TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBEN GARCIA, JR.,
and a class of property buyers similarly situated
(22-1574),
Plaintiff-Appellant,

PHILIP LEE ELLISON,
MATTHEW EDWIN GRONDA (22-1578),
Interested Parties-Appellants,

v.

TITLE CHECK, LLC,
Defendant-Appellee.

FILED
May 17, 2023
DEBORAH S. HUNT, CLERK

ORDER

Before: GILMAN, KETHLEDGE, and MURPHY,
Circuit Judges.

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

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0159n.06

Nos. 22-1574/1578

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBEN GARCIA, JR.,
and a class of property buyers similarly situated
(22-1574),
Plaintiff-Appellant,

PHILIP LEE ELLISON,
MATTHEW EDWIN GRONDA (22-1578),
Interested Parties-Appellants,

v.

TITLE CHECK, LLC,
Defendant-Appellee.

FILED
Apr 05, 2023
DEBORAH S. HUNT, CLERK

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF MICHIGAN

OPINION

Before: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

PER CURIAM. Ruben Garcia, Jr., and his attorneys, Philip Lee Ellison and Matthew Edwin Gronda, appeal the district court's order imposing sanctions against counsel for bringing and litigating a frivolous lawsuit against Title Check, LLC. Because the district court did not abuse its discretion, we affirm its sanctions order.

Garcia, through Ellison and Gronda as counsel, sued Title Check over fees that it charged for running tax-foreclosure auctions on behalf of Michigan governmental entities. In 2018, Garcia bought real estate in Bay County at a foreclosure auction. His winning bid was $11,500, but as described in the auction rules, the full purchase price included Title Check's additional ten-percent buyer's fee of $1,150. Garcia alleged that this fee violated Michigan's General Property Tax Act, which provided that properties must be offered for auction at a "minimum bid" that "shall include" all outstanding taxes, interest, penalties, and fees due on the property and all expenses of preparing for and administering the auction. Mich. Comp. Laws § 211.78m(16)(a) (2018). Garcia claimed that the statute authorized only those items to be included in the minimum bid, making the buyer's fee illegal. He brought claims against Title Check for Hobbs Act extortion and wire fraud under

the Racketeer Influenced and Corrupt Organizations Act ("RICO") and for unjust enrichment under Michigan law. He sought damages and injunctive relief and proposed to represent a class of similarly situated buyers.

The district court granted Title Check's motion to dismiss Garcia's amended complaint, holding that the Michigan statute's "shall include" language merely required the minimum bid to consist of certain items to ensure that the governmental entity at least recouped the taxes owed plus all associated costs, but that it did not prohibit Title Check's buyer's fee. The district court held that, because the fee was not improper, Garcia had not alleged facts that could support his Hobbs Act extortion and wire-fraud claims under RICO, and because a contract governed his purchase at auction and he knew the terms and received what he bargained for, he did not sufficiently plead an unjust-enrichment claim.

Garcia, still through attorneys Ellison and Gronda, appealed. We affirmed the district court's decision, holding that the statute's language delineating what the minimum bid "shall include" was not exhaustive and thus did not prohibit Title Check's buyer's fee. Garcia petitioned for rehearing en banc, which was denied.

Title Check then moved for sanctions in the district court against Ellison and Gronda under 28 U.S.C. § 1927 and the court's inherent authority, arguing that Garcia's case was frivolous and their persistence in litigating it needlessly cost the defendant company thousands of dollars in legal fees.

Title Check reasoned that counsel's legal theory about the statutory language was baseless and, even if it were not, that the RICO and unjust-enrichment claims were patently meritless. The company also argued that counsel knew that the case lacked a good-faith basis because opposing counsel explained as much by letter at the start of the litigation. Title Check further asserted that Garcia's attorneys brought the case for the improper purpose of obtaining discovery that counsel could use to file cases about a separate issue with foreclosure auctions that had spawned a flood of litigation in Michigan courts. See *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 440 (Mich. 2020). In response, Ellison and Gronda argued that the case was not brought in bad faith and that they had advanced a plausible theory of statutory interpretation about a novel question of law.

The district court granted Title Check's motion and ordered Ellison and Gronda to pay the attorney's fees and costs that the company incurred in defending the case: $73,752.45. The court, relying solely on § 1927, determined that Garcia's complaint was frivolous and that, because his attorneys should have known that the claims were frivolous, they "'unreasonably and vexatiously' multiplied the proceedings." The court thus concluded that § 1927 sanctions were warranted.

Garcia appealed, as did Ellison and Gronda, and their cases were consolidated. We denied their motion to stay the sanctions order pending appeal without bond, noting that "[c]ounsel made no efforts to engage with [Federal Rule of Civil Procedure] 62(b)," which provides that a bond or other security is

required to obtain a stay. On appeal, they argue that the district court erred in three ways: (1) by imposing against Garcia sanctions that are limited to attorneys; (2) by awarding sanctions for the full amount of work performed by Title Check's counsel instead of the amount that related to the unnecessary filings; and (3) by levying sanctions based on a misunderstanding of Michigan precedent, even though the legal issue was a matter of first impression.

Under § 1927, a court can order an "attorney... who so multiplies the proceedings in any case unreasonably and vexatiously . . . to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Sanctions are warranted "when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court.' While subjective bad faith is not required, the attorney in question must at least knowingly disregard the risk of abusing the judicial system, not be merely negligent." *Kidis v. Reid*, 976 F.3d 708, 723 (6th Cir. 2020) (quoting *Carter v. Hickory Healthcare Inc.*, 905 F.3d 963, 968 (6th Cir. 2018)). We review under the abuse-of-discretion standard a district court's award of sanctions under § 1927. *United States v. Llanez-Garcia*, 735 F.3d 483, 491 (6th Cir. 2013).

The district court did not abuse its discretion by imposing sanctions against Ellison and Gronda. Counsel continued to press frivolous causes of action based on an implausible parsing of the statutory language. Their argument that Title Check engaged in extortion and wire fraud under RICO by charging

a buyer's premium to the auction price was unreasonable on its face. And their claim for unjust enrichment was meritless given that a contract governed the auction, which, under state law, made such relief unavailable. Counsel's argument that the statute's requirement that the minimum bid "shall include" various items in fact precluded all other items was not just unsound, but also at odds with authoritative caselaw. Title Check's attorney informed Ellison and Gronda shortly after they filed suit that it was without merit, yet they litigated it, without success at every turn, all the way through a petition for en banc review. Sanctions, then, were not inappropriate.

Ellison and Gronda argue that their actions did not warrant sanctions because the legal issues raised by the case were debatable. They also claim that the district court misunderstood Michigan law by stating, to quote their brief, that "the word 'include' in a Michigan statute always 'conveys the conclusion that there are other items includable, though not specifically enumerated.'" They cite several Michigan court cases noting that "include" can limit or expand a list. See, e.g., *Belanger v. Warren Consol. Sch. Dist., Bd. of Educ.*, 443 N.W.2d 372, 377 n.25 (Mich. 1989). And they point out that the provision at issue had never been interpreted by either a Michigan or a federal court.

But the district court did not state that the word "include" always indicates non-exclusivity. Indeed, the district court quoted the Michigan Supreme Court's statement that "include" has this effect "unless the context clearly indicates a contrary

legislative intent." *Skillman v. Abruzzo*, 88 N.W.2d 420, 422 (Mich. 1958). And that is all that the cases Ellison and Gronda list say. Counsel never offer a plausible argument that the context here signifies that "shall include" is a limit rather than a baseline of what the minimum bid must contain. Moreover, although no court had interpreted the statutory language before, counsel still do not explain how that makes their argument reasonable or how the causes of action they asserted were plausible. In short, Ellison and Gronda's arguments do not show that the district court's sanctions order was based "on an erroneous view of the law or a clearly erroneous assessment of the evidence," *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 395 (6th Cir. 2009) (quoting Ridder v. City of Springfield, 109 F.3d 288, 293 (6th Cir. 1997)), and thus they have not established that the court abused its discretion.

Ellison and Gronda also argue that the district court erroneously imposed sanctions for the entire amount of work that Title Check's counsel performed in the case. They claim that the sanctions should have been tailored to opposing counsel's work on the matters that they "multiplie[d] . . . unreasonably and vexatiously." But they failed to make this argument in the district court after Title Check moved for sanctions for the full amount of their attorney's fees and costs. And in any event, the district court reasonably found that the entire action was frivolous and vexatious.

Finally, Title Check concedes that Garcia is correct that he cannot be sanctioned under § 1927, which applies only to attorneys. But the district court

discussed only counsel's actions and its order applied solely to counsel. Thus, although Garcia's argument is well taken, remand is unnecessary.

For these reasons, we AFFIRM the district court's sanctions order.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RUBEN GARCIA, JR.,
Plaintiff,

v.

TITLE CHECK, LLC,
Defendant

Case No. 1:20-cv-724
HONORABLE PAUL L. MALONEY

ORDER GRANTING DEFENDANT'S MOTION FOR SANCTIONS

In 2018, Plaintiff Ruben Garcia purchased a property at a foreclosure auction in Bay County, Michigan, administered by Defendant Title Check, LLC. The "Rules and Regulations" at the auction indicated in the "Terms of Sale" section that "[t]he full purchase price [of the property] consists of the final bid price plus a buyer's premium of 10% of the bid price, any outstanding taxes due on the property including associated fees and penalties, and a $30.00 deed recording fee" (ECF No. 9-6 at PageID.298).

Based on these terms, Plaintiff entered into a written agreement to purchase the property for a total of $14,360.73. This price consisted of Plaintiff's $11,500 winning bid, the 10% buyer's premium of $1,150, $1,680.73 in summer taxes owed, and a $30 recording fee.

Two years later, Plaintiff commenced this action shortly after the Michigan Supreme Court decided *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434 (Mich. 2020). In *Rafaeli*, the court held that a provision of Michigan's General Property Tax Act (GPTA) violated the Michigan Constitution's Takings Clause because it required foreclosing governmental units to retain "surplus proceeds" made at foreclosure auctions that "exceed the amount plaintiffs owed in unpaid delinquent taxes, interest, penalties, and fees." *Id.* at 440-41. Although Plaintiff Garcia did not lose his property in a foreclosure auction due to outstanding taxes owed—he purchased the property at a foreclosure auction—he still attempted to challenge the purchase price of the property that he bought[1] at the auction based partly on *Rafaeli* and the constitutionality of the GTPA (see *First Amended Complaint*, ECF No. 9).[2] He alleged that the 10% buyer's premium was not authorized under the

[1] Defendant notes that "Plaintiff read and understood the[] Rules and Regulations, and admits that before making a bid, he was 'told and reminded' of the terms of sale" (ECF No. 25 at PageID.487). He also signed a Buyer's Affidavit, affirming he read, understood, and agreed to the terms of sale and any additional terms (*Id.* at PageID.488).

[2] Interestingly, around the time that Plaintiff commenced this lawsuit, Plaintiff's counsel also filed numerous lawsuits in state and federal court raising different *Rafaeli* claims (ECF No. 25 at PageID.488 n.2).

GTPA, and thus, Defendant was prohibited from charging such a fee. Based on this allegation, Plaintiff raised two claims: (1) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and (2) "unjust enrichment/restitution/disgorgement" (*Id.*).

This Court dismissed the entire complaint.[3] Plaintiff's argument was essentially that "because the GPTA does not explicitly authorize the 10% buyer's premium as part of the 'minimum bid,' it prohibits Title Check from charging such a fee" (ECF No. 18 at PageID.460). The Court noted that Plaintiff's argument was made "without citing any portion of the GPTA" and that it was "unpersuasive" (*Id.* at PageID.461). The GPTA defines "minimum bid" and then it provides that the minimum bid "shall include" several fees such as delinquent taxes, interest, penalties, and expenses of administering the sale, for example (*Id.*). Plaintiff's argument rested on the idea that the "shall include" language identified an exhaustive list, and that Title Check may not charge any fees beyond the specific fees enumerated in the GPTA. But this Court disagreed with Plaintiff's position and found that, based on basic statutory interpretation principles, "the word 'include' serves to 'enlarge rather than limit'" (*Id.* at PageID.462)

[3] Even before Defendant filed its Rule 12(b)(6) motion to dismiss, Defense counsel corresponded with Plaintiff's counsel, explaining the deficiencies in Plaintiff's complaint and legal theories (see ECF No. 25-2). Defense counsel indicated his client's intent to seek Rule 11 sanctions if Plaintiff did not agree to voluntarily dismiss the case. Plaintiff's counsel refused to dismiss the complaint and the case proceeded (see ECF No. 25-3).

(quoting *Skillman v. Abruzzo*, 88 N.W.2d 420, 422) (Mich. 1958); *Mich. Bell Tel. Co. v. Dep't of Treasury*, 518 N.W.2d 808, 812 (Mich. 1994)).

Given that the Court found that the 10% buyer's premium was permitted under the GPTA, "the enumerated claims in the complaint crumble[d]" (ECF No. 18 at PageID.463). The Court then dismissed the RICO and unjust enrichment claims due to Plaintiff's failure to plead sufficient facts to support the claims.

The Sixth Circuit affirmed the dismissal of the complaint in a succinct four-page opinion. See *Garcia v. Title Check, LLC*, No. 21-1449 (6th Cir. Jan. 12, 2022). First, the circuit affirmed this Court's finding that the buyer's premium was a permissible fee under the GPTA, given that the term "include" is a term of enlargement, not limitation. *Id.* (citing *Mich. Bell Tel. Co.*, 518 N.W.2d at 812). Second, because Plaintiff therefore failed to plead facts that showed the buyer's premium violated the GPTA, the court found that Plaintiff's RICO and unjust enrichment claims could not survive. Specifically, Plaintiff failed to plead facts supporting the two predicate offenses for the RICO claim, and for the unjust enrichment claim, he failed to plead that Defendant received and retained a benefit from Plaintiff, resulting in inequity. The circuit concluded by citing this Court: "all parties received exactly what they bargained for." *Id.*

Despite the dismissive tone of the circuit panel opinion, Plaintiff filed an en banc petition (ECF No. 25 at PageID.491). Not a single judge on the Sixth Circuit voted to hear the case en banc.

Defendant has now moved for sanctions pursuant to 28 U.S.C. § 1927 or alternatively, pursuant to the Court's inherent authority (ECF No. 25). Because the Court finds that the frivolity of Plaintiff's complaint supports an award of sanctions under § 1927, the Court need not use its inherent authority to award sanctions.

Section 1927 provides that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The purpose of § 1927 is to "deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006). Thus, if an attorney is sanctioned under this section, he is personally responsible for satisfying the "excess costs attributable to his misconduct." *Id.*

Moreover "[s]ection 1927 imposes an objective standard of conduct on attorneys, and courts need not make a finding of subjective bad faith before assessing monetary sanctions." *King v. Whitmer*, 556 F. Spp. 3d 680, 696 (E.D. Mich. 2021) (citing *Red Carpet*, 465

F.3d at 646). In other words, although a showing of subjective bad faith is not required, to be sanctioned under § 1927, an attorney's conduct must constitute more than mere negligence or incompetence, such as if he "intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings." *Red Carpet*, 465 F.3d at 646. Finally, "[a] court need only determine that 'an attorney reasonably should know that a claim pursued is frivolous'" to award sanctions pursuant to § 1927. See *King*, 556 F. Supp. 3d at 696 (quoting *Jones v. Continental Corp.,* 789 F.2d 1225, 1230 (6th Cir. 1986)).

The Court finds that Plaintiff's counsel's actions meet this standard. Not only should counsel have known that the complaint was frivolous—given the existence of Michigan Supreme Court authority directly contrary to his position—but he also "knowingly disregard[ed] the risk that his actions will needlessly multiply proceedings." *Red Carpet*, 465 F.3d at 646.

As this Court and the Sixth Circuit have noted, Plaintiff's claims rested on the interpretation of the word "include" in the definition of the term "minimum bid" in the GPTA. The GPTA defined "minimum bid" as follows:

> The minimum amount established by the foreclosing governmental unit for which property may be sold under this section. The minimum bid shall *include* all of the following:

> (i) All delinquent taxes, interest, penalties, and fees due on the property…
> (ii) The expenses of administering the sale, including all preparations for the sale. The foreclosing governmental until shall estimate the cost of preparing for and administering the annual sale for purposes of prorating the cost for each property included in the sale.

Mich. Comp. Laws § 211.78m(16)(a) (2018) (emphasis added). Plaintiff argued that, other than the above fees and expenses, the GPTA "authorize[d] nothing more." See *Garcia*, No. 21-1449. And because the 10% buyer's premium is not expressly listed in § 211.78m(16)(a), he argued that Defendant violated the statute.

However, Plaintiff's counsel should have known this argument was completely meritless. As this Court noted in its order granting Defendant's motion to dismiss, Plaintiff's argument that the list in § 211.78m(16)(a) is exhaustive "runs afoul of well-established principles of statutory interpretation" (ECF No. 18 at PageID.462). The Michigan Supreme Court has analyzed the term "include" in both the "ordinary common usage," as well as "the effect generally given [to] it by the courts unless the context indicates a contradictory legislative intent," and it has found that "include" serves to "enlarge rather than limit." See *Skillman*, 88 N.W.2d at 422. In another Michigan Supreme Court opinion, the court

noted that the word "includes" "conveys the conclusion that there are other items includable, though not specifically enumerated." *Mich. Bell Tel. Co.*, 518 N.W.2d at 812. Plaintiff's argument to the contrary was plainly frivolous, and counsel should have assessed the frivolity of the argument, given this Michigan Supreme Court case law. By litigating this case (even after Defendant put Plaintiff's attorney on notice of the deficiencies in the complaint before Defendant filed its motion to dismiss) and eventually proceeding all the way to an en banc petition, Plaintiff's counsel "unreasonably and vexatiously" multiplied the proceedings in this matter. His conduct will have consequences.

The Court also briefly notes Plaintiff's counsel's arguments in his response to Defendant's motion for sanctions. Counsel states that the "legal basis" for his proposition—that the 10% buyer's premium was not authorized by the GPTA—was that the GPTA "expressly states that properties are to be offered at a 'minimum bid' comprised of 'all the outstanding taxes, interest, penalties, and fees' plus 'the proportional costs of preparing for and conducting the auction sale'" (ECF No. 28 at PageID.599) (citing § 211.78m(16)(a)). Notably, counsel conveniently omits the term "include" and instead uses the unquoted "comprised of" language. Had the GPTA used "comprised of" rather than "include," Plaintiff's argument would likely be much stronger. This case rested on the interpretation of the word "include," and the Court finds counsel's current characterization of his underlying "legal basis" for this matter to be inaccurate.

Further, Plaintiff's counsel argues that this action was not frivolous because "it presented a novel question of law" (ECF No. 28 at PageID.603). While the specific, narrow issue of whether a buyer's premium is permissible under the GPTA has yet to have been litigated in Michigan state court or federal court, the interpretation of the word "include" certainly has. See *Mich. Bell Tel. Co.*, 518 N.W.2d at 812; *Skillman*, 88 N.W.2d at 422. Thus, the Court is unpersuaded that Plaintiff was attempting to advance a novel issue of law.

Because the Court finds that Plaintiff's counsel unreasonably and vexatiously multiplied the proceedings in this case by raising claims that he should have known were frivolous, pursuant to 28 U.S.C. § 1927, the Court will award Defendant its requested attorney fees and costs (see ECF No. 32-3). Accordingly,

IT IS HEREBY ORDERED that Defendant's motion for sanctions (ECF No. 24) is GRANTED. Defendant is awarded the entirety of its requested costs and attorney fees for a total of $73,752.45.4

IT IS SO ORDERED.

Date: June 28, 2022 /s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

APPENDIX D

NOT RECOMMENDED FOR PUBLICATION
No. 21-1449

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBEN GARCIA, JR.,
Plaintiff-Appellant,

v.

TITLE CHECK, LLC,
Defendant-Appellee.

FILED
Jan 12, 2022
DEBORAH S. HUNT, CLERK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ORDER

Before: GILMAN, KETHLEDGE, and MURPHY, Circuit Judges.

Ruben Garcia, Jr., through counsel, appeals the district court's dismissal of his complaint against Title Check, LLC, for failure to state a claim on which relief may be granted. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a).

Garcia's suit is, as the district court put it, "tangentially related to the deluge of litigation" about the since-amended Michigan General Property Tax Act ("GPTA"). See *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 440 (Mich. 2020). In his pleadings, Garcia alleged that Title Check provided services to Michigan governmental entities to facilitate auction sales of real property that the governments had foreclosed on for delinquent real-estate taxes. In 2018, Garcia bought a property in Bay County at one of these auctions with a winning bid of $11,500. Title Check charged him a fee of ten percent of the bid price, or $1,150. Garcia alleged that this fee was not permitted by the GPTA or Title Check's contract with Bay County. He claimed that Michigan law required that properties be offered for auction at a "minimum bid" that could include only all outstanding taxes, interest, penalties, fees, and expenses of preparing for and administering the auction. See Mich. Comp. Laws § 211.78m(16)(a) (2018). Garcia asserted that Title Check's actions amounted to Hobbs Act extortion and wire fraud under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, as well as unjust enrichment under Michigan law. Garcia brought these claims on his own behalf and sought to represent a class of buyers who were

charged the same fee by Title Check during the relevant statute-of-limitations period. He requested damages and injunctive relief.

Title Check moved to dismiss Garcia's action, arguing that the GPTA allowed for the imposition of a buyer's premium and therefore that Garcia failed to state any claim for relief. The district court agreed and granted Title Check's motion. The court noted that the statute required the minimum bid to include certain items to ensure that the governmental entity at least recouped the taxes owed plus all associated costs, but the law nowhere prohibited Title Check's buyer's fee. Concluding that the fee was not improper, the district court held that Garcia had not alleged facts that could support his Hobbs Act extortion and wire-fraud claims under RICO. The court further held that his unjust-enrichment claim failed because (1) a contract governed his purchase at auction, (2) Garcia knew about the terms before he placed a bid, and (3) he received what he bargained for.

On appeal, Garcia argues that the district court erred in holding that Title Check's buyer's fee was authorized by statute and in finding that he had failed to allege sufficient facts to state the above claims for relief.

We review de novo a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Daunt v. Benson*, 999 F.3d 299, 307 (6th Cir. 2021). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The district court noted that "[t]he heart of Garcia's argument is simple: because the GPTA does not explicitly authorize the 10% buyer's premium as part of the statutory 'minimum bid,' it prohibits Title Check from charging such a fee." The GPTA defines the "minimum bid" as

> the minimum amount established by the foreclosing governmental unit for which property may be sold under this section. The minimum bid shall include all of the following:
> (i) All delinquent taxes, interest, penalties, and fees due on the property…
> (ii) The expenses of administering the sale, including all preparations for the sale. The foreclosing governmental unit shall estimate the cost of preparing for and administering the annual sale for purposes of prorating the cost for each property included in the sale.

Mich. Comp. Laws § 211.78m(16)(a) (2018). Garcia maintains that the "'minimum bid' is the key to this case." "It authorizes nothing more" than the above items, he argues. Because by contract Title Check charged the governmental entities for the preparation and administration of the auction, Garcia argues that those expenses were already included in the "minimum bids." Therefore, he concludes that its buyer's fee violated the statute.

Garcia's argument is unpersuasive. As the district court noted, the "minimum bid 'shall include' several enumerated costs, and Garcia's position rests on the idea that this is an exhaustive list—any fee or cost not listed after 'shall include' may not be included." But "[w]hen used in a statutory definition, the word 'includes' is a term of enlargement, not of limitation." *Mich. Bell Tel. Co. v. Dep't of Treasury*, 518 N.W.2d 808, 812 (Mich. 1994). Garcia maintains that because the statute required that the minimum bid include the prorated administrative expenses, the buyer's fee was prohibited. But neither the statutory text nor the structure of the minimum bid supports that interpretation. In short, Garcia did not plead facts showing that the buyer's fee violated the GPTA.

Given that Garcia failed to adequately allege that the buyer's fee was unauthorized, the district court did not err in dismissing his causes of action. To allege a RICO claim, a plaintiff must allege that the defendant engaged in at least two predicate offenses. See 18 U.S.C. § 1961(5). For the first predicate, Garcia alleged that Title Check committed Hobbs Act extortion under 18 U.S.C. § 1951(b)(2), which prohibits obtaining property from another, with his consent, under color of official right. The claim requires allegations "that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). Garcia argues that Title Check is obtaining a buyer's fee from successful bidders by acting as a governmental agent. But because the buyer's fee is not prohibited by the GPTA, he did not

adequately plead that Title Check was not entitled to the payment.

For the second RICO predicate, Garcia alleged that Title Check committed wire fraud. See 18 U.S.C. § 1343. Again, because the statute did not prohibit a buyer's fee, Garcia has failed to allege that Title Check engaged in any false, deceptive, or fraudulent activities to deprive him of money. See *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 404 (6th Cir. 2012).

Finally, Garcia asserted an unjust-enrichment claim under Michigan law. To plead such a claim, a plaintiff must allege that the defendant received and retained some benefit from the plaintiff resulting in inequity. See *Belle Isle Grill Corp. v. City of Detroit*, 666 N.W.2d 271, 280 (Mich. Ct. App. 2003)). Once more, because the buyer's fee did not violate the GPTA, no inequity resulted from Garcia's payment of it. As the district court stated, "all parties received exactly what they bargained for."

Accordingly, we AFFIRM the district court's judgment.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RUBEN GARCIA, JR.,
Plaintiff,

v.

TITLE CHECK, LLC,
Defendant

Case No. 1:20-cv-724
HONORABLE PAUL L. MALONEY

OPINION

This matter is before the Court on Defendant Title Check, LLC's motion to dismiss Plaintiff Ruben Garcia, Jr.'s complaint (ECF No. 11). For the reasons to be explained, the Court will grant the motion.

I.

This case, filed on August 4, 2020, alleges that Title Check, LLC, has violated the Racketeer

Influenced and Corrupt Organizations ("RICO") act[1] and participated in innumerable unjust enrichment claims by charging buyers of foreclosed homes a 10% fee.

This case is tangentially related to the deluge of litigation this Court has seen regarding the Michigan General Property Tax Act ("GPTA").[2] Title Check handles parts of the tax foreclosure sale process for over 60 counties throughout the state. According to the complaint, after a property owner fails to pay his taxes and "forfeits" the property to the county, Title Check steps in and handles the remainder of the process from notice to sale. At the eventual auction, Title Check charges property purchasers a 10% fee. The complaint hinges on the allegation that because neither the GPTA nor the contract between Bay County and Title Check allow Title Check to charge such a fee, it is illegal.

Plaintiff Ruben Garcia, Jr., attended a foreclosure auction on August 8, 2018 in Bay City. At that auction, he was aware that Title Check created an "auction book" that listed the starting bid for the properties up for sale (ECF No. 9-6). The auction book also included the relevant "rules and regulations" for the foreclosure sales, including a section governing the "terms of sale" which provided that "[t]he full purchase price consists of the final bid price *plus* a buyer's premium of 10% of the bid price, any outstanding taxes due on the property including associated fees and penalties, and a $30.00 deed

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[1] 18 U.S.C. §§ 1961-1968

[2] M.C.L. § 211.1, *et seq*

recording fee." (*Id.* at PageID.298.) Garcia admits that he was "told and reminded" of these terms of sale before placing the winning bid on a property (First Amended Complaint, ECF No. 9 at ¶ 51). He agreed to and paid the following price: the $11,500 winning bid, a $30 deed fee, an $1,150 buyer's premium, and $1,680.73 in summer taxes, for a total of $14,360.73 (ECF No. 9-13). Interestingly, Garcia does not take issue with the deed fee or the summer taxes not being included in the minimum bid.

After the sale, he received an Auction Receipt, which reiterated the terms of sale, and included a Buyer's Affidavit (*Id.*). Garcia signed the Affidavit, which affirmed that he had "read, underst[oo]d, and agree[d] to the above Terms of Sale as well as any additional terms, conditions, and restrictions printed in sale booklets, posted at the sale site, on http://www.tax-sale.info, or made verbally at the location of sale on the day of the auction." (*Id.* at PageID.371.)

Now, Garcia alleges that the buyer's premium—the 10% fee—violates the RICO act because it was extortion and wire fraud, and it was unjust enrichment because Title Check may not charge a buyer any cost beyond the minimum bid imposed by the GPTA. Garcia has pleaded "on behalf of himself an all others similarly situated," though he has not filed a motion to certify a class. Title Check has filed a motion to dismiss the complaint for failure to state a claim (ECF No. 11)

II.

A complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the speculative level, *Twombly*, 550 U.S. at 555, and the "claim to relief must be plausible on its face." *Id.* at 570. "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. For Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). If plaintiffs do not "nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. For Bio-Ethical Reform*, 648 F.3d at 369. The Sixth Circuit has noted that courts "may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6th Cir. 2011). However, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations"; rather, "it must assert sufficient facts to prove the defendant with 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Rhodes v. R&L Carriers, Inc.*, 491 F. App'x 579, 582 (6th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555). The Court considers the complaint itself and the documents attached to the complaint. Fed. R. Civ. P. 10(c).

III.

The heart of Garcia's argument is simple: because the GPTA does not explicitly authorize the 10% buyer's premium as part of the statutory "minimum bid," it prohibits Title Check from charging such a fee.

At the time Garcia purchased his property,[3] the GPTA defined the minimum bid as follows:

> "Minimum bid" is the minimum amount established by the foreclosing

[3] The GPTA has since been amended, effective January 1, 2021. P.A. 2020, No. 255.

> governmental unit for which property may be sold under this section. The minimum bid shall include all of the following:
>
> (i) All delinquent taxes, interest, penalties, and fees due on the property. If a city, village, or township purchases the property, the minimum bid shall not include any taxes levied by that city, village, or township and any interest, penalties, or fees due on those taxes.
>
> (ii) (ii) The expenses of administering the sale, including all preparations for the sale. The foreclosing governmental unit shall estimate the cost of preparing for and administering the annual sale for purposes of prorating the cost for each property included in the sale.

M.C.L. § 211.78m(16)(a).

At a foreclosure auction, the foreclosing governmental unit has broad discretion "to adopt procedures governing the conduct of the sale and the conveyance of parcels under this section[.]" M.C.L. § 211.78m(2). But to sell the property, the foreclosing governmental unit must receive at least the minimum bid, so that the foreclosing governmental unit "breaks even" on the sale. *Rafaeli, LLC v. Oakland County*,

952 N.W. 2d 434, 483-485 (Viviano, J., concurring) (Mich. 2020); M.C.L. § 211.78m(2).

Garcia argues (without citing any portion of the GPTA) that the inclusion of the buyer's premium is contrary to the express terms of the GPTA: he argues that silence is not authorization. Absent any statutory support or caselaw, the Court does not find this argument persuasive. The GPTA is clear that the minimum bid is just that: a minimum. It sets a floor, rather than a ceiling, price. Properties may not be sold under the minimum bid amount, but the GPTA does not forbid property to be sold for a price larger than the minimum bid. That minimum bid "shall include" several enumerated costs, and Garcia's position rests on the idea that this list is an exhaustive list—any fee or cost not listed after "shall include" may not be included. This interpretation runs afoul of well-established principles of statutory interpretation.

The Michigan Supreme court has stated that both "the meaning accorded the word 'include' by ordinary common usage," and the "effect generally given it by the courts unless the context clearly indicates a contrary legislative intent," support the proposition that the word "include" serves to "enlarge rather than limit." *Skillman v. Abruzzo*, 88 N.W.2d 420, 422 (Mich. 1958); see also *Michigan Bell Tel. Co. v. Dep't of Treasury*, 518 N.W.2d 808, 812 (Mich. 1994) ("When used in a statutory definition, the word 'includes' is a term of enlargement, not of limitation."). That is so because the word "includes" "conveys the conclusion that there are other items includable, though not specifically enumerated. Such a definition suggests, if not requires, a construction

broad enough to encompass other items not explicitly mentioned." *Michigan Bell*, 518 N.W.2d at 812 (quoting 2A Singer, Sutherland Statutory Construction (5th ed.), § 47.07, pp. 151-156) (internal quotation marks and citation omitted). When applied to the GPTA, this is logical: consider a property on which the county performed environmental or demolition work, and the county sought to recover those costs via an add-on cost at the time of sale. It would be contrary to one of the purposes of the GPTA—to allow counties to "break even" on properties—to forbid the county from collecting those costs simply because they are not enumerated in the minimum bid section of the GPTA. Put simply, the GPTA outlines a floor price for the sale. The word "include" does not appear to exclude other costs.

Garcia does not address this argument at any length in his response, nor does he provide any alternative reading of the statute beyond his general proposition that the enumerated fees are the only fees allowable. The Court finds his position unconvincing. Absent this foundational element, the enumerated claims in the complaint crumble.

Count I: RICO

To "prove the elements of an underlying RICO violation," a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *American Biocare Inc. v. Howard & Howard Attorneys PLLC*, 702 F. App'x 416, 421 (6th Cir. 2017). In addition, plaintiffs must "show that the RICO violation was the proximate cause of the injury to his business or property." *Id*. "Racketeering activity

consists of acts which are indictable under a number of federal statutes listed in 18 U.S.C. § 1961(1)(B)." *Heinrich v. Waiting Angels Adoption Servs. Inc.*, 668 F.3d 393, 404 (6th Cir. 2012). Garcia identifies two predicate acts: extortion and wire fraud.

The complaint fails to allege that Title Check engaged in extortion. Under 18 U.S.C. § 1951, "'extortion' means obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). As this text makes clear, extortion "has two different theories of liability. Extortion can occur either (1) through the threat of force, violence, or fear; or (2) through 'the color of official right'—i.e., by a public official." *United States v. Watson*, 778 F. App'x 340, 345 (6th Cir. 2019). Extortion under color of official right "require[s] some quid pro quo. This means that the victim gave up her property to the public official in exchange for something else." *Id.* "In other words, extortion by a public official" under color of official right is "the rough equivalent of what we would now describe as 'taking a bribe.' " *Id.* (quoting *Evans v. United States*, 504 U.S. 255, 260 (1992)).

Garcia argues that Title Check was acting "under color of official right" by pretending that its actions were authorized by the GPTA, and thus committed extortion. This argument fails for two reasons. First, as outlined above, Title Check's actions were authorized by the GPTA, so there was nothing improper or illegal happening. And second, there is no allegation of a quid pro quo or a bribe. In fact, Garcia knew *before* the auction that the buyer's premium

would be charged, and he agreed to pay that fee. No one forced or pressured him to purchase the property, and Garcia was not provided anything in exchange for paying the buyer's premium. The complaint fails to plead the predicate act of extortion.

Turning to the allegation that Title Check engaged in wire fraud: here, Garcia must show (1) a scheme to defraud, and (2) use of the wires "in furtherance of the scheme." *Heinrich*, 668 F.3d at 404. "A scheme to defraud includes any plan or course of action by which someone uses false, deceptive, or fraudulent pretenses, representations, or promises to deprive someone else of money." *United States v. Jamieson*, 427 F.3d 394, 402 (6th Cir. 2005). "A plaintiff must also demonstrate scienter to establish a scheme to defraud, which is satisfied by showing the defendant acted either with a specific intent to defraud or with recklessness with respect to potentially misleading information." *Heinrich*, 668 F.3d at 404. When making these allegations, a plaintiff must "satisfy the heightened pleading requirements of Rule 9(b)" and "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Id.* (quoting *Frank v. Dana Corp.*, 547 F.3d 564, 270 (6th Cir. 2008) (quotation marks omitted)).

Garcia's argument here is that Title Check's assertions that it was "entitled to demand, charge and obtain a buyer's premium of 10% of the bid price by operations of law is/was fraudulent and/or not authorized by law." (First Amended Complaint, ¶ 75.)

Again, this argument fails for two reasons. First, nothing about the buyer's premium appears to be illegal. Second, Garcia does not specifically identify any false statements. Indeed, he was told of the terms of sale before bidding on the property he ultimately purchased, and he was reminded of the terms of sale after purchasing the property. Title Check was as clear as can be, and the buyer's premium was disclosed in multiple places. Nothing was fraudulent, so Garcia has failed to plead the predicate act of wire fraud.

Absent pleading the elements of any predicate act of racketeering activity, Garcia's RICO claim must be dismissed.

Count II: Unjust Enrichment

For an unjust enrichment claim, Garcia must show (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the defendant's retention of the benefit. *Belle Isle Grill Corp. v. Detroit*, 666 N.W.2d 271, 280 (Mich. Ct. App. 2003). If both elements are established, "the law will imply a contract in order to prevent unjust enrichment." *Id.* That said, it is well established that a contract will not be implied where an express contract governing the same subject matter exists. *Id.*; *Skaggs v. Nationstar Mortgage, LLC*, No. 1:16-cv-1048, 2017 WL 1371077, at *5 (W.D. Mich. Apr. 17, 2017) (unjust enrichment claim "fails because there was a contract covering [defendant's] conduct and the benefit it received").

That is the case here. There is a contract that governs the transaction at issue: the buyer's premium is expressly included in the Terms of Sale. In his amended complaint, Garcia attempts to evade dismissal by alleging that any contract was between him and the foreclosing governmental units and created at the fall of the auction hammer, rather than between Garcia and Title Check. But the Michigan Courts have repeatedly rejected this type of argument, finding that when an express contract exists that governs the subject matter of the lawsuit, even if that contract is not between the named parties, there can be no claim for unjust enrichment. See, e.g., *Martin v. East Lansing School District*, 483 N.W.2d 656 (Mich. Ct. App. 1992). This prevents "an express and implied contract covering the same subject matter at the same time." *Campbell v. City of Troy*, 202 N.W.2d 547 (Mich. 1972).

There exists an express contract that governs the merits of Garcia's claim. He read and was reminded of the terms of sale both before and after the sale; Those terms of sale were the terms he accepted by placing the winning bid. Because those terms are memorialized in an express contract, there can be no quasi-contract claim for unjust enrichment. And in any event, all parties received exactly what they bargained for under the contract—as outlined above, Title Check was as clear as day when it disclosed the buyer's premium. Garcia's unjust enrichment claim is meritless and must be dismissed.

In short, the Court finds no support for Plaintiff's position in the GPTA or elsewhere.

Accordingly,

IT IS HEREBY ORDERED that Defendant's motion to dismiss the complaint (ECF No. 11) is GRANTED.

Judgment to follow.

IT IS SO ORDERED.

Date: April 29, 2021 /s/ Paul L. Maloney
Paul L. Maloney
United States District Judge