APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-3216/3217

FIRST FLOOR LIVING LLC, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND, OHIO, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 1:21-cv-00018—J. Philip Calabrese, District Judge.

Argued: December 6, 2022
Decided and Filed: September 28, 2023

Before: SILER, GILMAN, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Justin D. Stevenson, BOWER STEVENSON LLC, Cleveland, Ohio, for Appellants. Elena N. Boop, CITY OF CLEVELAND, Cleveland, Ohio, for Appellee City of Cleveland. Matthew P. Baringer, DAVIS & YOUNG, Willoughby Hills, Ohio, for Appellee Laster LLC. Richard C.O. Rezie, GALLAGHER SHARP LLP, Cleveland, Ohio, for Appellee Baumann Enterprises. Alayna K. Bridgett, HAHN LOESER & PARKS, LLP, Cleveland, Ohio, for Appellee Cuyahoga County Land Reutilization Corporation. **ON BRIEF:** Justin D. Stevenson, BOWER STEVENSON LLC, Cleveland, Ohio, for Appellants. Elena N. Boop, Nathaniel Hall, CITY OF CLEVELAND, Cleveland, Ohio, for Appellee City of Cleveland. Matthew P. Baringer, DAVIS & YOUNG, Willoughby Hills, Ohio, for Appellee Laster LLC. Phil Eckenrode, HAHN LOESER & PARKS, LLP, Cleveland, Ohio, for Appellee Cuyahoga County Land Reutilization Corporation. Robert P. Lynch, Jr., GALLAGHER SHARP LLP, Cleveland, Ohio, for Appellee Baumann Enterprises in case 22-3217 only. Nos. 22-3216/3217 *First Floor Living LLC, et al. v. City of Cleveland, et al.*

SILER, J., delivered the opinion of the court in which GILMAN, J., joined. NALBANDIAN, J. (pp. 16–18), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SILER, Circuit Judge. In 2018, First Floor Living, LLC ("First Floor") and Lush Designs, LLC ("Lush Designs") (collectively "Plaintiffs") each purchased real estate parcels in Cleveland for the purpose of rehabilitating and redeveloping the properties. First Floor's property was located at 4400 Warner Road, and Lush Designs' property was located at 7410 Linwood Avenue. Prior to Plaintiffs' purchases, the City of Cleveland ("Cleveland") declared the buildings on the properties public nuisances, condemned them, and ordered that they be demolished. Following the purchases, and after Plaintiffs had invested time and resources into renovating the buildings, Cleveland authorized private contractors to demolish them.

In 2021, following demolition of the buildings, Plaintiffs filed suit against Cleveland; Cuyahoga County Land Reutilization Corporation ("Land Bank"); Laster, LLC (Laster); and Baumann Enterprises, Inc. ("Baumann") (collectively "Defendants"), arguing that the demolitions violated numerous state laws and federal constitutional provisions.[1] The district court denied Plaintiffs' Rule 56(d) motion for discovery, granted summary judgment to Defendants on the constitutional claims, and declined to exercise supplemental jurisdiction over the remaining state law claims.

[1] Land Bank was the prior owner of the property that First Floor purchased, and Laster and Baumann were the private contractors hired to demolish the buildings.

Plaintiffs argue that the district court erred by denying their Rule 56(d) motion for discovery and by granting Defendants' motions for summary judgment. We affirm.

I.

A.

In 2009, Cleveland declared the building located at 7410 Linwood Avenue a public nuisance and condemned it, finding that the building "constitute[d] an immediate hazard to human life and health." The property changed owners for nearly a decade until 2018, when Lush Designs purchased it. Following Lush Designs' purchase of the property, Cleveland sent a "new owner letter" via United States Postal Service ("USPS") certified mail to the Linwood Avenue address and to Leslie Gaskins, the company's statutory agent. The letter informed Lush Designs that the building located on its property had been declared a public nuisance due to numerous code violations and also included a notice of condemnation and demolition. The letter advised Lush Designs that it must correct the violations by submitting a written rehabilitation plan within ten days and satisfying all permitting requirements or the building would be demolished. Certified mail receipts indicate that the letters were received, although the letter sent to Gaskins was signed for by someone other than her. The letter addressed to the Linwood Avenue property was picked up at the post office. Cleveland also posted a condemnation notice on the building in a prominent location.

After purchasing the property, Lush Designs allegedly "invested substantial time and resources into improving and repairing" the building. Gaskins spoke with individuals at Cleveland's building department on numerous occasions and was told that the Linwood Avenue building was "not subject to" a condemnation order. However, in 2019, Cleveland issued a permit to Baumann to demolish the building. Then, after searching its database and finding no active or unrevoked rehabilitation permits for the building, Cleveland authorized Baumann to proceed with the demolition, which occurred later that month. Lush Designs learned about the demolition when its representative arrived at the property "and found an empty lot where [its] building used to stand."

B.

In 2016, Cleveland declared the building located at 4400 Warner Road to be a public nuisance and condemned it, finding the building "to be structurally unsafe." Cleveland posted a notice on the building that "[t]his [s]tructure is in a DANGEROUS CONDITION and has been CONDEMNED" by the Commissioner of the Division of Code Enforcement within Cleveland's Department of Building and Housing. Cleveland also sent a letter via certified mail to the building's address, enclosing the notice that had been posted at the property. The letter listed the building violations and advised the owner that, to prevent "further enforcement action, including demolition of the property at your costs," the owner needed to file a notice of appeal with the Cleveland Board of Building Standards and Building Appeals or submit a rehabilitation plan to Cleveland's Building

and Housing Department and obtain all required permits within 30 days. Thereafter, Cleveland sent another letter, this one to the State of Ohio, which owned the property at the time. That letter instructed the State to notify Building and Housing within 10 days of any corrective actions it planned to take to address the safety violations; it also included instructions for obtaining all necessary permits and submitting a written plan to the Building and Housing Department. The letter indicated that, pursuant to Cleveland Codified Order § 3103.09(k)(2), "any and all owners of the property who appear in the chain of title from the time of receipt of the condemnation notice until demolition of the building or structure are jointly and severally responsible for all costs and expenses incurred by the Department of Building and Housing."

The letter also noted that, under Ohio Revised Code § 5301.253,

> any violation notice of the Department of Building and Housing that appears on the Department's public records is notice to all subsequent purchasers, transferees, or other person who acquire[s] any interest in the real property in which the violations exist and may be enforced against their interest in the real property without further notice or order to them.

A certified mail return-receipt confirmed that the property owner, the State, received the letter. Upon receiving this notice, the State never submitted a remediation plan, filed an appeal, or addressed the safety violations.

The State then sold the property to Land Bank in late 2016, and Land Bank sold the property to First Floor in 2018. For the next two years, First Floor allegedly invested money, time, and resources into rehabilitating and developing the property. However, First Floor never applied for any rehabilitation permits.

In 2020, Cleveland mailed the same notice of condemnation and demolition order previously sent to the State of Ohio to First Floor via certified mail, both to the property address and to First Floor's statutory agent Joon Yub Kim. The certified mail receipts indicate that the letter sent to the property was returned as "vacant" and the letter to Kim was returned as "unclaimed." Although Cleveland argued that it posted notice at the property after First Floor's purchase, the only evidence of a posting, which the district court disregarded, was a series of "disjointed handwritten notes on what appears to be a post-it note." Cleveland also searched its databases for evidence that First Floor had applied for any construction permits demonstrating that it intended to rehabilitate the structure. Finding none, Cleveland authorized Laster to demolish the building. First Floor learned about the demolition from a neighbor of the property. First Floor unsuccessfully attempted to halt the demolition.

C.

In 2021, Plaintiffs filed suit against Defendants, alleging (1) deprivation of property without due process in violation of the Fourteenth Amendment; (2) taking of property in violation of the Fifth Amendment; and (3) several state law claims. After the Defendants filed motions for summary judgment, the district court held a status conference in which Plaintiffs "indicated that some discovery may be necessary to respond to the motions." The district court directed Plaintiffs to file a Rule 56(d) motion requesting discovery.

Plaintiffs filed their Rule 56(d) motion and requested discovery in the following areas:

- internal communications by Laster and Baumann "regarding the process by which they demolished the properties";
- communications between Cleveland and both Laster and Baumann regarding those companies' relationship with Cleveland;
- the identities of the individuals involved in the building demolitions;
- "potential depositions of" those who were involved in the demolitions;
- "Land Bank[']s internal communications about the First Floor Living Property" to confirm there were "no further intentional or wrongful actions" taken by the Land Bank;
- the metadata and electronic file information of the photos attached to Cleveland's motion for summary judgment;

- Cleveland's internal communications surrounding the two demolitions;
- documentation and communications between Cleveland and both Laster and Baumann;
- the identities of "the specific individuals responsible for and involved in sending and posting any notices directed at the Plaintiffs";
- "potential depositions" of the individuals involved in sending and posting the notices;
- other situations where Cleveland demolished properties "under similar circumstances to those of Plaintiffs";
- documentation and information about the routine practices followed by Cleveland in issuing notices and demolishing buildings.

In the attached Declaration supporting the Rule 56(d) motion, Plaintiffs admitted that "much of the information regarding the merits of [their] claims . . . lie[s] in the[ir] possession," but they wanted to "test or verify" the information provided by the Defendants.

The district court denied Plaintiffs' Rule 56(d) request for discovery for two reasons. First, it found that they failed to make a reasonably particularized showing "of why they need discovery or the material facts they hope to uncover." Second, although the law generally favors discovery, it found that Plaintiffs' requested discovery was unnecessary because "threshold legal questions" could "expeditiously and efficiently dispose of the case."

The district court granted Defendants' motions for summary judgment. It first found that the notice

provided to both First Floor and Lush Designs was sufficient to satisfy due process. As for the Linwood Avenue property, the district court determined that (1) Lush Designs and its statutory agent received certified letters regarding both the condemnation determination and the demolition order; (2) notice of condemnation and the demolition order were posted at the property; and (3) Cleveland provided notice to previous owners, and even if city employees provided Lush Designs with false or inaccurate information, "transfer of ownership does not erase the City's prior efforts to provide notice to interested parties."

The district court found that it was "a closer call" whether First Floor received adequate notice on the Warner property. After all, although Cleveland sent notice to both the property and First Floor's statutory agent, both letters were returned undelivered. The district court also found that "the record is not clear regarding whether" a posting of the condemnation and demolition order "actually occurred" at the property after First Floor took possession. However, it did find that Cleveland had a routine practice of posting notices on properties, and that First Floor failed to proffer any evidence "in the face of an established routine practice that the posting did not occur."

Ultimately, the district court found that Cleveland "undertook reasonable and fairly extensive efforts beginning in 2016 to provide notice," including posting the Condemnation and Violation Notice at the Warner Road property in 2016; sending a violation notice explaining the need for a rehabilitation plan to the 2016 owner, the State of Ohio; issuing notices of the violations to First Floor and its statutory agent;

and searching its records to ensure that First Floor had not applied for any permits to address the violations. All of this, the district court reasoned, was enough to find that First Floor received constitutionally sufficient notice.

For the same reasons articulated for Cleveland, the district court also granted summary judgment to Baumann and Laster. And because Plaintiffs "provided no evidence that the Land Bank was involved" in the condemnation or demolition of the Warner Property, it also granted Land Bank's summary judgment motion. The district court determined that Plaintiffs had abandoned their Fifth Amendment takings claim, and because no federal constitutional issues remained, it declined to exercise supplemental jurisdiction over the remaining state-law claims and dismissed the case.

Plaintiffs timely appealed.[2]

II.

A.

We affirm the district court's denial of Plaintiffs' Rule 56(d) motion.[3] Rule 56(d) permits, but does not require, a district court to defer consideration of a defendant's motion for summary judgment until after

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[2] Plaintiffs do not contest the district court's grant of summary judgment to Land Bank, but they do contest summary judgment as to Baumann and Laster. They also do not challenge the district court's grant of summary judgment on the Fifth Amendment takings claim.

[3] Although previously found in Rule 56(f), a motion requesting additional time for discovery "is now designated as Rule 56(d)." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 623 n.7 (6th Cir. 2014).

the parties have conducted discovery. *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 623 (6th Cir. 2014) (citing Fed. R. Civ. P. 56(d)). "This court reviews a district court's decision on a Rule 56(d) motion for discovery for an abuse of discretion." *Doe v. City of Memphis*, 928 F.3d 481, 486 (6th Cir. 2019) (internal quotations omitted) (quoting *In re Bayer Healthcare & Merial Ltd. Flea Control Prods. Mktg. & Sales Pracs. Litig.*, 752 F.3d 1065, 1074 (6th Cir. 2014)). This means that we will not reverse the district court's decision unless the "ruling was arbitrary, unjustifiable, or clearly unreasonable." *Id.* (quoting *E.M.A. Nationwide, Inc.*, 767 F.3d at 623).

We generally apply the following five-factor test to determine whether the district court abused its discretion by denying a Rule 56(d) motion:

> (1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the desired discovery would have changed the ruling below; (3) how long the discovery period had lasted; (4) whether the appellant was dilatory in its discovery efforts; and (5) whether the appellee was responsive to discovery requests.

CenTra, Inc. v. Estrin, 538 F.3d 402, 420 (6th Cir. 2008) (quoting *Plott v. Gen. Motors Corp.,* 71 F.3d 1190, 1196–97 (6th Cir. 1995)). But this is an ill-fitting test "when the parties have no opportunity for discovery," and we have generally held that, in the absence of any discovery, "denying the Rule 56[(d)] motion and ruling on a summary judgment motion is . . . an abuse of discretion." *Siggers v. Campbell*, 652 F.3d 681, 696 (6th Cir. 2011) (quoting *CenTra, Inc.*, 538 F.3d at 402); *see also White's Landing Fisheries,*

Inc. v. Buchholzer, 29 F.3d 229, 231 (6th Cir. 1994) (holding "in the instant case" that the grant of summary judgment without any discovery was an abuse of discretion).

However, notwithstanding the strong presumption in favor of permitting discovery before ruling on a motion for summary judgment, a district court does not abuse its discretion by denying a Rule 56(d) motion that is supported by mere "general and conclusory statements" or that fails to include "any details or specificity." *Zakora v. Chrisman*, 44 F.4th 452, 479 (6th Cir. 2022) (internal quotation marks and citations omitted). In those circumstances, we have affirmed a district court's denial of a Rule 56(d) motion "even when the parties were given no opportunity for discovery." *Heard v. Caruso*, 351 F. App'x 1, 14–15 (6th Cir. 2009) (internal quotation marks and citations omitted). And we have also affirmed when "further discovery would not have changed the legal and factual deficiencies." *Id.* at 15 (quoting *CenTra, Inc.*, 538 F.3d at 420); *see also Allen v. Collins*, 529 F. App'x 576, 583–84 (6th Cir. 2013) (affirming the denial of a Rule 56(d) motion despite the party's "indolent and cavalier approach" and refusal to provide discovery before the court granted a motion for summary judgment because additional discovery would not have changed the claims' legal and factual deficiencies).

Here, five of Plaintiffs' discovery requests pertained to "internal communications" among the Defendants that do not relate to whether Plaintiffs received sufficient notice before the demolitions occurred. *See Speroni S.p.A. v. Perceptron, Inc.*, 12 F. App'x 355, 359 n.3 (6th Cir. 2001). Furthermore, as

the district court found, Plaintiffs' request for documents pertaining to Cleveland's routine practices in issuing notices and demolishing buildings is irrelevant to whether Cleveland upheld its obligations under the Fourteenth Amendment's Due Process Clause in this case. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (highlighting the fact that a governmental entity's own procedures are separate from due process requirements).

Plaintiffs also requested discovery on "the identities of the individuals involved in the building demolitions," "metadata and electronic file information" of the attachments to Cleveland's motion for summary judgment, and "potential depositions" of those involved in posting the notices on the properties. Once again, Plaintiffs failed to show why this information was relevant. *See Burns v. Town of Palm Beach*, 999 F.3d 1317, 1334 (11th Cir. 2021) (affirming the district court's finding that a Rule 56(d) motion seeking "potential depositions" failed to "specifically demonstrate" how this "discovery would show a genuine issue of fact"). And Plaintiffs' general desire to "confirm that there were no further intentional or wrongful actions taking place," to "ensure the veracity of [Defendants'] evidence," and to determine "whether or not additional related information exists," is insufficient to support its Rule 56(d) motion. *See Ball v. Union Carbide Corp.*, 385 F.3d 713, 720–21 (6th Cir. 2004) (affirming the district court's denial of a Rule 56(d) motion alleging that defendants "selected some [documents] and omitted others").

Although it might have been prudent for the district court to permit discovery in this case, given

the early stage of the litigation, "we cannot say that its refusal to do so was an abuse of discretion." *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981); *see also Allen*, 529 F. App'x at 584 ("Were this Court directly hearing this case, we would be hard pressed to grant summary judgment . . . without giving the [plaintiffs] the benefit of discovery the way the district court did here. But . . . [w]e must [affirm], because discovery would not have changed the legal and factual deficiencies."). Ultimately, the discovery Plaintiffs requested in their Rule 56(d) motion was irrelevant to the issue of whether they received adequate notice and would not have changed the outcome of the district court's ruling. *Local Union 369, Int'l Bhd. of Elec. Workers v. ADT Sec. Servs., Inc.*, 393 F. App'x 290, 295 (6th Cir. 2010). Therefore, we hold that the district court's denial of Plaintiffs' Rule 56(d) motion was not an abuse of discretion.

B.

We also affirm the district court's grant of summary judgment in favor of Defendants. District court orders granting summary judgment are reviewed de novo. *Davis v. Colerain Twp.*, 51 F.4th 164, 170 (6th Cir. 2022). Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)).

A material fact is one that "might affect the outcome of the suit under the governing law," and a genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). At the summary judgment stage, we "consider[] the facts and any inferences drawn from the facts in the light most favorable to the non-moving party." *Chapman v. UAW Local 1005*, 670 F.3d 677, 680 (6th Cir. 2012) (en banc) (citing *White v. Detroit Edison Co.*, 472 F.3d 420, 424 (6th Cir. 2006)).

The issue is whether Plaintiffs were given reasonable notice before the buildings were demolished. Under the Due Process Clause, actual notice is not required before the government may take property. *Jones v. Flowers*, 547 U.S. 220, 226 (2006). Instead, the government is required to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (quoting *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). However, this does not mean that notice "is a mere gesture." *Mullane*, 339 U.S. at 314. Instead, "notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance." *Id.* The adequacy of notice is evaluated "from the perspective of the sender, not the recipient." *Ming Kuo Yang v. City of Wyoming*, 793 F.3d 599, 602 (6th Cir. 2015) (quoting *Lampe v. Kash*, 735 F.3d 942, 944 (6th Cir. 2013)).

1.

The district court properly found that the notice provided to Lush Designs was constitutionally sufficient. After Lush Designs purchased the Linwood

Avenue property in 2018, Cleveland sent a "new owner letter" via certified mail both to the Linwood Avenue property address and to Lush Designs' statutory agent, Leslie Gaskins. The letter included both the notice of condemnation and demolition order and advised Lush Designs to submit a written rehabilitation plan within 10 days of receipt and to obtain all necessary city permits for any rehabilitation work. It is uncontested that the return receipts show that the letter addressed to Lush Designs was picked up at the post office.

The letter addressed to Lush Designs' statutory agent Leslie Gaskins was also successfully delivered, although it was signed by someone other than Gaskins. Although Lush Designs makes much of the fact that Gaskins was not the person who signed for the letter, requiring Cleveland to scrutinize return-receipt signatures to ensure that the proper person signed each one is unreasonable. *See Karkoukli's, Inc. v. Dohany*, 409 F.3d 279, 285 (6th Cir. 2005) (holding that although there is always more a government entity can do to provide notice, "[t]he Constitution does not require such heroic efforts by the Government; it requires only that the Government's effort be reasonably calculated to apprise a party of the pendency of the action" (quoting *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (internal quotation marks omitted))).

In addition to the certified letters, Cleveland also posted a notice on the property that included the condemnation and violation notice. It is well established that "posting notice on real property is a singularly appropriate and effective way of ensuring that a person is actually apprised of proceedings

against him." *Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 313 (6th Cir. 2021) (quoting *Jones*, 547 U.S. at 236).

Finally, before commencing demolition, Cleveland searched its databases to ensure that Lush Designs had not applied for any permits to rehabilitate the structure. It was only after sending the notices by certified mail, posting a notice on the property, and searching for any permit applications that Cleveland issued a demolition permit and authorized the demolition of the building. Although perhaps not heroic, Cleveland's efforts were certainly "reasonably calculated to apprise [Lush Designs] of the pendency of the action," which is all that due process requires. *Karkoukli's*, 409 F.3d at 285.

As a last-ditch effort, Lush Designs argues that notice was somehow invalid because Cleveland employees told it the Linwood Avenue property was not on the city's demolition list. However, informal conversations with city employees regarding the status of the property do not negate the official notice that Lush Designs received by certified mail and through the posting on the property. *Cf. Hill v. City of Jackson*, 751 F. App'x 772, 775 (6th Cir. 2018) (affirming, on other grounds, the district court's grant of summary judgment to the defendant due to previously issued notice of condemnation despite the plaintiff's being erroneously told following purchase that his property "was not on a demolition list").

Summary judgment was proper because Lush Designs received "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

opportunity to present their objections." *Jones*, 547 U.S. at 226 (quoting *Mullane*, 339 U.S. at 314).[4]

2.

We also affirm the district court's grant of summary judgment to Cleveland on First Floor's claim, and we find that First Floor received constitutionally sufficient notice. In granting summary judgment, the district court pointed to the following four notification efforts by Cleveland: (1) posting the Condemnation and Violation Notice at the Warner Road property in 2016; (2) sending a notice by certified mail in 2016 to the owner, the State of Ohio,

[4] To the extent Plaintiffs argue that Laster and Baumann were state actors and therefore liable under 42 U.S.C. § 1983, they have failed to demonstrate, under any test, that this is true. The public function test traditionally applies to the exercise of "powers traditionally reserved to the state, such as holding elections, taking private property under the eminent domain power, or operating a company-owned town." *Romanski v. Detroit Ent., LLC*, 428 F.3d 629, 636 (6th Cir. 2005). Plaintiffs have failed to demonstrate that demolition is a power "traditionally reserved to the state." *Id.* An argument pursuant to the nexus test fares no better. Under the nexus test, there must be "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 565 (6th Cir. 2007) (internal quotation marks and citations omitted). Here, Laster and Baumann were simply private contractors hired to perform a demolition and were not acting under color of state law. *See Dale E. Frankfurth, D.D.S. v. City of Detroit*, 829 F.2d 38 (6th Cir. Sept. 1, 1987) (table) (finding "demolition of the building . . . was not action taken under color of state law"). No party argues that the third and final test, the state- compulsion test, is applicable in this case. Therefore, Plaintiffs' argument fails.

regarding the Condemnation and Violation Notice; (3) sending a notice by certified mail in 2020 to both the Warner Road property and First Floor's statutory agent regarding the Condemnation and Violation Notice; and (4) searching the records to ensure that First Floor "had not secured a permit to improve the building or otherwise address the violations." The district court also noted Cleveland's routine practice of posting notices on a condemned structure if the property changes ownership after condemnation.

The district court correctly found that these actions satisfied the notice requirement. As for the first two items, notice by mail and the property posting in 2016, it is undisputed that Cleveland posted the Condemnation and Violation Notice and that the State of Ohio, the previous owner, received the mailed notice and decided to take no action. Once the State of Ohio received those notices and chose to do nothing for 30 days, the property was subject to demolition. And when a property changes hands, this does not erase a government's previous successful notification efforts or require the government to start the notification process over. "Any other conclusion . . . 'would require the [City] . . . to halt and restart nuisance proceedings every time title to a nuisance property changes hands . . . [,] unduly hamper[ing] the state's interest in demolishing blighted properties.'" *Keene Grp.*, 998 F.3d at 319 (Readler, J., concurring) (citation omitted) (alterations in original); *see also* Ohio Rev. Code § 5301.253 ("Any notice . . . of the state or a political subdivision that relates to a violation of the building or housing code . . . that appears on the public records of the issuing authority is notice to all subsequent purchasers . . . and may be

enforced against their interest in the real property without further notice or order to them.").[5]

However, notwithstanding Cleveland's prior successful notification efforts, Cleveland also sent the notice of condemnation and demolition to the Warner Road property address and to First Floor's statutory agent after First Floor purchased the property. First Floor does not contest that the letters were sent to the correct addresses for both the Warner Road property and its statutory agent, and First Floor offers no reasons why the statutory agent failed to claim Cleveland's mailed notice. Ultimately, although First Floor never received the mailed notices, this situation is analogous to *Keene Group, Inc.*, where we held that the plaintiff received adequate notice where letters that were sent to him but returned undelivered "were the last in a series of efforts by Defendants to provide notice of the taking to Plaintiff, rather than the only such effort." 998 F.3d at 313.

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[5] Although it may seem unfair that the State of Ohio received both mail and posted notice while First Floor contends that it never saw any notices, Cleveland Codified Order § 3103.09(k)(2) provides that "any and all owners of the property who appear in the chain of title from the time of receipt of the condemnation notice until demolition of the building or structure are jointly and severally responsible for all costs and expenses incurred by the Department of Building and Housing." It is undisputed that the State was the owner of the property when Cleveland first sent out the condemnation notice and demolition order. It is also undisputed that the State sold the property to the Land Bank, which then sold the property to First Floor. Without deciding any liability matters here, § 3103.09(k)(2) highlights the potential joint and several liability of multiple owners when a property that is subject to demolition changes hands before the demolition occurs.

The district court also properly admitted the Rule 406 evidence regarding Cleveland's routine practice of posting notices on condemned properties. At the summary-judgment stage, courts may consider Rule 406 evidence of an organization's routine practice to infer that a routine practice was carried out. *See, e.g.*, *Doe ex rel. Rothert v. Chapman*, 30 F.4th 766, 770 (8th Cir. 2022); *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1261–62 (10th Cir. 2012); *cf.*

J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co., 936 F.2d 144, 1495–96 (6th Cir. 1991) (finding that the district court properly accepted undisputed evidence of a bank's routine practice when ruling on a summary judgment motion). Here, Cleveland presented evidence that it followed the routine practice of posting notices in approximately 12,000 demolitions since 2006. As the district court found, this habit evidence supports Cleveland's argument that it posted a notice on the Warner Road property after First Floor took ownership, and Plaintiffs failed to show "in the face of an established routine practice that the posting did not occur."

Furthermore, First Floor failed to apply for rehabilitation permits after purchasing the property. Cleveland searched its database to ensure that no rehabilitation permits had been received before moving forward with the demolition. Had First Floor applied for rehabilitation permits, Cleveland would have halted the demolition "unless and until the permits [were] closed or revoked." Taken together, Cleveland's notification efforts "were 'reasonably calculated' to give notice to [First Floor]." *Ming Kuo Yang*, 793 F.3d at 603. Therefore, summary judgment as to all Defendants was properly granted.

AFFIRMED.

CONCURRENCE/DISSENT

NALBANDIAN, Circuit Judge, concurring in part and dissenting in part. I agree with the majority that the City of Cleveland provided constitutionally sufficient notice of the Linwood Avenue Property's pending demolition to Lush Designs. I write separately because I don't think we have enough information to decide, on summary judgment, "whether the city's [] notice efforts amounted in the aggregate to a reasonable effort to apprise [First Floor] of what was going on" with the Warner Road Property. *Ming Kuo Yang v. City of Wyoming*, 793 F.3d 599, 604 (6th Cir. 2015).

In 2016, Cleveland posted a condemnation notice on the Warner Road Property and successfully sent a copy of the notice to the owner at the time.[1] The property changed hands twice over the next two years, leaving it in the hands of First Floor. Then, in 2020, Cleveland sent a copy of the 2016 notice of condemnation to the property and First Floor's statutory agent. But Cleveland knew delivery failed. Cleveland argues that it then posted a notice of condemnation on the Warner Road Property but, in support, proffered "disjointed handwritten notes on what appears to be a post-it note" that the district court didn't credit. R. 60 at PageID 690. So Cleveland also proffered evidence of its general pattern and

[1] If the owner fails to take necessary action to abate the nuisance, Cleveland may take appropriate action, which includes demolition. *See* Cleveland Codified Ordinances § 3103.09(h)(1). It is undisputed that the prior owner didn't act within the time require d.

practice of posting these types of notices, which First Floor disputed.

First, consider the obvious. Cleveland's unsuccessful attempts to mail a copy of the notice of condemnation in 2020, standing alone, would be constitutionally deficient. The copy mailed to the Warner Road Property was returned as "vacant" and the copy mailed to First Floor's statutory agent was returned as "unclaimed." R. 33-10 at PageID 328; R. 33-11 at PageID 329; R. 33-12 at PageID 330. Due process requires more from Cleveland. *See Jones v. Flowers*, 547 U.S. 220, 225, 229–30 (2006).

So the question is: what do we make of Cleveland's other attempts? I question whether the notice provided to a prior owner in 2016—two years before First Floor purchased the property, and four years before it was demolished—provides First Floor its due notice. *Cf. Lampe v. Kash*, 735 F.3d 942, 943 (6th Cir. 2004) (holding that notice to counsel who stopped representing a party eight years earlier is constitutionally deficient). We know that notice given to one party is not always imputed to another party. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798–99 (1983). It's possible that, if the city recorded the 2016 notice of condemnation, that would suffice. *See Kornblum v. St. Louis Cnty.*, 72 F.3d 661, 664 (8th Cir. 1995) (en banc). But here, Cleveland didn't provide evidence

that the 2016 condemnation notice was publicly available.[2]

And while posting notice on the Warner Road Property would be a "singularly appropriate and effective way of ensuring that [First Floor] is actually apprised of proceedings against [it]," *see Jones*, 547 U.S. at 236 (cleaned up), I believe that there's a genuine dispute of material fact on whether Cleveland posted a notice of condemnation on the Warner Road Property in 2020. Recall that the district court didn't credit Cleveland's proffered "disjointed handwritten notes on what appears to be a post-it note" as evidence that it posted on the property in 2020. R. 60 at PageID 690. And while Cleveland proffers a declaration that explains its practice of routinely posting such notices, First Floor provides a dueling declaration that casts doubt on this routine practice.

A neighbor who lived around the corner from the Warner Road Property attests that he was "regularly present at the building, and drove past the building on a near daily basis," and didn't see a posted notice.

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[2] Judge Readler's concurrence in *Keene* expresses concern over "eras[ing]" a city's prior successful attempts at notice and the burden this might place on a government entity's interest in demolishing blighted properties. *See Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 319 (6th Cir. 2021) (Readler, J., concurring). Point taken, but I think the concern is reduced when a demolition order has been pending for four years (and when the city sends "new owner letters"). And as much as the concern is rooted in parties evading liability for past adverse judgments, liability and constitutional notice are distinct concepts. *See, e.g.*, *Golden State Bottling Co., v. NLRB*, 414 U.S. 168, 179–80 (1973).

R. 48-1, Affidavit of David Bond, ¶¶ 9–10, PageID 508. This, coupled with an indecipherable 2020 photograph, creates a genuine dispute of material fact. *Cf. Ming Kuo Yang*, 793 F.3d at 605□06 (finding no issue of material fact where a city's building-code enforcement log confirmed that a city official posted a demolish order on a building).[3]

It's clear that First Floor could have benefitted from some discovery on this issue. For example, First Floor requested depositions of the individuals involved in posting notices. If a city official tasked with posting the notice on the Warner Road Property admitted that he meant to do so, but didn't, that would be material.

To sum it up, I don't think Cleveland carried its burden to show that they are entitled to summary judgment as to the Warner Road Property. And I believe the district court abused its discretion in denying First Floor any opportunity for discovery on the Warner Road Property.

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[3] Cleveland also argues that we can credit the undisputed fact that notice was posted on the Warner Road Property in 2016, looking to *Keene* for support. But, on my read, the demolition order in *Keene* was posted after the sale to the new owner went through. *See Keene*, 998 F.3d at 309–10, 313. And Cleveland doesn't argue that the 2016 notice was still posted on the property in 2018 when First Floor took possession of the Warner Property.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

No. 1:21-cv-00018

FIRST FLOOR LIVING, LLC, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, OHIO, ET AL.

Defendants.

Judge J. Philip Calabrese
Magistrate Judge Thomas M. Parker

Filed: February 7, 2022

OPINION AND ORDER

Plaintiffs First Floor Living LLC and Lush Designs, LLC purchased separate parcels of real estate in the City of Cleveland, which they intended to rehabilitate and redevelop. They allege that the City of Cleveland, the Cuyahoga County Land Bank (formally, the Cuyahoga County Land Reutilization Corporation), and two contractors demolished the structures on the properties without notifying

Plaintiffs. By doing so, Plaintiffs complain that Defendants deprived them of property without due process in violation of the Fifth and Fourteenth Amendments. They also assert several claims under State law. The City of Cleveland counterclaims, seeking compensatory damages consisting of the costs associated with demolishing the structures. Each Defendant moves for summary judgment. (ECF No. 33; ECF No. 35; ECF No. 36; ECF No. 37; ECF No. 38.) For the reasons that follow, the Court **GRANTS** Defendants' motions for summary judgment on each of Plaintiffs' federal claims (the first and second causes of action asserted in the amended complaint) and declines to exercise supplemental jurisdiction over Plaintiffs' remaining claims under State law and the City's counterclaim and third-party claim, which also assert claims under State law. Therefore, the Court **DISMISSES WITHOUT PREJUDICE** the balance of the action.

STATEMENT OF FACTS

Plaintiffs' claims arise from the demolition of two different properties and, as relevant to Plaintiffs' federal claims, from facts relating to notice that differ for each property.

A. Linwood Property

In October 2018, Lush Designs, LLC purchased the property located at 7410 Linwood Avenue, Cleveland, OH 44105 at a tax foreclosure sale. (ECF No. 49-1, ¶¶ 3–4, PageID #526.) Almost a decade earlier, in 2009, the City had condemned the structure on the Linwood Property as a public nuisance. (ECF No. 33-15, PageID #339–40.) When

Lush Designs purchased the property, the City sent a new-owner letter dated March 1, 2019 to the company's statutory agent, Leslie Gaskins, a member of Lush Designs, and to the Linwood Property itself. (ECF No. 33-17; ECF No. 33-18; ECF No. 33-19.) The record confirms delivery to each of these recipients. (*Id.*) In fact, on March 19, 2019, a person picked up the letter at the post office. (ECF No. 33-17, PageID #333.)

That letter enclosed a violation notice that directed the new owner to correct and abate conditions at the property and to notify the City of its rehabilitation plans. (ECF No. 33-3, PageID #291–92; ECF No. 33-15, PageID #333.) Additionally, the new-owner letter informed Lush Designs that failure to comply with the notice would result in further enforcement action, including "demolishing, repairing, altering, securing, boarding, or otherwise abating the public nuisance" and collection of related costs. (ECF No. 33-15, PageID #333.) The City also posted the condemnation and violation notice on a boarded-up window at the Linwood Property on March 6, 2019. (ECF No. 33-20; ECF No. 57-5.)

After purchasing the property, Lush Designs invested substantial time and resources into improving and repairing the Linwood Property. (ECF No. 49-1, ¶ 6, PageID #527.) These efforts included discussing plans for the property with the City's building department. (*Id.*) Shortly after purchase, Ms. Gaskins visited the City's building department and inquired whether the Linwood Property was subject to any City orders. (*Id.*, ¶ 9). Ms. Gaskins and a colleague, Charles Stroud, spoke to multiple employees of the City's building department and the Land Bank about the Linwood Property. (*Id.*,

¶¶ 11 & 12, PageID #528.) No person suggested that the property was condemned or subject to possible demolition. (*Id.*, ¶ 11; ECF No. 51-1, ¶ 5, PageID #575.)

In July 2019, Baumann Enterprises, Inc. received notice from the City seeking bids for demolition of the Linwood Property. (ECF No. 35-1, ¶ 8, PageID #376.) When it won the bid, the City issued an order to abate the nuisance (ECF No. 35-2, PageID #380), and Baumann Enterprises applied for a demolition permit (ECF No. 35-1, ¶ 12, PageID #377). On August 12, 2019, the City issued a demolition permit. (ECF No. 35-3, PageID #382.) By that date, a subcontractor had removed the asbestos from the Linwood Property at substantial cost. (ECF No. 35-1, ¶ 22, PageID #378.) No evidence explains why that remediation did not occur earlier, though the record suggests that the City has a practice of deferring such expenditures until it can recoup them from a private property owner. Baumann Enterprises began demolition on or about August 12, 2019 and completed it within three weeks. (*Id.*, ¶¶ 22 & 28, PageID #378–79.)

From the perspective of Lush Designs, it only learned of the demolition of the Linwood Property when Ms. Gaskins visited it and found an empty lot. (ECF No. 49-1, ¶ 13, PageID #528.) Lush Designs contends that it did not receive notice that the City had condemned the Linwood Property or that it might be demolished. (*Id.*, ¶¶ 7–8, PageID #527.) Although a certified mail receipt for the new-owner letter bears a signature (ECF No. 33-19, PageID #348), it is not Ms. Gaskins' signature and not one she recognizes (ECF No. 49-1, ¶ 15, PageID #528).

B. Warner Property

Following an unsuccessful sheriff's sale, the property located at 4400 Warner Road in Cleveland, Ohio, which is located about a block away from a public grade school for girls, was forfeited to the State in 2016. (ECF No. 33-1, PageID #282; ECF No. 33-2, PageID #284–87.) On July 28, 2016, the City posted condemnation and violation notices at the property. (ECF No. 33-3, ¶ 3, PageID #289.) A series of photographs in the record show the postings. (ECF No. 33-4.) On September 1, 2016, the City sent to the State of Ohio as the property's new owner a violation notice and notice for a necessary rehabilitation plan. (ECF No. 33-3, ¶ 3, PageID #289; ECF No. 33-5.)

Although the parties agree that the Land Bank next owned the Warner Property, the record does not reflect how or when that came to be. Whatever the case, First Floor Living purchased the Warner Property from the Land Bank in March 2018. (ECF No. 33-8; ECF No. 48-1, ¶ 5, PageID #507–08.) Upon purchase, First Floor Living invested substantial time and resources renovating the property. (ECF No. 48-1, ¶¶ 5 & 7, PageID #507–08; ECF No. 50-1, ¶¶ 5 & 6, PageID #548–49.) After First Floor Living acquired the Warner Property, the City of Cleveland sent a new- owner letter dated January 22, 2020 to First Floor Living. (ECF No. 33-9.) That letter provided notice that the City had determined that the property was a public nuisance and required a rehabilitation plan. (*Id.*, PageID #321.) The City sent this new-owner letter both to the Warner Property and to Joon Kim, who is listed as the statutory agent for First Floor Living. (*Id.*; *id.*, PageID #323; ECF No. 33-3, ¶ 3, PageID #290–91.) Both letters were returned

undelivered. (ECF No. 33-3, ¶ 3, PageID #291; ECF No. 33-11; ECF No. 33-12.) The City's records reflect that a condemnation notice and violation notice were posted at the Warner Property on January 22, 2020. (ECF No. 33-3, ¶ 3, PageID #291; ECF No. 33-13.)

On August 5, 2020, the City issued a permit to Laster LLC for demolition of the Warner Property. (ECF No. 37-2.) On August 16, 2020, Laster delivered its equipment to the property for the demolition. (ECF No. 37-1, ¶ 4, PageID #401.) When Don Laster arrived at the property on August 17, 2020 to begin demolition, he found a note on his equipment "purportedly from the property owner(s) telling me not to go forward with the demolition." (*Id.*, ¶ 5.) Another person, who identified himself as an owner of the property, told Laster he did not have authority for the demolition. (*Id.*, ¶ 6, PageID #402.) Calls to the authorities and the involvement of a police officer confirmed that the demolition could proceed, and it did. (*Id.*, ¶¶ 7–10.)

From the perspective of First Floor Living, it had no notice of the possibility of demolition until August 16, 2020, when a neighbor called David Bond, a member of the First Floor Living who lived around the corner from the property. (ECF No. 48-1, ¶¶ 1, 4, 6, 8, 10 & 11, PageID #507–09.) Bond says that demolition began on the Warner Property the same day. (*Id.*, ¶ 11, PageID #508–09.)

STATEMENT OF THE CASE

In January 2021, Lush Designs and First Floor Living sued the City of Cleveland, Laster LLC, Baumann Enterprises, and the Land Bank. (ECF

No. 1.) Plaintiffs later filed a first amended complaint, in which they allege that all Defendants violated (1) their due process rights by razing the structures on the Linwood Property and the Warner Property without adequate notice (Count 1) and (2) the Fifth Amendment by demolishing the structures on the properties at issue without just compensation (Count 2). (ECF No. 19, ¶¶ 41–64, PageID #183–87.) Further, Plaintiffs claim that the Land Bank was negligent per se for failing to notify First Floor Living at the time of sale that the City had condemned the Warner Property (Count 3). (*Id.*, ¶¶ 65–69, PageID #187–88.) Finally, Plaintiffs allege that Laster and Baumann Enterprises trespassed and unlawfully converted the structures in demolishing the structures (Counts IV and V). (*Id.*, ¶¶ 70–83, PageID #188–89.)

The City counterclaims, seeking to recover abatement costs for each property. (ECF No. 27, ¶¶ 55–77, PageID #240–42.) These costs allegedly amount to $92,058.33 for the Linwood Property (*id.*, ¶¶ 70–76, PageID #241–42) and to $9,849.33 for the Warner Property (*id.*, ¶¶ 67–69, PageID #241).

Separately, each Defendant moves for summary judgment. (ECF No. 33; ECF No. 35; ECF No. 36; ECF No. 37.) The City of Cleveland also moves for summary judgment on its counterclaim. (ECF No. 38.) Plaintiffs oppose all but the Land Bank's motion for summary judgment. (ECF No. 48; ECF No. 49; ECF No. 50; ECF No. 52.)

ANALYSIS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On a motion for summary judgment, the Court must view evidence in the light most favorable to the non-moving party. *Kirilenko-Ison v. Board of Educ. of Danville Indep. Schs.*, 974 F.3d 652, 660 (6th Cir. 2020) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

On a motion for summary judgment, the moving party has the initial burden of establishing that there are no genuine issues of material fact as to an essential element of the claim or defense at issue. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479–80 & n.12 (6th Cir. 1989); *Chappell v. City of Cleveland*, 584 F. Supp. 2d 974, 988 (N.D. Ohio 2008). After discovery, summary judgment is appropriate if the nonmoving party fails to establish "an element essential to that party's case and upon which that party will bear the burden of proof at trial." *Tokmenko v. MetroHealth Sys.*, 488 F. Supp. 3d 571, 576 (N.D. Ohio 2020) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

"The party seeking summary judgment has the initial burden of informing the court of the basis for its motion" and identifying the portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (citing *Celotex Corp.*, 477 U.S. at 322). Then, the nonmoving party must "set forth specific facts showing there is a

genuine issue for trial." *Id.* (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986)). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586.

If a genuine dispute exists, meaning "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," summary judgment is not appropriate. *Id.* However, if "the evidence is merely colorable or is not significantly probative," summary judgment for the movant is proper. *Id.* The "mere existence of some factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Anderson*, 477 U.S. at 247–48). To determine whether a genuine dispute about material facts exists, it is not the Court's duty to search the record; instead, the parties must bring those facts to the Court's attention. *See Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1087 (6th Cir. 1996). Ultimately, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251.

I. Plaintiffs' Objections to Evidence on Summary Judgment

On summary judgment, the central inquiry "determin[es] whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a

finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S. at 250. Generally, a district court "will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter." *Kermavner v. Wyla, Inc.*, 250 F. Supp. 3d 325, 329 (N.D. Ohio 2017) (citing *Anderson*, 477 U.S. at 249). A district court examines only "disputes over facts that might affect the outcome of the suit under governing law." *Anderson*, 477 U.S. at 248. "It is well settled that only admissible evidence may be considered by the trial court ruling on a motion for summary judgment." *Wiley v. United States*, 20 F.3d 222, 225–26 (6th Cir. 1994). As relevant here, "hearsay evidence cannot be considered on a motion for summary judgment." *Wiley*, 20 F.3d at 225–26; *see also* Fed. R. Civ. P. 56(c)(4) (relating to affidavits).

Plaintiffs object to several pieces of evidence on which Defendants rely in support of summary judgment: (1) copies of certified mail receipts showing delivery of the new-owner letter and violation notice to Lush Designs (ECF No. 33-16; ECF No. 33-17); (2) the photograph of the Lush Designs new-owner letter posted at the Linwood Property (ECF No. 33-20); and (3) the City's interoffice document noting that the building department posted the new-owner letter sent to First Floor Living at the Warner Property (ECF No. 33-13). The Court considers each objection in turn.

I.A. USPS Mail Receipts

Plaintiffs object to the certified-mail notices from the postal service for the new- owner letter sent to the Linwood Property and to Leslie Gaskins. (ECF No.

50, PageID #543–44; ECF No. 33-16; ECF No. 33-17.) Specifically, Plaintiffs argue that the City provides no "indication as to who sent the notices or kept the records." (ECF No. 50, PageID #543.)

Both notifications fall under the exception to the hearsay rule for records of a regularly conducted activity. *See* Fed. R. Evid. 803(6). Here, State law authorizes a municipal corporation such as the City of Cleveland to provide notice by certified mail before proceeding with the removal of buildings or other structures. Ohio Rev. Code § 715.26(B). Therefore, retaining certified-mail receipts generated by the United States Postal Service is a regular and proper part of the City's practices and meets the other prerequisites for application of this exception. (*See* ECF No. 33-3, 4–6, PageID #293.) As for the specific objection that the City did not identify who sent the notices or kept the records, the City's declaration identifies the records as generated and maintained by the City's Department of Building and Housing. (ECF No. 33-3, 3, PageID #289.) Nor do Plaintiffs show or call into question that the source of these documents is untrustworthy. For these reasons, the Court overrules this objection.

I.B. Photograph of the Linwood Property

Plaintiffs object to "a blurry picture of the Linwood Property purporting to evidence the posted notice." (ECF No. 50, PageID #543.) Plaintiffs question the trustworthiness of the picture because the "image of the notice posted on the building shows only an image of the building with very little additional detail." (*Id.*, PageID #544.) Further, Plaintiffs fault the City for not identifying who took

the picture or providing information about the internal processes and procedures by which such pictures are maintained to ensure their accuracy. (*Id.*)

Contrary to Plaintiffs' claim, the photograph shows the notice posted on a boarded-up window on the Linwood Property, near its address. (ECF No. 33-20, PageID #349.) Although the two postings on that boarded-up window are not legible, one of them clearly says "CONDEMNED" in big, block letters. (*Id.*) On its face, then, the content of the picture supports the City's declaration, which says that it posted a violation and condemnation notice on the property on March 6, 2019. (ECF No. 33-3, 3, PageID #293.) Although the City did not identify the specific person who took the photo, the City also identifies the picture as generated and maintained by the City's Department of Building and Housing. (ECF No. 33-3, 3 & 4–6, PageID #289 & #293.) Plaintiffs do not provide any evidence or anything other than unsupported assertions that the source of these documents is untrustworthy.

Accordingly, this photograph satisfies Rule 803(6) as an exception to the hearsay rule. Under that an exception, records of a regularly conducted activity made at or near the time by someone with knowledge and kept in the normal course as part of a regular activity do not constitute hearsay, regardless of the declarant's availability. Fed. R. Evid. 803(6). In addition to the declaration of the interim director of the City's Building and Housing Department (ECF No. 33-3), the City's Chief Building and Housing Inspector, attests that he personally affixed the notice

on the Linwood Property and photographed the posting. (ECF No. 57-5, 2, 4–7, PageID #644–45.)

Plaintiffs rely on *Ellis v. Jamerson*, 174 F. Supp. 2d 747, 752–53 (E.D. Tenn. 2001), to support their argument that the City fails to show that it satisfies the requirements of Rule 803(6). But the record at issue in that case involved oral statements at a press conference, and the City provides sufficient detail about the photograph of the Linwood Property to bring it within Rule 803(6). For these reasons, the Court overrules this objection.

I.C. Evidence of Posting at the Warner Property

The City's evidence that it posted a violation notice at the Warner Property consists of disjointed handwritten notes on what appears to be a post-it note. (ECF No. 33-13, PageID #331.) The third line of those notes reads: "NOL [new-owner letter] + Post done 1/22/20." (*Id.*) The City does not identify the author of the note. (*See* ECF No. 33-3, 3, PageID #291 (Exhibit L).) Although the City's evidence states that its regular practice was to photograph the posting of notices (ECF No. 33-3, 5, PageID #293), the only photographs of postings at the Warner Property date to 2016 (ECF No. 33-4, PageID #294–97.) Although various of the postings shown in those photographs are illegible, one clearly reads: "This Structure is in a DANGEROUS CONDITION and has been CONDEMNED. Its Use Is Prohibited By" the City of Cleveland's Department of Building and Housing. (ECF No. 33-4, PageID #294.)

In reply, the City supplies an additional declaration from its chief building inspector, who also

manages its demolition bureau. (ECF No. 57-6, 2, PageID #652.) He attests to the City's regular practices and procedures once a property is condemned. (*Id.*, 4–5, PageID #653.) Those procedures include posting a condemnation notice on the property. (*Id.*, 5(c).) This declaration makes no mention of photographing the posting. Although this declaration does not go so far as to state that the City complied with its practices and procedures for the Warner Property, the City argues for its admission under Rule 406 as evidence of its routine practices. "Evidence . . . of an organization's routine practice may be admitted to prove that on a particular occasion . . . the organization acted in accordance with the . . . routine practice." Fed. R. Evid. 406.

Plaintiffs use the cases on which the City relies to argue that such evidence is not appropriate for summary judgment. (ECF No. 58-1, PageID #670.) *Bowman v. Corrections Corp. of America*, 350 F.3d 537, 549 (6th Cir. 2003), involved the admissibility of habit evidence at trial under plain-error review. Similarly, *Martin v. Thrifty Rent A Car*, 145 F.3d 1332, 1998 WL 211786, at *4–6 (6th Cir. 1998) (table), involved appeal from the admission of habit evidence at trial after the opposing party had a full opportunity to test the evidence. And in *United States v. Syouf*, No. 3:98- cv-7175, 1999 WL 689953, at *3 (N.D. Ohio Mar. 26, 1999), the court relied on evidence of a routine practice in a denaturalization order but did so following a hearing. In each of these cases, Plaintiffs note, courts relied on evidence under Rule 406 only after a hearing that included a full opportunity to test the evidence.

But nothing about Rule 406 has a carve out from the normal rules of summary- judgment practice. *See, e.g.*, *Bell v. Conrail*, 299 F. Supp. 2d 795, 800 (N.D. Ohio 2004) (admitting Rule 406 evidence on summary judgment). The City tendered a declaration, as Rule 56 requires, attesting to its routine practices of posting notices, and Rule 406 itself provides that such evidence can "prove that on a particular occasion" the organization acted pursuant to these practices. Fed. R. Evid. 406. Notably, the City presents evidence that it has followed these routine practices in some 12,000 demolitions since 2006. (ECF No. 57-6, 14, PageID #655.) This number of instances supports the foundational requirements for admissibility under Rule 406. *See, e.g.*, *Bell*, 299 F. Supp. 2d at 800. Therefore, the Court overrules Plaintiffs' objection and will consider this evidence on summary judgment.

II. Due Process Claims (Count 1)

Plaintiffs argue that the City and its agents failed to provide adequate notice under the Due Process Clause of the Fourteenth Amendment before razing the buildings on the Linwood and Warner Properties. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" before the government may take property. *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). When notice is required as a matter of due process, "the Constitution judges the adequacy of notice from the perspective of the sender, not the recipient, which means that the individual recipient's lack of due diligence will not negate otherwise reasonable

efforts at notice." *Ming Kuo Yang v. City of Wyoming, Mich.*, 793 F.3d 599, 602 (6th Cir. 2015) (cleaned up). "When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. But actual notice is not required. *See Dusenbery v. United States*, 534 U.S. 161, 170 (2002).

This reasonableness inquiry relies heavily on the circumstances of the case. Typically, when a notice is returned to the post office or sender that notice might be inadequate under the "desirous sender" standard. *Jones v. Flowers*, 547 U.S. 220, 229–30 (2006). But the failure of notice does not alone establish constitutional inadequacy; rather, it puts the sender on notice that it must take reasonably available additional steps to apprise the interested party, regardless of whether actual notice is perfected. *Id.* Nonetheless, the government need only make a significant, not exhaustive, effort to ascertain a means of notifying the interested party. *Karkoukli's, Inc. v. Dohany*, 409 F.3d 279, 285 (6th Cir. 2005). It need not review every governmental record or database for updated contact information. *Id.* Posting notice at the property constitutes one reasonable measure, which the Supreme Court has recognized as a "singularly appropriate and effective way of ensuring that a person is actually apprised of proceedings against him." *Jones*, 547 U.S. at 236 (cleaned up); *see also Yang*, 793 F.3d at 603 (same). But if there are no reasonable additional steps that the government can take to provide notice upon return of notice letter, "it

cannot be faulted for doing nothing." *Jones*, 547 U.S. at 234.

II.A. City of Cleveland

In addition to these constitutional principles of due process, State statutes and local ordinances require notice to property owners and govern the demolition of buildings and other structures. Under Section 715.26(B) of the Ohio Revised Code, a municipal corporation such as the City of Cleveland may "provide for the inspection of buildings or other structures and for the removal . . . of insecure, unsafe, or structurally defective buildings." Ohio Rev. Code § 715.26(B). This statute provides that the City, "at least thirty days prior to the removal[,] . . . shall give notice by certified mail of its intention with respect to such removal . . . to owners of record of such property." *Id.*

Further, the City of Cleveland's Codified Ordinances outline the procedures by which it regulates buildings and other structures. Section 3103.09(b)(1) provides that the City can declare a building a nuisance that is an "unsafe structure" or "injurious to or a menace to the public health, safety or welfare, or [is] structurally unsafe, unsanitary" or otherwise unsafe, a fire hazard, vacant, or "a hazard to the public health, safety or welfare by reason of inadequate maintenance, dilapidation, obsolescence or abandonment." Cleveland Codified Ordinances § 3103.09(b)(1). All unsafe structures or conditions are declared public nuisances.

Where a building is a public nuisance, Cleveland's ordinances provide that it "shall forward by certified mail to the owner, agent or person in control of

the building, . . . a written notice of violation stating the defects in the building or structure." *Id.* § 3103.09(e)(1). This notice shall require the owner "to abate the nuisance condition of the building or structure by correction of the violations and defects . . . or by demolition and removal of the building, structure, or a portion of those." *Id.* Also, the notice shall state that "if the nuisance is not abated within the required time that the Director may take appropriate action to repair, remove, or otherwise abate the public nuisance and that the owner, agent or person in control shall be responsible for the costs." *Id.* If, after a reasonable and diligent search, the City cannot find the person to whom the notice is addressed, "then the notice and order shall be sent by certified mail to his or her tax mailing address, if available, . . . and a copy of the notice shall be posted in a conspicuous place on the premises to which it relates. The mailing and posting shall be deemed legal service of the notice." *Id.* § 3103.09(b)(2).

If the owner neglects the notice or fails to repair, rehabilitate, or demolish the structure, the City "may take appropriate action to demolish and remove an unsafe structure or to remove or abate any condition that is defined as a nuisance." *Id.* § 3103.09(h)(1). Before beginning demolition, the City must provide notice thirty days in advance. *Id.* § 3103.09(h)(2). But notice separate from notice of violation is not required. *Id.* The owner of the structure is liable for any and all expenses if the City of Cleveland demolishes, boards up, or otherwise abates any nuisance of a building that is an unsafe structure, including but not limited to attorneys' fees, court costs,

and costs of inspection and for administrative staff and support staff. *Id.* § 3103.09(k).

II.A.1. Notice to Lush Designs (Linwood Property)

The City argues that it is entitled to summary judgment because it provided constitutionally adequate notice to Lush Designs when it sent the new-owner letter via certified mail to both the Linwood Property and to Gaskins, a member of Lush Designs, and posted the notice at the Linwood Property. (ECF No. 33, PageID #268.) The Court agrees. The new-owner letter notified Lush Designs of both the condemnation determination and the demolition order. (ECF No. 33-15.) Further, the record shows that both letters were successfully delivered, and the new-owner letter was also posted at the Linwood Property. (ECF No. 33-16; ECF No. 33-17; ECF No. 33-20.)

Relying on a declaration from Gaskins, Plaintiffs argue that the City never notified Lush Designs of the condemnation and subsequent demolition. (ECF No. 49-1.) Specifically, it argues that (1) someone other than the intended recipients received the mailed letters and (2) when Lush Designs purchased the Linwood Property, the City reassured Gaskins that there were no outstanding violations. (*Id.*) Even if true, however, due process does not require actual notice. *Jones*, 547 U.S. at 226; *Dusenbery*, 534 U.S. at 170.

Plaintiffs rely on the Supreme Court's decision in *Jones* to argue that, where a municipality knows that its efforts to provide notice to a property owner fall short, due process requires additional steps. Fair

enough. But due process judges the adequacy of notice from the perspective of the sender, not the recipient. *Ming Kuo Yang*, 793 F.3d at 602 (citing *Lampe v. Kash*, 735 F.3d 942, 944 (6th Cir. 2013)). Here, the record shows that the City sent two certified letters containing notices of violation with sufficient information advising of the need to abate the nuisance and warning of demolition. The postal service informed the City that both letters were delivered. (ECF No. 33-16.) And the record shows that the City checked the tracking information for the letters, which shows that one was picked up in person at the post office. (ECF No. 33-17.) Even though the signature on the certified mail receipt does not appear to be that of Gaskins, the City may reasonably assume that the signatory was another representative of Lush Designs. Moreover, particularly in light of the other information from the postal service reflecting delivery, the City had fairly grounded and objective reasons to think that notice made its way to the intended recipients.

On these facts, the City acted reasonably to assure that it provided notice. Therefore, the subsequent efforts *Jones* requires do not come into play. In any event, the City posted notice of condemnation on the Linwood Property on March 6, 2019. As for Plaintiffs' contention that City employees provided assurances that there were no issues with the property, such an argument has no relevance to the due-process notice inquiry. *See Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 312–13 (6th Cir. 2021) (rejecting due-process challenge where the plaintiff had actual knowledge of condemnation). Even crediting Plaintiffs' declaration that the City

misled Lush Designs by providing it inaccurate or false information, the due-process analysis focuses on the City's efforts to provide notice, and transfer of ownership does not erase the City's prior efforts to provide notice to interested parties. *See Keene Grp.*, 998 F.3d at 319 (Readler, J., concurring). To hold otherwise "would require the City . . . to halt and restart nuisance proceedings every time title to a nuisance property changes hands unduly hampering the state's interest in demolishing blighted properties." *Keene Grp., Inc. v. City of Cincinnati*, No. 1:19-CV-730-WOB, 2020 U.S. Dist. LEXIS 123134, 2020 WL 3980304, at *3 (S.D. Ohio July 14, 2020) (cleaned up). In this respect, the record shows that the City reasonably believed Lush Designs or its representatives received two certified letters providing notice, which was also posted on the property. Due process requires notice reasonably calculated under the circumstances to reach its intended recipient. These facts show that the City discharged its obligations to meet this minimal requirement as a matter of law.

II.A.2. Notice to First Floor Living (Warner Property)

Similarly, the City maintains that it is entitled to summary judgment because it provided First Floor Living with adequate notice. (ECF No. 33, PageID #268.) Unlike the circumstances related to the Linwood Property, the adequacy of the notice the City provided has more complications and presents a closer call. First, there is no dispute that the City sent notice to the Warner Property and to First Floor Living's statutory agent. But the record shows that

each was returned undelivered. (ECF No. 33-6; ECF No. 33-7.) Relying solely on the two undelivered mail notices, the City would be hard pressed to show that it took measures reasonably calculated to notify First Floor Living of the condemnation and subsequent demolition. *See Jones,* 547 U.S. at 234. Indeed, in such circumstances, the Supreme Court recognizes that due process requires additional efforts reasonably calculated to provide notice. *Id.*

When it comes to real property, "posting notice on [the] property is 'a singularly appropriate and effective way of ensuring that a person . . . is actually apprised of proceedings.'" *Id*. at 236 (quoting *Greene v. Lindsey*, 456 U.S. 444, 452–53 (1982)). For this reason, the City points to posting of the notice at the Warner Property on January 22, 2020 as constitutionally adequate notice. But the record is not clear regarding whether that posting actually occurred. The evidence for it amounts to little more than barely decipherable chicken scratch. Also, the meaning of that note is unclear. It states "NOL + Post 1/22/20." (ECF No. 33-13.) "Post" might mean posting of the new-owner letter and a violation notice at the Warner Property. But it might also mean postmarked. January 22, 2020 is the same day the new-owner letter was postmarked to the recipients the City intended to reach.

Construed in favor of Plaintiffs, the evidence in the record on summary judgment with respect to posting on the property shows that the City has a routine practice of posting and photographing the posted notice. Indeed, the record shows that it did so on the Warner Property in 2016. But the record contains no photographic evidence it did so again in

2020. Instead of photographic evidence, the City relies on its routine practice and the handwritten note that posting occurred. Because that handwritten note is sketchy, at best, the Court disregards it. Even so, Plaintiffs point to no evidence in the face of an established routine practice that the posting did not occur. That First Floor Living's ownership did not see any posting (ECF No. 48-1, 10, PageID #508) goes to actual knowledge but does not mean that the City failed to follow its practice in this one instance. Perhaps it did not. Such a claim amounts to little more than speculation.

For purposes of due process, posting in 2020 is not the only notice that matters. When ownership of the Warner Property changed hands after 2016, the City's policies and procedures required new notice and posting. (ECF No. 57-6, 6(e), PageID #653–54.) But those local requirements do not bear on the due-process analysis. As already noted, because the due-process analysis focuses on the sender, transfer of ownership does not erase the City's prior efforts to provide notice to interested parties. *See Keene Grp.*, 998 F.3d at 319 (Readler, J., concurring). When First Floor Living acquired the Warner Property, the City was not constitutionally required to restart its processes for addressing blighted or abandoned properties. *Keene Grp.*, 2020 U.S. Dist. LEXIS 123134, 2020 WL 3980304, at *3. In addition to the City's evidence of its practices regarding posting, the overall efforts that the City undertook meet the constitutional minimum of due process.

Plaintiffs argue that the intervening time between the first notices and demolition of the structures undermines the City's claim that it made

constitutionally adequate efforts to provide notice. Plaintiffs rely on three cases, each of which is distinguishable. First, they cite *Hamilton v. City of Rochester*, No. 99-CV-6341P, 2004 WL 1125156 (W.D.N.Y. Mar. 31, 2004). There, a four-year delay occurred between the final hearing and demolition. The *Hamilton* Court found dispositive the facts that the plaintiff pulled permits, began construction, and was in communication with several city officials to abate the nuisance. After the plaintiff pulled permits and put the city on notice that it had begun work on the property, the city did not issue a new notice of its intent to begin demolition. *Id.* at *13–14. Here, the record contains no evidence Plaintiffs secured permits or otherwise placed the City on notice that they intended to abate the conditions of the property.

Second, in *Ellis v. City of Montgomery*, 460 F. Supp. 2d 1301 (M.D. Ala. 2006), the city employed a constitutionally deficient method to identify the correct property owner. There, the city checked an outdated records database when more updated property records were readily obtainable. No such issue applies here.

Third, in *Kornblum v. St. Louis County*, 72 F.3d 661 (8th Cir. 1995), the local government did not attempt to inform the new owner of demolition before demolishing the property. *Id.* at 662. Here, the City attempted to notify First Floor Living and prior owners.

Moreover, the City undertook reasonable and fairly extensive efforts beginning in 2016 to provide notice. After condemning the Warner Property in 2016 and posting the Condemnation and Violation Notice at the Warner Property, the City sent a violation

notice and advised of the need for a rehabilitation plan to the State of Ohio. As the Warner Property changed hands, the City diligently issued notice of the violations to the new owners. (ECF No. 33-9; ECF No. 33-10; ECF No. 11; ECF No. 12.) And before the City issued the demolition permit, it searched its records to ensure that First Floor Living had not secured a permit to improve the building or otherwise address the violations. (ECF No. 33-14; ECF No. 57-6, ¶ 13, PageID #655.)

In this way, the City acted to notify interested parties and monitor any steps to abate the nuisance. These facts show that the City took reasonably calculated measures starting in 2016 to notify interested parties of condemnation of the Warner Property.

To be sure, the City could have avoided this dispute by properly documenting the notice posted on the Warner Property in 2020 or through different policies better designed to facilitate needed investment in the City. But those administrative and policy decisions, though unfortunate, do not show a violation of due process, and the Court so concludes.

II.B. Baumann Enterprises and Laster

Assuming without deciding that the Baumann Enterprises and Laster acted as agents of the City in demolishing the Linwood and Warner Properties, the Court concludes, for the same reasons as above, that these Defendants did not violate Plaintiffs' due-process rights.

II.C. The Land Bank

Though Plaintiffs assert that the Land Bank violated their due-process rights, they provide no evidence that the Land Bank was involved in the City's condemnation proceedings or took part in the demolition of the Warner Property. Accordingly, the Land Bank is entitled to judgment as a matter of law.

* * *

For the above reasons the Court **GRANTS** summary judgment in favor of Defendants on Plaintiffs' due-process claims in Count 1.

III. Takings Clause Claim (Count 2)

Plaintiffs abandon their takings claim, conceding that Defendants' actions do not violate the Fifth Amendment. (ECF No. 50, PageID #534 n.4; ECF No. 52, PageID #586 n.3.) Indeed, as Plaintiffs acknowledge, under the law of this Circuit, "[d]emolition . . . to enforce building codes or abate a public nuisance does not constitute a taking." *Davet v. City of Cleveland,* 456 F.3d 549, 553, 554 (6th Cir. 2006). Therefore, the Court **GRANTS** summary judgment in favor of Defendants on Count 2.

IV. State-Law Claims

Under 28 U.S.C. § 1367(a), district courts may exercise supplemental jurisdiction over all other claims that are so related to those in the action within the Court's original jurisdiction that they form part of the same case or controversy. Further, Section 1367(c)(3) provides that a district court may decline to exercise supplemental jurisdiction where, as here,

the district court has dismissed all claims over which it has original jurisdiction.

In deciding whether to exercise supplemental jurisdiction, the district court should consider factors such as "comity, judicial economy, convenience, and fairness." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.,* 196 F.3d 617, 620–21 (6th Cir. 1999). "[G]enerally '[w]hen all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims.'" *Packard v. Farmers Ins. Co. of Columbus*, 423 F. App'x 580, 585 (6th Cir. 2011) (quoting *Musson Theatrical v. Fed. Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir. 1996)); *see also Juergensen v. Midland Funding, LLC*, No. 5:18-cv-1825, 2018 WL 5923707, at *2 (N.D. Ohio Nov. 13, 2018). After reviewing the record in this matter, the Court declines to exercise its discretion to retain supplemental jurisdiction over the parties' remaining claims and counterclaims under State law.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' motions for summary judgment on each of Plaintiffs' federal claims (the first and second causes of action asserted in the amended complaint) and declines to exercise supplemental jurisdiction over Plaintiffs' remaining claims under State law and the City's counterclaim and third-party claim. Therefore, the Court **DISMISSES WITHOUT PREJUDICE** the balance of the action.

SO ORDERED.

Dated: February 7, 2022

J. Philip Calabrese
United States District Judge
Northern District of Ohio

Appendix C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

No. 1:21-cv-00018

FIRST FLOOR LIVING, LLC, ET AL..

Plaintiffs,

v.

CITY OF CLEVELAND, OHIO, ET AL.

Defendants.

Judge J. Philip Calabrese
Magistrate Judge Thomas M. Parker

August 17, 2021

MINUTE ORDER (non-document)

This civil matter was before the Court for a telephone status conference on Tuesday, August 17, 2021. Justin Stevenson appeared for Plaintiffs and Counterclaim Defendants First Floor Living, LLC, and Lush Designs, LLC; Mr. Stevenson also appeared for Third-Party Defendants Leslie M. Gaskins and David Bond; Nathaniel Hall appeared for Defendant and Counterclaim/Third-Party Plaintiff City of Cleveland; Matthew Baringer appeared for Defendant Laster LLC; Robert Lynch and Robert

Pleines appeared for Defendant Baumann Enterprises, Inc.; Alayna Bridgett and Phillip Eckenrode appeared for Defendant Cuyahoga County Land Reutilization Corporation. The Court and parties discussed a schedule related to the pending motions for summary judgment. Plaintiffs indicated that some discovery may be necessary to respond to the motions. Therefore, the Court directed Plaintiffs to respond pursuant to Rule 56(d) as to all the pending motions in a single filing no later than September 7, 2021. The Court also directed Plaintiff to respond to Defendant Laster's motion for leave to supplement as part of the same filing. Defendants shall respond by September 21, 2021. The Court sets a status conference for Wednesday, September 29, 2021 at 3:00. The conference will be conducted via Zoom and the Court's deputy will provide meeting information. Judge J. Philip Calabrese on 8/17/2021. (Y,A) (Entered: 08/17/2021)

Appendix D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

No. 1:21-cv-00018

FIRST FLOOR LIVING, LLC, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, OHIO, ET AL.

Defendants.

Judge J. Philip Calabrese
Magistrate Judge Thomas M. Parker

October 12, 2021

ORDER

Plaintiffs First Floor Living LLC and Lush Designs, LLC purchased two parcels of real estate in the City of Cleveland, which they intended to rehabilitate and redevelop. They allege that the City of Cleveland, the Cuyahoga County Land Bank (formally, the Cuyahoga County Land Reutilization Corporation), and two contractors demolished the structures on the properties without notice to Plaintiffs. By doing so, Plaintiffs allege that Defendants deprived them of property without due

process in violation of the Constitution and violated their federal civil rights and State law.

STATEMENT OF THE CASE

Defendants each independently move for summary judgment, arguing that they are entitled to judgment as a matter of law based on facts that are largely undisputed or easily proved (*See* ECF No. 33; ECF No. 35; ECF No. 36; ECF No. 37.) Defendant Laster LLC, seeks leave to include additional documents as part of its motion for summary judgment (ECF No. 39), and the City of Cleveland moves for summary judgment on its counterclaim for costs associated with the demolition (ECF No. 38.)

Plaintiffs respond to Defendants' motions for summary judgment by seeking discovery under Rule 56(d). (ECF No. 41.) With respect to the City's motion, Plaintiffs desire to delve more deeply into the City's notice efforts, arguing that its efforts to provide notice were insufficient to comply with due process and other requirements. (*Id.*, PageID #446–47.) Plaintiffs maintain that, without discovery, they "will have little ability to rebut the facts asserted by the City other than to simply state that Plaintiffs did not receive the City's notices." (*Id.*, PageID #448.) Plaintiffs also seek discovery from the Land Bank to determine based on its internal documents "to confirm that there were no further intentional or wrongful actions taking place during or around the time in which Plaintiff First Floor Living purchased" one of the properties at issue. (*Id.*, PageID #445–46.) As for the contractors, Plaintiffs argue that it needs discovery to explore potential disputes of fact and self-

serving statements that the contractors are not State actors. (*Id.*, PageID #444–45.)

In support of their motion, Plaintiffs attach the declaration of their counsel. (ECF No. 41-1.) In his declaration, counsel states that the contractors' version of the facts differs from Plaintiffs' in certain key respects. (*Id.*, ¶¶ 6, 7, PageID #452.) Concerning the Land Bank, counsel's declaration largely tracks Plaintiffs' motion. (*Id.*, ¶ 8, PageID #453.) As for the City's motion, counsel declares that the issues are inherently fact-intensive and will required discovery of all relevant facts and circumstances. (*Id.*, ¶ 9.)

GOVERNING LEGAL STANDARD

Rule 56(d) provides that a court may defer consideration of a motion for summary judgment to allow time for a party opposing the motion to gather affidavits or take discovery. Fed. R. Civ. P. 56(d)(1) & (2). Rule 56(d) helps ensure that plaintiffs receive "a full opportunity to conduct discovery" when faced with a motion for summary judgment. *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)). "A party invoking [the] protections [of Rule 56(d)] must do so in good faith by affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 623 (6th Cir. 2014) (quoting *Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir. 1975)). The party seeking discovery must "indicate to the district court [the party's] need for

discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Ball*, 385 F.3d at 720 (quoting *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000)).

"The party opposing a motion for summary judgment . . . possesses no absolute right to additional time for discovery under Rule 56." *Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989). "A district court does not abuse its discretion in denying discovery when the discovery requested would be irrelevant to the underlying issue to be decided." *In re Bayer Healthcare & Merial Ltd. Flea Control Prods. Mktg. & Sales Litig.*, 752 F.3d 1065, 1074 (2014) (quoting *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 862 (6th Cir. 2005)). Further, summary judgment without discovery may be appropriate where "the court deems as too vague the affidavits submitted in support of the motion" or "if further discovery would not have changed the legal and factual deficiencies." *CenTra, Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008) (internal quotation marks omitted). Similarly, a district court has "discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Id.* (quoting *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008)).

A "motion requesting time for additional discovery should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence." *E.M.A. Nationwide, Inc.*, 767 F.3d at 623 n.7 (clean up) (quoting *Convertino v. U.S. Dep't of Justice*, 684 F.3d

93, 99 (D.C. Cir. 2012)). The Sixth Circuit has identified five factors it considers on review of a ruling on a Rule 56(d) motion: (1) when the movant learned of the issue on which it seeks discovery; (2) "whether the desired discovery would have changed the ruling below;" (3) how long discovery lasted; (4) whether the movant was dilatory in its discovery efforts; and (5) whether the movants were responsive to discovery requests. *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008) (quoting *Plott v. General Motors Corp.*, 71 F.3d 1190, 1196–97 (6th Cir. 1995)).

ANALYSIS

Under this standard, the Court denies Plaintiffs' motion for two reasons.

First, Plaintiffs have not carried their burden of making a reasonably particularized showing of why they need discovery or the material facts they hope to uncover. *See Ball*, 385 F.3d at 720. Instead, Plaintiffs advance conclusory generalizations to the effect that they want to explore the particulars of the City's notice regime generally and to make sure the Land Bank did not commit any other wrongful acts that damaged them. In other words, they want to undertake a fishing expedition. As the Court understands the issues on summary judgment, Defendants generally maintain that they complied with the Constitution and the laws by providing notice based on largely undisputed or easily established facts. Discovery is unnecessary to answer these threshold questions, and Plaintiffs have not established that they cannot respond to these threshold issues as a matter of law or that additional discovery will cure any legal or factual deficiencies.

Perhaps the record contains factual disputes that make a summary judgment improper at this stage. If so, summary judgment will be inappropriate.

Second, on the facts and circumstances of this case, where the threshold issues present legal questions that turn on undisputed facts, the Sixth Circuit's five-factors test is a poor fit. Though the law generally favors discovery, Rule 1 and the proportionality principles of Rule 26(b)(1) militate against discovery where, as here, threshold legal questions may expeditiously and efficiently dispose of the case. For this reason, the Court exercises its discretion consistent with the Civil Rules to limit discovery at this time.

CONCLUSION

At bottom, at least as the Court presently understands Defendants' motions based on previous discussions with the parties and preliminary review of the motions themselves, Defendants seek summary judgment based on easily proved or largely undisputed facts. Therefore, the Court **DENIES** Plaintiffs' motion under Rule 56(d). In doing so, the Court notes that, if, upon further analysis, the issues presented are not capable of resolution as a matter of law or require further factual development, the Court will deny the motions for summary judgment, and the case will proceed to discovery. In this way, the Court balances the needs of the case and the parties' competing interests within the framework of Rule 56 and Rule 1.

SO ORDERED.

Dated: October 12, 2021

J. Philip Calabrese
United States District Judge
Northern District of Ohio

Appendix E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

No. 1:21-cv-00018

FIRST FLOOR LIVING, LLC, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, OHIO, ET AL.,

Defendants.

Judge J. Philip Calabrese
Magistrate Judge Thomas M. Parker

Filed: May 6, 2021

SCHEDULING AND PROCEDURAL ORDER

This civil matter was before the Court for an initial case management conference on May 6, 2021. Justin Stevenson appeared for Plaintiffs and Counterclaim Defendants First Floor Living, LLC, and Lush Designs, LLC; Mr. Stevenson also appeared for Third-Party Defendants Leslie M. Gaskins and David Bond; Leslie Shafer appeared for Defendant and Counterclaim/Third-Party Plaintiff City of

Cleveland; Thomas Wright appeared for Defendant Laster LLC; Robert Lynch and Robert Pleines appeared for Defendant Baumann Enterprises, Inc.; Phillip Eckenrode appeared for Defendant Cuyahoga County Land Reutilization Corporation.

After providing the Court with a brief overview of their respective cases and positions, the parties discussed Plaintiffs' amended complaint, which was filed on May 5, 2021. (ECF No. 19.) To clarify any ambiguity about which complaint constitutes the operative pleading, the Court confirmed with each Defendant that none objected to Plaintiffs' amended complaint, and none did. Accordingly, the Court **GRANTS LEAVE TO AMEND** under the liberal amendment policy of Rule 15(a) and deems the first amended complaint filed and operative. (ECF No. 19.) The Court also **DENIES WITHOUT PREJUDICE** the City's motion for partial dismissal (ECF No. 13.)

Based on this amended complaint, due to the nature of the claims at issue in this action, and to preserve judicial economy, the Court proposed and the parties agreed to a modified schedule, as follows:

Deadline to Answer the Amended Complaint:	May 19, 2021
Initial Disclosures due:	May 20, 2021
Deadline to Amend Pleadings or Add Parties:	June 4, 2021
Threshold Motions for Summary Judgment:	August 2, 2021
Telephone Status Conference	August 17, 2021 at 2:00 pm

By August 2, 2021, Defendants will file motions for summary judgment directed to threshold legal issues that may require some factual support beyond the pleadings.

At the August 17th telephone status conference, the parties and the Court will discuss what limited discovery is necessary for Plaintiffs to respond to the motions and set the balance of the schedule for briefing on the threshold issues in the case. The Court defers more fulsome discovery and dispositive motions on other issues until resolution of the forthcoming motions.

SO ORDERED.

Dated: May 6, 2021

J. Philip Calabrese
United States District Judge
Northern District of Ohio

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 22-3216/3217

FIRST FLOOR LIVING LLC, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND, OHIO, ET AL.,

Defendants-Appellees.

Order Denying Petition for Rehearing

Filed: November 7, 2023

Before: SILER, GILMAN, and NALBANDIAN, Circuit Judges.

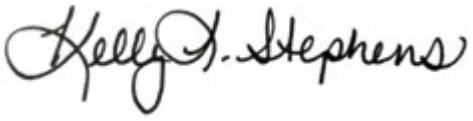
ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence*. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited*. The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations*. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.