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**Pro Hac Vice*

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LYNETTE JOHNSON,

Plaintiff,

v.

CITY OF EAST ORANGE; ANNMARIE CORBITT, in her official capacity as Collector of Taxes; and TED R. GREEN, in his official capacity as Mayor of East Orange,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
ESSEX COUNTY
DOCKET NO. ESX-C-000016-23

Civil Action

BRIEF IN SUPPORT OF PLAINTIFF'S OPPOSITION TO SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff Lynette Johnson opposes the Defendants' motion for summary judgment, and requests instead that this Court grant partial summary judgment in her favor. In particular, she does not seek summary judgment on Count III, the proper adjudication of which requires further factual development. She does, however, seek summary judgment that Defendants are liable for an uncompensated taking under Counts I and II. Plaintiff does not seek a judgment as to the precise remedy, i.e., the amount of compensation that is constitutionally required; additional litigation will be necessary to determine that amount, in part because of a dispute over the total amount of debt that Plaintiff owed to the City.[1]

In 2014, Ms. Johnson purchased 250 Tremont Avenue in East Orange, New Jersey (the Property), for $55,000. She bought the Property with the intention of allowing two of her adult children to operate their businesses on the premises. At the time of purchase, the Property was in disrepair, and Ms. Johnson commenced plans to renovate. She signed a Letter of Agreement with the City confirming her intention to renovate, and providing that the Property may not be occupied until the City issued a "full Certificate of Conformity."

Unfortunately for Ms. Johnson, her prior experience as a homeowner in New Jersey left her with the mistaken belief that property taxes would not be assessed on the Property until it was certified for occupancy by the City. That assumption was incorrect. Nonetheless, it could have, and would have, been remedied but for the fact

[1] Plaintiff refers the Court to its response to the Defendants' Statement of Undisputed Material Facts, ¶ 19.

that the City never sent any notices of tax assessments, or foreclosure proceedings, to her mailing address. The City knew exactly where she lived; the Letter of Agreement between Ms. Johnson and the City listed her mailing address in bold, italicized typeface. But the City instead sent the tax notices to the Property itself, which had no mailbox. All mailings to the Property were returned undeliverable.

As a result, Ms. Johnson did not realize that a tax debt was accruing on the Property. Neither did she realize it was in danger of foreclosure. Although she worked with the City to obtain construction permits necessary for the renovation, no one from the City during this process informed her that the Property was subject to a tax lien. Ultimately, the City purchased the tax lien for the amount owing on the Property at the maximum rate of interest, and later foreclosed, taking full title in fee simple pursuant to New Jersey's Tax Sale Law, N.J.S.A. § 54:5-1, *et seq*. The City subsequently sold the Property to a third party for $101,000.

The City cannot reap a profit from the collection of a debt owed by a citizen. But by the City's admission, the Property's value exceeded Ms. Johnson's debt (**Exh. "V"** to the Bonchi Cert., # 8; Ltr. Br. 16 n.11), and the City retained that entire value, failing to compensate Ms. Johnson for her equity interest in the Property. That was a taking without just compensation. Accordingly, the City's motion for summary judgment should be denied and Ms. Johnson's cross-motion for partial summary judgment should be granted.

ARGUMENT

The New Jersey Constitution, like its federal counterpart,[2] prohibits government from taking private property for public use without just compensation. N.J. Const. 1947 art. I, ¶ 20. It similarly commands that the taking of any property interest by local government can only be made with just compensation. *Id.* art. IV, § 6, ¶ 3. This "essential guarantee" of the Constitution is "of ancient origin[,]" *Borough of Harvey Cedars v. Karan*, 214 N.J. 384, 402 (2013), and is designed to forbid government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Klumpp v. Borough of Avalon*, 202 N.J. 390, 405 (2010); *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Here, the City took Ms. Johnson's equity interest in her Property without compensation. An equity interest is a property interest in the fair market value of property beyond encumbering debts. *See Crane v. Comm'r of Internal Revenue*, 331 U.S. 1, 7 (1947) ("[E]quity is defined as the value of a property above the total of the liens."). This interest is a discrete and constitutionally protected property interest which has been universally recognized in Anglo-American law for centuries. *See Hall v. Meisner*, 51 F.4th 185, 187 (6th Cir. 2022) ("Under . . . the law of virtually every state for the past 200 years[,] a creditor can divest a debtor of real property only" by "compensate[ing] the debtor for her equitable interest in the property[.]").

[2] New Jersey's Takings Clauses provide protections that are coextensive with the Takings Clause of the United States Constitution. *Klumpp*, 202 N.J. at 405 (citing *Mansoldo v. State*, 187 N.J. 50, 58 (2006). Federal takings precedent is therefore relevant authority for interpreting the state constitution.

But instead of compensating Ms. Johnson for her equity, the City subjected her to a strict foreclosure. Strict foreclosure is a "draconian" procedure which fully divests the debtor of all interest in the Property. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541 (1994) (in strict foreclosure, debtor's "entire interest in the property was forfeited, regardless of any accumulated equity"). In New Jersey, strict foreclosure is only permissible under special circumstances not applicable here.[3] *See Patsourakos v. Kolioutos*, 31 Backes 87, 95 (N.J. Ch. 1942) (observing that "strict foreclosure is permitted in certain and exceptional circumstances," and listing the "only" four instances in which it may be available) (citing *Sears Roebuck & Co. v. Camp*, 23 Backes 403, 408–410 (N.J. Ch. 1938)). In cases where, as here, the value of the land exceeds the amount of the debt, the law has long considered strict foreclosure to be "unconscionable." *See Lansing v. Goelet*, 9 Cow. 346, 355 (N.Y. 1827); *see also Hall*, 51 F.4th at 194 (observing that the protection of debtors' equity interest dates back even to Magna Carta).

[3] Strict foreclosure is only available "(1) where, during the customary foreclosure by judicial sale or a conveyance by the mortgagor, equitable estates have become united in the mortgagee, who is also in possession under his legal title, and some outstanding junior interest has not, by reason of pure inadvertence not aggravated by bad faith, been barred by the decree; (2) where the mortgage has been given for the entire purchase price, and the value of the land does not exceed the amount of the mortgage; (3) where the mortgage is in the form of an absolute deed of conveyance, without written defeasance and the grantee-mortgagee is in possession, altho [sic] foreclosure by sale is usually deemed to be the remedy better designed to safeguard the essential interest of the parties; and (4) where a vendee has failed to make the payments stipulated in a contract for the sale of land." *Patsourakos*, 31 Backes at 95 (citing *Sears Roebuck & Co. v. Camp*, 23 Backes 403, 409 (N.J. Ch. 1938)). *See also* N.J. Stat. Ann. § 2A:50-63(b) (establishing limited circumstances under which strict foreclosure of a mortgage may be had). Of course, the second scenario listed above, in which the value of the land does not exceed the amount of the mortgage, is the exception that proves the general rule: strict foreclosure is wholly *inappropriate* to extinguish equitable title where, as here, the value of the land exceeds its debts. *See Hall*, 51 F.4th at 192 (Since the end of the 18th century, American courts "were uniformly hostile to strict foreclosure in cases . . . where the land's value exceeded the amount of the debt.").

The City's primary argument for summary judgment is that New Jersey authorities have never recognized a former owner's right to any equity in a tax foreclosure. (Ltr. Br. 13). That assertion is not only incorrect, but it misidentifies the issue. The question is instead whether equity is a property interest—it is—and whether the government has taken it—it has.

As the Sixth Circuit recently recognized, government effects a taking without just compensation when, to recover a debt, it extinguishes an owner's equity interest in property without refunding the surplus value left over after the debt has been satisfied. *Hall*, 51 F.4th at 196. There is no controversy[4] that Ms. Johnson's property was worth far more than the debts it secured to the City. (**Exh. "V"** to the Bonchi Cert., ## 8–9).[5] By taking that interest—and failing to compensate her for it—the City violated the Takings Clause. This Court should therefore deny the City's motion for summary judgment and should grant Plaintiff's motion for partial summary judgment instead.

Finally, Plaintiff does not here seek summary judgment of her claim for unjust enrichment. That is a more fact-intensive claim and requires further discovery to establish which City officials knew, or should have known, the relevant factors leading to the failure to actually notify Ms. Johnson of the pendency of foreclosure.

[4] There remains a dispute as to the exact amount of Ms. Johnson's total debts owed to the City at the time of foreclosure, but there is no question that—whatever the exact amount—the debts were worth far less than the Property itself.

[5] Indeed, the City avers that every *in rem* foreclosure under the Tax Sale Law will result in the taking of more than what was owed. (Ltr. Br. 16 n.11). Far from supporting the City, this admission of widespread and systematic uncompensated takings is a reason why this Court should provide the relief requested by Plaintiff.

I. THE EQUITY INTEREST IN PROPERTY IS PROTECTED BY THE TAKINGS CLAUSE

The Takings Clause protects "every sort of interest [in property] the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *see Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015) (The Takings Clause "protects private property without any distinction between different types."). Such interests include "a right to receive money that is secured by a particular piece of property." *Koontz v. St. Johns River Wtr. Mgmt. Dist.*, 570 U.S. 595, 613 (2013).

The City's argument in support of summary judgment is thus far too narrow. The question is not whether New Jersey law has ever specifically and positively recognized the right to receive surplus equity in a tax foreclosure[6] (Ltr. Br. 13), but whether a property owner's equity interest in real estate is a property right recognized under New Jersey law and protected by the Fifth Amendment. It is.

An equity interest, in New Jersey as elsewhere, is the value of one's land minus any encumbering debts. *Crane v. Comm'r*, 331 U.S. 1, 7 (1947) ("[E]quity is defined as the value of a property above the total of the liens."); *see also Cateret Sav. & Loan Ass'n, F.A. v. Davis*, 105 N.J. 344, 347 (1987) ("The value of the land above the loan" is "entitled to protection in equity."). Equity interest is a discrete and constitutionally

[6] The City also overstates its case for answering this question in the negative. Although the bulk of authority interpreting New Jersey's tax statutes have not read them to require the refund of surplus proceeds, none of the cases cited by the City involved a takings claim. Moreover, there are a handful of authorities evincing that the right to surplus equity in a tax foreclosure was recognized *See, e.g.*, *Gavanesch v. Jersey City*, 59 A. 25, 25 (N.J. 1904) (in a case concerning land sold for taxes under the Martin Act, "[t]he surplus money, upon being received by the city, was held by it for the benefit of the owner of the lands, . . . who was entitled to receive it upon demand"); *Charles v. Hastedt*, 51 N.J. Eq. 171, 177–78 (Ch. Div. 1893) (ordering the sale of property to satisfy an assessment under the Martin Act, and describing how the surplus is to be disbursed).

protected property interest which has been universally recognized in American law for centuries. *See Hall*, 51 F.4th at 187 ("Under . . . the law of virtually every state for the past 200 years[,] a creditor can divest a debtor of real property only" by "compensate[ing] the debtor for her equitable interest in the property[.]").

New Jersey is no exception. Equity belongs to the owner of the land, and it survives a transfer of the land for payment of debt. *See, e.g.*, *Danes v. Smith*, 30 N.J. Super. 292, 301–02 (App. Div. 1954) (After foreclosure, "surplus beyond the mortgage debt" is "available for distribution according to the respective interests of the parties."); *Atlantic City Nat'l Bank v. Wilson*, 108 N.J. Eq. 213, 219 (1931) (Successor of mortgagor "is entitled to receive from the funds in court all surplus beyond the amount necessary to pay the incumbrances prior to the mortgage under which he first obtained title[.]").

In virtually every other context, New Jersey law affirmatively protects equity interests. For example, equity is property to be divided in a marital dissolution. Mark S. Guralnick, N.J. Family Law Ann. A Ch. 3 III (Dec. 2022 update) (Equitable distribution "applies to both real estate . . . and to legal as well as equity rights acquired in property during the course of a marriage."). It is protected in executions on judgments and has been for over a century. *Vanduyne v. Vanduyne*, 16 N.J. Eq. 93, 94 (Ch. 1863) (irrespective of language in an execution, sheriff is authorized to sell "only so much of the premises as may be necessary" to satisfy the execution). New

Jersey also implements the Uniform Commercial Code[7] by returning surplus equity to the former owner after the foreclosure of a security interest, N.J.S.A. § 12A:9-608, and makes this protection a mandatory term that cannot be waived by agreement. N.J.S.A. § 12A:9-602(5), (8), (9).

Equity interests are undoubtably private property interests, and therefore the government violates the Takings Clause when it confiscates equity without compensation. *Hall*, 51 F.4th at 195; *see also Bogie v. Town of Barnet*, 129 Vt. 46, 49, 55 (1970); *Polonsky v. Town of Bedford*, 173 N.H. 226, 239 (2020) ("[W]hen a municipality acquires property by tax deed and the equity in the property exceeds the amount owed, a taking has occurred, regardless of whether the former owner took steps to correct the consequences of the tax delinquency.").

The City's cited authorities fairly describe the operation of New Jersey's tax sale laws, but none of them involved a takings challenge. The fact that the tax sale laws are written to confiscate equity does not save the City from liability for takings. After all, the "Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take." *Hall*, 51 F.4th at 190; *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (Government cannot "by *ipse dixit* . . . transform private property into public property without compensation."); *see also* Transcript of Oral Argument, *Tyler v.*

[7] A comment to U.C.C. Section 9-602 observes that "in the context of rights and duties after default, our legal system has traditionally looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. . . . The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense[,]" and are "long-standing and deeply rooted."

Hennepin County, 87:13 (U.S. 22-166) (in which Chief Justice Roberts asks that if the government can take an entire home, the value of which far exceeds the tax debts owed, then "what's the point of the Takings Clause?").[8]

II. GOVERNMENT EXCEEDS ITS LAWFUL TAXING AUTHORITY WHEN IT TAKES MORE THAN IT IS OWED AND MUST RESPECT THE PROPERTY RIGHTS OF ALL PARTIES IN A TAX FORECLOSURE

While the City undoubtedly has the authority to levy and collect taxes, it has no authority to take more than it is owed. When a single taxpayer is made to contribute more than her quota, the government is no longer exercising the taxing power but is engaged instead in eminent domain. *Agens v. City of Newark*, 37 N.J.L 415, 423 (1874).

New Jersey Courts have long recognized the important line between the taxing power, on the one hand, and eminent domain, on the other. *Agens*, 37 N.J.L. at 423; *Jardine v. Borough of Rumson*, 30 N.J. Super. 509, 518 (App. Div. 1954) (Laws imposing an undue tax burden "would, to the extent that one man's property is appropriated by them, in excess of his just contribution, to relieve others of a public burden properly resting upon them, take private property for public use, without just compensation."); *Bonnet v. State*, 141 N.J. Super. 177, 201 (Law Div. 1976) ("When a property owner is asked to pay his or her fair share to defray the lawfully incurred expenses of the community, that is taxation. If an individual is asked to pay more and, upon failure to do so, the property may be sold to satisfy the charge, that is

[8] *Available at*: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-166_c18e.pdf

confiscation. It is the taking of private property for public use without compensation. . . . In constitutional terms, the imposition of unfair tax burdens, to the point where they are discriminatory, with the power to sell the taxed property to collect payment, violates [the Takings Clause of the New Jersey Constitution]." (citations omitted)). As a historical matter, "abuses of the tax power, more than any other factor, led to the adoption of constitutional guarantees to protect against future government excesses." *Township of Montville v. Block 69, Lot 10*, 74 N.J. 1, 14 (1977).

New Jersey law has also long upheld the principle that governments can only take what they are owed in taxes, and no more. *See, e.g.*, *Pugh v. Comm'rs of Sinking Fund*, 53 N.J.L. 629, 630 (1891) ("When a tax-warrant directs a sale to be made to raise a sum larger than the whole amount due, it is a clear excess of authority[.]"); *Hopper v. Malleson's Ex'rs*, 16 N.J. Eq. 382, 385 (1863) (tax-sale of land for thirty cents more than the tax debt was a "clear excess of authority"). In *Dvorkin v. Dover Twp.*, 29 N.J. 303, 308 (1959), the Court considered whether purchasers of municipal tax liens were entitled to a refund of their purchase price in the event that the property was subsequently redeemed. *Id.* Despite statutory language to the contrary, the Court reasoned that the legislature must have intended to make a refund available. *Id.* at 318. Though the decision was motivated by several considerations, first among them were the "rudiments of fairness and good faith dealing," *id.* at 314, the same basic principles advanced by Ms. Johnson and protected by the Constitution. Where the bid paid for a tax lien exceeds the sum required for redemption, then the bidder "must be made whole" in the event that the property is

later redeemed. *Id.* The Court observed that "a contrary conclusion results in a forfeiture—an assumption not lightly to be indulged, especially where we are called upon to determine the respective rights arising from the dealings of the citizen and his government." *Id.*

III. THE CITY VIOLATES THE TAKINGS CLAUSE WHEN IT CONFISCATES EQUITY THAT EXCEEDS THE LEGITIMATE TAX DEBT

Because the law recognizes equity as a discrete and protected property interest, and because government exceeds the taxing power when it takes more than it is owed, the government is liable for a *per se* taking when it seizes equity for a public use. *See Klumpp*, 202 N.J. at 405 ("Regardless of the exact [takings] method employed, where a taking occurs, the Takings Clause requires the government to compensate the property owner."); *Rafaeli v. Oakland County*, 505 Mich. 429, 474–75 (2020); *Thomas Tool Servs., Inc. v. Town of Croydon*, 145 N.H. 218 (2000) (taking established where state law gives surplus from tax sale to government); *see also Webb's Fabulous Pharmacies*, 449 U.S. at 164; *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003). While the government may constitutionally take and sell foreclosed properties for the public purpose of collecting a valid tax debt, the just compensation component of the Takings Clause also mandates that it must either pay for the equity at the time it takes the property, or it must sell the property and refund to the former owner any surplus proceeds generated from the sale. *See, e.g.*, *Bogie*, 129 Vt. at 46–47.

A review of U.S. Supreme Court precedent strongly supports that Ms. Johnson is owed just compensation for her equity.[9] The jurisprudence consistently holds that government violates the Takings Clause when it confiscates preexisting property interests by redefining private property as public. In *Webb's Fabulous Pharmacies*, 449 U.S. at 158–59, the Court considered whether the government violated the Takings Clause by keeping the interest earned on private funds deposited with a court. The Court answered in the affirmative, and held that the Takings Clause cannot be avoided by simply designating private funds as public: "Neither the Florida legislature by statute, nor the Florida courts by judicial decree, may [take the interest] by recharacterizing the principal as 'public money[.]'" *Id.* at 164; *see also Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests."); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (states effect a taking when they recharacterize traditional private property as public).

Yet the New Jersey Tax Sale Law purports to do just that. The law ostensibly converts surplus equity in tax-foreclosed property to "public" property by granting fee simple title on foreclosure and failing to make any provision for protecting the former owner's equity. The Constitution does not permit this. *Webb's Fabulous Pharmacies*,

[9] Plaintiff also notes that a case presenting virtually identical issues is currently pending before the United States Supreme Court in *Tyler v. Hennepin County*, Dkt. No. 22-166. In particular, the first question presented there is: "Whether taking and selling a home to satisfy a debt to the government, and keeping the surplus value as a windfall, violates the Takings Clause?" Oral Argument was held on April 26, 2023.

449 U.S. at 164 (Government may regulate property rights, but it cannot "by *ipse dixit* . . . transform private property into public property without compensation.").

The fact that the property owner is indebted to the government does not alter the analysis. In *Armstrong*, 364 U.S. at 41, the United States took title to certain building materials after its hired shipbuilder defaulted on a contract. The materials were subject to the liens of third parties, who demanded compensation after the government confiscated the materials. *Id.* The Court agreed with the lien holders, holding that property rights in liens do not simply disappear when the government takes title to the underlying property. *Id.* at 48. Before the government confiscated those materials, the plaintiffs had a cognizable financial interest—i.e., a property right—in the materials; afterwards, they had none. *Id.* That "was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens[.]" *Id.* The government could take the underlying property, but only subject to the constitutional requirement to pay just compensation for the value of the liens. *Id.* at 49.

Armstrong therefore confirms that East Orange's conversion of private equity to public use is a taking. As in *Armstrong*, the City "for its own advantage" confiscated Ms. Johnson's equity when it took title to the entire property despite having a legitimate interest only the portion thereof sufficient to discharge Ms. Johnson's debt. *See id.* at 48.

The Tax Sale Law fundamentally violates the "fairness and justice" principles that animate the Takings Clause. *See Klumpp*, 202 N.J. at 405 (Takings Clause was

"designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.") (quoting *Armstrong*, 364 U.S. at 49); *Sigler v. Fuller*, 34 N.J.L. 227, 230 (1870) (a case where "the public would [] take private property over and above the benefits for a great public use" is "treated as an invasion of the organic law, that private property shall not be taken for public use without just compensation"); *see also Dvorkin*, 29 N.J. at 314 ("forfeiture" in a tax foreclosure proceeding should be avoided under the "rudiments of fairness and good faith dealing").

Indeed, ample case law establishes that the property interests of all parties must be protected in a tax foreclosure proceeding under New Jersey law. *See, e.g.*, *Cherokee Equities, LLC v. Garaventa*, 382 N.J. Super. 201, 209 (Ch. Div. 2005) (tax lien assignees); *Dvorkin*, 29 N.J. at 308 (tax lien purchasers); *Hopper*, 16 N.J. Eq. at 388–89 (mortgagees).

In *Hopper*, a tax-sale purchaser sought to extinguish the interest of mortgagees which had arisen under the predecessor to the defaulting taxpayers. *Id.* at 383–84. In reviewing the history of New Jersey's property tax enforcement policies, the Court observed that prior to 1854, no law authorized the sale of land to recover taxes. *Id.* at 388. This left a serious enforcement gap, because "[i]f there was no tenant upon the land, and no vendible property to be taken by way of redress, there was no means of enforcing the payment of the tax against a non-resident land owner." *Id.* The tax sale

law[10] "furnished a remedy for this evil, by subjecting the land of the delinquent taxpayer to the lien of the tax," and to sale for the satisfaction thereof. *Id.* But the legislature could not be assumed to have "designed utterly to abandon its long approved policy of protecting the rights of the tax payer." Construing the relevant statues narrowly to protect private property interests, the Court held that the mortgagees' interests must survive the tax sale. *Id.* at 389.

Even tax lien speculators, generally thought to be acting at their own risk, are entitled to constitutional protection of their property. *Cherokee Equities*, *LLC*, 382 N.J. Super. at 210–11. *Cherokee Equities* concerned two tax lien certificates covering the same property. *Id.* at 204–05. The holder of the second certificate commenced a foreclosure action, after which a third party purchased the first certificate and sought to intervene in the action and redeem the property. *Id.* The foreclosing party argued that case law prohibited the acquisition of a redeemable property interest after the commencement of a foreclosure action. *Id.* at 209. The court disagreed, observing that "[p]roperty interests, whether title, mortgage or prior tax liens must be protected once a foreclosure complaint has been filed even if the acquiring party had knowledge of the foreclosure." *Id.*

In short, the cases indicate that "the government should be animated by a justice as anxious to consider the rights of the" property owner "as to insist upon its own." *Dvorkin*, 29 N.J. at 314; *see Montville Twp.*, 74 N.J. at 14 ("While the

[10] The statute at issue in *Hopper* authorized only the sale of tax-delinquent land for a term of years to the bidder agreeing to take the shortest term, after which the estate reverted to the original owner. *Hopper*, 16 N.J. at 386. Thus, the delinquent taxpayer's equitable interest in the property was protected.

importance of the government's taxing power cannot be ignored, we must not forget that governmental concern for convenience or simplicity does not outweigh individual rights."). Those facing foreclosure for delinquent property taxes are "[o]ften . . . among society's most unfortunate, losing all they own because they do not have the funds to redeem." *Cherokee Equities*, 382 N.J. Super. at 211. Like the property interests of mortgagees and tax lien speculators, the property interests of delinquent taxpayers is protected by the Constitution, and cannot be taken without just compensation.

Ms. Johnson owed the City a debt consisting of overdue taxes, interest, fees, and costs. The City took a great deal more. It later sold the property for a sum far exceeding Ms. Johnson's tax debt, and those funds are now held by the City for the benefit of the public. Yet the singling out of one person's property for a public benefit "has none of the essential characteristics of a tax." *The Tide-Water Co. v. Coster*, 18 N.J. Eq. 518, 527 (1866). That is because the confiscation of Ms. Johnson's equity was not legitimate tax collection; it was instead a taking of private property requiring just compensation. *See id.* (When the sum collected in taxation exceeds the benefit of public services to the taxpayer, "then to that extent, most incontestably, private property is assumed by the public.").

IV. THE CITY IS NOT ENTITLED TO SUMMARY JUDGMENT ON MS. JOHNSON'S CLAIM FOR UNJUST ENRICHMENT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING DEFENDANTS' ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF MS. JOHNSON'S CORRECT MAILING ADDRESS

The City cannot have summary judgment on Ms. Johnson's claim for unjust enrichment because there remain genuine issues of material fact.[11] Neither are they entitled to judgment as a matter of law.

A. Ms. Johnson can establish inequitable (and illegal) conduct by demonstrating that the City had constructive knowledge of her correct mailing address.

The City relies on the *Brick* case to argue that it need do nothing more than mail notice of a tax foreclosure to the address listed on the latest tax duplicate, no matter what it might have known or should have known about the taxpayer's actual mailing address. (Ltr. Br. 18–20); *see Brick Twp. v. Block 48-7, Lots 34, 35, 36*, 202 N.J. Super. 246 (App. Div. 1985) (hereinafter *Brick I*). The City neglects to tell the whole story.

The *Brick* case cited by the City is only *Brick I*. There, two co-owners of tax-foreclosed property—sophisticated with respect to real estate and the law[12]—sought relief from a foreclosure judgment on allegations that they had not been properly noticed. *Brick I*, 202 N.J. Super. at 246. The foreclosing court denied relief, and the Appellate Division reversed. As the City correctly notes, the court in *Brick I* did explain that government officials are not required to take affirmative steps to double-

[11] For the same reason, Ms. Johnson does not here move for summary judgment on Count III.
[12] Robert V. Paschon was an attorney, and Byron Kotzs was a real estate entrepreneur. *Brick I*, 202 N.J. Super. at 247.

check tax rolls for outdated addresses or to locate taxpayers to ensure the listed addresses are current. (Ltr. Br. 18–19).

But the court *also* explained that the case is different when the government is alleged to have actual knowledge of the correct address. *Brick I*, 202 N.J. Super. at 254 (while government had no duty to investigate listed address, "it is something else altogether if someone involved ignored conscious awareness that the address was outdated or that the mailing was returned and that [the property owners] were available for service"). The court therefore remanded the case to further develop the factual record as it pertained to the question of actual knowledge.

In *Brick II*, uncited by the City in its letter brief, the court reviewed the improved factual record and ruled for the property owners. *Brick Twp. v. Block 48-7, Lots 34, 35, 36, Kenlav*, 210 N.J. Super. 481, 485 (App. Div. 1986) (hereinafter *Brick II*). The hearing on remand had revealed several factors which established that the attorney who had prosecuted the foreclosure suit, together with his contracted assistant, had awareness sufficient to impose a duty to correct their error and send notice to the current address. *Id.*

First, the prosecuting attorney knew both of the property owners personally and knew where they could be reached. *Id.* at 483. Apparently, however, he did not realize that these two were among the defendants in the foreclosure suit he was prosecuting. *Id.* Second, his assistant also knew where the two owners could be reached, and further knew that the mailings which had been sent to the incorrect addresses were returned undelivered. *Id.*

The court expressed surprise about the "fragmentation" of available knowledge on the part of the prosecuting attorney's office but did not consider this an exculpatory factor. *Id.* at 484 (while there was no duty to seek out taxpayers to determine whether listed addresses were current, "it is yet another thing for those involved in prosecuting a suit to deal with available information in such a way as to render it useless"). Because "the information was plainly and simultaneously before [the prosecutors of the foreclosure suit] both that defendants' address was outdated and that defendants had readily available addresses where they could be reached[,]" the court remanded the case with instructions to provide the owners a reasonable time to pay their tax debt. *Id.* at 485.

The Appellate Division expounded on this ruling in a similar case, *Sourlis v. Borough of Red Bank*, the next year. 220 N.J. Super. 434 (App. Div. 1987). It explained that, although the record did not establish "actual awareness," constructive knowledge of a change in address is enough to entitle a property owner to be mailed notice at the correct address. *Id.* at 439–40.

Here, the City concedes it was in possession of a "letter of agreement" listing Ms. Johnson's "mailing address" on the first page, in bold and italicized type face, as 68 S. Devine Street, Newark, NJ 07106. (**Exh. "T"** to the Bonchi Cert.; **Exh. "V"** to the Bonchi Cert., # 4).[13] It also concedes that the foreclosure notice mailings sent to Ms. Johnson at the Property were all returned undelivered. (**Exh. "U"** to the Bonchi

[13] This admission was made with the caveat that the letter was in possession of the Building Division, and not the Tax Office. But as in *Brick II*, the "compartmentaliz[ation of] available knowledge" is not dispositive of clean-handedness. 210 N.J. Super. at 484.

Cert., #10). It concedes that it had Ms. Johnson's phone number on file as evidenced by its listing on a construction permit applied for by Ms. Johnson. (Ans. ¶ 64; **Exh. "W"** to the Bonchi Cert., EO 3). These facts, taken together with the allegations in Ms. Johnson's complaint, clearly give rise to the possibility that the City had as much or more constructive knowledge of Ms. Johnson's correct mailing address as did the prosecutors of the foreclosure in *Brick II* and in *Sourlis*.

The City insists that none of its employees knew or suspected that no one was residing at the property. (**Exh. "V"** to the Bonchi Cert., #2; **Exh. "U"** to the Bonchi Cert., #6). Yet the City itself asked Ms. Johnson to "agree and commit not to occupy, nor in any way deliver up the premises for occupancy until after a full Certificate of Conformity is obtained." (**Exh. "T"** to the Bonchi Cert., ¶ 8). *Cf. Brick I*, 202 N.J. Super. 246 (distinguishing *Robinson v. Hanrahan*, 409 U.S. 38 (1972), on the grounds that in *Robinson*, the failure of mail to reach its intended recipient was due to the government's own actions).

Ms. Johnson believes that further factual development would assist the Court in evaluating who knew, or should have known, what, and when they knew or should have known it.

B. Ms. Johnson can establish all necessary elements of her Unjust Enrichment claim.

To recover under a claim for unjust enrichment, a plaintiff must establish that the defendant "received a benefit, and that retention of the benefit without payment therefor would be unjust." *Associates Commercial Corp. v. Walla*, 211 N.J. Super. 231, 243 (App. Div. 1986). The City identifies an additional element: that the plaintiff

"expected remuneration from the defendant" when the benefit was conferred. (Ltr. Br. 20 (citing *Thieme v. Aucoin-Thieme*, 227 N.J. 269, 288 (2016))). But first, that additional element is not necessary to establish Ms. Johnson's claims in this case. And even if it were, the City's assertion that Ms. Johnson cannot possibly hope to establish her claims falls flat.

Although the "most common circumstance" for unjust enrichment includes the plaintiff's expectation of remuneration, the doctrine of unjust enrichment can apply even in the absence of such expectations. *County of Essex v. First Union Nat'l Bank*, 373 N.J. Super. 543, 550 (App. Div. 2004), *rev'd in part on other grounds*, 186 N.J. 46 (2006). Thus, although some courts have characterized the expectation of remuneration as a "requirement" for unjust enrichment, *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554 (1994), others have described it as merely a "common thread" in successful claims. *See Wallia*, 211 N.J. Super. at 244. Especially where, as here, a benefit was received as a result of alleged government misconduct, unjust enrichment does not require the plaintiff to establish any expectations on her part. *See First Union Nat'l Bank*, 373 N.J. Super. at 550.

Regardless, Ms. Johnson can testify—quite reasonably—that she never expected that the government would, or even could, take the "unconscionable" step of strictly foreclosing land whose value exceeded its debts, particularly when "the law of virtually every state for the past 200 years" requires surplus equity to be returned to a debtor after foreclosure of real property. *See Hall*, 51 F.4th at 187, 192; *see Horne*, 576 U.S. at 361 ("people . . . do not expect their property, real or personal, to be

actually occupied or taken away"). After all, disbelief is not an uncommon reaction to the government-sanctioned theft of home equity. *See, e.g.,* George F. Will, *The County Seized Her Condo, Sold It, and Kept All the Money*, Wash. Post (Apr. 24, 2023, 7:30 AM)[14]; Good Morning America, *Supreme Court Takes on What Critics Call Predatory Tax Foreclosure Practice* (video at 4:43) (Apr. 27, 2023) (anchors Robin Roberts, Michael Strahan, and George Stephanopoulos expressing disbelief about the practice, including that it "doesn't make sense").[15] Moreover, Ms. Johnson reasonably did not expect that the government would or could foreclose her Property without mailing notice to the residential address they had on file, and mailing notice instead to the vacant commercial property which, per mutual agreement between Ms. Johnson and the City, was to remain vacant until the City's issuance of a full certificate of conformity. Finally, Ms. Johnson did not expect that the City would accept $1,914 from Ms. Johnson in relation to a construction permit on the Property without informing her that a tax lien was pending on the very same Property, and that she was in danger of losing her home and all of her equity. (**Exh. "V"** to the Bonchi Cert., ## 5–7); *cf. U.S. Bank Nat'l Ass'n v. Hylton*, 403 N.J. Super. 630, 642–43 (Ch. Div. 2008) (expectations prong of unjust enrichment satisfied where plaintiff *would have* expected remuneration if it had known all of the facts).

Moreover, the City's argument that its confiscation of Ms. Johnson's equity cannot be inequitable because it "followed the law" ignores the very bases of this

[14] *Available at* https://www.washingtonpost.com/opinions/2023/04/24/minnesota-home-equity-theft-supreme-court-case/.
[15] *Available at* https://www.goodmorningamerica.com/US/story/supreme-court-takes-critics-call-predatory-tax-foreclosure-98833801.

action; namely, that the retention of her equity violates the New Jersey Constitution—the highest law of the state—and that the City failed to act on its actual or constructive knowledge that it had been mailing notices of the foreclosure to the wrong address, when it had the correct address in its possession.

Finally, the City's characterization of this action as a "backdoor" method of raising an untimely claim is simply incorrect, especially insofar as it suggests that Ms. Johnson seeks to obtain relief "identical" to that which would have been available under a motion to vacate. On the contrary, a successful motion to vacate would result, naturally, in the vacation of the foreclosure judgment and the return of the Property's title to Ms. Johnson. But Ms. Johnson does not seek to recover title to the Property;[16] she seeks instead only her equity interest in the Property, an interest to which the City has no legitimate claim of entitlement.

Ultimately, Ms. Johnson believes that further factual development will assist the Court in evaluating the merits of her unjust enrichment claim. The Court should therefore deny the City's motion for summary judgment as to Count III.

[16] Even so, there is no fixed limitations period for a motion to vacate a foreclosure judgment based on lack of notice. Such a motion need only be brought within a "reasonable time." *Sourlis*, 220 N.J. Super. at 437. Reasonableness is a fact-dependent inquiry, and the *Chiquita Realty* case cited by the City is easily distinguishable on the grounds that, there, the property owner first learned of the pending foreclosure while the right to redeem still existed, and that it had taken affirmative actions which manifested an intent to treat the judgment as valid. *City of Newark of County of Essex v. (497) Block 1854, Lot 15, 9-11 South 7th St, Chiquita Realty, Inc.*, 244 N.J. Super. 402, 411–12 (App. Div. 1990).

CONCLUSION

For the reasons stated above, Plaintiff respectfully asks this Court to DENY Defendants' Motion for Summary Judgment in its entirety, and to GRANT Plaintiff's Cross-Motion for Summary Judgment on Counts I and II of her Complaint.

DATED: May 1, 2023.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this date, a true and correct copy of this Brief In Support of Plaintiff's Opposition to Summary Judgment and Cross-Motion for Partial Summary Judgment was electronically filed via eCourts. Counsel for all parties are registered users of eCourts and service will be accomplished by eCourts. I also emailed a copy to the following counsel of record:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED: May 1, 2023.

s/ Jonathan M. Houghton
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Case number:	ESX-C-000016-23
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Cross/Counter/3rd party claim	Cross/Counter/3rd party claim	Notice of Cross Motion FINAL.pdf
Other	Brief ISO Opposition to SJ and Cross Motion for Partial SJ	Opp to MSJ and XMSJ FINAL.pdf

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Good Afternoon Counsel,

Attached please find Plaintiff's Opposition to Summary Judgment and Cross-Motion for Partial Summary Judgment and supporting documents.

In addition, attached is the filing submitted last week, Motion to Hold Case in Abeyance and supporting documents. This filing was registered on the Court docket and confirmed via phone with the Court clerk. However, for some reason no filing notification was ever sent via email.

Regards,

Katherine Turnbill | Legal Secretary
Pacific Legal Foundation
916.419.7111 | Office
In office: 8 am to 4:30 pm (EST)

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