No. ____

In The
Supreme Court of the United States

TAWANDA HALL, CURTIS LEE,
CORETHA LEE, and KRISTINA GOVAN,
Cross-Petitioners,

v.

ANDREW MEISNER, Treasurer,
in his official capacity, et al.,
Cross-Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the forfeiture of property worth far more than needed to satisfy a debt plus interest, penalties, and costs is a fine within the meaning of the Eighth Amendment.

PARTIES TO THE PROCEEDING

Conditional Cross-Petitioners are Tawanda Hall, Curtis Lee, Coretha Lee, and Kristina Govan.

Conditional Cross-Respondents are Andrew Meisner, in his official capacity as Oakland County Treasurer; Oakland County; Southfield Neighborhood Revitalization Initiative, LLC; City of Southfield, Michigan; Frederick Zorn; Kenson Siver; Susan P. Ward-Witkowski; Gerald Witkowski; Irv Lowenberg; Mitchell Simon; E'toile Libbett; and Southfield Non-Profit Housing Corporation.

LIST OF ALL PROCEEDINGS

Meisner v. Hall, No. 22-874, Petition for Writ of Certiorari (U.S. Mar. 9, 2023).

Hall v. Meisner, U.S. Court of Appeals for the Sixth Circuit, No. 21-1700, judgment entered October 13, 2022, en banc review denied January 4, 2023.

Hall v. Meisner, U.S. District Court for the Eastern District of Michigan, No. 2:20-cv-12230-PDB-EAS, opinion and order against Respondents Andrew Meisner and Oakland County on Petitioner's Takings Claim issued May 21, 2021, and two opinions and orders on other claims and involving additional plaintiffs and defendants issued October 4, 2021.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Petitioners Tawanda Hall, Curtis and Coretha Lee, and Kristina Govan respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit, if the Court grants the Petition for Writ of Certiorari in *Meisner v. Hall*, No. 22-874.

OPINIONS BELOW

The decision of the Sixth Circuit is published at *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), and reproduced in the Appendix to the Petition for Writ of Certiorari (Pet.App.1a). The Sixth Circuit's denial of rehearing en banc is available at 2023 WL 370649 (6th Cir. Jan. 4, 2023) and reprinted at Pet.App.65a.

The district court's unpublished opinion dismissing all claims against Andrew Meisner and Oakland County is available at 2021 WL 2042298 (E.D. Mich. May 21, 2021) and reprinted at Pet.App.27a.

The district court's opinion dismissing the claims against Southfield Non-Profit Housing Corporation, Southfield Neighborhood Revitalization Initiative, LLC, Mitchell Simon, and E'toile Libbett is published at 565 F.Supp.3d 928 (E.D. Mich. 2021) and reprinted in the attached appendix at CrossPet.App.1.

The district court's opinion dismissing the claims against the City of Southfield, Frederick Zorn, Kenson Siver, Susan Ward-Witkowski, Gerald Witkowski, and Irvin Lowenberg is published at 565 F.Supp.3d 953 (E.D. Mich. 2021) and reprinted at CrossPet.App.45.

The district court's judgment is reprinted at Pet.App.67a.

JURISDICTION

The Sixth Circuit entered judgment on October 13, 2022, and denied the petition for rehearing en banc on January 4, 2023. Andrew Meisner and Oakland County filed a petition for writ of certiorari on March 9, 2023. This conditional cross-petition is filed within 30 days of that petition pursuant to Supreme Court Rule 12.5.

Lower courts had jurisdiction under 28 U.S.C. §§ 1331, 1346(a), and 1361. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Because this case only questions the constitutionality of a previous, now-repealed version of the statute at issue, Cross-Petitioners do not believe 28 U.S.C. § 2403(b), which allows a state to intervene to defend the constitutionality of a statute, applies. *See* Order, *Hall v. Meisner*, No. 21-700 (6th Cir. Sept. 16, 2022) (denying intervention). However, in an abundance of caution, pursuant to Supreme Court Rule 29.4(c), Cross-Petitioners alert the Court that they are questioning the constitutionality of a prior state statute and sent a courtesy copy to the Michigan Attorney General.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part, "No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

INTRODUCTION

Oakland County and Andrew Meisner (collectively, County) foreclosed on the homes of Tawanda Hall, Curtis and Coretha Lee, and Kristina Govan (Homeowners) to satisfy a tax debt but took far more than was owed. Pet.App.5a–6a. The County took absolute title to the homes, all of which were free of other encumbrances and valued at many times more than their tax debts. The total debts included added penalties, interest, and costs. Pet.App.5a–6a. The iteration of Michigan's tax statute operative at the time authorized the confiscation of the entirety of these debtors' home equity. Pet.App.4a–5a.

The County did not conduct any public sale of the homes. Pet.App.5a–6a. Instead, the City of Southfield exercised a statutory option to purchase the homes "for a public purpose" directly from the County by paying only the tax debt on each property. *Id.*; Mich. Comp. Laws § 211.78m (2017). The City then transferred the properties to the Southfield Neighborhood Revitalization Initiative, LLC (SNRI) for $1 each to fulfill the City's public purposes.[1]

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[1] The City of Southfield sought to "revitalize and stabilize neighborhoods" and return homes to "productive use and purchase by individuals and families seeking housing opportunities within the City of Southfield." City Resolution, R.44-5, PageID.1254. To that end, the City partnered with the Southfield Non-Profit Housing Corporation, which set up the for-profit Southfield Neighborhood Revitalization Initiative, LLC, to sell the properties. *See id.*; CrossPet.App.53. Both organizations

Pet.App.5a. Ms. Hall, Ms. Govan, and the Lees did not receive or have an opportunity to recover compensation for the equity (i.e., the value of their homes beyond the tax lien, penalties, interest, and collection costs) taken by the County during the foreclosure or at any later time from the City or SNRI.

On appeal to the Sixth Circuit, the court held that, consistent with hundreds of years of Anglo-American history and tradition, and the Michigan Supreme Court's decision in *Rafaeli, LLC v. Oakland County*, 505 Mich. 429, 474–84 (2020), the County unconstitutionally took private property when it took the equity in the homeowners' properties. The County's failure to pay just compensation upon taking the properties violated the Fifth Amendment of the U.S. Constitution. Pet.App.4a, 21a.

Whether the government's confiscation of home equity is an unconstitutional taking or a fine within the meaning of the Excessive Fines Clause are questions currently pending before this Court in *Tyler v. Hennepin County*, No. 22-166. *See also Meisner v.*

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are controlled by City officials. Mayor Siver is president of the Non-Profit and signed the paperwork creating the Company. CrossPet.App.53. City Manager Fred Zorn is a board member and Vice-President of the non-profit, and the "manager" and registered agent for the company. *Id.* The district court below denounced the structure in two separate orders: "[T]he fact that elected officials were using their political status . . . by obtaining properties before they could go to auction following tax foreclosure is, at a minimum, troubling. Clearly, defendants, particularly the elected officials, have [not] even attempted to avoid the appearance of impropriety, as a clear conflict of interest exists regarding their involvement with SNPHC and SNRI. This type of behavior is not only shocking to the consc[ience], but also rightfully breeds distrust among their electorate." CrossPet.App.43–44; CrossPet.App.90–91.

Hall, No. 22-874, Petition for Writ of Certiorari at i ("The question presented is substantively the same one this Court is already considering in *Tyler*[.]"). While the County here petitions for review and remand[2] solely of the takings claim, the Sixth Circuit decision addressed additional claims. The court below reached and rejected the Homeowners' excessive fines claim, which was pled in the alternative. If this Court grants the County's petition to evaluate or remand the Homeowners' takings claims, then this Court also should evaluate or remand the Homeowners' excessive fines claim.[3]

STATEMENT OF THE CASE

A. Oakland County took property worth substantially more than Ms. Hall, Ms. Govan, and the Lees owed the County

In 2010, Tawanda Hall bought a five-bedroom, four-bath, single-family home in Southfield, Michigan, where she and her family lived for many years. *Hall v. Meisner*, No. 2:20-cv-12230-PDB-EAS, Compl. Exh. B, R.1-3, PageID.35–37 (E.D. Mich. Aug. 18, 2020).[4] On February 14, 2018, the County foreclosed and took title to Ms. Hall's home to collect $22,642 in property taxes, interest, penalties, and fees. Pet.App.5a, 31a. Under Michigan's tax statute,

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[2] The County primarily requests this Court to hold its petition pending the result in *Tyler*, then vacate and remand for reconsideration in light of *Tyler*. *See* Pet. at 2, 5, 11, 18, 22.

[3] This Cross-Petition does not request review of the other state and federal claims alleged in the Complaint. *See* CrossPet.App.121–26.

[4] The Complaint (without exhibits) is reprinted at CrossPet.App.92.

she then entered into a payment plan with the County. CrossPet.App.100. Without notice and despite the existing payment plan, the County deeded itself the property, extinguishing her interest in it.[5] Then, on June 29, 2018, the County Treasurer deeded the property to the City, which paid only the tax debt. CrossPet.App.97. On October 23, 2018, the City gave the property to the Southfield Neighborhood Revitalization Initiative, LLC, for $1, which in turn later sold it for $308,000—$285,000 more than Ms. Hall's total tax debt. *Id.* Ms. Hall received nothing for her equity.

Pursuant to that same process, the County foreclosed on the home of Curtis and Coretha Lee for

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[5] Curiously, even though state law suggests that payment plans should be entered into prior to foreclosure, *City of Dearborn Heights v. Wayne Cnty. Treasurer*, Nos. 327928, 327950, 2016 WL 6825434, at *1, *6–*8 (Mich. Ct. App. Nov. 17, 2016) (unpublished), the County gave Ms. Hall a payment plan for $650 per month only two days before her right to redeem ended. Payment Plan, R.32-2, PageID.353. She was told that she would not need to make timely payments and only needed to pay it off before the following February. She made one substantial payment. *Id.*; *Hall v. Meisner*, No. 2:18-cv-14086, Compl. R.1, PageID.30 (E.D. Mich. Dec. 28, 2018). Because her case was dismissed before fact-finding, it is unclear whether the County cancelled the payment plan on April 1, when she failed to redeem and Michigan's statute granted absolute title to the County, or whether the County waited until she missed her next payment. *Cf. In re Matter of Petition of the Treasurer of Oakland*, No. 17-159297, Opinion and Order (Mich. Cir. Ct. Nov. 6, 2018), *available at* R.43-10, PageID.1132 (finding that Oakland County had said "not to worry about late, lesser or missing payments because as long as she was in a payment plan the Treasurer would not foreclose"); *see also City of Dearborn Heights*, 2016 WL 6825434, at *8 ("the Treasurer could waive strict compliance with the payment dates . . . and it clearly did so by accepting the late payments and filing the certificate") (citation omitted).

$30,547 in property taxes, penalties, interest, and costs; after the same series of conveyances, the Southfield Neighborhood Revitalization Initiative sold the home for $155,000—approximately $124,000 more than the Lees' total tax debt. Pet.App.6a. The County likewise foreclosed on the home of Kristina Govan for a tax delinquency of $43,350; the Initiative (after the same conveyances) still holds title to the property, which, like the others, is worth more than her total tax debt. *Id.*

When the County took absolute title to each Homeowner's property, the homes were worth more than each debtor owed. CrossPet.App.109. None of the Homeowners had mortgages on their properties. CrossPet.App.100. None of the Homeowners recovered even a dime for the value of their homes that far exceeded their debts, because a prior version of Michigan's tax statute purported to authorize the forfeiture of all their equity. CrossPet.App.116.

The County now alleges for the first time in its petition for writ of certiorari—without any support in the record—that the properties were "rehabbed" before they were sold, Pet.3. This new factual assertion is inappropriate for consideration on a motion to dismiss. *See Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060, 1063 (4th Cir. 1984). In fact, the Complaint—the allegations of which are presumed true on a motion to dismiss—alleges only that the City contracted with Habitat for Humanity to make "needless repairs." CrossPet.App.102. Moreover, once the government took absolute title to the properties, the act of "taking" was complete. Pet.App.20a, 25a (The County's taking "absolute title to plaintiffs' homes . . . was the action that caused the

injury giving rise to this suit; what happened afterward had no effect upon their legal rights."). The condition of the properties at the time of the taking may go to the amount of just compensation, but does not affect the validity of the constitutional claims.

B. Michigan's tax foreclosure scheme

Michigan's property tax statutes at the time provided that on March 1 any taxes owed from the prior calendar year are "delinquent." Mich. Comp. Laws § 211.78a(2). If still unpaid one year later, the government began a year-long preparation to foreclose on the property. *Id.* § 211.78g(1); *Rafaeli,* 505 Mich. at 444. By the following spring, if the debt was unpaid and procedures were followed, Michigan's circuit court would enter a foreclosure judgment that vested "absolute title" to the property in the county if the debt was not paid by March 31. Mich. Comp. Laws § 211.78k(6) (2019). By the time of foreclosure, more than 40% in interest, costs, and penalties were added to the original property tax debt. Mich. Comp. Laws § 211.78a; Mich. Comp. Laws § 211.78g(3). Once the County took title, a city or town in which the property was located could purchase the property "for a public purpose" by paying only the outstanding tax debt. If not purchased by another government entity, a County would ordinarily sell the property at auction and keep all the proceeds to fund its activities.

Michigan's Legislature amended the laws that applied to the Homeowners in 2020 in response to the Michigan Supreme Court's decision in *Rafaeli*.[6] That

[6] The amendments went into effect on December 22, 2020, with the following explanation: "This amendatory act is curative and intended to codify and give full effect to the right of a former

case held that, consistent with common law protections developed over hundreds of years in English and American law, government effects a taking without just compensation when it fails to refund the surplus proceeds from a tax sale to the former owner of the property. 505 Mich. at 476–84. The case arose when Uri Rafaeli inadvertently underpaid his property taxes by $8.41, Oakland County foreclosed and took absolute title, then sold the property at auction for $24,500, keeping all the proceeds. *Id.* at 473. The court held that the County violated the Michigan Takings Clause when the County kept the surplus proceeds from the sale of Rafaeli's property, *id.* at 474, and declined to rule on whether it effected a federal taking. *See id.* at 458 n.65.[7]

After the Michigan Supreme Court issued its decision in *Rafaeli*, the state legislature made significant amendments to its tax foreclosure statutes. Crucially, homeowners should no longer lose their equity when the government forecloses to recover tax debts. Regardless of whether this Court grants and evaluates or remands these Cross-Petitions, Michigan law now gives debtors like the

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holder of a legal interest in property to any remaining proceeds resulting from the foreclosure and sale of the property to satisfy delinquent real property taxes under the general property tax act, 1893 PA 206, MCL 211.1 to 211.155 , as recognized by the Michigan Supreme Court in *Rafaeli, LLC v. Oakland County*, docket no. 156849, consistent with the legislative findings and intent under section 78 of the general property tax act, 1893 PA 206, MCL 211.78."

[7] The *Rafaeli* case did not present an excessive fines claim to the Michigan Supreme Court. *See Rafaeli*, 505 Mich. at 484 n.134 (noting abandonment of claim).

Homeowners a right to claim the surplus proceeds from a public sale of their property. Mich. Comp. Laws § 211.78m. Cities that want to exercise a right of first refusal must pay fair market value for the property, and the surplus proceeds from that sale are returned to the debtor. *Id.*

C. Procedural history

Homeowners filed this lawsuit, a putative class action, in federal court one month after the Michigan Supreme Court decided *Rafaeli*.[8] Homeowners alleged, *inter alia*, that the defendants effected a taking without just compensation by taking more than they owed the County, or alternatively violated the Excessive Fines Clause, incorporated through the Fourteenth Amendment. CrossPet.App.112–21.

The district court dismissed Homeowners' claims on a motion to dismiss for failure to state a claim, misconstruing the Michigan Supreme Court's decision in *Rafaeli* as preventing Homeowners' takings and excessive fines claims. Pet.App.53a–60a. The district court issued separate opinions and orders dismissing the non-County defendants, and dismissing certain plaintiffs (not Petitioners or Cross-Petitioners here) on procedural grounds. Pet.App.25a, 51a; CrossPet.App.43, 91.

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[8] The proposed class consisted of "all titleholders of real property and associated property rights including equity and/or surplus proceeds generated by the involuntary transfers orchestrated by Defendants in the City of Southfield during the relevant statutorily-limited time period who were subject to the unconstitutional conduct and concerted actions which resulted in the taking and/or unconstitutional forfeiture of their surplus or excess equity beyond the tax debt owing and due." CrossPet.App.108.

On appeal, the Sixth Circuit held that the government violates the Fifth Amendment's Takings Clause when it confiscates equity in property to satisfy a debt of lesser value. Pet.App.21a. The "self-dealing" Michigan statute allowed the state and counties, "alone among all creditors," to take a landowner's equity "without paying for it, when it collects a tax debt." Pet.App.3a. The court held that confiscation of the equity was "an aberration from some 300 years of decisions by English and American courts" and "[t]he government may not decline to recognize long-established interests in property as a device to take them." *Id.* By taking the Homeowners' equity, the County violated the Fifth Amendment. *Id.*

The court affirmed dismissal of the excessive fines question for "substantially the reasons stated by the district court." Pet.App.22a. The district court, for its part, held that the forfeiture of the Homeowners' equity was not punishment, and therefore outside the scope of the Excessive Fines Clause, because the Michigan Supreme Court in *Rafaeli* said "that the GPTA 'is not punitive in nature.'" Pet.App.59a (quoting *Rafaeli*, 505 Mich. at 449).[9]

The court reversed dismissal of the state law claims and held that on remand the district court must abstain from deciding those. Pet.App.21a–22a (Michigan courts must decide whether the facts alleged violate the Michigan Constitution's Takings Clause).

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[9] The Sixth Circuit also affirmed dismissal of some plaintiffs on procedural grounds. Pet.App.23a–24a.

REASONS FOR GRANTING THE CONDITIONAL PETITION

I. The Lower Court's Treatment of the Excessive Fines Claim Conflicts with This Court's Precedent

The County confiscated the Homeowners' equity, hundreds of thousands of dollars more than the taxes, penalties, interest, and fees owed. This confiscation, imposed to deter noncompliance with tax laws, is at least partly punitive and therefore a "fine" within the meaning of the Excessive Fines Clause.

A. The decisions below conflict with this Court's precedents applying the Excessive Fines Clause to civil punishments

The "[p]rotection against excessive punitive economic sanctions secured by the [Excessive Fines] Clause is . . . both fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition." *Timbs v. Indiana*, 139 S.Ct. 682, 689 (2019) (citation and quotation omitted). To determine whether an economic sanction falls within its protection, the Court considers "whether it is punishment," not whether it is criminal or civil. *Austin v. United States*, 509 U.S. 602, 610 (1993). The Clause applies to forfeitures that are "at least partially punitive." *Timbs*, 139 S.Ct. at 690; *see also United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (the Clause "limits the government's power to extract payments, whether in cash or in kind [like forfeiture of an interest in real property] as punishment for some offense"). A forfeiture or fine has the hallmark of punishment when it "cannot fairly be

said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." *Austin*, 509 U.S. at 610–11 (emphasis added).

In *Austin*, the Court held that the civil forfeiture of a mobile home and auto body shop used in an illicit drug sale was "punishment," and therefore a fine subject to the Eighth Amendment. *Id.* at 604–06. The Court noted that forfeitures under the statute in that case looked like punishment because they were neither fixed in amount nor linked to the public harm caused by the property owner's actions. *Austin*, 509 U.S. at 621. They "var[ied] so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental," thus defying description as "remedial." *Id*. at 622 n.14.

The same is true of Michigan's former home forfeiture scheme. Ms. Hall, for example, lost her home worth approximately $308,000 to satisfy a debt of $22,642 in taxes, penalties, interest, and costs. The government confiscated property more than 13 times greater than her debt. Had her property been worth twice as much with the same or lesser debt, the penalty would have been capriciously greater. As in *Austin*, there is no relationship between the debt owed and the sanction imposed.

The type of offense here differs from *Austin*—the offense of depriving the sovereign of timely revenue and causing the trouble of collections versus the offense of allowing one's property to be used in criminal activity—but that does not change the fact that the forfeiture here works a "payment to a sovereign as punishment for some offense, and, as

such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin*, 509 U.S. at 622 (quotation and citation omitted). Although the obligation to pay taxes is nonpenal, tax *penalties* are consistent with the conception of public offenses described as punitive in *Huntington v. Attrill*, 146 U.S. 657, 668 (1892): "The test whether a law is penal, in the strict and primary sense, [has been] whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *See also Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 278–80 (1935).

Yet the lower courts held that the sanction here could not be punitive, because the Michigan Supreme Court said the purpose of the statute was primarily to collect taxes. Pet.App.59a. Taxation does not hold such power to immunize itself from constitutional scrutiny. *See Child Labor Tax Case*, 259 U.S. 20, 36–38 (1922) (striking down a tax penalty under the Tenth Amendment and noting, "[t]o give such magic to the word 'tax'" when imposed for an offense against the public as to allow taxes to escape constitutional scrutiny—it would "break down all constitutional limitation of the powers of" the government). And although this case arises in the overall context of taxation, Homeowners are *not* challenging the amount of the tax and its associated penalties, interest, and costs. They are challenging the confiscation of property *above and beyond* the tax. This aspect of the decisions below conflicts with *Austin* and *Timbs*, which said that a statute only needed to be partly punitive.

Thus, the lower courts' dismissal of the Homeowners' Excessive Fines Clause claim conflicts with this Court's precedent and warrants review.

B. The lower courts' decisions conflict with standards established by this Court in *Kokesh v. S.E.C.* for determining when a civil sanction constitutes a punishment

Kokesh v. S.E.C., 581 U.S. 455, 457 (2017), confirms the punitive nature of a statute that takes more than necessary to remedy a harm. *Kokesh* was not an Excessive Fines Clause case, but one that determined the meaning of the term "penalty" in a statute of limitations governing federal prosecution "for the enforcement of any civil fine, penalty, or forfeiture." *Id.* (quoting 28 U.S.C. § 2462). At issue was whether the U.S. Securities and Exchange Commission was subject to a five-year limitation period in seeking disgorgement of money as a remedy for the violation of securities laws. *Id.* at 457–59.

After defining a "penalty" as "a punishment . . . imposed and enforced by the State for [an] . . . offense against its laws," *id.* at 461 (quoting *Huntington*, 146 U.S. at 667), the Court engaged in a careful discussion of the concept of punishment that bears directly on Excessive Fines questions, including the one presented by the Homeowners. "When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Kokesh*, 581 U.S. at 465 (citation omitted). Disgorgement is in many cases a punishment because it "go[es] beyond compensation" for loss, stripping the penalized person of more funds than needed to provide restitution or compensation for a loss. This element of the sanction

can only be understood as having a deterrent effect, and "[s]anctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'" *Id.* at 464, 467 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979), and citing *Bajakajian*, 524 U.S. at 329 ("Deterrence . . . has traditionally been viewed as a goal of punishment.")).

The district court said that the law's aim was to "encourage" timely tax payments and therefore not punitive, which precluded application of the Excessive Fines Clause. Pet.App.59a. But this conclusion, affirmed by the Sixth Circuit, is contrary to *Kokesh*'s analysis of the Court's Excessive Fines jurisprudence, which "emphasized 'the fact that sanctions frequently serve more than one purpose.'" *Kokesh*, 581 U.S. at 466 (quoting *Austin,* 509 U.S. at 610). "'A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.'" *Id.* at 467 (quoting *Bajakajian,* 524 U.S. at 331 n.6).

Michigan's former scheme stripped property owners, including the Homeowners here, of more than needed to satisfy their debts plus reasonable interest, penalties, and costs to compensate the government for loss. Just as in *Kokesh*, Michigan's statute went "beyond compensation," and accordingly had the effect of punishing property owners for violating a public law. *Id.* (quotation omitted). The Eighth Amendment applies when a civil sanction is "at least partially punitive," *Timbs*, 139 S.Ct. at 690, and therefore applies to the penalty imposed on the

Homeowners. *See Sessions v. Dimaya*, 138 S.Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("Today's 'civil' penalties include confiscatory rather than compensatory fines . . . .").

This Court has counseled that "[t]here is good reason to be concerned [about] fines, uniquely of all punishments" because most types of punishment cost a state money whereas "fines are a source of revenue . . . . [I]t makes sense [therefore] to scrutinize government action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991). The penalty imposed on Ms. Hall, the Lees, and Ms. Govan in this case, resulting in a large windfall to the government—and the even greater sums commonly captured in other similar cases—are testimony in support of that concern.

II. Lower Courts Have Conflicting Approaches to Civil Confiscations Under the Excessive Fines Clause

While this Court's decisions in *Timbs* and *Bajakajian* hold that the Excessive Fines Clause applies to civil confiscations in some circumstances,[10] lower courts remain confused about whether confiscations of money or property in a purely civil context is subject to constitutional limits.

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[10] In *Bajakajian*, the offense was solely a failure to report the transportation of money outside the United States, with no relation to other illegal activities, and the defendant was not a money launderer, drug trafficker, or tax evader, the type of individual the statute was designed to punish. 524 U.S. at 337–38.

In *Yates v. Pinellas Hematology & Oncology, P.A.*, the Eleventh Circuit considered whether a monetary award imposed under the False Claims Act is a fine for the purposes of the Excessive Fines Clause. 21 F.4th 1288, 1308 (11th Cir. 2021). Like the lost home equity, the amount of the award did not correspond to any monetary injury caused by the person subject to the penalty. Because the False Claims Act fines are "compulsory irrespective of the magnitude of the financial injury to the United States, if any," the court held that the penalties were "at least in part punitive" and therefore fines subject to analysis under the Excessive Fines clause. *Id.*

The Ninth Circuit takes the same approach to penalties that bear no connection to the offense. In *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000), the court considered a fixed deduction from funds received by prison inmates that supported a victim's compensation fund. Because the money was "[e]xtract[ed] . . . from each and every inmate, without regard to the existence and extent of any injury to a victim," it was not purely remedial, but was "punitive and subject to Eighth Amendment scrutiny." *Id.*; *see also Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020) (late fees connected to parking tickets are subject to Excessive Fines Clause per *Bajakajian*); *United States v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001) (similar ruling regarding False Claims Act penalties); *Hays v. Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003) (same).

The Seventh Circuit also applied an excessive fines analysis to a flat $500 administrative penalty imposed on owners of vehicles found to contain illegal drugs or guns in *Towers v. City of Chicago*, 173 F.3d

619, 621 (7th Cir. 1999). The court held that the penalty could not be "solely remedial" because it does not compensate the city for any losses. *Id.* at 624. Instead, its plain "punitive purpose" was to "deter[] owners from allowing their vehicles to be used for prohibited purposes." *Id.* Even if this deterrence was only a part of the reason for imposing the penalty, that was enough to warrant consideration of whether the amount violated the Excessive Fines Clause. *Id.* (applying *Austin*, 509 U.S. at 609). *See also Dorce v. City of New York*, 608 F.Supp.3d 118, 143–44 & n.10 (S.D.N.Y. 2022) (noting discrepancy between taxes owed and equity seized and that "incentivizing prompt payment is merely another way of saying deterring late payment, which 'reflects a purpose that is deterrent in part, and therefore punitive, as opposed to furthering the sole goal of compensating for lost revenue'") (citation omitted).

Some state courts have also analyzed civil penalties as fines subject to the Excessive Fines Clause. For example, the California Supreme Court analyzes purely civil penalties under the Excessive Fines Clause. In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 712 (2005), the court considered a statute that penalized "nonsale distribution" of cigarettes on public property where minors may be present. "Each distribution of a single package . . . to an individual member of the general public" is subject to "a civil penalty of not less than $200 for one act, $500 for two acts, and $1000 for each succeeding act." *Id.* After handing out cigarettes at several events in 1999, R.J. Reynolds was fined

$14,826,200.[11] *Id.* The California high court unanimously held that the penalty plainly qualified as a fine under *Bajakajian*[12] and remanded for a determination of whether the fine was unconstitutionally excessive. *Id.* at 731 (fine would be excessive if the company believed, in good faith, that it acted in compliance with the law and if the Attorney General delayed notifying the company that it was out of compliance in order to run up the amount of the penalty).

Similarly, in *Colorado Department of Labor and Employment v. Dami Hospitality, LLC*, 442 P.3d 94, 96 (Colo. 2019), *cert. denied*, 140 S.Ct. 849 (2020), the Colorado Supreme Court applied the Excessive Fines Clause to civil penalties ranging from $250 per day to $500 per day, imposed each day that a business was out of compliance with the state's workers' compensation law. The court held that the penalties were imposed regardless of any underlying criminal offense, and that there is no relevant distinction between penalties that "are part of a criminal scheme or a civil one." *Id.* at 100. Relying on *Austin* and *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 285 (1989), the court held that the

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[11] R.J. Reynolds gave away cartons and packages containing a total of 108,155 packs of cigarettes to 14,834 people at its booth or tent at a street fair, motorcycle race, car show, beer festival, and similar events. Each recipient showed proof that they were current smokers and at least 21 years old. *Id.* at 713.

[12] *See also Hale v. Morgan*, 22 Cal.3d 388, 407–08 (1978), in which concurring Justice Newman opined that a $100 daily fine for cutting off a nonpaying tenant's utilities to prompt him to leave violated the state constitutional provision barring excessive fines. The majority struck down the fine on due process grounds. *Id.* at 397–403.

Excessive Fines Clause applied, even to corporations. *Dami Hosp.*, 442 P.3d at 100. It then remanded for the lower court to consider whether the fine was unconstitutionally disproportionate to the gravity of the offense, in conformity with the test adopted in *Bajakajian*. *Id.* at 101.[13] *See also Wilson v. Comm'r of Revenue*, 656 N.W.2d 547, 554 (Minn. 2003) (penalty on employers who disregard wage levy notices from the state that exceeds costs needed to investigate or recover lost revenue is punishment because it can only be explained by and "*must* be calculated to deter").

To the contrary, the First Circuit's decision in *United States v. Toth*, 33 F.4th 1 (1st Cir. 2022), held that the civil FBAR penalty was not a fine subject to the Excessive Fines Clause because it was "not tied to any criminal sanction," *id.* at 16, and served a remedial purpose, even without any correlation between the penalty and the financial loss, if any, caused by the underlying violation. *Id.* at 18–19. *See also McNichols v. Comm'r*, 13 F.3d 432, 434 (1st Cir. 1993) (in a case involving a convicted drug dealer challenging penalties for income tax evasion, the court limited *Austin* to its facts and the specific statute at issue). Although this Court denied Monica Toth's petition for writ of certiorari, Justice Gorsuch observed that the First Circuit's decision is "difficult to reconcile with our precedents." *Toth v. United States*, 143 S.Ct. 552, 553 (2023) (Gorsuch, J., dissenting from denial of certiorari) (noting that "civil" and "remedial" labels should not insulate partially

[13] Additionally, the court held that "courts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment." *Id.* at 102.

punitive penalties from analysis under the Excessive Fines Clause).

CONCLUSION

If the County's petition is granted, so too should the Homeowners' Cross-Petition be granted.

DATED: April 2023.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TAWANDA HALL, *et al.*,

Plaintiffs,

v.

OAKLAND COUNTY TREASURER ANDREW MEISNER, OAKLAND COUNTY, SOUTHFIELD NON-PROFIT HOUSING CORPORATION, and CITY OF SOUTHFIELD, *et al.*,

Defendants,
_____/

Case No. 20-12230

Paul D. Borman
United States
District Judge

OPINION AND ORDER GRANTING DEFENDANTS SOUTHFIELD NON-PROFIT HOUSING CORPORATION, SOUTHFIELD NEIGHBORHOOD REVITALIZATION INITIATIVE, LLC, MITCHELL SIMON, AND E'TOILE LIBBETT'S MOTION TO DISMISS (ECF NO. 31)

On August 18, 2020, Plaintiffs, former real property owners in the City of Southfield, Michigan, filed a proposed class action complaint against 13 defendants. The defendants can be separated into four

groups: (1) Oakland County Treasurer Andrew Meisner ("Treasurer") and Oakland County (collectively, the "Oakland County Defendants"); (2) City of Southfield ("Southfield"), City Manager Frederick Zorn, Mayor Kenson Siver, Former City Attorney Susan Ward-Witkowski, Gerald Witkowski (Code Enforcement and Eviction Administrator for SNRI), and Treasurer Irvin Lowenberg (collectively, the "Southfield Defendants"); (3) Southfield Neighborhood Revitalization Initiative ("SNRI"), Southfield Nonprofit Housing Corporation ("SNPHC"), Director E'Toile Libbett ("Director SNRI"), and Mitchel Simon ("Treasurer SNPHC") (collectively, the "SNRI Defendants"); and (4) Habitat for Humanity of Oakland County, Inc. ("Habitat"). (ECF No. 1, Complaint.)

The Complaint contains seven counts: Count I – Taking Without Just Compensation – Fifth Amendment, under 42 U.S.C. § 1983, against the Oakland County Defendants and Southfield Defendants only; Count II – Inverse Condemnation – Fifth Amendment; Count III – Violation of the Takings Clause of the Michigan Constitution; Count IV – Eighth Amendment Violation – Excessive Fine Forfeiture, against Oakland County only; Count V – Procedural Due Process, against Southfield and Oakland County Treasurer only; Count VI – Substantive Due Process, against Southfield and Oakland County Treasurer only; and Count VII (mislabeled "Count VI") – Unjust Enrichment, against all Defendants except Oakland County. (Compl.) Plaintiffs ask the Court to award them the "taken and/or forfeited equity" in their foreclosed properties along with money damages for the alleged constitutional violations and claim of unjust enrichment. (*Id*., Relief Requested, PageID.30-31.)

Now before the Court is Defendants Southfield Non-Profit Housing Corporation, Southfield Neighborhood Revitalization Initiative, LLC, Mitchell Simon, and E'Toile Libbett's (the "SNRI Defendants") Motion to Dismiss Complaint. (ECF No. 31.)[1] The Court held a hearing using Zoom videoconference technology on Tuesday, September 28, 2021, at which counsel for Plaintiffs and Defendants appeared. For the reasons that follow, the Court GRANTS the SNRI Defendants' Motion to Dismiss Complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The eight named Plaintiffs in this action allege that they previously owned real property located in the City of Southfield, Michigan. All named Plaintiffs failed to pay property taxes and their properties were foreclosed by Defendant Oakland County Treasurer on the basis of nonpayment of taxes pursuant to Michigan's General Property Tax Act ("GPTA"), Mich. Comp. Laws § 211.1 *et seq*. (Compl. ¶ 1, PageID.2.)

The GPTA permits the recovery of unpaid real-property taxes, penalties, interest, and fees through the foreclosure and sale of the property on which there is a tax delinquency. *See* Mich. Comp. Laws § 211.1 *et seq*. Under the Act, the county treasurer may elect to act as the collection agent for the municipality where

[1] The three other groups of Defendants also filed separate motions to dismiss. The Court granted Defendant Habitat for Humanity's Motion to Dismiss on April 20, 2021 (ECF No. 58), and the Oakland County Defendants' Motion to Dismiss on May 21, 2021. (ECF No. 62). The Southfield Defendants' motion to dismiss will be addressed separately by the Court. (*See* ECF No. 34, Southfield Defendants' Motion to Dismiss.)

the property is located when taxpayers become delinquent on their property taxes. Mich. Comp. Laws § 211.78(8). After three years of delinquency, multiple notices and various hearings, tax-delinquent properties are forfeited to the county treasurer; foreclosed on after a judicial foreclosure hearing by the circuit court and title to the forfeited property is transferred to the county treasurer; and, if the property is not timely redeemed by March 31 of that year, fee simple title is vested absolutely in the county treasurer, without any further redemption rights available to the delinquent taxpayer. Mich. Comp. Laws § 211.78 *et seq*. As the Act applied during the time periods relevant to this action, after foreclosure, the property is then disposed of as follows:

(1) The state or municipality where the property is located has the right to claim the property in exchange for the payment to the county of unpaid taxes, interest and other costs (the "minimum bid");[2] or

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[2] The longstanding ability for municipalities to purchase tax foreclosed properties for an amount equal to the taxes and penalties due and owing has since been eliminated as a result of a recent amendment to the GPTA, Mich. Comp. Laws § 211.78m, which became effective on January 1, 2021. The amended GPTA now allows the state and/or municipalities to purchase tax foreclosed properties "at the greater of the minimum bid or its fair market value[.]" Mich. Comp. Laws § 211.78m(1). While this amendment will affect the manner in which future tax foreclosure sales are handled, it does not provide a basis for liability against the defendants in this action. The Act provides that any retroactive effect is dependent upon a decision of the Michigan Supreme Court that "its decision in Rafaeli, LLC v. Oakland County, docket no. 156849, applies retroactively." Mich. Comp. Laws § 211.78t(1)(b)(i). There has been no such decision from the Michigan Supreme Court.

(2) If the state or municipality does not exercise their right of first refusal, the property is put up for sale at a public auction in July and, if not sold, again in October.

Mich. Comp. Laws § 211.78m.

Plaintiffs in this case allege that a judgment of foreclosure was entered against each of them and pertaining to each Plaintiff's property, by the Oakland County Circuit Court. (Compl. ¶¶ 21-28, PageID.5-7.) Specifically, Plaintiffs allege:

- Plaintiff **Tawanda Hall** owed $22,642.00 in delinquent property taxes.[3] The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $308,000.00.

- Plaintiff **Carolyn Miller** owed $29,759.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $120,000.00.

- Plaintiff **American Internet Group, LLC** owed $9,974.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of

[3] Plaintiffs plead that this amount includes the "delinquent property taxes, interest penalties, and fees." (Compl. ¶ 21, PageID.5.)

Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $149,900.00.

- Plaintiff **Anthony Akande** owed $2,415.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $152,500.00.

- Plaintiffs **Curtis Lee and Coretha Lee** owed $30,547.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $155,000.00.

- Plaintiff **Marcus Byers** alleges he had "equitable title with his court appointed guardian" in the subject property and owed $4,113.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quitclaimed the property to SNRI for $1.00, which still holds title to the property. Plaintiffs allege the property has a fair market value of $90,000.00.

- Plaintiff **Kristina Govan** owed $45,350.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the

> minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00, which still holds title to the property. Plaintiffs allege the property "is worth in excess of the amount owed in taxes." (Compl. ¶¶ 21-27, PageID.5-7.)

Plaintiffs assert that "[m]ost of the Plaintiffs had entered into delinquent property installment agreements [with the County]," even though "[t]he Treasurer knew the Circuit Court had already entered a Judgment of foreclosure prior to entering the delinquent property tax payment plans with Plaintiffs ... which purportedly prevented foreclosure." (*Id.* ¶¶ 31-32, PageID.7.) Plaintiffs claim that they "made a payment to the Treasurer with the promise that such payment would prevent tax foreclosure," and "in many instances ... made substantial payments of 1-2 years of property taxes prior to March 31st of the year of foreclosure," but that the County still foreclosed on their properties. (*Id.* ¶¶ 31, 33-34, PageID.7.)

As a result of the foreclosures, Plaintiffs lost all title and interest in their properties, and title in fee vested in the foreclosing government unit ("FGU"), in this case, the Oakland County Treasurer. (*Id.* ¶¶ 21-28, PageID.5-7.) *See* Mich. Comp. Laws § 211.78k(6). Pursuant to Mich. Comp. Laws § 211.78m(1) (as it existed at that time), the Oakland County Treasurer offered the properties to the City of Southfield under the City's right of first refusal. (*Id.* ¶ 29, PageID.7.) In each case, the City paid the Treasurer the minimum amount due under the statute – the delinquent tax amount – with funds provided by Defendant Southfield Nonprofit Housing Corporation ("SNPHC"). (*Id.* ¶¶ 21-27, 83(e), PageID.5-7, 16.) The City in turn conveyed each of the properties to Defendant Southfield Neighborhood Revitalization Initiative, LLC ("SNRI") for $1.00. (*Id.*)

SNRI was created by Defendant SNPHC, and the SNPHC is the sole member of SNRI. (ECF No. 31, SNRI Defs.' Mot. at p. 3, PageID.182.) SNRI was formed for the purpose of purchasing tax foreclosed and other properties, improving such properties, selling such properties to persons of low to moderate income when possible, and improving housing and homeownership opportunities in the City of Southfield, and to otherwise restore tax-foreclosed properties on the tax-roll. (*Id.*, citing ECF No. 31-2, SNRI Operating Agreement.)

According to Defendants, under this initiative, SNRI entered into an agreement to work with Defendant Habitat for Humanity ("Habitat"), to rehabilitate the homes that are salvageable. (SNRI Defs.' Mot. at p. 3, PageID.182; ECF No. 24, Habitat Def.'s Mot. at p. 1, PageID.145.) Plaintiffs allege that Habitat received "close to $300,000 in funds from SNRI in 2016, [and] was paid over 1 million dollars from SNRI since its inception in June of 2016 by being the recipient of often needless repairs, as well as the conveyance of property from SNRI, City of Southfield, and the SNPHC for less than full consideration." (Compl. ¶ 46, PageID.9.)

Plaintiffs assert that the City of Southfield, SNPHC and the SNRI have identical and interchangeable governance. Plaintiffs allege that Southfield Mayor Kenson Siver is a board member of SNPHC and that Southfield City Manager Fred Zorn is "a managing member of SNRI and ... also a board member of SNPHC." (Compl. ¶¶ 7, 49, PageID.3, 10.) Mayor Siver is listed as the President of SNPHC, which is the sole member of SNRI, and Zorn, Mitchell Simon (a CPA), and E'toile Libbett (a realtor) are listed as managers of SNRI. (SNRI Operating Agreement, PageID.210.) Plaintiffs allege that

Defendants Siver, Zorn, City Attorney Susan Ward-Witkowski, and Gerald Witkowski "used power under the GPTA for personal economic gain," that they understood "that they would personally benefit and utilize their power to benefit the SNRI and SNPHC," and "knew their acts would remove the subject properties from the tax rolls of Southfield for the gain of SNRI." (Compl. ¶¶ 64, 67, 71, PageID.12-13.)

B. The Michigan Supreme Court's Decision in *Rafaeli, LLC v. Oakland County*

On July 17, 2020, the Michigan Supreme Court issued its opinion in *Rafaeli, LLC v. Oakland County*, 505 Mich. 429 (2020). In *Rafeli*, two former property owners brought an action against Oakland County and its Treasurer, Andrew Meisner, alleging due process and equal-protection violations as well as an unconstitutional taking by selling their tax-foreclosed properties at public auction in satisfaction of their tax debts and then retaining the surplus proceeds from that sale of their properties. *Id.* at 438-40.

The Oakland County Circuit Court had previously granted summary disposition to defendants Oakland County and its treasurer, Andrew Meisner, finding that defendants did not "take" plaintiffs' properties "because plaintiffs forfeited all interests they held in their properties when they failed to pay the taxes due on the properties." *Id.* at 440. Plaintiffs appealed, and the Michigan Court of Appeals affirmed the circuit court's opinion and "rejected plaintiffs' argument that the GPTA's 'scheme' allows for unconstitutional takings," holding that "defendants acquired their interest in plaintiffs' properties 'by way of a statutory scheme that did not violate due process' and thus defendants were not required to compensate plaintiffs for property that was lawfully obtained." *Id.* at 441.

Plaintiffs sought leave to appeal to the Michigan Supreme Court, which granted plaintiffs' application and ordered the parties to address the issue of "whether defendants violated the Takings Clause of the United States Constitution, the Michigan Constitution, or both by retaining the proceeds from the sale of tax-foreclosed property that exceeded the amount of the taxes, penalties, interest, and fees owed on the property." *Id.*

The Michigan Supreme Court concluded that a property owner does not lose all rights to the property during the tax foreclosure proceedings. The Court first explained that "forfeiture" under the GPTA simply permits the county and county treasurer to seek a judgment of foreclosure, but "does not affect title, nor does it give the county treasurer ... any rights, titles, or interests to the forfeited property. Therefore, we reject the premise that plaintiffs 'forfeited' all rights, titles, and interests they had in their properties by failing to pay their real-property taxes." *Id.* at 448-49.

The Court next addressed plaintiffs' due process concerns, noting that "the GPTA explicitly states its intent to comply with minimum requirements of due process and not create new rights beyond those prescribed in the Constitutions of our nation or this state." *Id.* at 451. The Court stated:

> As long as defendants comply with these due-process considerations, plaintiffs may not contest the legitimacy of defendants' authority to foreclose on their properties for unpaid tax debts, *nor may plaintiffs contest the sale of their properties to third-party purchasers.*

Id. (emphasis added); *see id.* at 451 ("The remedy for a taking of private property is just compensation,

while the remedy for being deprived of property without due process of law is the return of the property.").

The Michigan Supreme Court held that Michigan's "common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of the property." *Id.* at 470. The Court also found that Michigan's 1963 Constitution "protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2." *Id.* at 473. Because the common-law interest was protected by Michigan's Takings Clause, the GPTA could not abrogate that common law interest. *Id.* (explaining that "[w]hile the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause.").

Finally, the Michigan Supreme Court held that Oakland County's retention of the proceeds of the auction sale that exceeded the amount of property taxes owed and other charges and fees constituted an unconstitutional taking.

> Once defendants foreclosed on plaintiffs' properties, obtained title to those properties, and sold them to satisfy plaintiffs' unpaid taxes, interest, penalties, and fees related to the foreclosures, any surplus resulting *from those sales* belonged to plaintiffs. That is, after the sale proceeds are distributed in accordance with the GPTA's order of priority, any surplus that remains is the property of plaintiffs, and defendants were required to return that property to plaintiffs. Defendants' retention of those surplus proceeds under GPTA

> amounts to a taking of a vested property right requiring just compensation. To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid property taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties.

Id. at 474-75 (emphasis added). *See also id.* at 476 (stating that the surplus proceeds of the sale "is a separate property right that survives the foreclosure process"). The Court clarified that "a former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus." *Id.* at 477 (emphasis added).

The Michigan Supreme Court defined "just compensation" as "the amount of surplus proceeds generated from the tax foreclosure sale." *Id.* at 481-82 ("mak[ing] clear, the property 'taken' is the surplus proceeds from the tax-foreclosure sale of plaintiffs' properties to satisfy their tax debts"). The Court expressly "reject[ed] the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of [a] position had their properties not been taken at all" because "this would run contrary to the general principle that just compensation is measured by the value of the property *taken*," and "plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full" and "[i]f plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole,

but they would themselves benefit from their tax delinquency." *Id.* at 483 (emphasis in original); *see also id.* fn. 134 ("[W]e are unaware of any authority affirming a vested right to equity held in property generally.").

> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property – *no more, no less*.

Id. at 483-84 (emphasis added); *see id.* at 477 ("Indeed, a former property owner *only* has a right to collect the surplus proceeds from the tax-foreclosure sale; that is, a former property owner has a compensable takings claim *if and only if* the tax foreclosure sale produces a surplus.") (emphases added).

The Michigan Supreme Court then held:

> Plaintiffs, former property owners whose properties were foreclosed and sold to satisfy delinquent real-property taxes, have a cognizable, vested property right to the surplus proceeds resulting from the tax foreclosure sale of their properties. This right continued to exist even after fee simple title to plaintiffs' properties vested with defendants, and therefore, defendants' retention and subsequent transfer of those proceeds into the county general fund amounted to a taking of plaintiffs' properties under Article 10, § 2 of our 1963 Constitution. Therefore, plaintiffs are entitled to just compensation, which in the

> context of a tax-foreclosure sale is commonly understood as the surplus proceeds.

Id. at 484-85.

C. The SNRI Defendants' Motion to Dismiss

The SNRI Defendants filed a motion to dismiss in this case, arguing that Plaintiffs' claims against them, and specifically their claim for unjust enrichment, is legally and factually deficient and must be dismissed under Fed. R. Civ. P. 12(b)(6). (ECF No. 31, SNRI Defs.' Mot.) The SNRI Defendants initially argue that Plaintiffs Carolyn Miller, American Internet Group, LLC, and Anthony Akande's claims are barred by res judicata for having previously litigated post-foreclosure claims against the SNRI Defendants relating to the loss of their properties, and that Plaintiff Marcus Byers lacks standing to bring any claims, because he did not own the subject property. The SNRI Defendants next argue that there is no basis for them to be liable to Plaintiffs under a theory of unjust enrichment, and further assert that Plaintiffs fail to state claims against Defendants SNPHC, Simon, and Libbett because those defendants are not named in any of the Counts in the Complaint.

Plaintiffs filed a Response in opposition to the SNRI Defendants' motion to dismiss. (ECF No. 47, Pls.' Resp.) Plaintiffs argue that Plaintiffs Tawanda Hall, Miller, American Internet Group, and Akande's claims are not barred by res judicata, and that Plaintiff Byers does have standing in this action because he had an "equitable interest" in the subject property. Plaintiffs further assert that they have stated a Fifth Amendment Takings claim and a claim under the Michigan Constitution against all SNRI Defendants (Counts I-III), as well as a claim under 42

U.S.C. § 1983 against these Defendants. Finally, Plaintiffs contend that they have stated an unjust enrichment claim against the SNRI Defendants as well.

The SNRI Defendants filed a reply brief in support of their motion to dismiss. (ECF No. 50, SNRI Defs.' Reply.) The SNRI Defendants argue that Plaintiffs fails to state an unjust enrichment claim against them post-tax foreclosure. The SNRI Defendants further contend that Plaintiffs' takings claims fail because there is no claim under Michigan law for taking "surplus equity," and Plaintiffs fail to plead that the SNRI Defendants are "state actors." Finally, the SNRI Defendants state that Plaintiffs have abandoned their claims against SNPHC, Simon, and Libbett because they failed to respond to the SNRI Defendants' argument with regard to these defendants.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. To state a claim, a complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he complaint 'does not need detailed factual allegations' but should identify 'more than labels and conclusions.'" *Casias v. Wal–Mart Stores, Inc.*, 695 F.3d 428, 435 (6th Cir. 2012) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Handy-Clay v. City*

of Memphis, 695 F.3d 531, 538 (6th Cir. 2012). The court "need not accept as true a legal conclusion couched as a factual allegation, or an unwarranted factual inference." *Id.* at 539 (internal citations and quotation marks omitted); *see also Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987)). In other words, a plaintiff must provide more than a "formulaic recitation of the elements of a cause of action" and his or her "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56. The Sixth Circuit has explained that "[t]o survive a motion to dismiss, a litigant must allege enough facts to make it plausible that the defendant bears legal liability. The facts cannot make it merely possible that the defendant is liable; they must make it plausible." *Agema v. City of Allegan*, 826 F.3d 326, 331 (6th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). It is the defendant who "has the burden of showing that the plaintiff has failed to state a claim for relief." *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015).

In ruling on a motion to dismiss, the Court may consider the complaint as well as: (1) documents that are referenced in the plaintiff's complaint and that are central to plaintiff's claims; (2) matters of which a court may take judicial notice; (3) documents that are a matter of public record; and (4) letters that constitute decisions of a governmental agency. *Thomas v. Noder-Love*, 621 F. App'x 825, 829 (6th Cir. 2015) ("Documents outside of the pleadings that may typically be incorporated without converting the motion to dismiss into a motion for summary judgment are public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies.") (internal quotation marks

and citations omitted); *Armengau v. Cline*, 7 F. App'x 336, 344 (6th Cir. 2001) ("We have taken a liberal view of what matters fall within the pleadings for purposes of Rule 12(b)(6). If referred to in a complaint and central to the claim, documents attached to a motion to dismiss form part of the pleadings…. [C]ourts may also consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies."); *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (finding that documents attached to a motion to dismiss that are referred to in the complaint and central to the claim are deemed to form a part of the pleadings). Where the claims rely on the existence of a written agreement, and plaintiff fails to attach the written instrument, "the defendant may introduce the pertinent exhibit," which is then considered part of the pleadings. *QQC, Inc. v. Hewlett-Packard Co.*, 258 F.Supp.2d 718, 721 (E.D. Mich. 2003). "Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document." *Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

III. ANALYSIS

A. Plaintiffs Miller, AIG, and Akande' Claims Against Defendant SNRI are Barred by Res Judicata, But Plaintiffs' Claims Against Defendants SNPHC, Simon and Libbett are not Barred

The SNRI Defendants argue that the claims of three of the eight named Plaintiffs – Carolyn Miller, American Internet Group, LLC, and Anthony Akande –are barred by res judicata because those plaintiffs have previously litigated postforeclosure claims in

state court against the SNRI Defendants based on the "same facts and occurrences of the tax foreclosure of their properties." (SNRI Defs.' Mot. at pp. 4-8, PageID.183-87.) Plaintiffs respond that Plaintiffs Miller, American Internet Group, and Akande's claims are not barred by res judicata, asserting that their prior litigation "was an unfair housing case based on racial discrimination in 2018" and that the "scheme to strip Plaintiffs' equity" alleged in this case was "not known at the time of the state suit." (Pls.' Resp. at p. 6, PageID.1705.)

"[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). "The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v. State*, 470 Mich. 105, 121 (2004). Under Michigan law, "the doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.* Michigan thus "take[s] a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*

In this case, Plaintiff Miller claims her property was foreclosed on for a $29,759.00 tax debt. (Compl. ¶ 22, PageID.5.) After foreclosure the City purchased the property from Oakland County for the $29,759.00 tax debt amount and deeded the property to the SNRI for $1.00. (Compl. PageID.39.) Plaintiff American Internet Group claims its property was foreclosed on

for $9,974.00 of delinquent property taxes. (Compl. ¶ 23, PageID.5-6.) The City also purchased this property for the tax debt and transferred it to the SNRI for $1.00. (Compl. PageID.42.) Similarly, Plaintiff Akande's property was allegedly foreclosed for $2,415.00, and the City purchased the property for that amount and transferred it to the SNRI for $1.00. (Compl. ¶ 24, PageID.6, 45.)

The SNRI Defendants explain that, after the foreclosures and transfers in 2016, Plaintiffs Miller, American Internet Group, and Akande, and others, filed suit in Oakland County Circuit Court in 2017 against the Oakland County Treasurer, the City of Southfield, and SNRI, alleging various discriminatory housing practices claims in relation to the foreclosure of their properties. (See ECF No. 34-2, Southfield Defs.' Mot Ex. 1, Complaint in *Ronald Hayes, et al. v. Oakland County Treasurer's Office, et al.*, Case No. 2017-157366-CZ (Michigan Sixth Judicial Circuit, 2017).) That state court complaint was based on the same premise as this case – that the County, City, and SNRI created a "scheme" to divest Southfield citizens of their homes and procure a profit through application of Michigan's tax foreclosure process. (*See id.*, PageID.457.) That complaint alleged that "once certain properties owned by African-Americans were foreclosed upon for non-payment of delinquent real estate taxes, systematically the officials of the City of Southfield that designed this discriminatory scheme made sure that these properties were requested to be held-back from public auction by the Oakland County Treasurers Office and subsequently designated for purchase by the City of Southfield, Non-Profit Housing Corporation," and "[t]hat immediately upon the City of Southfield reacquiring the real estate foreclosed upon ... then after placed the properties out-of-the-reach of the previous owners by transferring by Quit Claim Deed to an agency known as the Southfield

Neighborhood Revitalization Initiative, LLC, a for profit limited liability company...." (*Id.* ¶¶ 9-10, PageID.460-61 (emphasis in original).) The complaint further alleged "the City of Southfield through the scheme alleged in the common allegations ... targeted [plaintiff's] homes for designation for non-bid transfer to the Southfield Non-Profit Housing Commission" and that "the transfer of these non-bid homes ... were actually transferred to a 'for profit' organization-SNRI, LLC, for the ultimate personal gain of yet to be exposed individuals." (*Id.* ¶¶ 43-44, PageID.467-68.) The complaint sought, in part, "the loss of equity (FMV) in their residential properties." (*Id.* PageID.469.)

Those state court plaintiffs then moved to amend the complaint to "remove the discrimination counts and add allegations that Plaintiffs made timely payments that were rejected by Defendant Oakland County Treasurer[.]" (ECF No. 32-4, State Court Motion to Amend, PageID.389-90.) In that motion to amend, the plaintiffs alleged that "Southfield did not purchase the property for the minimum bid. Southfield quit claimed its interest to SNRI for no consideration. SNRI's Directors and/or Officers are City of Southfield officials who used their inside knowledge about these mortgage-free properties to acquire the properties for their own personal benefit and not for public purpose." (*Id.* PageID.394.)

All of the state court defendants moved to dismiss that action, and the state court judge dismissed the case with prejudice because "the claims alleged are clearly unenforceable as a matter of law," and denied the plaintiffs' motion to amend because the plaintiffs failed to provide the court with a proposed amended complaint and because any amendment would be futile. (SNRI Defs.' Mot. at p. 6, PageID.185, citing Ex. 3, ECF No. 31-4, Order on Summary

Disposition, PageID.217-19.) This dismissal constitutes an adjudication on the merits for purposes of res judicata. *Chakan v. City of Detroit*, 998 F. Supp. 779 (E.D. Mich. 1998); *ABB Paint Finishing v. Nat'l Fire Ins.*, 223 Mich. App. 559 (1997).

The SNRI Defendants contend that "Plaintiffs' current claims arise from the exact set of facts and circumstances as their prior cases – their failure to pay taxes, subsequent foreclosure by the OCT and subsequent transfers of the tax foreclosed properties," and that their claims therefore are barred by res judicata because they "rely on the same core operative facts and issues.' (SNRI Defs.' Mot. at pp. 7-8, PageID.186.)

Plaintiffs respond that their present claims "were not known at the time of the state suit," that "the landscape of the law has shifted" and "[t]his action could have not been resolved at the time of the state court case because the Michigan Constitution had not established the right to the equity/surplus proceeds from a tax foreclosure," and that "the parties were not identical." (Pls.' Resp. at pp. 6-7, PageID.1705-06.)[4]

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[4] Plaintiffs rely, in part, on a state court order declining to accept reassignment of a class action from another court, to support their argument against res judicata in this case. (Pls.' Resp. at p. 7, PageID.1706, citing Ex. G, ECF No. 42-7, PageID.797-98.) However, that state court order declining reassignment is not persuasive authority. In that case, the defendants moved to have the case reassigned from Judge Denise Langford-Morris to Judge Hala Jarbou because Judge Jarbou handled the 2017 foreclosure case. Judge Jarbou declined reassignment as improper under the local court rule regarding assignment of cases, finding "the instant action does not arise out of the same transaction and occurrent that was before th[at] Court in 2016 [a bulk foreclosure action]" because "not all of the Plaintiffs' properties were foreclosed in 2017 by this Court" and thus "the instant action

(continued…)

First, as previously found by this Court in its prior Opinion and Order (ECF No. 62, PageID.2198), Plaintiffs' state court lawsuit was based on essentially the same alleged "scheme" to induce tax foreclosures and transfer properties to SNRI for a profit. (*See* State Court Complaint, PageID.457 (alleging the "scheme" was to "re-direct foreclosure upon homes to a private 'for profit organization' – Southfield Neighborhood Revitalization Initiative, LLC so as to deny African-Americans to bid at a public auction an opportunity to reacquire their homes") (emphasis in original).) That state court complaint alleged that "the City of Southfield through the scheme alleged in the common allegations ... targeted [plaintiff's] homes for designation for non-bid transfer to the Southfield Non-Profit Housing Commission" and that "the transfer of these non-bid homes ... were actually transferred to a 'for profit' organization-SNRI, LLC, for the ultimate personal gain of yet to be exposed individuals." (*Id.* ¶¶ 43-44, PageID.467-68.) The complaint sought as relief, in part, "the loss of equity (FMV) in their residential properties." (*Id.* PageID.469.) Moreover, when those state court plaintiffs moved to amend the complaint, the plaintiffs alleged that "Southfield did not purchase the property for the minimum bid. Southfield quit claimed its interest to SNRI for no consideration. SNRI's Directors and/or Officers are City of Southfield officials who used their inside knowledge about these mortgage-free properties to acquire the properties for their own personal benefit and not for public purpose." (Mot. to Amend, PageID.343.)

The Michigan Supreme Court "has taken a broad approach" to the question of whether the claims

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does not 'arise out of the same transaction and occurrence.'" (ECF No. 42-7, PageID.797-98.) In this case, the properties at issue are identical.

precluded were or could have been decided in the prior action, embracing the "transactional" test, under which res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich. at 121, 124. "[T]he determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in" the first action. *See id.* at 125. "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit...." *Id.* (citation omitted). Applying this framework, the Court here finds that the prior state court lawsuit and this suit involve the same core set of facts, and the issues in this case were, or could have been, resolved in the prior suit.

Second, Plaintiffs summarily assert that the parties in the two actions "were not identical," but they do not otherwise develop this argument. (Pls.' Resp. at p.7, PageID.1176.) The SNRI Defendants fail to otherwise argue that the parties to the prior litigation and this action are identical or substantially identical. (See SNRI Defs.' Mot. at pp. 6-8, PageID.185-87.) An undeveloped argument is deemed waived. *Hensley v. Gassman*, 693 F.3d 681, 688 n. 6 (6th Cir.2012); *Kennedy v. Comm r of Soc. Sec.*, 87 F. App'x. 464, 466 (6th Cir. 2003) ("issues which are 'adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived'") (quoting *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996)). SNRI is a defendant in both actions. However, Defendants SNPHC, Simon and Libbett were not named parties in the prior state court action.

Parties are substantially identical when a party in a second suit is "so identified in interest with [a party from the first suit] that he or she represents the same legal right." *Viele v. D.C.M.A.*, 167 Mich. App. 571, 580 (1988) (citation omitted). The SNRI Defendants have failed to meet their burden to demonstrate that SNRI, SNPHC, Simon, and Libbett are in privity through agency principles, and thus are substantially identical for purposes of res judicata. *See Lyons v. Washington*, No. 212516, 2000 WL 33407429, at *1 (Mich. App. Aug. 18, 2000) (citing *Viele*, 167 Mich. App. at 580). Accordingly, the Court finds that Plaintiffs' claims against Defendants SNPHC, Simon, and Libbett are not precluded by res judicata.

Continuing as to Plaintiffs' claims against Defendant SNRI only, Plaintiffs argue that "the landscape of the law has shifted" and "[t]his action could have not been resolved at the time of the state court case because the Michigan Constitution had not established the right to the equity/surplus proceeds from a tax foreclosure." (Pls.' Resp. at pp. 7-8, PageID.1706-07.) Plaintiffs contend that, before the Michigan Supreme Court's decision in *Rafaeli, LLC v. Oakland County*, 505 Mich. 429 (2020), "there were no common law property rights that existed unambiguously in the equity/surplus proceeds after a property tax foreclosure," and "it would have been largely futile to bring most of the present claims." (*Id.*) However, "an intervening change of law" precludes the application of res judicata only when it "alters the legal principles on which the court will resolve the subsequent case.'" *In re Bibi Guardianship*, 315 Mich. App. 323, 334 (2016) (citation omitted). As discussed more fully *infra*, *Rafaeli* does not recognize a right to recover alleged equity in property after a foreclosure, and thus does not represent a change to the legal landscape regarding Plaintiffs' claims in this case.

Interestingly, in a seeming admission of the failure of their takings claim in this case, Plaintiffs admit in their Response that:

> There still is no adequate remedy or procedure to address the unlawful conduct in this case until the Michigan Legislature finds *Rafaeli, LLC, supra*, retroactive. Even then, ambiguity will persist (see Justice Viviano's Concurrence in *Rafaeli, LLC, supra.*[)]

(Pls.' Resp. at p. 7, PageID.1706.) As will be discussed further *infra*, Justice Viviano recognized in his concurrence that "the majority's view of the case would seemingly be that if the property does not sell at auction and is simply transferred to a governmental unit, the taxpayer is out of luck: no proceeds, let alone a surplus, have been produced or retained by the government." *Id.* at 518 (Viviano, J., concurring).[5]

Based on all the above, the Court finds that Plaintiffs Miller, American Internet Group, and Akande's claims against Defendant SNRI are barred by res judicata, but that Plaintiffs' claims against Defendants SNPHC, Simon, and Libbett are not so barred. However, even if these plaintiffs' claims were not barred by res judicata, they would nevertheless fail for the reasons stated *infra*.

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[5] In addition, Plaintiffs' citation to Judge Tarnow's May 31, 2020 decision in *Johnson v. Meisner*, Case No. 19-11569 (E.D. Mich.), is misplaced because Judge Tarnow declined to apply res judicata to the plaintiffs' claims in that case because the prior dismissal was under Rule 12(b)(1), for lack of jurisdiction, not Rule 12(b)(6), and Rule 12(b)(1) dismissals are not dismissals on the merits and thus do not have preclusive effect. (ECF No. 42-9, PageID.900-01.)

B. Plaintiff Marcus Byers Lacks Standing

Plaintiff Marcus Byers alleges that he held "equitable title" with his guardian in property that was foreclosed on for $4,113.00 in delinquent taxes. (Compl. ¶ 26, PageID.6.) However, the records Plaintiffs attach to the Complaint indicate that the property was owned by, and foreclosed under, the ownership of Debbie Byers, who is not a named Plaintiff. (Compl. PageID.51.) After the foreclosure, the property was sold to the City for the tax debt amount, and then transferred to SNRI for $1.00. (*Id.*)

To satisfy the Article III standing requirement in a civil forfeiture action, "a claimant must alleged a colorable ownership, possessory, or security interest in a least a portion of" the property in interest. *U.S. v. Real Prop. Located at 4527-4535 Michigan Ave., Detroit, Mich.*, 489 F. App'x 855, 857 (6th Cir. 2012) (citing *U.S. v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998)). The courts generally look to "the law of the jurisdiction that created the property right to determine the petitioner's legal interest." *U.S. v. Salti*, 579 F.3d 656, 668 (6th Cir. 2009) (citation omitted). In Michigan, "an interest in real property can only be created 'by act or operation of law, or by a deed or conveyance in writing.'" *Real Prop.*, 489 F. App'x at 857 (citing Mich. Comp. Laws § 566.106) (finding that the claimants lacked standing because the deed to the clubhouse property was not in their name and no other writing existed showing their interest in the property).

The SNRI Defendants explain that Plaintiff Marcus Byers' former spouse, and the former owner of the property at issue in this action (21666 Hidden Rivers Drive property), Debbie Byers, previously filed a lawsuit in the Oakland County Circuit Court

against the Oakland County Treasurer and SNRI on February 25, 2019, challenging the tax foreclosure and seeking reinstatement of title. (SNRI Defs.' Mot. at p. 6, PageID.185, citing Ex. 4, ECF No. 31-5, Debbie Byers' Verified Petition, PageID.220-32.) The Circuit Court granted both defendants' motions for summary disposition, finding that Debbie Byers failed to state a claim against either defendant and that she received constitutionally proper notice of the foreclosure under the GPTA. (Ex. 5, ECF No. 31-6, Opinion and Order Granting Summary Disposition, PageID.233-39.) Debbie Byers appealed the circuit court's opinion, arguing that she was entitled to "just compensation," but the Michigan Court of Appeals denied her appeal on February 26, 2020. (SNRI Defs.' Mot. at pp. 6-7, PageID.185-86, citing Ex. 6, ECF No. 31-7, Debbie Byers' Appeal Packet, PageID.240-49, and Ex. 7, ECF No. 31-8, Court of Appeals Order Denying Application for Leave to Appeal, PageID.250.) Debbie Byers then filed for Chapter 13 bankruptcy on August 3, 2020, and initiated an Adversary Complaint against Defendants Oakland County Treasurer and SNRI on September 30, 2020. (SNRI Defs.' Mot. at p. 7, PageID.186, citing Ex. 8, ECF No. 31-9, Debbie Byers' Adversary Compl., PageID.251-68.) The adversary complaint raises claims challenging the tax foreclosure, the subsequent conveyance of the property including SNRI's title, and a "Post Taking Claim for Just Compensation [] Under the Fifth Amendment – Inverse Condemnation," and seeks a monetary judgment of the "surplus equity" in the property. (*Id.*)[6]

[6] The SNRI Defendants argue that Debbie Byer's claims would be barred by res judicata. However, Debbie Byers is not a plaintiff in this action and so that argument need not be addressed.

The SNRI Defendants assert that Plaintiff Marcus Byers lacks standing to bring suit against them because he was not the owner of the Hidden Rivers Drive property. (SNRI Defs.' Mot. at pp. 8-9, PageID.187-88.) Rather, all former title and interest in that property prior to the tax foreclosure was held by Marcus Byers' former spouse, Debbie Byers, who purchased the property from Wells Fargo Bank in 2008 and who is presently litigating claims in Bankruptcy Court. (*Id.* citing Ex. 9, ECF No. 31-10, Deed, PageID.269-70, Ex. 10, ECF No. 31-11, Judgment of Divorce, PageID.271-73.)

Plaintiffs respond only that Marcus Byers has a closed head injury since 1998 and that Debbie Byers "purchased a house with his money and has been his legal guardian," that "[t]he equity in or from the property belongs to Mr. Byer[s]," and "Byers' equitable interest meets the threshold for standing as an injury in fact." (Pls.' Resp. at pp. 9-10, PageID.1708-09.) Plaintiffs rely on expired guardianship papers naming "Kiara Napier" as Byers' guardian and an unrecorded Quit Claim deed from Debbie Byers to herself and Marcus Byers, dated July 30, 2020, to try to assert that Byers somehow had an interest in the property in 2018. (*Id.* citing Ex. L, ECF No. 42-12, PageID.928-31).

However, Debbie Byers could only convey the interest she had in 2020, which, following the 2018 foreclosure of the property, was none. Without an interest in the subject property when the foreclosure and transfer occurred, the Court finds that Plaintiff Marcus Byers lacks standing in this case and dismisses his claims with prejudice.

C. Plaintiffs' Unjust Enrichment Claim Against the SNRI Defendants

The SNRI Defendants contend that Plaintiff's only claim against them appears to be the unjust enrichment claim in Count VII. (SNRI Defs.' Mot. at p. 10, PageID.189.) The Defendants argue that Plaintiffs fail to state such a claim. (*Id.* at pp. 10-17, PageID.189-96.)

Plaintiffs' unjust enrichment claim in Count VII of their complaint alleges that "SNRI obtained the surplus equity and or equity from the tax foreclosure" "in a prearranged transfer for inadequate value," and that "[t]he retention of the benefits [surplus equity] by SNRI (or subsequent non-bona fide purchasers) of the property ights, equity and/or surplus equity amounts to unjust enrichment to the SNRI." (Compl. ¶¶ 145-48, PageID.29.) Plaintiffs allege that "[t]he surplus equity and or equity in justice and equity belongs to the Plaintiffs[] individually and to the Class Members," and that "Plaintiffs[] individually and as class representatives have been damaged by their loss of equity." (*Id.* ¶¶ 149-50, PageID.30.)

Under Michigan law, "[u]njust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another." *Tkachik v. Mandeville*, 487 Mich. 38, 48 (2010) (citation omitted). A plaintiff alleging unjust enrichment must establish two elements: "(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 478 (2003).

The SNRI Defendants first contend that Plaintiffs have failed to show that the SNRI Defendants received a "benefit" from Plaintiffs. They argue that the Michigan Supreme Court in *Rafaeli* did not establish a cause of action for Plaintiffs to sue the

SNRI Defendants in this case for the return of "surplus equity." (SNRI Defs.' Mot. at p. 10, PageID.189.) They explain that the Michigan Supreme Court in *Rafaeli* limited the plaintiffs' claims in that case against the county and the county treasurer to the excess proceeds realized from the tax foreclosure sale (the auction) (i.e., the proceeds realized in excess of the delinquent taxes, interest, penalties, and fees), "no more, no less." (*Id.*, citing *Rafaeli*, 505 Mich. at 484). *See also Rafaeli*, 505 Mich. at 477 ("[A] former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus.") (emphasis added).

In this case, the Plaintiffs' properties were not sold at auction, but were purchased after foreclosure from the Oakland County Treasurer by the City of Southfield for the minimum bid. Accordingly, it is undisputed that no "surplus proceeds" were realized from a "tax-foreclosure sale," and Plaintiffs have failed to demonstrate a property right or amount or benefit that was "unjustly" taken from them by anyone, much less than by the SNRI Defendants, the subsequent transferee who properly acquired the properties from the City after proper tax-foreclosure proceedings. The Michigan Supreme Court made clear in *Rafaeli* that a plaintiff's only "property interest" surviving a tax-foreclosure is not in the real property itself, but only in the surplus proceeds resulting from the tax-foreclosure sale, if any, resulting from the sale of the property at an auction. In this case, there are no such surplus proceeds.

The SNRI Defendants next contend that Plaintiffs seek to create a cause of action that would allow former property owners to claim monetary damages from a subsequent transferee of property previously foreclosed on the basis of non-payment of taxes. (SNRI Defs.' Mot. at p.12, PageID.191.) Such a

theory, they assert, "would in fact yield unjust results to any party obtaining tax foreclosed property, and result in perpetual uncertainty as to the insurability of title with respect to [] tax foreclosed properties" by "enabl[ing] those who have failed to pay real property taxes and failed to timely redeem the assessed real estate after entry of a judgment of foreclosure to maintain an interest in the property notwithstanding the foreclosure process." (*Id.* at pp. 12-13, PageID.191-92.) The SNRI Defendants state that their program, in which they worked with Habitat to rehabilitate buildings which are salvageable, is a lawful program and consistent with the public policy for the GPTA:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.

Mich. Comp. Laws § 211.78(1). In fact, the SNRI Defendants point out that the City of Southfield/SNRI program and partnership is not unique, as other communities have engaged in similar programs, which have been upheld by Michigan courts. (SNRI Defs.' Mot. at pp. 13-14, PageID.192-93.)

For example, the City of Grand Rapids entered into an agreement with the Kent County Land Bank Authority ("KCLBA") to purchase tax-foreclosed properties from the Kent County Treasurer, whereby the KCLBA placed money in escrow for the City to

purchase properties from the Treasurer for the minimum bid, which were then transferred to the KCLBA for that same amount, plus the cost of recording fees. *See Rental Props. Owners Ass'n of Kent Cnty. v. Kent Cnty. Treasurer*, 308 Mich. App. 498, 505-06 (2014). The plaintiffs in that case argued that the process through which the KCLBA obtained title to the foreclosed properties was in violation of the law. *Id.* at 507-08. The plaintiffs argued that "Grand Rapid's purchase of the properties was a 'ruse' to disguise the violation, that the KCLBA inappropriately funded Grand Rapid's purchase of the properties from the Kent County Treasurer, and that the Legislature did not intend for local governmental units to act as a 'straw man' to avoid a public sale of the properties." *Id.* at 515. The Michigan Court of Appeals disagreed and concluded that:

> Grand Rapids purchased the properties as part of its obligation to provide for the health, safety, and welfare of its community and then conveyed them to the KCLBA to fulfill the public purpose of restoring blighted properties and neighborhoods and to provide housing on tax-foreclosed properties. Language cannot be read into MCL 211.78m to proscribe how Grand Rapids chooses to effectuate the public purpose. Although Grand Rapids entered into an agreement with the KCLBA before purchasing the properties from the Kent County Treasurer, and the KCLBA placed the money in escrow for Grand Rapids to purchase the properties from the Kent County Treasurer, it does not follow from the *Rutland Twp.* analysis that the transactions should be invalidated under MCL 124.755(6) as a "sham."

Id. at 516. "Other than the restriction that the purchase be for a public purpose, the Legislature did not restrict in any way how Grand Rapids may convey the property thereafter. MCL 211.78m." *Id.* at 517. *See also City of Bay City v. Bay Cnty. Treasurer*, 292 Mich. App. 156, 159, 167 (2011) (finding the City's stated public purpose – "to reduce the number of vacant tax reverted properties within [its] limits thereby minimizing the real and present dangers they present and to remove certain blighted conditions present on the subject properties" and thus "ensure a healthy and growing tax base" – sufficient, noting " it is not for the courts to read into MCL 211.78m(a) restrictions or conditions on what constitutes a public purpose that are not within the language of the statute itself and that essentially usurp the Legislature's authority to determine what constitutes a public purpose").

The GPTA creates a scheme whereby the foreclosing governmental unit must offer the tax-foreclosed properties for sale to the state first, then the city, village, or township (as in this case), then the county in which the property is located. MCL 211.78m(1). Any purchase by the city, village, township, or county must be for a public purpose. MCL 211.78m(1). The Michigan Court of Appeals explained in *Rental Properties Owners* that the GPTA otherwise does not "place restrictions on, or even address, a local governmental unit's use or subsequent sale of such properties." *Id.* at 514. As the SNRI Defendants explain in their reply brief, "there was nothing unlawful with the OCT's tax foreclosure of Plaintiffs' properties, the City's exercise of its right of first refusal, or SNRI's purchase of the Properties [from the City]." (SNRI Defs.' Reply at p. 2, PageID.1975.)

The SNRI Defendants thus contend that there is no legal basis for a claim of unjust enrichment against them because they acquired the subject properties through the actions of the Oakland County Treasurer and the City, not from the Plaintiffs, and thus did not receive a benefit from Plaintiffs. They rely in part on *Karaus v. Bank of New York Mellon*, 300 Mich. App. 9 (2012), for the proposition that when a defendant receives a benefit from a third party, and not through the actions of the plaintiff directly, there is no receipt of a benefit by the defendant from the plaintiff as required for a claim of unjust enrichment. (SNRI Defs.' Mot. at pp. 15-16, PageID.194-95.)[7] However, courts have found that this *Karaus* holding "does not stand for the proposition that a plaintiff may prevail against a defendant on an unjust enrichment theory only if the plaintiff directly conferred the benefit upon the defendant. On the contrary, the court in *Karaus* recognized the possibility that a plaintiff may recover from a defendant upon whom he did not confer a benefit if the defendant has engaged in misleading conduct that led to the plaintiff's loss." *Kerrigan v.*

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[7] In *Karaus*, a homeowner borrowed money from a bank to finance construction on his house and, in return, the homeowner granted a mortgage to the bank. The plaintiff performed construction work on the home, but the homeowner did not pay the plaintiff in full. The plaintiff then brought an unjust enrichment claim against the bank that held the mortgage. The Michigan Court of Appeals affirmed judgment in favor of the bank on the grounds that the bank did not obtain a benefit directly from the plaintiff. *Karaus*, 300 Mich. App. at 23. The court noted that the bank was "completely uninvolved" with the agreement between the plaintiff and the homeowner, and it found no evidence that the bank "requested any of the work performed by plaintiff or misled plaintiff to receive any benefit." *Id*. ("The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution").

Visalus, Inc., 112 F. Supp. 3d 580, 614 (E.D. Mich. 2015).

Defendants contend that Plaintiffs have pleaded no allegations of misconduct, wrongdoing or misleading conduct by the SNRI Defendants, but instead complain of Defendants' lawful use of the Michigan foreclosure law. Plaintiffs claim that "the recipients of the 'unjust consideration' were not only involved with the transfer of the surplus proceeds/equity from Plaintiffs, but orchestrated and participated in a scheme or a conspiracy to strip the equity of plaintiffs' properties through concerted action." (Pls.' Resp. at p. 22, PageID.1721.) However, Plaintiffs offer only conclusory allegations in support of their unjust enrichment claim. To the extent Plaintiffs assert that the SNRI Defendants are liable to them for unjust enrichment because they were involved in a "scheme" or "conspiracy" to "strip the equity from Plaintiffs' properties," that claim fails because, as explained above, there is nothing improper or unlawful with the Oakland County Treasurer's foreclosure of Plaintiffs' properties, the City's exercise of its statutory right of first refusal, or SNRI's purchase of the properties. *See Rental Prop. Owners*, 308 Mich. App. at 516-17. "There must be more than a benefit received by a party, the party 'is liable to pay therefore only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.'" *Hoving v. Transnation Title Ins. Co.*, 545 F. Supp. 2d 662, 669 (E.D. Mich. 2008) (quoting *Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 521, 546 (1991)). Accordingly, for all of these reasons, Plaintiffs fail to state an unjust enrichment claim against the SNRI Defendants, and that claim is dismissed.

D. Whether Plaintiffs Have Stated Any Claims Against Defendants SNPHC, Simon and Libbett Individually

The SNRI Defendants further assert that Plaintiffs' Complaint must be dismissed against Defendants SNPHC, Simon and Libbett because there is not a single reference to these three defendants in any of Plaintiffs' Counts in their Complaint. (SNRI Defs.' Mot. at pp. 18-20, PageID.197-99.) The SNRI Defendants contend that there is in fact only limited, one or two paragraph references to these three defendants throughout the Complaint. (*Id.*)

Plaintiffs failed to respond to this argument. (See Pls.' Resp.) The SNRI Defendants argue that Plaintiffs therefore have abandoned their claims against SNPHC, Simon and Libbett by failing to respond to this argument. (SNRI Defs,' Reply at pp. 6-7, PageID.1979-80.) *See Cruz v. Capital One, N.A.*, 192 F. Supp. 3d 832, 838-39 (E.D. Mich. 2016) ("A plaintiff abandons undefended claims.") (citing *Doe v. Bredesen*, 507 F.3d 998, 1007-08 (6th Cir. 2007)); *Mekani v. Homecomings Fin., LLC*, 752 F. Supp. 2d 785, 797 (E.D. Mich. 2010) (explaining that where a plaintiff fails to respond to an argument in a motion to dismiss, "the Court assumes he concedes this point and abandons the claim.").

First, Defendants are correct that there is no reference to Defendants SNPHC, Simon or Libbett in any of the Counts in Plaintiffs' Complaint. The SNRI Defendants are also correct that Defendants Simon and Libbett are only mentioned in two paragraphs each in Plaintiffs' 150 paragraph Complaint. Specifically, Defendant Simon appears when discussing the parties' identities in paragraph 10 ("Defendant Mitchell Simon is a CPA and the Treasurer of the SNPHC and Board member of

SNPHC.") and in the General Allegations in paragraph 71 ("Meisner, Zorn, Simon, Susan Ward - Witkowski and Siver knew that their acts would remove the subject properties from the tax rolls of Southfield for the gain of SNRI."). (Compl. ¶¶ 10, 71, PageID.3, 13.) Defendant Libbett appears only in paragraph 11 ("Defendant E'toile Libbett is a real estate broker and board member of SNRI.") and paragraph 68 ("Defendants Zorn, Siver, Libbett entered into a conspiracy which to engage in a scheme that conducted a pattern of unlawful activity affecting interstate commerce."). (Compl., ¶¶ 11, 68, PageID.3, 12.) Further, Defendants Simon and Libbett's names are only even mentioned one time each in the body of Plaintiffs' Response brief, at page 3 ("Former Southfield official Gerald Witkowski as well as SNPHC Treasurer Mitchell Simon received proceeds from the equity of Plaintiffs' properties."), and at page 24 ("Likewise, the SNRI has as its three members Zorn, Siver and a politically connected Realtor Defendant E'Toile Libbett."). (Pls.' Resp. at pp. 3, 24, PageID.1702, 1723.)

The Court agrees with Defendants that these limited, conclusory allegations as to Defendants Simon and Libbett fail to state a claim against these two defendants. A plaintiff's complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. Plaintiffs' Complaint does not meet these standards with respect to their allegations against Defendants Simon and Libbett. Plaintiffs' Complaint fails to plead how either defendant is allegedly liable to Plaintiffs under any of the claims

pleaded, and Plaintiffs' claims against Defendants Simon and Libbett therefore are dismissed.

However, while the SNRI Defendants contend in their motion that "the only reference to Defendant SNPHC appears when discussing the parties' identities" and that "[t]his lone allegation is no basis to impose liability against the SNPHC, let alone sufficient to state a cause of action against," (SNRI Defs.' Mot. at p. 18-19, PageID.197-98), that is not correct. While it is true that Defendant SNPHC is not named in any of the Counts in Plaintiffs' Complaint, SNPHC is named in multiple paragraphs in the General Allegations section of Plaintiffs' Complaint, generally alleging that SNPHC provided funds to the City of Southfield to purchase foreclosed properties pursuant to its statutory right of first refusal, and complaining of the City officials' involvement with SNPHC. (Compl. ¶¶ 44, 46, 48-50, 61, 67, and 83(e), PageID.9-10, 12, 16.) Defendant SNPHC is also discussed in Plaintiffs' Response brief, primarily with regard to allegations that SNPHC provided funds to the City of Southfield to purchase foreclosed properties from the Oakland County Treasurer, which were then transferred to Defendant SNRI, as part of a "scheme" to unconstitutionally take Plaintiffs' property rights. (See Pls.' Resp. at pp. 2, 3, 14, 15, 18, 19, 24, PageID.1701-02, 1713-14, 1717-18, 1723.)

Although the Court could find that Plaintiffs waived any opposition to Defendants' motion with regard to Defendant SNPHC by failing to respond to it, *see Mekani*, 752 F. Supp. 2d at 797 (explaining that where a plaintiff fails to respond to an argument in a motion to dismiss, "the Court assumes he concedes this point and abandons the claim."), the Court finds that, even though Plaintiffs failed to specifically include allegations against Defendant SNPHC in any of Plaintiffs' Counts, they have sufficiently alleged

SNPHC's involvement with the other defendants in the General Allegations section of their Complaint, and thus will decline to dismiss Defendant SNPHC on this basis.

E. Whether Plaintiffs Have Stated a Takings Claim Against the SNRI Defendants Under the United States or Michigan Constitutions

Plaintiffs argue in their Response brief that they have stated a Fifth Amendment Takings claim and a claim under the Michigan Constitution against all SNRI Defendants. (Pls.' Resp. at pp. 10-21, PageID.1709-20.) Plaintiffs' counsel stated that the hearing that they assert this claim in Count II of their Complaint. The Court notes that while the takings claim in Count I (Fifth Amendment and Fourteenth Amendment/§ 1983 claim) is expressly asserted "Against Oakland County, Andrew Meisner, City of Southfield, Fred Zorn, Ken Siver, Susan Witkowski and Gerald Witkowski Only" (Compl. PageID.18), Count II (Post Taking Claim for Just Compensation Under the Fifth Amendment – Inverse Condemnation) is not similarly expressly limited. However, Count II only contains allegations against the Oakland County and Southfield Defendants, and does not include any allegations against any of the SNRI Defendants, and this takings claim could be dismissed against the SNRI Defendants for this reason.[8]

[8] The Court further notes that Count II is titled as a "Post Taking Claim for Just Compensation Under the Fifth Amendment – Inverse Condemnation." Section 1983 is the "exclusive remedy for constitutional violations," *Foster v. Michigan*, 573 F. App'x 377, 391 (6th Cir. 2014), and Plaintiffs cannot proceed "directly" against these defendants under the Fifth and Fourteenth

(continued…)

Assuming that Plaintiffs have asserted a constitutional taking claim against the SNRI Defendants in their Complaint, those defendants contend that such a claim fails for several reasons: (1) there is no recognizable claim for taking of "surplus equity;" (2) Plaintiffs failed to plead the SNRI Defendants are state actors; and (3) Plaintiffs failed to plead that SNRI Defendants deprived Plaintiffs of any constitutional right. (SNRI Defs.' Reply at pp. 3-6, PageID.1976-79.)

The Takings Clause of the Fifth Amendment prohibits taking "private property ... for public use, without just compensation." U.S. Const. amend. V.

Amendments. *Thomas v. Shipka*, 818 F.2d 496, 499 (6th Cir. 1987) (holding that "in cases where a plaintiff states a constitutional claim under 42 U.S.C. § 1983, that statute is the exclusive remedy for the alleged constitutional violations"), *vacated and remanded on other grounds*, 488 U.S. 1036 (1989); *Woods Cove, III, LLC v. City of Akron*, No. 5:16-CV-1016, 2018 WL 4104186, at *5 n.15 (N.D. Ohio Aug. 29, 2018) ("Therefore, to the extent plaintiffs are attempting to assert a direct constitutional claim under the Fifth Amendment, that is grounds enough for failure of the claim."). Count II thus can be dismissed on this basis, or can be subsumed with Count I.

To the extent Plaintiffs seek to assert an inverse condemnation claim under state law, such a claim is encompassed by Count III of Plaintiffs' Complaint, asserting a taking claim under the Michigan Constitution, Article X, Section 2. *See Biff's Grills, Inc. v. Michigan State Highway Comm'n*, 75 Mich. App. 154, 156-57 (1977) (recognizing that an inverse condemnation claim is the "means of enforcing the constitutional ban on uncompensated takings of property"); *see also Fox v. Cnty. of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *13 (E.D. Mich. Jan. 13, 2021) (reaching the same conclusion); *Arkona, LLC v. Cnty. of Cheboygan*, No. 19-CV-12372, at *9 (E.D. Mich. Jan. 15, 2021) (same). Count II can be dismissed for this reason as well.

The clause applies to state governments through the Fourteenth Amendment. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The Sixth Circuit has articulated a two-part test in evaluating claims that a governmental action constitutes a taking of private property without just compensation. First, "the court must examine whether the claimant has established a cognizable property interest for the purposes of the Just Compensation Clause." *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 481 (6th Cir. 2004) (internal quotation marks omitted); *see also Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place."). Second, "where a cognizable property interest is implicated, the court must consider whether a taking occurred." *Coalition for Gov't Procurement*, 365 F.3d at 481. "[T]he existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (internal quotation marks omitted).

First, as discussed above, and as explained in this Court's prior Opinion and Order (ECF No. 62), the Michigan Supreme Court made clear in *Rafaeli* that a plaintiff's only "property interest" surviving a tax-foreclosure is not in the real property itself, but only in the surplus proceeds, if any, resulting from the post-foreclosure sale of the property at an auction. *Rafaeli*, 505 Mich. at 484. *Rafaeli* did not confer a cause of action for a taking as to "surplus equity," explaining that "when property is taken to satisfy an unpaid tax debt, just compensation requires *the foreclosing government unit* to return any proceeds from the tax-foreclosure sale *in excess* of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property – *no more, no less*." *Id.* at 483-84 (emphases

added). The Court expressly "reject[ed] the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all." *Id.* at 483. The Court noted that the *Rafaeli* plaintiffs (like the Plaintiffs here) "conflate equity with surplus proceeds," but that the Court is "unaware of any authority affirming a vested property right to equity held in property generally." *Id.* at 484 n.134 ("The question presented is whether a former property owner retains the ability to collect any surplus proceeds that might result after the government seizes title to real property for failure to pay taxes *and then sells that property for more than the tax delinquency*.") (emphasis added). Plaintiffs concede in their Response brief that *Rafaeli* "does not address the exact fact situation that is presented by the instant action because it did not opine on the remedy for a taking violation when there is no auction." (Pls.' Resp. at p. 13, PageID.1712.)

In this case, the Plaintiffs' properties were not sold at an auction (like in *Rafaeli*) and no "surplus proceeds" were generated when the Oakland County Treasurer sold the properties to the City of Southfield for the minimum bid. The Oakland County Treasurer, the "foreclosing government unit," thus did not obtain any "surplus proceeds" that should be returned to Plaintiffs under *Rafaeli*. Plaintiffs allege that the City then conveyed the properties to SNRI for $1.00. (Compl. ¶¶ 21-27, PageID.5-7.) Some, but not all, of the subject properties were then rehabilitated and sold by Defendant SNRI, one to two years later, to individual buyers. Plaintiffs cite no authority for permitting them to recover proceeds from the sale of the properties, years after the foreclosure and after rehabilitation and repair of the properties by the non-profit Defendants.

Plaintiffs have failed to plead that the SNRI Defendants denied Plaintiffs a right guaranteed by the United States or Michigan Constitutions, and thus fail to state a takings claim against the SNRI Defendants.[9]

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** the SNRI Defendants' Motion to Dismiss and **DISMISSES WITH PREJUDICE** Plaintiffs' claims against Defendants Southfield Neighborhood Revitalization Initiative ("SNRI"), Southfield Nonprofit Housing Corporation ("SNPHC"), Director E'Toille Libbett, and Mitchell Simon.[10]

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[9] In light of this ruling, the Court need not address the SNRI Defendants' argument that Plaintiffs have failed to plead or allege that Defendants SNRI, SNPHC, Simon or Libbett are state actors.

[10] The Court concurs, for the most part, with the Michigan Court of Appeals in footnote 6 in *Jackson v. Southfield Neighborhood Revitalization Initiative, LLC, Fred Zorn, E'toile Libbett, Michael A. Mandelbaum, City of Southfield, Ken Siver, Oakland County Treasurer, Southfield Non-Profit Housing Corporation, Susan Ward Witkowski, Gerald Witkowski, and Andrew Meisner*, No. 344058, 2019 WL 6977831 (Mich. Ct. App. Dec. 19, 2019), *vacated in part by the Michigan Supreme Court*, 953 N.W.2d 402 (Mich. 2021), that "[a]lthough we find no basis for plaintiffs' substantive due process claims, we can appreciate their suspicion surrounding defendants' behavior. While the record before us does not provide evidentiary support for plaintiffs' claim that defendants sought to defraud these plaintiffs out of equity in their homes, the fact that elected officials were using their political status … by obtaining properties before they could go to auction following tax foreclosure is, at a minimum, troubling. Clearly, defendants, particularly the elected officials, have even attempted to avoid the appearance of impropriety, as a clear conflict of interest exists regarding their involvement with

(continued…)

IT IS SO ORDERED

Dated: October 4, 2021

s/Paul D. Borman
Paul D. Borman
United States
District Judge

SNPHC and SNRI. This type of behavior is not only shocking to the consc[ience], but also rightfully breeds distrust among their electorate. Regardless, the instant lawsuit is regrettably the incorrect vehicle to further explore the legality of defendants' actions."

Case 2:20-cv-12230-PDB-EAS ECF No. 66,
PageID.2271 Filed 10/04/21 Page 1 of 49

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TAWANDA HALL, *et al.*,

Plaintiffs,

v.

OAKLAND COUNTY TREASURER ANDREW MEISNER, OAKLAND COUNTY, SOUTHFIELD NON-PROFIT HOUSING CORPORATION, and CITY OF SOUTHFIELD, *et al.*,

Defendants,
_____/

Case No. 20-12230

Paul D. Borman
United States
District Judge

OPINION AND ORDER GRANTING DEFENDANTS CITY OF SOUTHFIELD, FREDERICK ZORN KENSON SIVER, SUSAN WARD-WITKOWSKI, GERALD WITKOWSKI, AND IRVIN LOWENBERG'S MOTION TO DISMISS (ECF NO. 34)

On August 18, 2020, Plaintiffs, former real property owners in the City of Southfield, Michigan, filed a proposed class action complaint against 13 defendants. The defendants can be separated into four groups: (1) Oakland County Treasurer Andrew

Meisner ("Treasurer") and Oakland County (collectively, the "Oakland County Defendants"); (2) City of Southfield ("Southfield"), City Manager Frederick Zorn, Mayor Kenson Siver, Former City Attorney Susan Ward-Witkowski, Gerald Witkowski (Code Enforcement and Eviction Administrator for SNRI), and Treasurer Irvin Lowenberg (collectively, the "Southfield Defendants"); (3) Southfield Neighborhood Revitalization Initiative ("SNRI"), Southfield Nonprofit Housing Corporation ("SNPHC"), Director E'Toile Libbett ("Director SNRI"), and Mitchel Simon ("Treasurer SNPHC") (collectively, the "SNRI Defendants"); and (4) Habitat for Humanity of Oakland County, Inc. ("Habitat"). (ECF No. 1, Complaint.)

The Complaint contains seven counts: Count I – Taking Without Just Compensation – Fifth Amendment, under 42 U.S.C. § 1983, against the Oakland County Defendants and Southfield Defendants only; Count II – Inverse Condemnation – Fifth Amendment; Count III – Violation of the Takings Clause of the Michigan Constitution; Count IV – Eighth Amendment Violation – Excessive Fine Forfeiture, against Oakland County only; Count V – Procedural Due Process, against Southfield and Oakland County Treasurer only; Count VI – Substantive Due Process, against Southfield and Oakland County Treasurer only; and Count VII (mislabeled "Count VI") – Unjust Enrichment, against all Defendants except Oakland County. (Compl.) Plaintiffs ask the Court to award them the "taken and/or forfeited equity" in their foreclosed properties along with money damages for the alleged

constitutional violations and claim of unjust enrichment. (*Id.*, Relief Requested, PageID.30-31.)

Now before the Court is Defendants City of Southfield, Frederick Zorn, Kenson Siver, Susan Ward-Witkowski, Gerald Witkowski, and Irvin Lowenberg's (the "Southfield Defendants") Motion to Dismiss (ECF No. 34).[1] The Court held a hearing using Zoom videoconference technology on September 28, 2021, at which counsel for Plaintiffs and Defendants appeared. For the reasons that follow, the Court GRANTS the Southfield Defendants' Motion to Dismiss Complaint.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The eight named Plaintiffs in this action allege that they previously owned real property located in the City of Southfield, Michigan. All named Plaintiffs failed to pay property taxes and their properties were foreclosed by Defendant Oakland County Treasurer on the basis of non-payment of taxes pursuant to Michigan's General Property Tax Act ("GPTA"), Mich. Comp. Laws § 211.1 *et seq.* (Compl. ¶1, PageID.2.)

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[1] The three other groups of Defendants also filed separate motions to dismiss. The Court granted Defendant Habitat of Humanity's Motion to Dismiss on April 20, 2021 (ECF No. 58), and the Oakland County Defendants' Motion to Dismiss on May 21, 2021. (ECF No. 62). The SNRI Defendants' motion to dismiss will be addressed separately by the Court. (See ECF No. 31, SNRI Defendants' Motion to Dismiss.)

The GPTA permits the recovery of unpaid real-property taxes, penalties, interest, and fees through the foreclosure and sale of the property on which there is a tax delinquency. *See* Mich. Comp. Laws § 211.1 *et seq*. Under the Act, the county treasurer may elect to act as the collection agent for the municipality where the property is located when taxpayers become delinquent on their property taxes. Mich. Comp. Laws § 211.78(8). After three years of delinquency, multiple notices and various hearings, tax-delinquent properties are forfeited to the county treasurer; foreclosed on after a judicial foreclosure hearing by the circuit court and title to the forfeited property is transferred to the county treasurer; and, if the property is not timely redeemed by March 31 of that year, fee simple title is vested absolutely in the county treasurer, without any further redemption rights available to the delinquent taxpayer. Mich. Comp. Laws § 211.78 *et seq*. As the Act applied during the time periods relevant to this action, after foreclosure, the property is then disposed of as follows:

> (1) The state or municipality where the property is located has the right to claim the property in exchange for the payment to the county of unpaid taxes, interest and other costs (the "minimum bid");[2] or

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[2] The longstanding ability for municipalities to purchase tax foreclosed properties for an amount equal to the taxes and penalties due and owing has since been eliminated as a result of a recent amendment to the GPTA, Mich. Comp. Laws § 211.78m, which became effective on January 1, 2021. The amended GPTA now allows the state and/or municipalities to purchase tax foreclosed properties "at the greater of the minimum bid or its

(continued…)

> (2) If the state or municipality does not exercise their right of first refusal, the property is put up for sale at a public auction in July and, if not sold, again in October.

Mich. Comp. Laws § 211.78m.

Plaintiffs in this case allege that a judgment of foreclosure was entered against each of them and pertaining to each Plaintiff's property, by the Oakland County Circuit Court. (Compl. ¶¶ 21-28, PageID.5-7.) Specifically, Plaintiffs allege:

- Plaintiff **Tawanda Hall** owed $22,642.00 in delinquent property taxes.[3] The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $308,000.00.

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fair market value[.]" Mich. Comp. Laws § 211.78m(1). While this amendment will affect the manner in which future tax foreclosure sales are handled, it does not provide a basis for liability against the defendants in this action. The Act provides that any retroactive effect is dependent upon a decision of the Michigan Supreme Court that "its decision in Rafaeli, LLC v. Oakland County, docket no. 156849, applies retroactively." Mich. Comp. Laws § 211.78t(1)(b)(i). There has been no such decision from the Michigan Supreme Court.

[3] Plaintiffs plead that this amount includes the "delinquent property taxes, interest penalties, and fees." (Compl. ¶ 21, PageID.5.)

- Plaintiff **Carolyn Miller** owed $29,759.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $120,000.00.

- Plaintiff **American Internet Group, LLC** owed $9,974.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $149,900.00.

- Plaintiff **Anthony Akande** owed $2,415.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $152,500.00.

- Plaintiffs **Curtis Lee** and **Coretha Lee** owed $30,547.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00. The property was subsequently sold for $155,000.00.

- Plaintiff **Marcus Byers** alleges he had "equitable title with his court appointed guardian" in the subject property and owed $4,113.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00, which still holds title to the property. Plaintiffs allege the property has a fair market value of $90,000.00.

- Plaintiff **Kristina Govan** owed $45,350.00 in delinquent property taxes. The Oakland County Treasurer foreclosed, issued a tax deed in favor of the City of Southfield for the minimum amount due under the GPTA, and the City quit claimed the property to SNRI for $1.00, which still holds title to the property. Plaintiffs allege the property "is worth in excess of the amount owed in taxes."

(Compl. ¶¶ 21-27, PageID.5-7.)

Plaintiffs assert that "[m]ost of the Plaintiffs had entered into delinquent property installment agreements [with the County]," even though "[t]he Treasurer knew the Circuit Court had already entered a Judgment of foreclosure prior to entering the delinquent property tax payment plans with Plaintiffs ... which purportedly prevented foreclosure." (*Id.* ¶¶ 31-32, PageID.7.) Plaintiffs claim that they "made a payment to the Treasurer with the promise that such payment would prevent tax foreclosure," and "in many instances ... made substantial payments of 1-2 years

of property taxes prior to March 31st of the year of foreclosure," but that the County still foreclosed on their properties. (*Id.* ¶¶ 31, 33-34, PageID.7.)

As a result of the foreclosures, Plaintiffs lost all title and interest in their properties, and title in fee vested in the foreclosing government unit ("FGU"), in this case, the Oakland County Treasurer. (*Id.* ¶¶ 21-28, PageID.5-7.) *See* Mich. Comp. Laws § 211.78k(6). Pursuant to Mich. Comp. Laws § 211.78m(1) (as it existed at that time), the Oakland County Treasurer offered the properties to the City of Southfield under the City's right of first refusal. (*Id.* ¶ 29, PageID.7.) In each case, the City paid the Treasurer the minimum amount due under the statute – the delinquent tax amount – with funds provided by Defendant Southfield Nonprofit Housing Corporation ("SNPHC"). (*Id.* ¶¶ 21-27, 83(e), PageID.5-7, 16.) The City in turn conveyed each of the properties to Defendant Southfield Neighborhood Revitalization Initiative, LLC ("SNRI") for $1.00. (*Id.*)

SNRI was created by Defendant SNPHC, and the SNPHC is the sole member of SNRI. (ECF No. 31, SNRI Defs.' Mot. at p. 3, PageID.182.) SNRI was formed for the purpose of purchasing tax foreclosed and other properties, improving such properties, selling such properties to persons of low to moderate income when possible, and improving housing and homeownership opportunities in the City of Southfield, and to otherwise restore tax-foreclosed properties on the tax-roll. (*Id.*, citing ECF No. 31-2, SNRI Operating Agreement.)

According to Defendants, under this initiative, SNRI entered into an agreement to work with Defendant Habitat for Humanity ("Habitat"), to rehabilitate the homes that are salvageable. (SNRI Defs.' Mot. at p. 3, PageID.182; ECF No. 24, Habitat Def.'s Mot. at p. 1, PageID.145.) Plaintiffs allege that Habitat received "close to $300,000 in funds from SNRI in 2016, [and] was paid over 1 million dollars from SNRI since its inception in June of 2016 by being the recipient of often needless repairs, as well as the conveyance of property from SNRI, City of Southfield, and the SNPHC for less than full consideration." (Compl. ¶ 46, PageID.9.)

Plaintiffs assert that the City of Southfield, SNPHC and the SNRI have identical and interchangeable governance. Plaintiffs allege that Southfield Mayor Kenson Siver is a board member of SNPHC and that Southfield City Manager Fred Zorn is "a managing member of SNRI and ... also a board member of SNPHC." (Compl. ¶¶ 7, 49, PageID.3, 10.) Mayor Siver is listed as the President of SNPHC, which is the sole member of SNRI, and Zorn, Mitchell Simon (a CPA), and E'toile Libbett (a realtor) are listed as managers of SNRI. (SNRI Operating Agreement, PageID.210.) Plaintiffs allege that Defendants Siver, Zorn, City Attorney Susan Ward-Witkowski, and Gerald Witkowski "used power under the GPTA for personal economic gain," that they understood "that they would personally benefit and utilize their power to benefit the SNRI and SNPHC," and "knew their acts would remove the subject properties from the tax rolls of Southfield for the gain of SNRI." (Compl. ¶¶ 64, 67, 71, PageID.12-13.)

B. The Michigan Supreme Court's Decision in *Rafaeli, LLC v. Oakland County*

On July 17, 2020, the Michigan Supreme Court issued its opinion in *Rafaeli, LLC v. Oakland County*, 505 Mich. 429 (2020). In *Rafaeli*, two former property owners brought an action against Oakland County and its Treasurer, Andrew Meisner, alleging due process and equal-protection violations as well as an unconstitutional taking by selling their tax-foreclosed properties at public auction in satisfaction of their tax debts and then retaining the surplus proceeds from that sale of their properties. *Id.* at 438-40.

The Oakland County Circuit Court had granted summary disposition to defendants, finding that defendants did not "take" plaintiffs' properties "because plaintiffs forfeited all interests they held in their properties when they failed to pay the taxes due on the properties." *Id.* at 440. Plaintiffs appealed, and the Michigan Court of Appeals affirmed the circuit court's opinion and "rejected plaintiffs' argument that the GPTA's 'scheme' allows for unconstitutional takings," holding that "defendants acquired their interest in plaintiffs' properties 'by way of a statutory scheme that did not violate due process' and thus defendants were not required to compensate plaintiffs for property that was lawfully obtained." *Id.* at 441. Plaintiffs sought leave to appeal to the Michigan Supreme Court, which granted plaintiffs' application and ordered the parties to address the issue of "whether defendants violated the Takings Clause of the United States Constitution, the Michigan Constitution, or both by retaining the proceeds from

the sale of tax-foreclosed property that exceeded the amount of the taxes, penalties, interest, and fees owed on the property." *Id.*

The Michigan Supreme Court concluded that a property owner does not lose all rights to the property during the tax foreclosure proceedings. The Court first explained that "forfeiture" under the GPTA simply permits the county and county treasurer to seek a judgment of foreclosure, but "does not affect title, nor does it give the county treasurer ... any rights, titles, or interests to the forfeited property. Therefore, we reject the premise that plaintiffs 'forfeited' all rights, titles, and interests they had in their properties by failing to pay their real-property taxes." *Id.* at 448-49.

The Court next addressed plaintiffs' due process concerns, noting that "the GPTA explicitly states its intent to comply with minimum requirements of due process and not create new rights beyond those prescribed in the Constitutions of our nation or this state." *Id.* at 451. The Court stated:

> As long as defendants comply with these due-process considerations, plaintiffs may not contest the legitimacy of defendants' authority to foreclose on their properties for unpaid tax debts, *nor may plaintiffs contest the sale of their properties to third-party purchasers*.

Id. (emphasis added); *see id.* at 451 ("The remedy for a taking of private property is just compensation, while the remedy for being deprived of property

without due process of law is the return of the property.").

The Michigan Supreme Court held that Michigan's "common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of the property." *Id.* at 470. The Court also found that Michigan's 1963 Constitution "protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, §2." *Id.* at 473. Because the common-law interest was protected by Michigan's Takings Clause, the GPTA could not abrogate that common law interest. *Id.* (explaining that "[w]hile the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause.").

Finally, the Supreme Court held that Oakland County's retention of the proceeds of the auction sale that exceeded the amount of property taxes owed and other charges and fees constituted an unconstitutional taking.

> Once defendants foreclosed on plaintiffs' properties, obtained title to those properties, and sold them to satisfy plaintiffs' unpaid taxes, interest, penalties, and fees related to the foreclosures, any surplus resulting *from those sales* belonged to plaintiffs. That is, after the sale proceeds are distributed in accordance with the GPTA's order of priority, any surplus that remains is the property of plaintiffs, and

> defendants were required to return that property to plaintiffs. Defendants' retention of those surplus proceeds under GPTA amounts to a taking of a vested property right requiring just compensation. To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid property taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties.

Id. at 474-75 (emphasis added). *See also id.* at 476 (stating that the surplus proceeds of the sale "is a separate property right that survives the foreclosure process"). The Court clarified that "a former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus." *Id.* at 477 (emphasis added).

The Michigan Supreme Court defined "just compensation" as "the amount of surplus proceeds generated from the tax foreclosure sale." *Id.* at 481-82 ("mak[ing] clear, the property 'taken' is the surplus proceeds from the tax-foreclosure sale of plaintiffs' properties to satisfy their tax debts"). The Court expressly "reject[ed] the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of [a] position had their properties not been taken at all" because "this would run contrary to the

general principle that just compensation is measured by the value of the property *taken*," and "plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full" and "[i]f plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency." *Id.* at 483 (emphasis in original); *see also id.* fn. 134 ("[W]e are unaware of any authority affirming a vested right to equity held in property generally.").

> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property – *no more, no less*.

Id. at 483-84 (emphasis added); *see id.* at 477 ("Indeed, a former property owner *only* has a right to collect the surplus proceeds from the tax-foreclosure sale; that is, a former property owner has a compensable takings claim *if and only if* the tax- foreclosure sale produces a surplus.") (emphases added).

The Michigan Supreme Court then held:

> Plaintiffs, former property owners whose properties were foreclosed and sold to satisfy delinquent real-property taxes, have a cognizable, vested property right to the

> surplus proceeds resulting from the tax-foreclosure sale of their properties. This right continued to exist even after fee simple title to plaintiffs' properties vested with defendants, and therefore, defendants' retention and subsequent transfer of those proceeds into the county general fund amounted to a taking of plaintiffs' properties under Article 10, § 2 of our 1963 Constitution. Therefore, plaintiffs are entitled to just compensation, which in the context of a tax-foreclosure sale is commonly understood as the surplus proceeds.

Id. at 484-85.

C. The Southfield Defendants' Motion to Dismiss

The Southfield Defendants filed a motion to dismiss, arguing that Plaintiffs' claims against them are legally and factually deficient and must be dismissed under Fed. R. Civ. P. 12(b)(6). (ECF No. 34, Southfield Mot.) The Southfield Defendants argue that Plaintiffs Tawanda Hall, Carolyn Miller, American Internet Group, LLC, and Anthony Akande's claims are barred by res judicata for having previously litigated claims against the Southfield Defendants relating to the tax foreclosures and loss of their properties, and that Plaintiff Marcus Byers lacks standing to bring any claims because he did not own the subject property. The Southfield Defendants contend that Plaintiffs have failed to state a Fifth Amendment Takings Claim against them because Plaintiffs have no cognizable interest in any "forfeited

equity." They assert that Plaintiffs' Eighth Amendment claim fails because the Southfield Defendants never took any action against Plaintiffs. These Defendants assert that Plaintiffs cannot state a substantive or procedural due process claim against them because Plaintiffs' asserted property interest – the alleged forfeited equity – is not cognizable under Michigan law, they have not pleaded a deprivation "at the hands of the Southfield Defendants," and Plaintiffs had adequate post-deprivation remedies. Finally, the Southfield Defendants argue that Plaintiffs' unjust enrichment claim fails because the Southfield Defendants never received a benefit from Plaintiffs, and no surplus proceeds were obtained by the County.

Plaintiffs filed a Response in opposition to the Southfield Defendants' motion to dismiss. (ECF No. 44, Pls.' Resp.) Plaintiffs argue that Plaintiffs Miller, American Internet Group, and Akande's claims are not barred by res judicata, that Plaintiff Byers does have standing in this action because he had an "equitable interest" in the subject property, and that Hall's prior dismissal was without prejudice and thus does not act as a res judicata bar. Plaintiffs further assert that they have stated a Fifth Amendment Takings claim and a claim under the Michigan Constitution against the Southfield Defendants for taking/retaining the surplus equity in their properties. Plaintiffs contend that they have stated an unjust enrichment claim against the Southfield Defendants because even though these Defendants did not directly retain any proceeds, they "orchestrated and participated in a scheme or conspiracy to strip the equity of Plaintiffs' properties

through concerted action." Plaintiffs further argue that if the Southfield Defendants' conduct did not violate the Fifth Amendment, they violated the substantive due process rights of Plaintiffs and violated the Eighth Amendment Excessive Fines clause.

The Southfield Defendants filed a reply brief in support of their motion to dismiss. (ECF No. 52, Southfield Reply.) The Southfield Defendants reassert that res judicata bars Plaintiffs Miller, Akande, American Internet Group, and Hall's claims, and that Plaintiff Byers lacks standing. They argue that Plaintiffs have failed to cite to any authority affirming a property right to "equity" in property generally after a tax foreclosure, and so Plaintiffs' takings and inverse condemnation claims fail. Defendants contend that Plaintiffs' unjust enrichment claim against the Southfield Defendants fails because Plaintiffs have failed to specifically plead how each Defendant allegedly "misled them." And, Plaintiffs' procedural and substantive due process claims fail because Plaintiffs have failed to identify a cognizable property interest, and have failed to show that the Southfield Defendants engaged in behavior that "shocks the conscience."

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. To state a claim, a complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he

complaint 'does not need detailed factual allegations' but should identify 'more than labels and conclusions.'" *Casias v. Wal–Mart Stores, Inc.*, 695 F.3d 428, 435 (6th Cir. 2012) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). The court "need not accept as true a legal conclusion couched as a factual allegation, or an unwarranted factual inference." *Id.* at 539 (internal citations and quotation marks omitted); *see also Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue* Shield, 552 F.3d 430, 434 (6th Cir. 2008) (citing *Morgan v. Church's Fried* Chicken, 829 F.2d 10, 12 (6th Cir. 1987)). In other words, a plaintiff must provide more than a "formulaic recitation of the elements of a cause of action" and his or her "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56. The Sixth Circuit has explained that "[t]o survive a motion to dismiss, a litigant must allege enough facts to make it plausible that the defendant bears legal liability. The facts cannot make it merely possible that the defendant is liable; they must make it plausible." *Agema v. City of Allegan*, 826 F.3d 326, 331 (6th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). It is the defendant who "has the burden of showing that the plaintiff has failed to state a claim for relief." *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015).

In ruling on a motion to dismiss, the Court may consider the complaint as well as: (1) documents that are referenced in the plaintiff's complaint and that are central to plaintiff's claims; (2) matters of which a court may take judicial notice; (3) documents that are a matter of public record; and (4) letters that constitute decisions of a governmental agency. *Thomas v. Noder-Love*, 621 F. App'x 825, 829 (6th Cir. 2015) ("Documents outside of the pleadings that may typically be incorporated without converting the motion to dismiss into a motion for summary judgment are public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies.") (internal quotation marks and citations omitted); *Armengau v. Cline*, 7 F. App'x 336, 344 (6th Cir. 2001) ("We have taken a liberal view of what matters fall within the pleadings for purposes of Rule 12(b)(6). If referred to in a complaint and central to the claim, documents attached to a motion to dismiss form part of the pleadings…. [C]ourts may also consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies."); *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (finding that documents attached to a motion to dismiss that are referred to in the complaint and central to the claim are deemed to form a part of the pleadings). Where the claims rely on the existence of a written agreement, and plaintiff fails to attach the written instrument, "the defendant may introduce the pertinent exhibit," which is then considered part of the pleadings. *QQC, Inc. v. Hewlett-Packard Co.*, 258 F.Supp.2d 718, 721 (E.D. Mich. 2003). "Otherwise, a plaintiff with a legally deficient claim could survive a

motion to dismiss simply by failing to attach a dispositive document." *Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

III. ANALYSIS

A. Plaintiffs Hall, Miller, AIG, and Akande's Claims Against the Southfield Defendants are Barred by Res Judicata

The Southfield Defendants argue that the claims of Plaintiffs Tawanda Hall, Carolyn Miller, American Internet Group, LLC, and Anthony Akande are barred by res judicata. (Southfield Mot. at pp. 8-9, PageID.439-40.)

"[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). "The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v. State*, 470 Mich. 105, 121 (2004). Under Michigan law, "the doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.* Michigan thus "take[s] a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising

reasonable diligence, could have raised but did not." *Id.*

1. Plaintiff Tawanda Hall

In this case, Plaintiff Hall claims that her property was foreclosed on by the Oakland County Treasurer for a $22,642.00 tax debt. (Compl. ¶ 21, PageID.5.) After foreclosure, the City of Southfield exercised its right of first refusal under the GPTA and purchased the property for the amount of the tax debt (the statutory "minimum bid"), and then deeded the property to Defendant SNRI for $1.00. (*Id.*) Plaintiff claims that the property was subsequently sold for $308,000. (*Id.*)

In December 2018, after the property had been deeded to SNRI but before it had been sold for $308,000, Hall, proceeding pro se, filed suit in the Eastern District of Michigan (in this Court) against the Southfield Defendants (City of Southfield, Frederick Zorn, Kenson Siver, Sue Ward-Witkowski, Gerald Witkowski, and Irvin Lowenberg) and other Defendants in this case. *Hall v. Meisner*, et al., Case No. 18-cv-14086 (Borman, J.). In that case, Hall made claims related to the foreclosure and subsequent sale of her tax-foreclosed property from Oakland County to the City of Southfield to the SNRI, alleging that "[t]his end run around Michigan law equates to a constitutional taking," and asserted claims for violation of the Fair Housing Act, due process, conspiracy and fraud under the RICO Act, and a state-law fraud claim. *Id.* ECF No. 9, Amended Complaint, PageID.76, 88-96. The Southfield Defendants filed a motion to dismiss Hall's claims in that case, and Hall

agreed to the dismissal, through assistance from the Federal Pro Se Legal Assistance Clinic, and dismissed the Southfield Defendants with prejudice. *Id.* ECF No. 21, Stipulation for Voluntary Dismissal With Prejudice, PageID.251-52. "A voluntary dismissal with prejudice operates as a final adjudication on the merits and has a res judicata effect." *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001).

Plaintiffs first erroneously contend in their Response that "the actual Order of the Court was without prejudice." (Pls.' Resp. at p. 11, PageID.1180.) The voluntary stipulation of dismissal as to the Southfield Defendants in that case was *expressly* "with prejudice." *Hall v. Meisner, et al.*, Case No. 18-cv-14086, ECF No. 21. The remaining, unserved, defendants were dismissed without prejudice. *Id.* ECF Nos. 19, 23.

Next, Plaintiffs' conclusory allegation that the stipulation of dismissal was somehow "ethically suspect" because she relied on the advice of a legal intern with the Pro Se Legal Assistance Clinic, who is now employed by the Southfield Defendants' counsel, is a non-starter. Defendants promptly noticed this Court of the potential conflict regarding Plaintiff Hall's prior suit and explained that the lawyer would be screened from any participation in this suit pursuant to the Michigan Rules of Professional Conduct. (ECF No. 9, Notice Pursuant to Mich. R. Pro. Conduct 1.10(B)(2).)

Plaintiffs do not otherwise dispute that the two actions involved the same parties or their privies or

that the issues in this case were or could have been resolved in the first. Accordingly, the Court finds that Plaintiff Hall's claims against the Southfield Defendants are precluded by res judicata.

2. Plaintiffs Miller, American Internet Group, and Akande

In this case, Plaintiff Miller claims her property was foreclosed on for a $29,759.00 tax debt. (Compl. ¶ 22, PageID.5.) After foreclosure the City purchased the property from Oakland County for the $29,759.00 tax debt amount and deeded the property to the SNRI for $1.00. (Compl. PageID.39.) Plaintiff American Internet Group claims its property was foreclosed on for $9,974.00 of delinquent property taxes. (Compl. ¶ 23, PageID.5-6.) The City also purchased this property for the tax debt and transferred it to the SNRI for $1.00. (Compl. PageID.42.) Similarly, Plaintiff Akande's property was allegedly foreclosed for $2,415.00, and the City purchased the property for that amount and transferred it to the SNRI for $1.00. (Compl. ¶ 24, PageID.6, 45.)

After the foreclosures and transfers in 2016, Miller, American Internet Group, and Akande, and others, filed suit in Oakland County Circuit Court in 2017 against the Oakland County Treasurer, the City of Southfield, and SNRI, alleging various discriminatory housing practices claims in relation to the foreclosure of their properties. (Southfield Mot. at p. 4, PageID.435, citing Ex. 1, ECF No. 34-2, *Ronald Hayes, et al. v. Oakland County Treasurer's Office, et al.*, Case No. 2017-157366-CZ (Michigan Sixth Judicial Circuit, 2017), State Court Complaint.) That

state court complaint was based on the same premise as this case – that the County, City, and SNRI created a "scheme" to divest Southfield citizens of their homes and procure a profit through application of Michigan's tax-foreclosure process. (*See id.*, PageID.457.) That complaint alleged that "once certain properties owned by African-Americans were foreclosed upon for non-payment of delinquent real estate taxes, systematically the officials of the City of Southfield that designed this discriminatory scheme made sure that these properties were requested to be held- back from public auction by the Oakland County Treasurers Office and subsequently designated for purchase by the City of Southfield, Non-Profit Housing Corporation," and "[t]hat immediately upon the City of Southfield reacquiring the real estate foreclosed upon ... then after placed the properties out-of-the-reach of the previous owners by transferring by Quit Claim Deed to an agency known as the Southfield Neighborhood Revitalization Initiative, LLC, a for profit limited liability company...." (*Id.* ¶¶ 9-10, PageID.460-61 (emphasis in original).) The complaint further alleged "the City of Southfield through the scheme alleged in the common allegations ... targeted [plaintiff's] homes for designation for non-bid transfer to the Southfield Non-Profit Housing Commission" and that "the transfer of these non-bid homes ... were actually transferred to a 'for profit' organization-SNRI, LLC, for the ultimate personal gain of yet to be exposed individuals." (*Id.* ¶¶ 43-44, PageID.467-68.) The complaint sought, in part, "the loss of equity (FMV) in their residential properties." (*Id.* PageID.469.)

Those state court plaintiffs then moved to amend the complaint to "remove the discrimination counts and add allegations that Plaintiffs made timely payments that were rejected by Defendant Oakland County Treasurer[.]" (ECF No. 32-4, State Court Motion to Amend, PageID.389-90.) In that motion to amend, the plaintiffs alleged that "Southfield did not purchase the property for the minimum bid. Southfield quit claimed its interest to SNRI for no consideration. SNRI's Directors and/or Officers are City of Southfield officials who used their inside knowledge about these mortgage-free properties to acquire the properties for their own personal benefit and not for public purpose." (*Id*. PageID.394.)

All of the state court defendants moved to dismiss that action, and the state court judge dismissed the case with prejudice because "the claims alleged are clearly unenforceable as a matter of law," and denied the plaintiffs' motion to amend because the plaintiffs failed to provide the court with a proposed amended complaint and because any amendment would be futile. (ECF No. 34-3, Order Granting Summary Disposition.) This dismissal constitutes an adjudication on the merits for purposes of res judicata. *Chakan v. City of Detroit*, 998 F. Supp. 779 (E.D. Mich. 1998); *ABB Paint Finishing v. Nat'l Fire Ins.*, 223 Mich. App. 559 (1997).

The Southfield Defendants assert that the state court case involved the same core set of facts that are at issue in this case: (1) Plaintiffs' failure to pay property taxes, (2) the County's foreclosure on their properties due to the delinquent taxes, (3) the City's purchase of the properties after foreclosure pursuant

to its statutory right of first refusal, and (4) the transfer of the properties from the City to SNRI. Both cases alleged a "scheme" whereby the County, City, and SNRI conspired to take the homes of Southfield residents through the foreclosure process to procure a profit. (Southfield Mot. at p. 9, PageID.440) (State Court complaint, PageID.457, 460-61.) The Southfield Defendants assert that Plaintiffs could have brought the present claims in the state court proceedings, and are precluded from doing so now. (Southfield Mot. at p. 9, PageID.440.)

Plaintiffs respond that these their claims are not barred by res judicata because (1) the alleged "scheme to strip Plaintiffs' equity" was not known at the time of the state court suit, (2) the parties are not identical, and (3) the "landscape of the law has shifted." (Pls.' Resp. at pp. 7-10, PageID.1176-79.)[4]

[4] Plaintiffs rely, in part, on a state court order declining to accept reassignment of a class action from another court, to support their argument against res judicata in this case. (Pls.' Resp. at p. 8, PageID.1177, citing ECF No. 44-7, PageID.1269-70.) However, that state court order declining reassignment is not persuasive authority. In that case, the defendants moved to have the case reassigned from Judge Denise Langford-Morris to Judge Hala Jarbou because Judge Jarbou handled the 2017 foreclosure case. Judge Jarbou declined reassignment as improper under the local court rule regarding assignment of cases, finding "the instant action does not arise out of the same transaction and occurrent that was before th[at] Court in 2016 [a bulk foreclosure action]" because "not all of the Plaintiffs' properties were foreclosed in 2017 by this Court" and thus "the instant action does not 'arise out of the same transaction and occurrence.'" (ECF No. 43-3, PageID.996-97.) In this case, the properties at issue are identical.

First, as previously found by this Court in its prior Opinion and Order (ECF No. 62, PageID.2198), Plaintiffs' state court lawsuit was based on essentially the same alleged "scheme" to induce tax foreclosures and transfer properties to SNRI for a profit. (State Court Complaint, PageID.457 (alleging the "scheme" was to "re- direct foreclosure upon homes to a private 'for profit organization' – Southfield Neighborhood Revitalization Initiative, LLC so as to deny African-Americans to bid at a public auction an opportunity to reacquire their homes") (emphasis in original).) That state court complaint alleged that "the City of Southfield through the scheme alleged in the common allegations ... targeted [plaintiff's] homes for designation for non-bid transfer to the Southfield Non-Profit Housing Commission" and that "the transfer of these non-bid homes ... were actually transferred to a 'for profit' organization-SNRI, LLC, for the ultimate personal gain of yet to be exposed individuals." (State Court Complaint, ¶¶ 43-44, PageID.467-68.) The complaint sought as relief, in part, "the loss of equity (FMV) in their residential properties." (*Id.* PageID.469.) Moreover, when those state court plaintiffs moved to amend the complaint, the plaintiffs alleged that "Southfield did not purchase the property for the minimum bid. Southfield quit claimed its interest to SNRI for no consideration. SNRI's Directors and/or Officers are City of Southfield officials who used their inside knowledge about these mortgage-free properties to acquire the properties for their own personal benefit and not for public purpose." (Mot. to Amend., PageID.394.)

The Michigan Supreme Court "has taken a broad approach" to the question of whether the claims

precluded were or could have been decided in the prior action, embracing the "transactional" test, under which res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich. at 121, 124. "[T]he determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in" the first action. *See id.* at 125. "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit." *Id.* (citation omitted). Applying this framework, the Court finds that the prior state court lawsuit and this suit involve the same core set of facts, and the issues in this case were, or could have been, raised in the prior suit.

Second, the parties in the two actions are substantially identical. Parties are substantially identical when a party in a second suit is "so identified in interest with [a party from the first suit] that he or she represents the same legal right." *Viele v. D.C.M.A.*, 167 Mich. App. 571, 580 (1988) (citation omitted). The Southfield Defendants explain that the additional defendants in this suit – Oakland County, SNPHC, Habitat for Humanity, and individual officials from the City, SNRI and SNPHC – share the same interest and rights as the named defendants. (Southfield Reply at pp. 1-2, PageID.2003-04.) The Court finds that the City of Southfield and its officials are in privity through agency principles, and thus are substantially identical for purposes of res judicata.

See Lyons v. Washington, No. 212516, 2000 WL 33407429, at *1 (Mich. App. Aug. 18, 2000) (citing *Viele*, 167 Mich. App. at 580).

Third, Plaintiffs argue that "the landscape of the law has shifted" and "[t]his action could have not been resolved at the time of the state court case because the Michigan Constitution had not established the right to the equity/surplus proceeds from a tax foreclosure." (Pls.' Resp. at p. 7, PageID.1176.) Plaintiffs contend that, before the decision in *Rafaeli*, "there were no common law property rights that existed unambiguously in the equity/surplus proceeds after a property tax foreclosure," and "it would have been largely futile to bring most of the present claims." (*Id.*) However, "an intervening change of law" precludes the application of res judicata only when it "alters the legal principles on which the court will resolve the subsequent case.'" *In re Bibi Guardianship*, 315 Mich. App. 323, 334 (2016) (citation omitted). As discussed more fully in this Opinion, *Rafaeli* does not recognize a right to recover alleged equity in property after a foreclosure, and thus does not represent a change to the legal landscape regarding Plaintiffs' claims in this case.

Interestingly, in a seeming concession of the failure of their takings claim in this case, Plaintiffs admit in their Response that:

> There still is no adequate remedy or procedure to address the unlawful conduct in this case until the Michigan Legislature finds *Rafaeli, LLC, supra*, retroactive. Even then, ambiguity will persist (see Justice

> Viviano's Concurrence in *Rafaeli, LLC, supra*.[)]

(Pls.' Resp. at p. 8, PageID.1177.) As will be discussed further *infra*, Justice Viviano recognized in his concurrence that "the majority's view of the case would seemingly be that if the property does not sell at auction and is simply transferred to a governmental unit, the taxpayer is out of luck: no proceeds, let alone a surplus, have been produced or retained by the government." *Id.* at 518 (Viviano, J., concurring).[5] Based on all the above, the Court find that Plaintiffs Miller, American Internet Group, and Akande's claims against the Southfield Defendants are barred by res judicata. However, even if these plaintiffs' claims were not barred by res judicata, they would nevertheless fail for the reasons stated *infra*.

B. Whether Plaintiff Marcus Byers Lacks Standing

Plaintiff Marcus Byers alleges that he held "equitable title" with his guardian in property that was foreclosed on for $4,113.00 in delinquent taxes. (Compl. ¶ 26, PageID.6.) However, the records Plaintiffs attach to the Complaint indicate that the property was owned by, and foreclosed under, the

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[5] Plaintiffs' citation to Judge Tarnow's May 31, 2020 decision in *Johnson v. Meisner*, Case No. 19-11569 (E.D. Mich.), is misplaced because Judge Tarnow declined to apply res judicata to the plaintiffs' claims in that case because the prior dismissal was under Rule 12(b)(1), for lack of jurisdiction, not Rule 12(b)(6), and Rule 12(b)(1) dismissals are not dismissals on the merits and thus do not have preclusive effect. (ECF No. 44-9, PageID.1372-73.)

ownership of Debbie Byers, who is not a named Plaintiff. (Compl. PageID.51.) After the foreclosure, the property was sold to the City for the tax debt amount, and then transferred to SNRI for $1.00. (*Id.*) To satisfy the Article III standing requirement in a civil forfeiture action, "a claimant must alleged a colorable ownership, possessory, or security interest in a least a portion of" the property in interest. *U.S. v. Real Prop. Located at 4527-4535 Michigan Ave., Detroit, Mich.*, 489 F. App'x 855, 857 (6th Cir. 2012) (citing *U.S. v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998)). The courts generally look to "the law of the jurisdiction that created the property right to determine the petitioner's legal interest." *U.S. v. Salti*, 579 F.3d 656, 668 (6th Cir. 2009) (citation omitted). In Michigan, "an interest in real property can only be created 'by act or operation of law, or by a deed or conveyance in writing.'" *Real Prop.*, 489 F. App'x at 857 (citing Mich. Comp. Laws § 566.106) (finding that the claimants lacked standing because the deed to the clubhouse property was not in their name and no other writing existed showing their interest in the property).

The Southfield Defendants assert that Plaintiff Marcus Byers lacks standing to bring suit against Defendants because he was not the owner of the Hidden Rivers Drive property. (Southfield Mot. at pp. 11-12, PageID.442-43.) Rather, all former title and interest in that property prior to the tax foreclosure in 2018 was held by Marcus Byers' former spouse, Debbie Byers, who purchased the property from Wells Fargo Bank in 2008 (and who, according to the SNRI Defendants, is presently litigating claims in Bankruptcy Court related to that property). (*Id.* citing

Ex. 8, ECF No. 34-9, Deed, PageID.560.) Without an ownership interest, Plaintiff Marcus Byers was not injured and lacks standing.

Plaintiffs respond only that Marcus Byers has a closed head injury since 1998 and his ex-wife Debbie Byers "purchased a house with his money and has been his legal guardian," that "[t]he equity in or from the property belongs to Mr. Byer[s]," and "Byers' equitable interest meets the threshold for standing as an injury in fact." (Pls.' Resp. at pp. 10-11, PageID.1179-80.) Plaintiffs rely on expired guardianship papers naming "Kiara Napier" as Byers' guardian and an unrecorded Quit Claim deed from Debbie Byers to herself and Marcus Byers, dated July 30, 2020, to try to assert that Byers somehow had an interest in the property in 2018. (*Id.* citing Ex. K, ECF No. 44-13, PageID.1400-03).

However, as Defendants point out in their Reply, Debbie Byers could only convey the interest she had in 2020, which, following the 2018 foreclosure of the property, was none. (Southfield Reply, at p. 3, PageID.2005.) Without an interest in the subject property when the foreclosure and transfers occurred, the Court finds that Plaintiff Marcus Byers lacks standing in this case and dismisses his claims with prejudice.

C. Plaintiffs' Takings Claims Against the Southfield Defendants

Plaintiffs assert a Fifth Amendment Takings claim and a takings claim under the Michigan Constitution in Counts I-III of their Complaint

against the Oakland County and Southfield Defendants. (Compl., PageID.18-25.) The Court previously found that Plaintiffs failed to state a takings claim against the Oakland County Defendants (ECF No. 62, PageID.2205-12), and similarly find that Plaintiffs fail to state a takings claims against the Southfield Defendants.

The Takings Clause of the Fifth Amendment prohibits taking "private property ... for public use, without just compensation." U.S. Const. amend. V. The clause applies to state governments through the Fourteenth Amendment. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The Sixth Circuit has articulated a two-part test in evaluating claims that a governmental action constitutes a taking of private property without just compensation. First, "the court must examine whether the claimant has established a cognizable property interest for the purposes of the Just Compensation Clause." *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 481 (6th Cir. 2004) (internal quotation marks omitted); *see also Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place."). Second, "where a cognizable property interest is implicated, the court must consider whether a taking occurred." *Coalition for Gov't Procurement*, 365 F.3d at 481. "[T]he existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (internal quotation marks omitted).

The Southfield Defendants argue that Plaintiffs cannot state a takings claim against them because Plaintiffs fail to identify a cognizable property interest, and because no state-created right exists under Michigan law for "surplus equity" in a foreclosed property. (Southfield Mot. at pp. 13-14, PageID.444-45.) The Southfield Defendants also argue that Plaintiffs cannot show that the Southfield Defendants took any property from them because the Oakland County Treasurer is the foreclosing governmental unit under the GPTA, not the City. (Southfield Mot. at p. 14, PageID.445.) Plaintiffs here seek the "taken and/or forfeited equity" in their property. (Compl., Relief Requested, PageID.30.) Defendants explain that the Michigan Supreme Court in *Rafaeli* limited a plaintiff's claim to the excess proceeds realized from the tax foreclosure sale (the auction) (i.e., the proceeds realized in excess of the delinquent taxes, interest, penalties, and fees), "no more, no less." (Southfield Mot. at p. 14, PageID.445.) *See Rafaeli*, 505 Mich. at 484; *see also id.* at 477 ("[A] former property owner has a compensable takings claim *if and only if* the tax-foreclosure sale produces a surplus.") (emphasis added). Indeed, the Michigan Supreme Court expressly rejected "the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all." *Id.* at 483.

Plaintiffs cite to *Coleman v. District of Columbia*, 70 F. Supp. 3d 58 (D.C. Cir. 2014) as applying the Fifth Amendment to property tax sales. (Pls.' Resp. at p. 14, PageID.1183.) However, Plaintiffs' reliance on *Coleman* is misplaced, as the plaintiff's property

interest in that case stemmed from Washington D.C. law. *Coleman*, 70 F. Supp. 3d at 81 (recognizing that "such an interest may be created by a statute that requires the refunding of surplus equity after a tax sale."). Moreover, the D.C. Circuit Court declined to address the viability of the plaintiff's takings claim because the district court below had not addressed this issue. *Id.*

In *Nelson v. City of New York*, 352 U.S. 103 (1956), the United States Supreme Court recognized that former property owners have an interest in surplus only to the extent it is provided under some other source, such as state law, and that federal law does not recognize a former property owner's property interest in potential equity that exists after a tax foreclosure. *See id.* at 110 ("What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recovery any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.").[6] In *Rafaeli*, the Michigan

[6] The Supreme Court in *Nelson* recognized that the New York law was a "harsh statute," but explained that "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed." *Nelson*, 352 U.S. at 111.

As explained above, since the Michigan Supreme Court's decision in *Rafaeli*, the Michigan Legislature has amended the GPTA, which now allows the state and/or municipalities to purchase tax foreclosed properties "at the greater of the minimum bid or its fair market value[.]" Mich. Comp. Laws

(continued…)

Supreme Court found that Michigan's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property, "no more, no less." *Rafaeli*, 505 Mich. at 470, 484.

In this case, the Plaintiffs' properties were not sold at auction, but were purchased from the Oakland County Treasurer, the FGU, by the City of Southfield for the minimum bid – the amount of the delinquent taxes, interest, penalties, and fees. Accordingly, it is undisputed that no "surplus proceeds" were generated with regard to any of the subject properties, and Plaintiffs have failed to demonstrate a vested property right or amount that was "unjustly" taken from them by anyone. The City of Southfield exercised its statutory right of first refusal to acquire the properties for the minimum bid under the GPTA, and paid that amount to the Oakland County Treasurer. The Michigan Supreme Court made clear in *Rafaeli* that a plaintiff's only "property interest" surviving a tax-foreclosure is not in the real property itself, but only in the surplus proceeds resulting from the tax-foreclosure sale, if any, resulting from the sale of the property at an auction. The *Rafaeli* court stated that it is "unaware of any authority affirming a vested

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§ 211.78m(1). While this amendment will affect the manner in which future tax foreclosure sales are handled, it does not provide a basis for liability against the Defendants in this action. The Act provides that any retroactive effect is dependent upon a decision of the Michigan Supreme Court that "its decision in Rafaeli, LLC v. Oakland County, docket no. 156849, applies retroactively." Mich. Comp. Laws § 211.78t(1)(b)(i). There has been no such decision by the Michigan Supreme Court.

property right to equity held in property generally." *Id.* at 484 n. 134; *see also Freed*, 2021 WL 942077, at *3-4 ("Plaintiff has failed to cite any law – Constitutional, statutory, precedential, or otherwise – that supports his equity-based argument" "that the property taken was the home's equity minus the debt owed"). Justice Viviano recognized in his concurrence that "the majority's view of the case would seemingly be that if the property does not sell at auction and is simply transferred to a governmental unit, the taxpayer is out of luck: no proceeds, let alone a surplus, have been produced or retained by the government." *Rafaeli*, 505 Mich. at 518 (Viviano, J. concurring).

Here, based on the law as it stands after *Rafaeli*, there are no such surplus proceeds in this case, and the Court finds that Plaintiffs therefore fail to state a takings claim against the Southfield Defendants. Like the United States Supreme Court stated in *Nelson*, this application of the Michigan GPTA is "harsh," but "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed." *Nelson*, 352 U.S. at 111. And, as another Court in this District recently found when dismissing a takings claim against Southfield, "Plaintiff has not shown, and the Court has not found, any authority stating that the recipients of property from a government agency which took the property from the owner, can be held liable under the Takings clause." *The Estate of Dell Johnson v. Meisner*, No. 19-11569, 2021 WL 3680479, at *5 (E.D. Mich. Aug. 18, 2021). Accordingly, the takings claims against the Southfield Defendants are dismissed.

D. Eighth Amendment Claim Against the Southfield Defendants

In their Complaint, Plaintiffs expressly plead that their claim for an Eighth Amendment violation is "against Oakland County only." (Compl. Count IV, PageID.25-26.) However, Plaintiffs allege within that Count that "[t]o the extent the actions of Defendants Oakland County and Southfield conduct [sic] is found to be a forfeiture the Eighth Amendment is applicable." (Compl. Count IV, PageID.25-26.) Plaintiffs plead that "[b]y imposing and retaining all the surplus equity in Plaintiffs' property Defendants violated the Eighth Amendment right to be free of excessive fines." (*Id.* ¶ 119, PageID.25.)

The purpose of the Eighth Amendment generally is "to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609 (1993). "The Excessive Fines Clause limits the government's power to extract payments, whether in case or in kind, 'as punishment for some offense.'" *Id.* at 609-10 (citation omitted). Thus, when analyzing government actions under the Excessive Fines Clause, the issue is "whether it is punishment." *Id.* at 610. In *Rafaeli*, the Michigan Supreme Court addressed this issue and found that the GPTA "is not punitive in nature. Its aim is to encourage the timely payment of property taxes and to return tax-delinquent property to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes." *Rafaeli*, 505 Mich. at 449.

The Southfield Defendants argue that Plaintiffs fail to state an Eighth Amendment Excessive Fines

claim against them because the Oakland County Treasurer took actions to foreclose Plaintiffs' property, not the Southfield Defendants, who took no actions against Plaintiffs. (Southfield Mot. at pp. 15-16, PageID.446-47.) In response, Plaintiffs argue that, if there was no taking by the Southfield Defendants, then "the Eighth Amendment Excessive Fines Clause prohibits the forfeiture of Plaintiffs' entire equity because it is grossly disproportionate to any act or omission." (Pls.' Resp. at pp. 27-28, PageID.1196-97, citing *United States v. Bajakajian*, 524 U.S. 321, 324 (1998), and *United States v. Certain Real Prop. Located at 11869 Westshore Dr., Putnam Twp., Livingston Cnty., Mich.*, 70 F3d 923, 927 (6th Cir. 1993).) The Southfield Defendants reply that the cases Plaintiffs rely on are distinguishable because they involved forfeitures of property because of a criminal act. (Southfield Reply at p. 7, PageID.2009.) Here, the Southfield Defendants purchased the properties from the Oakland County Treasurer, pursuant to the terms of the GPTA, for the minimum bid.

As explained above, in *Rafaeli*, the Michigan Supreme Court addressed "forfeiture" under the GPTA and explained that "the purpose of civil-asset forfeiture is different than the purpose of the GPTA provisions at issue here," and while civil forfeiture "serves, at least in part, to punish the owner...[,] the GPTA is not punitive in nature." *Rafaeli*, 505 Mich. at 449. The District courts that have considered the same argument made here – that the forfeiture of proceeds/equity in foreclosed property is punitive in nature and therefore governed by the Excessive Fines Clause – have unanimously rejected such a claim, finding the Michigan Supreme Court's interpretation

of the GPTA controlling. *See Arkona, LLC v. Cnty. of Cheboygan*, No. 19-CV-12372, 2021 WL 148006, at *9 (E.D. Mich. Jan. 15, 2021); *Fox v. Cnty. of Saginaw*, No. 19-CV-11887, 2021 WL 120855, at *13-14 (E.D. Mich. Jan. 13, 2021); *Grainger v. Cnty. of Ottawa*, No. 1:19-cv-501, 2021 WL 790771, at *12 (W.D. Mich. Mar. 2, 2021). This Court similarly finds that Plaintiffs fail to state an Eighth Amendment claim against the Southfield Defendants.

E. Due Process Claim

Plaintiffs allege a substantive due process claim "against Southfield and Oakland County Treasurer only." (Compl. PageID.28-29.)[7] Plaintiffs allege that Defendants "denied Plaintiffs their constitutional right to fair and just treatment during executive acts and deceptive communications from site officials who intentionally acted and deprived Plaintiffs of their property." (*Id.* ¶ 136, PageID.28.) Plaintiffs further allege that they "were led to believe by the Oakland County [sic] and by Southfield and their respective officials that they had the ability to maintain their property rights" and that "government officials

[7] Plaintiffs also purport to allege a procedural due process claim "against Southfield and Oakland County Treasurer only." (Compl. Count V, PageID.26-28.) However, Plaintiffs' procedural due process claim focuses on the property tax installment plans Plaintiffs allege they entered into with the Oakland County Treasurer, and thus do not appear to be asserted against the Southfield Defendants, who are not mentioned in any of the allegations in Count V. In fact, Plaintiffs do not address their procedural due process claim at all in their Response to the Southfield Defendants' motion. The Court therefore finds that Plaintiffs fail to state a procedural due process claim against the Southfield Defendants.

including the named Defendants herein engaged in unconscionable fraud against Plaintiffs" and "engaged in conduct that 'shocked the conscience' in the constitutional sense." (*Id.* ¶¶ 138-40, PageID.28-29.)

The Southfield Defendants argue that to properly assert a substantive due process claim, Plaintiffs must first identify a protected liberty or property interest and show how they were deprived of that interest. (Southfield Mot. at p. 16, PageID.447, citing *Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001).) These Defendants argue that Plaintiffs' substantive due process claim fails because their asserted property interest – the alleged forfeited equity in the properties – is not cognizable under Michigan law. (*Id.* at pp. 17-18, PageID.448-49.) For the reasons discussed above, the Court agrees that Plaintiffs do not have a cognizable property interest in the alleged lost equity in their former properties. The Southfield Defendants further argue that Plaintiffs fail to plead that the Southfield Defendants themselves deprived Plaintiffs of any alleged property right because the Southfield Defendants did not foreclose on Plaintiffs' properties. (*Id.*)

Plaintiffs argue in response that Defendants' alleged scheme to "use the municipalities right of first refusal under M.C.L. § 211.78m to act as a conduit to transfer the properties to SNRI for $1.00" "shocks the conscience." (Pls.' Resp. at p. 22, PageID.1191.) Plaintiffs contend that "[t]he intended and obtained result was that Plaintiffs' properties were taken without 'just compensation' and by means of intentional conduct by officials." (*Id.* at p. 23, PageID.1192.)

However, substantive due process claims may not be asserted "as a stand-in to address a failed takings claim." *Ostipow v. Federspiel*, 824 F. App'x 336, 345 (6th Cir. 2020) (citing *Hillcrest Prop., LLP v. Pasco Cnty.*, 915 F.3d 1292, 1304 (11th Cir. 2019) (Newsom, J., concurring in the judgment)); *Grainger*, 2021 WL 790771, at *13 (dismissing substantive due process claim because "Plaintiffs cannot meaningfully distinguish this substantive due process claim from his takings claim"); *Fox*, 2021 WL 120855, at *15 ("Plaintiff's substantive due process claim is precluded by his *prima facie* takings claim.").

Further, the Due Process Clause of the Fourteenth Amendment protects individuals from the arbitrary actions of government employees, but "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quotation omitted). Generally, conduct that "shocks the conscience" is conduct that is so brutal and offensive that it does not comport with traditional notions of fair play and decency. *Puckett v. Lexington-Fayette Urban Cnty. Gov't*, 566 F. App'x 462, 472 (6th Cir. 2014). As the Southfield Defendants note, the Sixth Circuit has resisted applying that standard except in cases involving physical force. *See, e.g.*, *id.* ("Generally, the 'shocks the conscience' strain of successful substantive due process claims is recognized 'in the exclusive context of cases involving physical abuse.'"). This case does not involve any allegations of physical force, and Plaintiffs have failed to allege that the Southfield Defendants, exercising their statutory right of first refusal to purchase the

subject properties for the minimum bid, engaged in arbitrary conduct lacking any rational basis.

Accordingly, the Court finds that Plaintiffs fail to state a substantive due process claim against the Southfield Defendants, and that claim is dismissed.

F. Unjust Enrichment

Plaintiffs' unjust enrichment claim (Count VII), alleges that "SNRI obtained the surplus equity and or equity from the tax foreclosure" "in a prearranged transfer for inadequate value" and that "[t]he retention of the benefits [surplus equity] by SNRI (or subsequent non-bona fide purchasers) of the property rights, equity and/or surplus amounts to unjust enrichment to the SNRI." (Compl. ¶¶ 145-48, PageID.29.) Plaintiffs allege that "[t]he surplus equity and or equity in justice and equity belongs to the Plaintiffs[] individually and to the Class Members," and that "Plaintiffs[] individually and as class representatives have been damaged by their loss of equity." (*Id.* ¶¶ 149-50, PageID.30.) There is an absence of any specific factual allegations in Plaintiffs' Complaint, Count VII, Unjust Enrichment, that the Southfield Defendants have been unjustly enriched. Thus, on its face, Plaintiffs' Complaint fails to factually plead an unjust enrichment claim against the Southfield Defendants (or indeed, any Defendants other than SNRI), and the Southfield Defendants could be entitled to dismissal of Plaintiffs' unjust enrichment claim on this basis. However, even considering this claim against the Southfield Defendants, it nevertheless fails.

Under Michigan law, "[u]njust enrichment is defined as the unjust retention of money or benefits which in justice and equity belong to another." *Tkachik v. Mandeville*, 487 Mich. 38, 48 (2010) (citation omitted). A plaintiff alleging unjust enrichment must establish two elements: "(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 478 (2003).

The Southfield Defendants argue that, as established by the Michigan Supreme Court in *Rafaeli*, Plaintiffs had no cognizable property interest in the alleged equity in the property, and thus Plaintiffs have failed to show that the Southfield Defendants received a benefit from Plaintiffs. Defendants rely on *Karaus v. Bank of New York Mellon*, 300 Mich. App. 9 (2012), for the proposition that when a defendant receives a benefit from a third party, and not through the actions of the plaintiff directly, there is no receipt of a benefit by the defendant from the plaintiff as required for a claim of unjust enrichment.[8] (Southfield Mot. at pp. 20-21,

[8] In *Karaus*, a homeowner borrowed money from a bank to finance construction on his house and, in return, the homeowner granted a mortgage to the bank. The plaintiff performed construction work on the home, but the homeowner did not pay the plaintiff in full. The plaintiff then brought an unjust enrichment claim against the bank that held the mortgage. The Michigan Court of Appeals affirmed judgment in favor of the bank on the grounds that the bank did not obtain a benefit directly from the plaintiff. *Karaus*, 300 Mich. App. at 23. The court noted that the bank was "completely uninvolved" with the

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PageID.451-52.) The Southfield Defendants assert that the City of Southfield purchased the properties from the Treasurer, pursuant to the City's legal right of first refusal under the GPTA, Mich. Comp. Laws § 211.78m, not the Plaintiffs, and thus they received no benefit from the Plaintiffs. (*Id.* at p. 21, PageID.452.) These Defendants further contend that the County obtained no surplus funds. (*Id.*)

However, courts have found that this *Karaus* holding "does not stand for the proposition that a plaintiff may prevail against a defendant on an unjust enrichment theory only if the plaintiff directly conferred the benefit upon the defendant. On the contrary, the court in *Karaus* recognized the possibility that a plaintiff may recover from a defendant upon whom he did not confer a benefit if the defendant has engaged in misleading conduct that led to the plaintiff's loss." *Kerrigan v. Visalus, Inc.*, 112 F. Supp. 3d 580, 614 (E.D. Mich. 2015). "There must be more than a benefit received by a party, the party 'is liable to pay therefore only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.'" *Hoving v. Transnation Title Ins. Co.*, 545 F. Supp. 2d 662, 669 (E.D. Mich. 2008) (quoting *Dumas v. Auto Club Ins. Ass'n*, 437 Mich. 521, 546 (1991)). Plaintiffs must plead how each Defendant specifically misled them and when, and how each defendant is unjustly

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agreement between the plaintiff and the homeowner, and it found no evidence that the bank "requested any of the work performed by plaintiff or misled plaintiff to receive any benefit." *Id.* ("The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution").

enriched, which they fail to do. Plaintiffs instead offer only conclusory allegations in support of their unjust enrichment claim. (See Compl. ¶¶ 63-68, PageID.12.)

Plaintiffs claim in their Response that the Defendants "were not only involved with the transfer of the surplus proceeds/equity from Plaintiffs, but also orchestrated and participated in a scheme or a conspiracy to strip the equity of Plaintiffs' properties through concerted action." (Pls.' Resp. at p. 19, PageID.1188.) However, there is nothing unlawful with the Oakland County Treasurer's foreclosure of Plaintiffs' properties, the City's exercise of its statutory right of first refusal, or SNRI's subsequent purchase of the properties.[9]

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[9] The Court concurs, for the most part, with the Michigan Court of Appeals in footnote 6 in *Jackson v. Southfield Neighborhood Revitalization Initiative, LLC, Fred Zorn, E'toile Libbett, Michael A. Mandelbaum, City of Southfield, Ken Siver, Oakland County Treasurer, Southfield Non-Profit Housing Corporation, Susan Ward Witkowski, Gerald Witkowski, and Andrew Meisner*, No. 344058, 2019 WL 6977831 (Mich. Ct. App. Dec. 19, 2019), vacated in part by the Michigan Supreme Court, 953 N.W.2d 402 (Mich. 2021), that "[a]lthough we find no basis for plaintiffs' substantive due process claims, we can appreciate their suspicion surrounding defendants' behavior. While the record before us does not provide evidentiary support for plaintiffs' claim that defendants sought to defraud these plaintiffs out of equity in their homes, the fact that elected officials were using their political status … by obtaining properties before they could go to auction following tax foreclosure is, at a minimum, troubling. Clearly, defendants, particularly the elected officials, have even attempted to avoid the appearance of impropriety, as a clear conflict of interest exists regarding their involvement with SNPHC and SNRI. This type of behavior is not only shocking to the consc[ience], but also rightfully breeds distrust among their electorate. Regardless, the instant lawsuit is regrettably the

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Accordingly, Plaintiffs fail to state an unjust enrichment claim against the Southfield Defendants, and that claim is dismissed.

IV. CONCLUSION

For the reasons set for the above, the Court **GRANTS** the Southfield Defendants' Motion to Dismiss and **DISMISSES WITH PREJUDICE** Plaintiffs' claims against Defendants City of Southfield, Frederick Zorn, Ken Siver, Susan Ward-Witkowski, Gerald Witkowski, and Treasurer Irvin Lowenberg.

IT IS SO ORDERED.

Dated: October 4, 2021

s/Paul D. Borman
Paul D. Borman
United States
District Judge

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incorrect vehicle to further explore the legality of defendants' actions."

Case 2:20-cv-12230PDB-EAS Filed August 18, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Tawanda Hall, Carolyn Miller, American Internet Group, LLC, Anthony Akande, Curtis Lee and Coretha Lee, Marcus Byers and Kristina Govan individually and all those similarly situated in the City of Southfield

Plaintiffs,

Case No.
v **Honorable**

Oakland County Treasurer Andrew Meisner, in his official and individual capacities, **Oakland County, Southfield Neighborhood Revitalization Initiative LLC, City of Southfield**, **Frederick Zorn** in his official and individual capacities, **Southfield Mayor Kenson Siver** in his official and individual capacities, **Southfield Non-Profit Housing Corporation**, **Habitat for Humanity of Oakland County Inc., Susan Ward - Witkowski** in her former official and individual capacities, **Gerald Witokowski** in his official and individual capacities, Treasurer **Irvin Lowenberg** and in his official and individual capacities,
Mitchell Simon, and
E'Toile Libbett,

Defendants.

****CLASS ACTION****
_____/

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COMPLAINT

NOW COME Plaintiffs Tawanda Hall, Carolyn Miller, American Internet Group, LLC, Anthony Akande, Curtis Lee and Coretha Lee, Marcus Byers and Christina Govan individually and as class representatives, by and through counsel Smith Law Group PLLC and for their Complaint states as follows:

PARTIES

1. Plaintiffs, Tawanda Hall, Carolyn Miller, American Internet Group, LLC, Anthony Akande, Curtis Lee and Coretha Lee, Marcus Byers and Christina Govan are named in their individual capacities and as proposed class representatives all being the former title holders and/or owners of property in Southfield, Michigan, in which all of their equity and surplus equity were foreclosed upon due to a delinquency of property taxes which caused them all injury and monetary damages by unconstitutional acts and other statutory and common law violations which included the taking and retention of surplus equity.

2. Defendant Andrew Meisner Treasurer (sometimes referred to as "Treasurer") is and has been the Treasurer of Oakland County since

2008; he is sued in his official and personal capacity. Defendant Andrew Meisner also has served on the Board of Habitat for Humanity for Oakland County, Inc. since 2016.

3. Defendant City of Southfield (Southfield) is a municipal entity formed under the laws of the State of Michigan.

4. Defendant Oakland County is a political subdivision of the State of Michigan which is delegated the responsibility to collect delinquent property taxes.

5. Defendant Southfield Neighborhood Revitalization Initiative, LLC, (SNRI) is a for-profit private corporation organized under the laws of the State of Michigan.

6. Defendant Southfield Non-profit Housing Corporation (SNPHC), is a 501(c)(3) non-profit corporation organized under the rules of the IRS and incorporated in the State of Michigan.

7. Defendant Fred Zorn (Zorn) is the current City Administrator for the City of Southfield; Zorn is Southfield's Chief Executive directing all day to day activities; and is a managing member of SNRI and Zorn is also a board member of SNPHC; and is sued in his official and personal capacities.

8. Defendant Habitat for Humanity of Oakland County Inc. (Habitat) is a 501(c)(3) non-profit corporation organized under the rules of the IRS incorporated as a non-profit corporation and is

incorporated in the State of Michigan. Defendant Meisner, the Oakland County Treasurer sits on the Habitat Board of Directors and impacts its operations.

9. Defendant Jerry Witkowski is/or was employed by the City of Southfield and is the project manager for SNRI and is sued in his official and personal capacities.

10. Defendant Mitchell Simon is a CPA and the Treasurer of the SNPHC and Board member of SNPHC.

11. Defendant E'toile Libbett is a real estate broker and board member of SNRI.

12. Defendant Mayor Ken Siver is the Mayor of the City of Southfield and is being sued in his official and individual capacities.

13. City of Southfield Treasurer Irvin Lowenberg is named in his official and individual capacities.

JURISDICTION

14. This is a civil action brought seeking unpaid "just compensation" and other monetary damages against Defendants for violation of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

15. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, which authorizes federal courts to decide cases concerning federal question jurisdiction; 28 U.S.C. § 1343, which authorizes federal courts to

hear civil rights cases, 28 U.S.C. § 2201, which authorizes declaratory judgments via the Declaratory Judgment Act; 28 U.S.C. § 1367, which authorizes supplemental state law claims, and Title 18, Section § 1961, and 42 U.S.C. § 1983.

16. Jurisdiction also arises under the Fifth and Fourteenth Amendments to the United States Constitution and as a result jurisdiction is proper pursuant to 28 U.S.C § 1331.

17. Plaintiffs both individually and as class representatives do not contest the tax assessed or attempt to interfere with its collection under state law but only seek compensation for the taking of their equity/surplus equity and injuries other than tax collection.

18. Plaintiffs individually and as class representatives seek damages in excess of $75,000.

19. Venue is proper in this Court as Defendants, individually and collectively, conduct their business in the City of Southfield in the Eastern District of Michigan and Plaintiffs and class members were injured in the Eastern District of Michigan.

GENERAL ALLEGATIONS

20. Plaintiffs Tawanda Hall, Carolyn Miller, American Internet Group, LLC, Anthony Akande, Curtis Lee and Coretha Lee, Marcus Byers and Kristina Govan and the class members

were the owners of the real property that was situated in the City of Southfield as more fully described in **Exhibit A.**

21. Plaintiff Tawanda Hall and her deceased husband owed $22,642.00 in delinquent property taxes, interest penalties and fees (herein after "delinquent property taxes" is defined as including taxes, interest, penalties and fees). On June 29, 2018 the Treasurer issued a tax deed in favor of Southfield. Southfield paid the Treasurer the minimum amount due under the statute (MCL 211.78m). On October 23, 2018 the home was conveyed by quit claim deed conveyed to SNRI for $1.00. Finally, the home was sold for fair market value of $308,000. **Exhibit B**

22. Plaintiff Carolyn Miller owed $29,759.00 in delinquent property taxes. On July 7, 2016, the Treasurer issued a tax deed in favor of Southfield. In a prearranged transaction Southfield reimbursed the Treasurer the minimum amount due under the statute. On October 23, 2018, the home was conveyed by quit claim deed to SNRI for $1.00. Finally, on January 17, 2018 the home was sold for fair market value of $120,000. **Exhibit C**

23. Plaintiff American Internet Group LLC (AIG) owed $9,974.00 in delinquent property taxes on its property located at 25927 McAlister, Southfield, Michigan. AIG is a federal contractor and provider of high-speed fiber internet and networking services to schools and colleges. AIG used the property as its principal office. On July

7, 2016, the Treasurer issued a tax deed in favor of Southfield. In a prearranged transaction Southfield reimbursed the Treasurer the amount of the delinquent taxes. On January 11, 2018, the property was conveyed by quit claim deed conveyed to SNRI for $1.00. Finally, the home was sold for fair market value of $149,900. **Exhibit D**

24. Plaintiff Anthony Akande a Pharmacist owed only $2,415.00 in delinquent property taxes. On July 7, 2016. The Treasurer issued a tax deed in favor of Southfield. Thereafter Southfield reimbursed the Treasurer $2,415.00. On September 22, 2018, the home was conveyed by quit claim deed conveyed to SNRI for $1.00. Finally, the home was sold for fair market value of $152,500. **Exhibit E**

25. Plaintiffs Curtis Lee and Coretha Lee owed $30,547.00 in delinquent property taxes. Lee works for the IRS. On July 7, 2016, the Treasurer issued a tax deed in favor of Southfield. On September 22, 2016, the home was conveyed by quit claim deed to SNRI for $1.00. Finally, the home was sold for fair market value of $155,000. **Exhibit F**

26. Plaintiff Marcus Byers owed $4,113.00 in delinquent property taxes. On June 29, 2018, the Treasurer issued a tax deed in favor of Southfield. Since 1995 Marcus Byers has suffered from a traumatic brain injury and holds equitable title with his court appointed guardian. On October 13, 2018, the condominium was then

by quit claim deed conveyed to SNRI for $1.00. SNRI still holds title to the Property which has a fair market value of $90,000. **Exhibit G**

27. Plaintiff Kristina Govan owed $45,350.00 in delinquent property taxes. Ms. Govan has nine (9) children and has been employed by the Detroit Department of Community Health for 20 years. On July 31, 2017, the Treasurer issued a tax deed in favor of Southfield. On October 2018, the home was conveyed by quit claim deed to SNRI for $1.00. SNRI still holds title to the property which is worth in excess of the amount owed in taxes. **Exhibit H**

28. Oakland County is the Foreclosing Governmental Unit (FGU) in each one of the tax foreclosures that affected each co-class representative and putative class member.

29. Oakland County Defendants Oakland County and Treasurer Andrew Meisner seized ownership of all the 138 properties formerly owned by plaintiffs and class members, transferring all the real estate to the City of Southfield for the delinquent taxes.

30. Defendants planned, schemed, and conspired to utilize a statutory right of first refusal MCL 211.78m to acquire the properties for the minimum bid from Oakland County.

31. Most of the Plaintiffs had entered into delinquent property installment agreements and had made a payment to the Treasurer with the promise

that such payment would prevent tax foreclosure.

32. The Treasurer knew the Circuit Court had already entered a Judgment of foreclosure prior to entering the delinquent property tax payment plans with Plaintiffs and Class Members which purportedly prevented foreclosure.

33. In many instances the Plaintiffs' and the class members made substantial payments of 1–2 years of property taxes prior to March 31st of the year of foreclosure, being advised by the Treasurer or his staff that such payments would prevent foreclosure.

34. FGU foreclosed despite the existence of the delinquent property tax payment plan agreements.

35. Plaintiffs had in actuality no redemption period as they did not learn of the tax foreclosure until after March 31st of the tax year.

36. There was not any notice or recording of the tax foreclosure until after March 31st of the year of foreclosure.

37. Plaintiffs and potential class members did not have any mortgage liens on their properties.

38. The properties were particularly selected by Zorn and his staff based on profit motive.

39. Defendant Andrew Meisner formulated policies and conduct which allowed the conversion of the

Plaintiffs and class members equity when seizing the entirety of the plaintiffs and class members equity in excess of the delinquent taxes owed, injuring the Plaintiffs and Class Members without any "adequate, certain or reasonable procedure" to obtain just compensation for the taking of their property.

40. Defendant Andrew Meisner, as Treasurer and/or on behalf of Oakland County, wrongfully took the equity and/or surplus when transferring the Plaintiffs and Class Members' properties to Southfield.

41. In *Rafaeli v. Oakland County*, Case No. 156849 (2020) Michigan's Supreme Court has held that property owners have a constitutional right under the Michigan Constitution to the surplus equity of their property above the amount of the delinquent tax; at least when there is a tax auction.

42. Plaintiffs have no "reasonable, certain, and adequate remedy" to obtain the return of their equity under the United States Constitution and its Amendments.

43. Plaintiffs have no reasonable, certain, complete, or efficient remedy in the Courts of the State of Michigan to enforce their Fifth amendment property rights and/or their rights under the Michigan Constitution.

44. Defendants Southfield and their officials schemed multiple times to remove properties from the tax rolls which created a pool of funds

so Defendants could enrich themselves through the affiliated SNRI and SNPHC.

45. Defendants who were officials of Oakland County and Southfield violated MCL 750.478 and committed unlawful acts under the laws of the State of Michigan both statutorily and under the common law. It was Southfield's official policy to obtain Plaintiffs and Class Members properties without paying just compensation.

46. Habitat (of which Oakland County Treasurer Andrew Meisner is a board member) received close to $300,000 in funds from SNRI in 2016, was paid over 1 million dollars from SNRI since its inception in June of 2016 by being the recipient of payments for often needless repairs, as well as the conveyance of property from SNRI, City of Southfield, and the SNPHC for less than full consideration.

47. Habitat's role in this scheme is a conflict of interest for Treasurer Andrew Meisner with his duties as Treasurer and an official of Oakland County.

48. There is no transparency in the finances of SNRI and SNPHC and there is a need to shed light on the Defendant entities to determine the extent of financial irregularities and the unjust enrichment caused by their illegal conduct.

49. SNPHC Board members (Frederick Zorn, Kenson Siver and Michael Mandelbaum) have a conflict of interest being elected officials with Southfield

as well as simultaneously serving as Board Members the SNPHC.

50. The SNPHC was used for private and political gain, and that the SNPHC should be shuttered as it has been a vehicle who fits the pattern and practice of a continuing unlawful enterprise that allows its board members, employees, contractors, and other insiders to benefit privately with funds from a charitable nonprofit which amounts to private inurement and is actionable under IRS rules.

51. Appellate Judges in both the Michigan Court of Appeals as well as in the United States Court of Appeals for the Sixth Circuit (Judges Shapiro and Kethledge) in similar cases have labeled the taking of equity tantamount to theft.

52. Defendant Andrew Meisner and the County of Oakland refuses to pay just compensation for the taking of equity above any lawful monies owed for property taxes.

53. There has not been any restoration of the equity or surplus equity provided by Defendants Andrew Meisner or Oakland County.

54. There has not been any restoration of the equity or surplus equity provided by Southfield.

55. Defendants Oakland County Treasurer, Oakland County, and Southfield have not initiated any condemnation action or proceedings for the amounts in excess of the tax delinquency.

56. Defendants have, in an identical fashion as described above, seized the excess equity from other pieces of real properties within the territorial limits of the City of Southfield which Plaintiffs Tawanda Hall, Christina Govan, Carolyn Miller, American Internet Group, LLC, Curtis and Coretha Lee, Marcus Byers and Anthony Akande, are seeking compensation.

57. This practice is governance for profit and includes many of the City of Southfield Elected and Appointed Officials, for Profit corporations, and a non-profit where the City of Southfield Mayor is president.

58. This case seeks to establish that these actions are violations of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

59. This is a civil action brought pursuant to 42 U.S.C. § 1983 seeking monetary damages and declaratory relief against Defendants for violations of the Fifth, Eighth, and Fourteenth Amendments.

60. In a similar case involving all the named Defendants the Michigan Court of Appeals said that the Southfield elected officials conduct was "shocking to the conscious" stating in pertinent part **"This type of behavior is not only shocking to the conscience, but also rightly breeds distrust among their electorate."** *Jackson v. Oakland County et al.*, Case no. 344058 (Michigan Court of Appeals, 2019). This "shocking to the conscious" standard arises the Defendants actions to one that offends any

semblance of normalcy, decency, or equity and further impinges any notion of fairness, due process and ordered liberty.

61. There exists a clear conflict of interest regarding the elected officials' involvement with SNRI and SNPHC.

62. Defendant Treasurer as the Foreclosing Government Unit sought and obtained a tax foreclosure judgment from the Oakland County Circuit Court taking the property interests of Plaintiffs due to unpaid taxes and administrative expenses, costs, and interest.

63. Defendants Siver, Zorn, and Susan Ward Witkowski wrongfully used their offices and implemented the scheme under color of official right and title.

64. Defendants Siver, Zorn, Gerald Witkowski, and the City Attorney Susan Ward Witkowski used power under the GPTA for personal economic gain and to augment their power, both political and financial.

65. The conduct of the Southfield officials consists of usurping the powers granted to the City of Southfield under MCL 211.78m and bestowing the spoils upon the SNRI to enhance the Defendants power, obtain economic advantage, and favors amounting to graft.

66. SNRI was formed to engage and participate in the equity stripping scheme.

67. There was understanding between Defendants Siver, Zorn, Susan Ward-Witkowski and Gerald Witkowski that they would personally benefit and utilize their power to benefit the SNRI and SNPHC.

68. Defendants Zorn, Siver, Libbett entered into a conspiracy which to engage in a scheme that conducted a pattern of unlawful activity affecting interstate commerce.

69. Andrew Meisner did not administer his office to insure the use of the Oakland County Treasurer's power under the GPTA to convey property by use of the right of first refusal granted to Southfield (pursuant to MCL 211.78m) was used for "Public Purpose."

70. The scheme which involves over 10 million dollars of real estate affects interstate commerce.

71. Meisner, Zorn, Simon, Susan Ward-Witkowski and Siver knew that their acts would remove the subject properties from the tax rolls of Southfield for the gain of SNRI.

72. Such conduct violates the Fifth Amendment made applicable to the states via the Fourteenth Amendment to the United States Constitution which requires the payment of just compensation upon a taking by those Defendants. See *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019).

73. Defendants since 2016 have taken more than 138 homes from similarly situated families in the City of Southfield and has retained all of the

equity and/or surplus equity in these takings and have given the funds to other Defendants without any meaningful way for prior homeowners to reacquire their properties for the taxes owed.

74. Michigan is in a minority of states that allowed this form of tax foreclosure, while at least 38 other states specifically forbid the taking of all the equity in the former homeowner's home without just compensation.

75. The conduct of Defendants was reckless and undertaken with complete indifference to Plaintiffs federal rights to be free from violation of the Fifth and Fourteenth Amendments to the United States Constitution as applied against municipalities and those acting under color of law.

76. Defendant Andrew Meisner, Southfield and the other Defendant public officials refused to return the excess equity beyond the tax debt and administrative expenses, penalties and interest and have appropriated the Plaintiffs' property's equity and/or surplus equity without just compensation.

CLASS ALLEGATIONS

77. Plaintiffs repeat, reallege and reincorporate herein by reference paragraphs 1–76 above.

78. Plaintiffs and Class Representatives bring this action against Defendants on Plaintiffs' own behalf and pursuant to Rule 23(a) and 23(b)(1)

(A), (B) and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of all titleholders of real property and associated property rights including equity and/or surplus proceeds generated by the involuntary transfers orchestrated by Defendants in the City of Southfield during the relevant statutorily-limited time period who were subject to the unconstitutional conduct and concerted actions which resulted in the taking and/or unconstitutional forfeiture of their surplus or excess equity beyond the tax debt owing and due.

79. The proposed class consists of all eligible property owners who during the relevant statutorily limited period, had a property seized by the Oakland County Treasurer which was transferred to the Southfield and thereafter transferred to the SNRI for $1.00 for unpaid property taxes. **Exhibit I**

80. The number of injured individuals who have been constitutionally injured is sufficiently numerous to make class action status the most practical method to secure redress for injuries sustained and class wide equitable relief.

81. The class is so numerous that in 2016, 2017 and 2018 alone the class is composed of 165 members which involves 138 parcels of real property and associated equity. There are additional putative members from 2019.

82. Defendants through a more insidious scheme obtained all the surplus equity in the Plaintiffs and Class Member's homes without any

meaningful remedy for retrieving the surplus that the Michigan Supreme Court called an unconstitutional taking in the *Rafaeli v. Oakland County* decision.

83. There are clear questions of fact raised by the named Plaintiff's claims common to, and typical of, those raised by the Class they seek to represent, including:

a) Oakland County through its Treasurer Andrew Meisner has been voluntarily and purposefully utilizing an unconstitutional statute MCL 211.78m which he has undertaken pursuant to his discretion to transfer properties to the City of Southfield;

b) Each class member's property prior to tax foreclosure was worth more than the total tax delinquency owed to Oakland County;

c) Oakland County through its Treasurer Andrew Meisner transferred each class member's property to Southfield for the amount of the delinquent taxes;

d) Southfield through its officials then transferred Plaintiffs and Class Members properties by quit claim deed to Defendant SNRI;

e) Southfield was paid the amount of the transfer price paid to Oakland County by the SNPHC or SNRI;

f) SNRI then sold the properties or intends to sell the properties for fair market value to third parties;

g) Oakland County Treasurer Andrew Meisner, Oakland County, and the other Defendant government entities refuses to pay just compensation, failed to initiate any form of condemnation proceedings, and to date failed to have or undertake a process to return the surplus equity, physical possession of Plaintiffs and Class Member's former homes, and equitable damages to Plaintiffs and Class Members; and

h) The unjust enrichment and collision of the SNRI and certain individual Defendants.

84. There are clear questions of law raised by the named Plaintiff's claims common to, and typical of those raised by the Class they seek to represent, including:

a) Whether the Defendants committed an unconstitutional taking by refusing to pay just compensation when seizing property in the form of equity and/or monies beyond the amount of unpaid taxes and administrative expenses, costs and interest owed in a tax delinquency, and have appropriated property in the form of excess or surplus equity for public use without the payment of just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

b. Whether the defendants committed an inverse condemnation by destroying equity via the seizure process and/or the later sale of property at a highly reduced, below fair market price and then retaining the remaining proceeds from the sale of tax foreclosed property that exceeded the amount of the tax delinquency;

c. Whether the Treasurer and Southfield can utilize MCL 211.78m to deny Plaintiffs and Class Members just compensation in violation of the Fifth Amendment takings clause;

d. Whether the Plaintiffs and Class Members have an "adequate, certain and reasonable" or complete and efficient remedy under Michigan Law; and

e. If deemed a forfeiture, whether the defendants violated either the Excessive Fines Clause of the United States Constitution, by retaining proceeds from the sale of tax foreclosed property that exceeded the amount of the tax delinquency;

85. The violations of law and resulting harms alleged by the named Plaintiff are typical of the legal violations and harms suffered by all Class members.

86. Plaintiff, as Class representative, will fairly and adequately protect the interests of the Class members and will robustly prosecute the suit on

behalf of the Class; and is represented by sufficiently experienced counsel.

87. Defendants have acted, failed to act, and/or are continuing to act on grounds generally against Plaintiff and all members of the Class in the same manner.

88. The maintenance of the action as a class action will be superior to other available methods of adjudication and will promote the convenient administration of justice, preventing possible inconsistent or varying adjudications with respect to individual members of the Class and/or one or more of the Defendants.

COUNT I

TAKING WITHOUT JUST COMPENSATION-FIFTH/14TH AMENDMENT 42 U.S.C. § 1983 (AGAINST OAKLAND COUNTY, ANDREW MEISNER, CITY OF SOUTHFIELD FRED ZORN KEN SIVER, SUSAN WITKOWSKI AND GERALD WITKOWSKI ONLY)

89. Plaintiffs repeat, reallege and reincorporate herein by reference paragraphs 1–88 above.

90. Defendant Andrew Meisner, Defendant Oakland County and the Defendants who are or were officials of Oakland County and the Southfield have taken property in the form of equity and/or monies beyond the amount of unpaid taxes and administrative expenses, costs and interest and have appropriated said monies for public use without the payment of just compensation.

91. Plaintiffs' and class members' constitutional right to just compensation upon the taking of their property is a fundamental right deeply rooted in Anglo-American legal traditions and essential to the framers' concept of ordered liberty.

92. This claim is being made pursuant to 42 U.S.C.§1983 which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated, or declaratory relief was unavailable.

93. No state court inverse condemnation or takings procedure is available by operation of Michigan case law that pertains to the circumstances of this case.

94. Defendants are persons under 42 U.S.C. §1983.

95. Despite the Michigan Supreme Court in *Rafaeli v. Oakland County* finding that there exists a

property right of a taxpayer in a commercial foreclosure under the Michigan Constitution to the surplus from a tax auction, there still exists "no reasonable, certain and adequate remedy" under the Fifth Amendment takings clause of the United States Constitution as to the Plaintiffs and Class Members.

96. *Rafaeli*, supra also did not uphold the constitutional standard enunciated in *Knick v. Township of Scott* that a "property owner has an actionable claim when the government takes property without paying for it." *Knick* at 2167.

97. Prior to the recent United States Supreme Court ruling *in Knick v. Township of Scott,* a Plaintiff suing in federal court had to first exhaust remedies in state court before bringing an inverse condemnation action. In *Knick*, the United States Supreme Court held that plaintiffs did not have to wait to exhaust state remedies but there was federal court jurisdiction as soon as a taking of private property for public use without just compensation occurred.

98. It is clear, by the *Rafaeli* decision, that Defendants Oakland County, Oakland County Treasurer and Southfield and their officers and created/empowered entities, including do not intend to be required or otherwise will pay just compensation by or via any procedures, making any such procedures unavailable or inadequate.

99. This claim is ripe without exhaustion of state compensation remedies or lack of subject matter jurisdiction for prudential reasons because the

State of Michigan's courts recently and clearly failed to recognize such a taking as existing as a matter of state law and failed to address a taking under the Fifth Amendment of the U.S. Constitution; and only applied the property right to surplus funds generated by a tax auction and thus has not provided an adequate reasonable process for obtaining return of surplus equity after a tax foreclosure.

100. It is the policy, custom, and/or practice of Defendants Oakland County and Southfield and the named officials and/or its final policymaker to utilize MCL 211.78m to deprive Plaintiffs' and represented Plaintiffs, of their property of equity and/or surplus funds a taken from them without just compensation. This draconian policy and conduct are sufficient to impose damages and other relief pursuant to *Monell v New York City Department of Social Services* and its progeny.

90. Plaintiffs continue to suffer great and material damages pursuant to 42 U.S.C. §1983.

91. Plaintiff and represented Plaintiffs have and/or be entitled to an award of damages as result of Defendants' violation of their rights under the United States Constitution, Amendment V.

COUNT II

POST TAKING CLAIM FOR JUST COMPENSATION UNDER THE FIFTH AMENDMENT-INVERSE CONDEMNATION

92. Plaintiffs repeat, reallege and reincorporate herein by reference paragraphs 1–91 above.

93. The Fifth Amendment to the United States Constitution provides in pertinent part that "….nor shall private property be taken for public use, without just compensation" U.S. Const., Amend. V said constitutional prohibition is known jurisprudentially as the "Takings Clause" of the United States Constitution.

94. The Takings Clause is applicable as to all states of United States and by extension to all political subdivisions, instrumentalities, counties, and cities including Oakland County and Southfield.

95. The principle embodied by the Takings Clause is to prohibit the government from mandating that a few people solely bear a disproportionate share of the public burden which shall be borne by the public as a whole.

96. MCL 211.78 by its terms, disregards equity and/or surplus equity and was utilized to achieve a taking of private property without just compensation.

97. A legislature cannot constitutionally enact a law that it calls a tax statute which on its face effects a taking of private property without just compensation. *Cf. Acker v Commissioner of Internal Revenue,* 258 F. 2d 568 (6th Cir., 1958), *aff'd* 361 U.S. 87 (1959).

99. The common law of the State of Michigan recognizes that any surplus proceeds arising

from a mortgage foreclosure sale are personalty and a person with an ownership interest in, or who succeeds to an ownership interest in the foreclosed real property has a right to claim ownership of the personalty. *Smith v Smith*, 13 Mich 258 (1865); also see *Rossman v Marsh,* 287 Mich 720 (1939) (proceeds from the sale of lands are personal property and not real property).

100. The judicial and non-judicial mortgage foreclosure statutes of the State of Michigan recognize that any surplus proceeds arising from a mortgage foreclosure sale of real property is, unless subject to subordinate secured creditors are the private property of the former owner of the real property. MCL 600.3125 (judicial foreclosure); MCL 600.3257 (foreclosure by advertisement).

101. By requiring that surplus proceeds arising generated from the sale of delinquent property tax forecloses to be delivered to the former owners other States including, but not limited to, the States of Idaho, California, Alabama, Florida, Georgia, and Indiana, New York, Illinois and New Jersey recognize that not to do so would violate the Takings Clause of the Fifth Amendment of the Constitution.

102. Plaintiffs individually and as class representatives have an interest in the windfall for which the properties were sold above the amount of the delinquent taxes as protected by the Fifth Amendment of the United States

Constitution and the Takings Clause by the Defendants.

103. Neither Defendants Oakland County, nor Southfield offered to pay in advance of the taking(s), nor contemporaneously therewith, nor at any time thereafter, Plaintiffs or Class Members just compensation for said taking(s).

104. Neither Plaintiffs, nor Class Members, have been provided by Defendants Oakland County or Southfield any procedure of any kind, and therefore no adequate procedure whatsoever, to seek just compensation for said taking(s), and absolutely no procedure or remedy exists under the General Property Tax Act (GPTA), or any Michigan Statute, for Plaintiffs and Class Members, to obtain just compensation for said takings within an inverse condemnation proceeding provided for and allowed by State law.

105. Plaintiffs' and represented Plaintiffs' claims of inverse condemnation under the Takings clause are mature and ripe.

106. Plaintiffs, and Class Members, have suffered great and material damages and injuries proximately caused by Defendants' conduct and the Takings Clause requires Defendants Oakland County and Southfield and, to pay Plaintiffs, and Class Members money damages tantamount to and consisting of just compensation for the taking(s) of their private property under the pretext of public use.

107. In material part 28 U.S.C. § 2201 (a) provides, that "In a case of actual controversy within its jurisdiction …. any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

COUNT III

Violation of the Takings Clause of the Michigan Constitution of 1963, Article 10, § 2

108. Plaintiffs repeat, reallege, and incorporate herein by reference paragraphs 1 through 107 above.

109. Under Article 10, § 2, of the Michigan Constitution of 1963, the government may not take private property for public use without just compensation therefore being first made or secured in a manner prescribed by law.

110. This state constitutional provision protects intangible property, including equity in homes and land.

111. Plaintiffs and represented plaintiffs owned equity in their respective properties that exceeded the value of their respective debts to the County.

112. By taking absolute title to Plaintiffs' properties and represented plaintiffs' properties and retaining profits from the auction of their properties, over and above the amount of unpaid taxes and administrative expenses, costs, and interest owed by each debtor, the County violated the Michigan Constitution's Takings Clause.

113. The County has appropriated this protected property interest without using the mandatory process outlined under the Uniform Condemnation Procedures Act, MCL 213.51, et seq.

114. Michigan in *Rafaeli* established a constitutional right in surplus equity but Plaintiffs and Class Members under state law still have no "reasonable, certain or adequate" remedy.

115. Plaintiffs and Class Members pursuant to the Michigan Constitution's Takings Clause are entitled to fair market value for just compensation and 125% of fair market value for takings of residential properties

COUNT IV
EIGHTH AMENDMENT VIOLATION
42 U.S.C. § 1983
EXCESSIVE FINE FORFEITURE
(AGAINST OAKLAND COUNTY ONLY)

116. Plaintiffs repeat, reallege and reincorporate herein by reference paragraphs 1–115 above.

117. The Eighth Amendment to the United States Constitution is the part of the United States Bill

of Rights prohibiting the government from imposing excessive fines, which the US Supreme Court has applied to actions(s) involving forfeitures.

118. To the extent the actions of Defendants Oakland County and Southfield conduct is found to be a forfeiture the Eighth Amendment is applicable.

119. By imposing and retaining all the surplus equity in Plaintiffs' property Defendants violated the Eighth Amendment right to be free of excessive fines.

120. Plaintiffs have suffered injury and/or be entitled to an award of damages as result of Defendants' violation of their rights under the United States Constitution.

121. The conduct of Defendants was reckless, surreptitious with complete indifference to Plaintiffs constitutional rights to be free from violations of the Eighth Amendment to the United States Constitution.

COUNT V
DUE PROCESS
(AGAINST SOUTHFIELD AND OAKLAND COUNTY TREASURER ONLY)

122. Plaintiffs repeat, reallege and reincorporate herein by reference paragraphs 1–121 above.

123. It is unconstitutional to deprive a person of property without due process of law.

124. The GPTA is intended to provide delinquent taxpayers with the minimum due process recognized by the United States and State of Michigan Constitutions. Delinquent taxpayers must be afforded the right of adequate notice which is reasonably calculated as reaching its recipient prior to the county taking their property for unpaid tax bills.

125. Procedural due process requires reasonable measures to be taken when the County knows that their efforts at providing notice have failed and they have or should have information which could be utilized to effectuate actual notice.

126. The Treasurer entered into tax foreclosure avoidance agreements or delinquent property tax installment plans with Plaintiffs and Class Members under MCL 211.78q(2) or MCL 211.78(q).

127. Oakland County Treasurer policy of mailing and posting notices but orally informing taxpayers to ignore such notices if Plaintiffs or Class Members participate in the installment plans violates the "due process clause" of the 14th Amendment to the United States Constitution.

128. The treasurer in many instances had prior to tax foreclosure or the expiration of the redemption period had established forfeiture/purchase agreement with Southfield.

129. The Treasurer's acceptance of late or payments for less than the full amount, make-up payments

or no payments was a course of conduct that modified any written agreements.

130. The installments agreements were valid until March 31 of the following year.

131. Oakland County Treasurer signed installment property tax payment agreements which portended to halt tax foreclosure and indicated Plaintiffs and Class Members would continue to get notice of tax foreclosures.

132. Despite those constitutional duties, Oakland County did not take additional reasonable steps when it knew its efforts at providing notice had failed or had entered into an agreement to halt tax foreclosure.

133. As a matter of policy and practice, the County failed to take such additional measures to provide adequate notice, such as notifying the Class Representatives and Members of the default on a tax payer installment agreement and for the re-activation of a tax foreclosure.

134. The failure of Oakland County and its Treasurer to take such sufficient measures to provide the Class members with notice prior to taking their property and/or to mislead them and/or to act without authority deprived the property owners of their constitutionally mandated rights to due process.

COUNT VI
SUBSTANTIVE DUE PROCESS
(AGAINST SOUTHFIELD AND OAKLAND COUNTY TREASURER)

135. Plaintiffs repeat, reallege and reincorporate herein by reference paragraphs 1–134 above.

136. Defendants, Ken Siver, acting through the Mayor's office, for the City of Southfield, Fred Zorn, and its official policymakers, and/or all acting in their official capacities and pursuant to customs, policies and/or practices, denied Plaintiffs their constitutional right to fair and just treatment during executive acts and deceptive communications from site officials who intentionally acted and deprived Plaintiffs of their property.

137. The evidence of the denial of a fair and just treatment as required by 14th Amendment of the United States Constitution is incumbent that government officials including named Defendants herein engaged in an unconscionable fraud against Plaintiffs, treating them with fundamental unfairness.

138. Plaintiffs were led to believe by the Oakland County and by Southfield and their respective officials that they had the ability to maintain their property rights.

139. Defendants, Southfield, and the Oakland County Treasurer have violated the 14th Amendment of the United States Constitution, as implemented through 42 USC § 1983.

140. Defendants Oakland County, Oakland County Treasurer, Southfield, and their officials in their individual and official capacities engaged in conduct that "shocked the conscience" in the constitutional sense.

141. Defendants conduct constitutes a conflict of interest and has no rational basis violating Plaintiffs and Class Members rights to substantive due process.

COUNT VI

UNJUST ENRICHMENT
(AGAINST ALL DEFENDANTS EXCEPT OAKLAND COUNTY)

142. Plaintiffs repeat, reallege and reincorporate herein by reference paragraphs 1–141 above.

143. Plaintiffs individually and as class representatives have a recognized constitutional right to the surplus proceeds and/or equity of their tax foreclosed property.

144. Plaintiffs' individually and as class representatives cannot have their property rights vitiated by Defendants Oakland County and Southfield's involuntary transfer without just and fair compensation.

145. SNRI obtained the surplus equity and or equity from the tax foreclosure.

146. SNRI obtained the surplus in a prearranged transfer for inadequate value.

147. Plaintiffs individually and as class representatives have no adequate remedy at law.

148. The retention of the benefit by SNRI (or subsequent non-bona fide purchasers) of the property rights, equity and/or surplus equity amounts to unjust enrichment to the SNRI.

149. The surplus equity and or equity in justice and equity belongs to the Plaintiffs' individually and to the Class Members.

150. Plaintiffs' individually and as class representatives have been damaged by their loss of equity.

RELIEF REQUESTED

WHEREFORE, Plaintiffs and Class Members respectfully requests this Court to enter an order—

A. Enter an order for damages in the amount of taken and/or forfeited equity and/or funds in excess of the unpaid taxes and administrative expenses, costs, and interest of and retained by Defendants by its illegal actions.

B. Enter an order for an award of consequential, nominal, and/or punitive damages as appropriate by statute, law, and equity pursuant 42 U.S.C. §1983 & §1988. Further enter an order for an award of actual and reasonable attorney fees and litigation expenses including costs, interest pursuant to 42 U.S.C. § 1988 and all other applicable laws, rules, or statutes.

C. Plaintiffs and represented Plaintiffs respectfully request this Honorable Court find that the Defendants retention, use and takings of the surplus proceeds constitute a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and the Michigan Constitution.

D. Plaintiffs and represented Plaintiffs request the Honorable Court to enter a judgment against Defendants Oakland County, SNRI and SNPHC, in an amount of just compensation for the takings equal to the fair market value or in the amount of the surplus proceeds so taken from them, together with interest thereon from the date of foreclosure sale, costs and attorney fees.

E. Enter an order for all such other relief the court deems just and equitable.

JURY DEMAND

151. For all triable issues, a jury is hereby demanded.

Respectfully submitted,

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No. ___

In The
Supreme Court of the United States

TAWANDA HALL, CURTIS LEE,
CORETHA LEE, and KRISTINA GOVAN,

Cross-Petitioners,

v.

ANDREW MEISNER, Treasurer,
in his official capacity, et al.,

Cross-Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI contains 5,623 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Executed on April 10, 2023.

s/ Christina M. Martin
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No.

TAWANDA HALL, CURTIS LEE,
CORETHA LEE, and KRISTINA GOVAN,
Cross-Petitioners,
v.
ANDREW MEISNER, Treasurer,
in his official capacity, et al.,
Cross-Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 11th day of April, 2023, send out from Omaha, NE 3 package(s) containing 3 copies of the CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Counsel for Cross-Petitioners

Subscribed and sworn to before me this 11th day of April, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
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43577

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From:	Paula Puccio
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Cc:	Incoming Lit; Christina M. Martin; Larry Salzman; Deborah J. La Fetra; Kady Valois; Paula Puccio
Subject:	Hall v. Meisner Conditional Cross-Petition for Writ of Certiorari
Date:	Tuesday, April 11, 2023 3:46:34 PM
Attachments:	Hall Conditional Cross-Petition.pdf Hall Cross PWC Appendix.pdf Hall Conditional Cross-Pet Cert of Compliance.pdf Hall Affidavit of Service.pdf

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On behalf of Christina Martin, *Counsel of Record* for Cross-Petitioners, please see attached Conditional Cross-Petition for Writ of Certiorari, Appendix, Certificate of Compliance, and Affidavit of Service, filed today with the U.S. Supreme Court.

Sincerely,

Paula Puccio | Paralegal
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