones v. Flowers* that "the government may hold citizens accountable for tax delinquency by taking their property," 547 U.S. 220, 234 (2006), it concentrated exclusively on whether the property owner in that case had been given *procedural due process*. *Id.* ("But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking"). The District cannot infer from *Jones* that a tax-sale foreclosure seizing surplus equity passes muster under the Takings Clause when the Court granted certiorari solely "to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property." *Id.* at 223.[11]

Nor does the District's citation of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), support its contention that a tax-sale foreclosure on surplus equity is merely a constitutional forfeiture. The Court in that case addressed the constitutionality of an intricate state statutory scheme terminating mineral rights as a result of abandonment through inactivity – not a forced seizure of property. *Id.* at 526 (recognizing that "States have the power to permit unused or abandoned

[11] The *McCachren* and *Mullane* decisions that the District references, District Mot. 17, are also procedural due process cases, neither of which addresses a tax-sale foreclosure statute. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 307 (1950) (addressing "the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking Law"); *McCachren v. U.S. Dep't of Agric., Farmers Home Admin.*, 599 F.2d 655, 656-57 (5th Cir. 1979) (per curiam) (rejecting plaintiffs' claims that their procedural due process rights were violated by the denial of a hearing in connection with a foreclosure on a deed of trust from the Farmers Home Administration).

interests in property to revert to another after the passage of time"). The District does not attempt to justify its tax-sale statute based on an abandonment theory, nor could it do so. As discussed at length in the class certification briefing, the District has not asserted any facts demonstrating the requisite intent among Plaintiffs and class members of voluntarily forsaking their property interests for purposes of establishing abandonment. *E.g.*, Pls.' Class Certification Reply Br. 2-5, ECF No. 34.

B. The Absence of a Judicial Sale Is Irrelevant.

The District's emphasis on the fact that its "tax-sale statute did not provide for a judicial sale and did not generate any surplus proceeds," District Mot. 14, misses the point. As the District notes, Plaintiffs' properties were "instantaneously transferred to the tax-sale purchaser" upon the foreclosure judgment. *Id.* at 15. Through that transfer, Plaintiffs' property interest in the surplus equity was unconstitutionally taken. Regardless of whether proceeds were created by a separate judicial sale, the end result is the same: Plaintiffs' property was seized and transferred to private parties without a public purpose and without just compensation.

Notwithstanding the District's assertions, nothing in *Nelson* or *Lawton* suggests that a takings claim may proceed "only if there is a judicial sale which generates such surplus proceeds." *Id.* at 15-16. In *Lawton*, the Court simply held that "withhold[ing] the surplus from the owner would be to violate the Fifth Amendment to the Constitution." *Lawton*, 110 U.S. at 150. Likewise, in *Nelson*, the Court recognized that the Takings Clause was not implicated because it did not face "a statute which absolutely preclude[d] an owner from obtaining the surplus proceeds of a judicial sale." *Nelson*, 352 U.S. at 110. In neither instance did the Court make a constitutional distinction between surplus retained as part of a judicial sale and surplus

retained through a transfer of the property. In truth, the distinction between such situations is that a transfer to a private party is clearly a violation of due process.

Moreover, the District's reasoning is nonsensical in light of the Court's ruling on the motion to dismiss. If it were true that a takings claim is only viable where surplus proceeds are generated by a judicial sale of the property, the Court would have dismissed Plaintiffs' claims because the District's tax-sale statute did not provide for such a sale in Plaintiffs' case. The Court did not do so, but instead held that the District's statute would constitute a taking if Plaintiffs could establish a property interest in their home equity. *Coleman I*, 2014 U.S. Dist. LEXIS 137526, at *50.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the District's Motion for Judgment on the Pleadings should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2015, a copy of the foregoing Opposition to Defendant's Motion for Judgment on the Pleadings was served on the following counsel of record via email:

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