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APPENDIX A

Case Nos. 22-1919/1939

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL PUNG,
Personal Representative of
the Estate of Timothy Scott Pung,
Plaintiff - Appellant,

v.

PETER M KOPKE, et al.,
Defendants - Appellees.

FILED
Jan 28, 2025
KELLY L. STEPHENS, Clerk

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

O P I N I O N

BEFORE:
McKEAGUE, KETHLEDGE, and NALBANDIAN,
Circuit Judges

NOT RECOMMENDED FOR PUBLICATION

McKEAGUE, Circuit Judge. A Michigan resident can reduce their property tax burden by exempting their primary residence from local school district taxes. Timothy Pung's primary residence (the "Pung property") received this exemption for many years. But after he died in 2004, Isabella County officials denied this exemption, causing an unpaid tax debt which led to the foreclosure of the property. Michael Pung—the representative of Timothy Pung's estate—sued Isabella County and several state officials claiming that the events leading up to the foreclosure sale and the sale itself violated the Fifth and Eighth Amendments. He also claims that defendants denied him equal protection and conspired to deprive him of due process. The district court granted Pung partial summary judgment on his Fifth Amendment claim. But the court either dismissed or granted summary judgment to the defendants on his other claims. We AFFIRM.

I.

A. Factual Background

Michigan law provides that a property owner may claim an exemption from local school district taxes if the owner occupies the property as his or her principal residence. Mich. Comp. Laws § 211.7cc(1). This exemption is called the Principal Residence Exemption (PRE), and an owner can claim it by "filing an affidavit . . . with the local tax collecting unit in which the property is located." *Id.* at § 211.7cc(2). The local tax collecting unit's assessor determines whether the property owner is eligible for the PRE. *Id.* at § 211.7cc(6). If an assessor denies a PRE, they must provide reasons for the denial in writing to the owner as well as the county treasurer. *Id*.

This appeal revolves around the Pung property in Union Township, Isabella County, Michigan. Timothy Pung, who passed away in 2004, previously owned the Pung property. Appellant Michael Pung (Timothy's uncle) is the personal representative of the resulting estate. Timothy filed an affidavit for a PRE in 1994, and the PRE was still active when Timothy died. Timothy was survived by his wife Donnamarie, and two children Katie and Marc. Upon Timothy's passing, Donnamarie continued to live in the residence until her death in 2008. After her death, Marc continued to reside there.

In March 2010, Appellee Patricia DePriest—the Union Township tax assessor— retroactively denied the PRE for the Pung property for tax years 2007, 2008, and 2009. DePriest was unsure who owned the property after Timothy's death, as "there was no other person on the deed or on the [PRE] affidavit" and Union Township representatives "could never find anyone at the address." DePriest Dep., E.D. R. 18-12, PageID 447. DePriest believed that the law required any new owner of a residence to file an affidavit to claim the PRE. Because there was no affidavit from Timothy Pung's heirs on file, she denied the PRE for those three years. She did not apply the PRE to the property for the 2010 or 2011 tax years. The Pungs appealed DePriest's denial regarding the 2007, 2008, and 2009 tax years to the Michigan Tax Tribunal. In the meantime, they refused to pay the extra taxes related to DePriest's denial of the PRE for the 2010 and 2011 tax years.

The Pungs successfully challenged DePriest's retroactive denial in the Michigan Tax Tribunal. After a hearing, the Tribunal granted the PRE to the Pung property. The Tribunal explained that Timothy Pung's estate still owned the property, and that Donnamarie and Marc were beneficiaries and thus part owners of the estate. Thus, Donnamarie and Marc were not new owners. The Tribunal also found that Donnamarie and Marc resided continuously at the property after Timothy's death. Since a property owner is entitled to the PRE as long as the property is the owner's principal residence, the Tribunal held

that the Pung property "qualified to receive [a PRE] under MCL 211.7cc for the tax years at issue." Tribunal Order, E.D. R. 8-4 PageID 84. During the hearing the presiding ALJ of the Tribunal said that the Pungs did not need a new affidavit— expressly rejecting DePriest's reading of the law. The Tribunal entered the order in March 2012. Curiously, the written order did not address whether the Pungs had to file a new affidavit to claim the PRE.

In June 2012, Appellee Steven Pickens—the Isabella County Treasurer—initiated foreclosure proceedings related to the unpaid balance on the 2010 and 2011 taxes. Despite having reservations, DePriest complied with the ALJ's oral representations and granted the 2012 PRE in December 2012. But DePriest did not let the matter rest. Notwithstanding the ALJ's statements at the hearing, she was steadfast in her belief that every subsequent owner of a property was required to file a new affidavit to claim the PRE. She reached out to Appellee Peter Kopke—former Chief Clerk of the Michigan Tax Tribunal—who confirmed that she had to deny the PRE for the Pung property because a new affidavit was never filed.

On February 4, 2013, the Pungs moved to dismiss the foreclosure proceeding based on the tax tribunal's ruling. On February 7, the County dropped the Pung property from its foreclosure petition and asked the court to deny as moot the Pungs' motion to dismiss. On that same day, DePriest revoked the

Pung property's PRE for the 2012 tax year. On February 15, the circuit court rejected the County's mootness arguments and held that the Tax Tribunal's ruling applied to the 2010 and 2011 tax years and declared the Pungs taxes fully paid. Thus, it dismissed the County's foreclosure petition against the Pung property. The Michigan Court of Appeals affirmed that ruling in 2015.

The record is unclear whether Pung received written notice of the 2012 PRE denial as required under Michigan law. DePriest claims that she sent a notice letter as a matter of standard practice; Pung claims that he never received a letter. Pung nevertheless received verbal notice of the revocation when he was trying to pay his tax bill in late February 2013. Pung immediately wrote the Tax Tribunal requesting the enforcement of its 2012 order for the years 2010–12. Kopke refused, stating that the Tax Tribunal order only applied to years 2007–09. Pung wrote again, reiterating his demand to enforce the Tribunal order. Kopke replied that he could not address Pung's demand and Pung should have filed an official appeal with the Tribunal or the Union Township Board of Review.

Pickens was aware of the controversy surrounding the Pung property. When DePriest denied the PRE for 2012, which resulted in additional property taxes, Pung's attorney had asked Pickens to "abate" the taxes. Since Pickens had no power to do so, he reached out to the Tax Tribunal to get

clarification on the impact of the Tax Tribunal's order. Pickens also recalls discussing the issue with Kopke at a Treasurer's Association conference; according to Pickens, Kopke said that Pickens was supposed "to do exactly what the order said, no more, no less." Pickens Dep., E.D. R. 18-13, PageID 486–87. Kopke denies ever having met or spoken with DePriest or Pickens.

Eventually, Pung refused to pay the balance tax caused by the removal of the PRE for 2012. This led to a $2,241.93 unpaid tax bill, and Pickens initiated foreclosure proceedings for tax delinquency in June 2014. Pung failed to appear at the foreclosure proceedings. The county circuit court entered its judgment of foreclosure in February 2015—ten days after the Michigan Court of Appeals affirmed the judgment regarding the Pungs' 2010 and 2011 taxes. In May 2015, Pung moved to set aside the foreclosure in Isabella County Circuit Court—asserting that he first heard about the foreclosure through an April 30 notice that the foreclosure had been finalized. Pung claimed that Isabella County violated his due process rights because he never received notice of the foreclosure. The circuit court set aside the foreclosure, but the Michigan Court of Appeals reversed and remanded for entry of the foreclosure. Subsequently, the foreclosure concluded, and the property sold for $76,008.00 at public auction. The county retained all the proceeds from the sale.

B. Procedural History

After the foreclosure judgment, Pung initiated this lawsuit in the Western District of Michigan. Pung claimed that Kopke, Pickens, and DePriest conspired to violate his due process rights under the Fourteenth Amendment. After the foreclosure sale, he added claims that Pickens and Isabella County imposed excessive fines under the Eighth Amendment and committed a Fifth Amendment taking when they refused to pay him the "entire value of the Pung Property and/or the value of the surplus equity in Pung Property" after the foreclosure sale. Second Amended Compl., W.D. R. 65, PageID 519, 521. Pung also brought a class-of-one Equal Protection claim against all defendants. Defendants moved to dismiss all claims against them. Pung moved for summary judgment on his Fifth Amendment takings and Eighth Amendment excessive fines claim against Pickens and Isabella County.

The district court dismissed Kopke from the proceedings because Pung failed to state a plausible claim against him. The court denied the remaining motions to dismiss and granted Pung's motion for summary judgment on the Fifth Amendment Takings claim. The court left open the question of damages. Since the court ruled in favor of Pung on the Fifth Amendment Takings claim, it denied the Eighth Amendment Excessive Fines claim as moot. The district court then transferred the case to the Eastern

District of Michigan because "[t]he convenience of the parties and witnesses" favored the transfer.

In the Eastern District, Pung renewed his motion for summary judgment on his Fifth Amendment Takings and Eighth Amendment Excessive Fines claims against Pickens and Isabella County. The court granted summary judgment in part and held that Pung was entitled to the surplus proceeds from the tax foreclosure sale plus interest. But the court denied Pung's claim for the loss in equity based on the property's fair market value.

The remaining defendants moved for summary judgment on the conspiracy to violate due process and equal protection class-of-one claims. The court granted both motions. The court held that the conspiracy claim was collaterally estopped because Pung already litigated a due process claim in state court. The court also held that the equal protection claim failed because Pung did not identify similarly situated parties that were treated differently. This appeal followed.

II.

This appeal concerns both the foreclosure sale and the 2012 PRE denial. Regarding the foreclosure, Pung argues that the district court's award of surplus proceeds violated the Fifth Amendment Takings and Eighth Amendment Excessive Fines clause. Isabella County argues that the district court improperly

awarded Pung interest on the surplus proceeds. Regarding the PRE denial, Pung claims that the defendants conspired to deny him due process and DePriest violated his equal protection rights. We review all claims de novo. Wilmington Trust Co. v. AEP Generating Co., 859 F.3d 365, 370 (6th Cir. 2017); Puskas v. Delaware County, 56 F.4th 1088, 1093 (6th Cir. 2023) (dismissals on the pleadings and summary judgment are subject to de novo review).

A. Fifth Amendment Takings Claim

On appeal, Pung argues that the Fifth Amendment entitles him to an award based on the full fair market value of the property and not merely the surplus proceeds from the foreclosure sale. He states that just compensation under the Fifth Amendment requires that "[t]he owner of taken property . . . be put in the same position monetarily as [he] would have occupied if his property had not been taken." Appellant's Br. 22–23. He claims that Isabella County took $192,158.07, the difference between the fair market value of the property ($194,400) and his tax delinquency ($2,241.93). The district court held that Pung was only entitled to the tax foreclosure proceeds that exceeded his tax debt.

The Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The government commits a Fifth Amendment taking when it retains the proceeds

from a tax foreclosure sale that exceed the delinquent property tax debt. *Freed v. Thomas*, 81 F.4th 655, 658–59 (6th Cir. 2023). In *Freed*, a county foreclosed on Freed's property to satisfy a $1,100 tax debt, sold it at public auction for $42,000, and retained the full sale price. *Id.* at 657. We found that Freed's Fifth Amendment rights were violated and awarded him the difference between the foreclosure sale amount and his tax debt, plus interest. *Id.* at 658. Freed argued that he was entitled to an additional $56,800 because the property's fair market value was $98,800, even though it sold at auction for only $42,000. *Id.* at 658. We disagreed and stated that "a plaintiff whose property is foreclosed and sold at a public auction for failure to pay taxes is [not] entitled to recoup the fair market value of the property." *Id.* Instead, we held that any surplus owed to the owner is determined by the foreclosure sale price. *Id.* After all, "the best evidence of a foreclosed property's value is the property's sales price, not what it was worth before the foreclosure." *Id.* at 659 (citing *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 548–49 (1994)). So "when a municipality sells foreclosed property at a properly conducted public auction," the owner is entitled to "the amount of the sale above his debt and no more." *Bowles v. Sabree*, 121 F.4th 539, 551 (6th Cir. 2024) (quoting *Freed*, 81 F.4th at 659).

So too here. Pung's property was sold at a tax auction for only $76,008.00. Pung's tax delinquency was $2,241.93. The district court awarded Pung

$73,767.07,[1] which it believed to be the difference between the tax delinquency and foreclosure sale price. The court also awarded any interest accrued on this amount from the time of the sale. Notwithstanding a minor error in its calculations, the district court ruled consistently with our holding in *Freed*.

In its cross-appeal, Isabella County argues that Pung is not entitled to any interest on the surplus proceeds from the tax foreclosure sale. It states that any interest award "imposes a loss upon the public that arises entirely from the failures of the delinquent taxpayer." Isabella Cnty. Br. 49. Yet a property owner's right to full compensation arises at the time of the taking. *Knick v. Township of Scott*, 588 U.S. 180, 190 (2019). And the property owner with a "valid takings claim is entitled to compensation as if it had been 'paid contemporaneously with the taking.'" *Id.* (quoting *Jacobs v. United States*, 290 U.S. 13, 17 (1933)). This is accomplished by compensating the property owner for "the total value of the property when taken, plus interest from that time." *Id.* This

[1] The district court's order contains a minor arithmetical error. Since the property was sold for $76,008.00, subtracting the tax delinquency of $2,241.93 yields a total of $73,766.07—not $73,767.07. It might seem trivial to quibble over a single dollar. But "forcing [a defendant] to pay one dollar—something he would not otherwise have done" is still an exercise of the judicial power. See *Farrar v, Hobby*, 506 U.S. 103, 116 (1992) (O'Connor, J., concurring). So it is best to be precise.

requirement is independent of any compensation remedy available under state law. *Id.* at 191.

A Fifth Amendment taking occurs when a county takes absolute title of the property. *Hall v. Meisner*, 51 F.4th 185, 196 (6th Cir. 2022). It follows that a county must pay a property owner interest on surplus proceeds from a tax foreclosure sale to ensure that the owner is compensated "contemporaneously with the taking." See *Jacobs*, 290 U.S. at 17. We held as much in *Freed* when we affirmed the district court's ruling that Gratiot County owed Freed the difference between the foreclosure sale amount and his debt, plus interest. 81 F.4th at 658–59. We have no reason to deviate from this precedent here and affirm the district court's award of interest.

B. Eighth Amendment Excessive Fines Claim

Pung's property was sold at a tax auction for approximately $76,008. Pung claims that the market value of the property was $194,400, and the approximate $118,000 loss in equity amounted to an excessive fine in violation of the Eighth Amendment. Since the district court resolved the Fifth Amendment Takings claim in his favor and granted him the surplus proceeds from the foreclosure sale, the court dismissed Pung's Eighth Amendment claim as moot. On appeal, Pung argues that because he was only awarded surplus proceeds under the Fifth Amendment, the court should have addressed his Eighth Amendment claim based on the loss in equity.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). In the property context, the Supreme Court has traditionally applied the Excessive Fines Clause to statutes that impose property forfeiture in addition to other criminal punishments. *See, e.g., United States v. Bajakajian*, 524 U.S. 321, 325, 328 (1998); *Austin*, 509 U.S. at 604.

More recently, the Court declined to reach the Eighth Amendment's implications in the context of tax delinquency foreclosure proceedings. *Tyler*, 598 U.S. at 647–48 (deeming it unnecessary to reach the Excessive Fines claim under the Eighth Amendment because the Fifth Amendment Takings Clause fully remedied the harm). Justice Gorsuch, in his concurring opinion, argued that the tax-forfeiture scheme under review might implicate the Eighth Amendment's Excessive Fines Clause. He argued that even though the scheme only imposed economic penalties "to deter willful noncompliance with the law" such penalties were still fines and the Constitution deems that "[t]hey cannot be excessive." *Id.* at 649–50 (Gorsuch, J., concurring).

We have not subjected the GPTA to similar Eighth Amendment scrutiny. The Michigan Supreme Court has held that the GPTA does "not necessarily punish property owners for failing to pay their property taxes"; because "[i]ts aim is to encourage the timely payment of property taxes." *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434, 448 (Mich. 2020). Based on this reasoning, we have held that the GPTA's tax forfeiture scheme does not fall within the ambit of the Eighth Amendment. *Freed*, 81 F.4th at 659; *Hall*, 51 F.4th at 196–97. Accordingly, we are bound by precedent and hold that there was no Eighth Amendment violation. *Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (holding that a prior circuit "decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.").

C. Equal Protection Class-of-One Claim

Pung claims defendants violated his equal protection rights because they treated him differently than other property owners when they denied the PRE. The district court granted summary judgment to the defendants because Pung failed to identify similarly situated parties who received the PRE. On appeal, Pung argues that DePriest failed to identify "literally anyone" else who was denied the PRE when they had a valid affidavit in place before the owner's

death but failed to file a new affidavit upon the owner's passing. Appellant's Br. 35. He argues that the absence of this evidence shows that he was treated differently than other property owners.

The Fourteenth Amendment's guarantee of the "equal protection of the laws" bars state action that "either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005). Claims advanced under the third category are referred to as a class-of-one claim. See *Davis v. Prison Health Servs.*, 679 F.3d 433, 441 (6th Cir. 2012). To prevail on a class-of-one claim, a plaintiff must show that (1) the state "intentionally treated" them "differently from others similarly situated" and (2) "there is no rational basis for the difference in treatment." Village of *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). A class-of-one claim fails if the plaintiff is unable to identify any similarly situated parties that were treated differently. *Stanislaw v. Thetford Township*, 515 F. App'x 501, 507 (6th Cir. 2024).

Our analysis begins and ends with the first prong. To succeed on a class-of-one claim, Pung bears the burden of showing that DePriest did not deny an exemption for other property owners who failed to file a new affidavit after the original owner passed away. Pung has not done so. The fact that DePriest was unable to identify another instance where she denied

an exemption in similar situations does not relieve Pung of his burden. So, we affirm the district court's grant of summary judgment on this claim.

D. Conspiracy to Deny Due Process

Pung claims that DePriest, Pickens, and Kopke conspired to withhold the PRE from the Pung Estate without due process. He argues that defendants denied him due process when DePriest failed to provide written notice of the 2012 PRE denial as required under Michigan law. He states that Pung's repeated victories in state courts "rankled" the defendants, and to get back at him they imposed an illegal tax resulting in the foreclosure of his property. Appellant's Br. 40–41.

The district court dismissed the claim against Kopke for failure to state a claim upon which relief can be granted. The court explained that Kopke's role in the alleged conspiracy was "too skeletal and attenuated" to support the claim against him. The court allowed the claim to proceed against DePriest and Pickens. But on summary judgment, the court concluded that Pung was collaterally estopped from bringing this claim because the Michigan state courts had already "squarely addressed the issue of whether Plaintiff's constitutional due process rights were violated when [defendants] foreclosed on the Property." *Pung v. County of Isabella*, No. 20-13113, 2022 WL 4586121, at *4 (E.D. Mich. Sept. 29, 2022). The court held that it was bound by the state court

decision because "[a] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Id.* (quoting *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)).

To establish a conspiracy under § 1983, Pung must show that DePriest, Kopke, and Pickens (1) had a "single plan"; (2) shared the objective to deprive Pung of his constitutional rights; and (3) committed an overt act. *Revis v. Meldum*, 489 F.3d 273, 290 (6th Cir. 2007). The agreement between the defendants need not be express and they need not know all the details of the illegal plan. *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011) ("Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy [and] [e]ach conspirator need not have known all of the details of the illegal plan or all of the participants involved." (alterations in original) (quoting *Hooks v. Hooks*, 771 F.2d 935, 944 (6th Cir. 1985)). Pung may also rely on circumstantial evidence to establish the presence of an agreement among the defendants, but such evidence may fail if the alleged conduct "is just as consistent with independent conduct as it is with a conspiracy." *Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012).

The district court dismissed the claim against Kopke on the pleadings. To survive a Rule 12(b)(6) motion to dismiss, a complaint must plead enough

factual allegations "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Such factual allegations must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). And a claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Such plausibility requires something more than the "sheer possibility that a defendant has acted unlawfully." *Id.*

Pung's complaint against Kopke does not clear this threshold pleading requirement. Pung's claim against Kopke rests solely on a phone conversation between Kopke and DePriest that allegedly led to the due process violation.[2] The alleged facts merely show that DePriest tried to understand whether the Tax Tribunal's order applied to the 2012 tax year and sought Kopke's advice. A claim that Kopke conspired to deprive Pung of due process is not "plausible" on such a thin record. Indeed, Pung's counsel admitted that it was difficult to explain the extent of Kopke's role in the entire process. As such, Pung has failed to state a plausible claim against Kopke and the district court was justified in dismissing him from the case.

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[2] As noted above, Kopke and Pickens may have discussed the Tax Tribunal order during a Treasurer's Association conference. Pung does not reference this fact in his complaint, and in any case, it does not alter the analysis of whether the district court properly dismissed the claims against Kopke.

The district court granted DePriest and Pickens's motion for summary judgment, concluding that the claim against them was collaterally estopped. Under Michigan law, collateral estoppel has three elements: "(1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.'" M*onat v. State Farm Ins. Co.*, 677 N.W.2d 843, 845–46 (Mich. 2004) (alteration in original) (footnote omitted) (quoting *Storey v. Meijer, Inc.*, 429 N.W.2d 169, 171 n.3 (Mich 1988)). The district court incorrectly found that the first element was satisfied. Pung did not bring a conspiracy to deny due process claim in state court; rather, he only argued that he was denied due process because he did not receive sufficient notice of the foreclosure proceedings. *In re Isabella County Treasurer*, 2017 WL 1393854, at *2. And the Michigan Court of Appeals held that Pung received "constitutionally sufficient" notice and was not "deprived of [his] constitutional right to due process." *Id.* at *3–4. The state courts did not consider whether DePriest, Pickens, and Kopke conspired to deny Pung of due process. Accordingly, the issue was not "actually litigated and determined" and Pung's conspiracy claim is not collaterally estopped. *Monat*, 677 N.W.2d at 845 (quoting *Storey*, 429 N.W.2d 171 n.3).

The question then becomes whether summary judgment is still appropriate, as "this court may affirm the judgment of the district court on any grounds supported by the record, even if they are different from those relied upon by the district court." *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 655 (6th Cir. 2000). Summary judgment is proper when "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). "A dispute of a material fact is genuine so long as 'the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Thacker v. Ethicon, Inc.*, 47 F.4th 451, 458 (6th Cir. 2022) (quoting *Kirilenko-Ison v. Bd. of Edu. of Danville Indep. Schs.*, 974 F.3d 652, 660 (6th Cir. 2020)). Courts draw all reasonable inferences in favor of the nonmoving party. *Carter v. Univ. of Toledo*, 349 F.3d 269, 272 (6th Cir. 2003). But the nonmoving party "must present significant probative evidence" that creates a genuine dispute of material fact. *Green Genie, Inc. v. City of Detroit*, 63 F.4th 521, 526 (6th Cir. 2023) (internal quotation marks omitted).

Pung falls short of this standard. We acknowledge the irregularity in which the exemption was denied: DePriest initially granted the 2012 exemption before revoking it, and the record is not clear on whether Pung received notice of denial.[3] But

[3] Regardless of whether Pung received written notice, he could have still approached the Board of Review for a retroactive

while these irregularities may show that DePriest failed at her duties, Pung must identify evidence that the Defendants agreed to a "single plan." *Revis*, 489 F.3d at 290. Here, DePriest's actions were "just as consistent with independent conduct as they were with a conspiracy." Hensley, 693 F.3d at 695, Womack v. Conley, 595 F. App'x 489, 494 (6th Cir. 2014). Although Pung claims that defendants conspired against him because they were "rankled" or "professionally angry and put off" he does not offer any evidence to support these claims. Appellant's Br. 40, 43, 45. Without such evidence, no reasonable jury could find in his favor.

Although we are sympathetic to Pung's plight, he has not provided any "significant probative evidence" to show that the defendants conspired to deny him due process. *Green Genie, Inc.*, 63 F.4th at 526 (internal quotation marks omitted). He cannot "avoid summary judgment by resorting to speculation, conjecture, or fantasy." *K.V.G. Props., Inc. v. Westfield Ins. Co.*, 900 F.3d 818 (6th Cir. 2018). Accordingly, we affirm the district court's grant of summary judgment in favor of DePriest and Pickens.

III.

For the foregoing reasons, we AFFIRM the district court.

PRE, that could have prevented the foreclosure. Mich. Comp. Laws § 205.735a.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL PUNG,
as personal representative of the
Estate of Timothy Scott Pung,
Plaintiff,

v.

COUNTY OF ISABELLA, STEVEN W.
PICKENS, in his official and personal
capacity, and PATRICIA DePRIEST,
in her personal capacity,
Defendants.

Case No. 20-13113
September 29, 2022

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT [#8] and DENYING AS MOOT PLAINTIFF'S MOTION TO COMPEL [#7]

[HON.] DENISE PAGE HOOD, District Judge.

I. INTRODUCTION

This cause of action was filed in the Western District of Michigan in 2018 and assigned to Chief Judge Robert J. Jonker. *See* Western District of Michigan, No. 18-01334. On September 29, 2020, Judge Jonker granted Plaintiff's partial motion for summary judgment, holding that Plaintiff was entitled to summary judgment with respect to his Fifth and Fourteenth Amendment takings claims regarding certain property in the County of Isabella. Effective November 23, 2020, Judge Jonker transferred this cause of action to the Eastern District of Michigan. Plaintiff then filed in this Court a Motion to Compel, ECF No. 7, and a Motion for Summary Judgment with respect to Counts III, IV, and V (pertaining to Defendants County of Isabella and Steven W. Pickens, in his official and personal capacities ("Pickens")). For the reasons that follow, the Court denies in part and grants in part Plaintiff's Motion to Compel and grants in part and denies in part Plaintiff's Motion for Summary Judgment.

II. STATEMENT OF FACTS

As stated by Judge Jonker in his motion granting summary judgment with respect to liability on Plaintiff's Fifth and Fourteenth Amendment claims:

> Plaintiff is the personal representative of the estate of his brother, Timothy Scott Pung, one asset of which was a homestead in Isabella

County. Timothy Pung died in 2004. His wife survived him and continued living in the house until her death in 2008, immediately after which his son, Marc Pung, lived continuously in the house. In 2013, Isabella County began a tax foreclosure process against the property over what it said was about $2,200 in unpaid real estate taxes [$2,241.93]. That process culminated in a final foreclosure judgment in June 2018. The ensuing foreclosure sale yielded about $76,000 [$76,008.00]. Plaintiff says there were never actually any unpaid taxes due at all, and that the County therefore never had a lawful basis to foreclose. But even if the foreclosure itself was proper, Plaintiff says that at a minimum the County had an obligation to account to Plaintiff for the excess sale proceeds above the amount necessary to satisfy the unpaid tax bill. This has spawned two sets of currently pending claims.

* * * * *

SECOND SET OF CLAIMS

Plaintiff's second set of claims asserts that the County itself unconstitutionally kept all the proceeds from the tax sale, rather than just the relatively small amount necessary to satisfy the balance of the tax bill allegedly still due. Plaintiff says this is either a Fifth and Fourteenth Amendment takings claim; or failing that for

> some reason, a violation of the Eight Amendment's prohibition on excessive fines. The defendants' position throughout most of this litigation has been that Michigan law expressly permits a County to retain the full amount of any tax foreclosure proceeds, not just the amount necessary to satisfy an outstanding bill; and that this does not amount to an unconstitutional taking because the taxpayer forfeited any protected property interest as a result of the order of foreclosure that necessarily preceded the tax sale itself. The Michigan Supreme Court recently rejected the defense view of Michigan tax foreclosure law in a unanimous decision holding that a municipality in Michigan is obligated to account for all sale proceeds above the amount necessary to satisfy any unpaid tax obligation. *Rafaeli LLC v. Oakland County*, Docket No. 156849, 2020 WL 4037642, [505 Mich. 429] (July 17, 2020).

Western District, ECF No. 119, PageID.1348-50.

Judge Jonker ultimately concluded that

> "The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation.'" *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019). In *Rafaeli*, the Michigan Supreme Court unanimously "conclude[d] that our state's common law recognizes a former

property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property." *Rafaeli LLC v. Oakland County*, Docket No. 156849, 2020 WL 4037642, at * 19, --- Mich.--- (July 17, 2020). The court "also recognize[d] this right to be 'vested' such that the right is to remain free from unlawful governmental interference." *Id.* Under *Rafaeli*, Isabella County may not retain proceeds of the foreclosure sale exceeding Plaintiff's tax liability. Because Isabella County did not follow that process here, but kept the full amount of the sale proceeds, not just the $2,200 necessary to satisfy the allegedly unpaid taxes, it has taken property in violation of Plaintiff's constitutionally protected property interest and is obligated to account to Plaintiff for it.[3] Accordingly, as to the second set of claims, the Court finds Plaintiff entitled to summary judgment as to liability on his Fifth and Fourteenth Amendment takings claims,[4] leaving only the question of damages for further litigation.[5]

[3] Now that the Michigan Supreme Court has ruled that Michigan law does not permit a municipality to retain excess sale proceeds, future claims to recover excess proceeds will presumably be unnecessary. It is also possible that Plaintiff now has an available remedy under Michigan law as interpreted by the Michigan Supreme

Court in *Rafaeli*. But even if that is theoretically true, it is not clear how that would necessarily apply for this plaintiff at this time. Moreover, after *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), it would not appear that Plaintiff has an obligation to exhaust that option, especially since it just potentially became available. Finally, in addition to those considerations, **there remains a potential dispute over whether the Fifth and Fourteenth Amendments require an accounting for not only the excess proceeds, but also for the full fair market value of the property, which could be a higher amount. The Court is not resolving that issue at this time. The parties may litigate the issue in the context of determining the proper amount of damages on these claims.**

[4] This makes it unnecessary to rule on the Excessive Fines claim, which Plaintiff brought in the alternative.

[5] As noted above, the damages issues include without limitation the question of whether the County is accountable for only the excess proceeds of sale, or for the excess equity measured by the fair market value of the property. Also as noted above, **the Excessive Fines claim is dismissed**

> **without prejudice because plaintiff expressly raised this as only an alternative theory**.

Western District, ECF No. 119, PageID.1357-58 (emphasis added)

The Court notes that the operative complaint for this cause of action is the Second Amended Complaint. Plaintiff's Second Amended Complaint asserts five claims: a conspiracy to violate due process by former defendant Peter M. Kopke, DePriest and Pickens (Count I); an Equal Protection Violation – Class of One, against all Defendants (Count II); an Eighth Amendment excessive fine claim against Isabella County and/or Pickens (Count III); Fifth/Fourteenth Amendment Taking against Isabella County and/or Pickens (Count IV); and Fifth/Fourteenth Amendment Taking Inverse Condemnation/Michigan Constitution against Isabella County (Count V). All of the claims stem from the determination by Union Township Assessor (and Defendant) Patricia DePriest to deny Michigan's "Principal Residence Exemption" ("PRE"), f/k/a a homestead exemption, to the property. Plaintiff states, and Defendants have not challenged, that the value of the property is at least $194,400 (which is double the State Equalized Value), a sum significantly in excess of the $76,008.00 for which the property was sold at the tax foreclosure sale.

III. LEGAL STANDARD

Rule 56(a) of the Rules of Civil Procedures provides that 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." Fed. R. Civ. P. 56(a). The presence of factual disputes will preclude granting of summary judgment only if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other

facts immaterial. *Celotex Corp.*, 477 U.S. at 322-23. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248

IV. ANALYSIS

A. Motion for Summary Judgment

There are a few key things to note about this case, at least a couple of which one party or another is ignoring or overlooking. First, the issue of whether the property was illegally foreclosed upon has been decided. Plaintiff lost a "due process" challenge against Pickens with regard to the 2015 foreclosure proceedings. Specifically, the Michigan Court of Appeals held that Plaintiff "was not deprived of its constitutional right to due process." *In re Petition of Isabella County Treasurer*, No. 329858, 2017 WL 1393854 (Mich. Ct. App. 2017). ECF No. 15-2, PageID.88-91. Plaintiff's repeated suggestions that Defendants illegally foreclosed on the property in 2015 because the property should have been treated with a PRE are irrelevant.

Second, Plaintiff's efforts to seek summary judgment on his claims that he has been subjected to an "excessive fine," in violation of the Eighth Amendment need not be considered. Judge Jonker previously dismissed Plaintiff's Eighth Amendment "excessive fine" claims (Counts II and III) without prejudice because Plaintiff brought it in the alternative. Accordingly, the Court denies as moot

Plaintiff's motion for summary judgment with respect to Counts II and III (the Eighth Amendment claims).

Third, contrary to Defendants' belief that Judge Jonker erred regarding his liability determination vis a vis the Fifth and Fourteenth Amendment takings claims, that liability determination is the law of the case and will not be reconsidered by this Court (although Defendants can challenge it in the Court of Appeals, as they have indicated they will do).

What is now before the Court, then, is whose argument is correct regarding the formula for damages: (a) Plaintiff's contention that he should be compensated for the amount that the alleged "equity" in the property (i.e., the fair market value of the property) exceeded Plaintiff's tax debt; or (b) Defendants' assertion that Plaintiff is entitled only to the amount by which the sale price at the foreclosure exceeded Plaintiff's tax debt (the "surplus proceeds").

1. Defendants' Argument

Defendants state that the Court in *Rafaeli* recognized that Michigan's General Property Tax Act's ("GPTA") statutorily mandated retention of "surplus proceeds" from the sale to be a "taking" under the Michigan Constitution. Defendants believe the *Rafaeli* opinion is particularly relevant to the claims at issue for two reasons. First, Defendants argue that the *Rafaeli* court recognized that denial of "refunds" resulted from a state statute, not an

enactment of a policy by Defendants County of Isabella or Pickens. Defendants contend that those refunds (arising out of a state statute) are the "property interest" recognized by *Rafaeli* and the basis for Judge Jonker's finding of liability under the Fifth Amendment. Because Judge Jonker concluded that the liability under the Fifth Amendment is predicated on a state law property interest, Defendants assert, they cannot be held liable for a federal claim under 42 U.S.C. §1983. They argue that the denial of refunds was not the result of any "policy" of the Defendants but, rather, due to the "policy" of the State of Michigan embodied in the GPTA, as enacted by the State Legislature. Defendants insist that Judge Jonker found Fifth Amendment "liability" without addressing this point.

Defendants argue that *Rafaeli*: (a) provided that the "property interests" lost by the foreclosed taxpayer are only the "surplus proceeds" from the foreclosure sale; and (b) expressly rejected an equity-based or "fair market value" definition of that property interest. *Rafaeli*, 505 Mich. at 483 ("We reject the premise that just compensation requires that plaintiffs be rewarded the fair market value of their properties so as to be put in as good a position had their properties not been taken at all."). Defendants point to the *Rafaeli* court's conclusion that, "when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes,

interest, penalties, and fees reasonably related to the foreclosure and sale of the property - - no more, no less." *Id.* at 483-84.

Defendants believe that if they can be held liable at all (under either state or federal law), Plaintiff cannot recover for an equity-based or "fair market value" claim as he now attempts. Defendants maintain that the Constitution protects – but does not "create" – any property interest. Citing *Leis v. Flynt*, 439 U.S. 438, 441 (1979). Defendants declare that, if the Plaintiff has any "property interest" to be compensated, it can be no more than the "surplus proceeds" property interest recognized by the Michigan Supreme Court in *Rafaeli*.

Defendants argue that the *Knick* opinion does not hold that "full compensation" is determined by any source other than what state law declares the extent of the plaintiff's "property interest" to have been. Defendants contend that, although the Fifth Amendment "allows the owner to proceed directly to federal court under §1983," *Knick*, 139 S. Ct. at 2171, it does not create the property interest by which either the fact or the amount of a "taking" is determined. Citing *Leis*, 439 U.S. at 441, *Phillips*, 524 U.S. at 164.

Defendants argue that the eminent domain cases cited by Plaintiff to argue that the measure of his compensation must be his "equity" in the "total value" of the property ignore the underlying question that

must precede the determination of "just compensation." Defendants state that the key question is whether the Plaintiff has a "property interest" in such "total value" equity from a source of law independent of the federal constitution – "what has the owner lost?" ECF No. 8, PageID.65. Defendants contend that the Michigan Supreme Court has answered: "surplus proceeds."

Defendants state that, although a county chooses whether or not to serve as the "foreclosing governmental unit" or to default that role to the State of Michigan, M.C.L. 211.78(6) ("The foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government for purposes of section 29 of article IX of the state constitution of 1963."), full participation by the county and its treasurer in the process is still required, including the denial of refunds. This is true, Defendants claim, even if the County defaults the role of foreclosing governmental unit to the State. By mandate of the GPTA, the properties of delinquent taxpayers "shall be returned as delinquent for collection," M.C.L. 211.78a(2), the county treasurer "shall send notice" to the taxpayer, M.C.L. 211.78c, and the county treasurer "shall prepare a list of all property subject to forfeiture for delinquent taxes," M.C.L. 211.78e(1). Defendants argue that the property "shall" be subjected to foreclosure proceedings, M.C.L. 211.78h, and the property will then be sold, with no option for the county to handle the funds it receives in any manner other than as

prescribed by M.C.L. 211.78m(8), which prohibits refunds (as recognized by the Supreme Court in *Rafaeli*).

Defendants argue that, even if a county chooses not to make itself or its treasurer the foreclosing governmental unit ("FGU"), the GPTA still requires the county treasurer to take the statutory steps to facilitate the state's foreclosure and sale of the property and to enforce the ensuing denial of any refund. The choice by a county to act (through its treasurer) as the "foreclosing governmental unit" is irrelevant to whether the county or treasurer could refund any money to Plaintiff, as neither ever had such an option under any scenario. Defendants insist that this was not a "policy" of the county or the treasurer but rather the policy of the State Legislature, as declared in the GPTA. *Rafaeli*, 2020 WL 4037642, at *9. And, Defendants argue, because the denial of refunds was not a policy of Defendant County of Isabella or Defendant Pickens, they cannot be held liable for any federal claim under 42 U.S.C. §1983. Citing *Leatherman*, 507 U.S. at 166.

Defendants claim that this *Monell* defense was specifically raised by Pickens and Isabella County in their motion to dismiss filed in the Western District. See Western District ECF No. 72-1, PageID.612-615. A review of Judge Jonker's order reveals that he never explicitly addressed this defense in his opinion. (Western Dist. ECF No. 72-5, PageID.1195-1206), but this defense has since been rejected by other courts in

this district and the Michigan Court of Appeals. See *Fox v. City of Saginaw*, 2021 WL 120855, at *6-7, 11 (E.D. Mich. 2021); *Proctor v. Saginaw Cnty. Bd. of Comm'rs*, 2022 WL 67248 at *13 (Mich. Ct. App. Jan. 6, 2022).

2. Plaintiff's Argument

Plaintiff argues that *Rafaeli* does not constitute the binding rule for this case. Plaintiff acknowledges that the Michigan Supreme Court in *Rafaeli* decided that the "surplus proceeds" is all that is compensable under the Michigan Constitution. Plaintiff contends that this federal court is not precluded from awarding a different sum when there is a Fifth Amendment taking and Michigan's remedy for the taking is legally inadequate under the Fifth Amendment.

Plaintiff maintains that the scope of damages regarding a taking in violation of the Fifth Amendment was not determined in *Rafaeli*. Plaintiff states that the *Rafaeli* plaintiff never presented an argument to suggest "that the tax foreclosure [sale] failed to obtain a fair price for the property," citing *Rafaeli*, 2020 Mich. LEXIS 1219, at *37 (Viviano, J., concurring), and the property at issue in that case appears to have been sold for its approximate fair market value.

Plaintiff argues that his property did not sell anywhere close to its fair market value (in fact, Plaintiff believes, the sale price was far less than half

of the fair market value). Plaintiff asserts that the Fifth Amendment's Just Compensation Clause requires more than what the Michigan Supreme Court provided in *Rafaeli*, noting that federal courts are not constrained by state law. Citing *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under the color of state law, whether that action be executive, legislative, or judicial.").

Plaintiff contends that, under the Fifth Amendment, compensation consists of "the total value of the property when taken, plus interest from that time." *Knick*, 139 S.Ct. at 2170). Plaintiff states that "[t]otal value" means the "full monetary equivalent" of the property taken. Citing *Almota Farmers Elevator & Whse Co. v. U.S.*, 409 U.S. 470, 473 (1973) (citation omitted) ("And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken."). Plaintiff claims that the owner of taken property must be put "in as good position pecuniarily as he would have been if his property had not been taken," *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 586 (1923), such that the taking government must pay "the full and perfect equivalent in money of the property taken."

United States v Miller, 317 US 369, 373 (1943).[1] The *Almota* court wrote:

> The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' 'And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.' *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (footnotes omitted). See also *United States v. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276, 279, 87 L.Ed. 336. To determine such monetary equivalence, the Court early established the concept of 'market value': the owner is entitled to the fair market value of his property at the time of the taking. *New York v. Sage*, 239 U.S. 57, 61, 36 S.Ct. 25, 26, 60 L.Ed. 143. See also *United States v. Reynolds, supra*, 397 U.S., at 16, 90 S.Ct., at 805; *United States v. Miller*,

[1] Plaintiff argues that, even if the Court finds that *Rafaeli* controls this case, Plaintiff would still be entitled to surplus proceeds, plus interest, plus attorney fees and costs. *Knick*, 139 S. Ct. at 2170; 42 U.S.C. § 1988. The US Supreme Court has confirmed that "[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law [like *Rafaeli*], cannot infringe or restrict the property owner's federal constitutional claim—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force." *Knick*, 139 S. Ct. at 2171.

> *supra*, 317 U.S., at 374, 63 S.Ct., at 280. And this value is normally to be ascertained from 'what a willing buyer would pay in cash to a willing seller.' *Ibid. See United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633, 81 S.Ct. 784, 790, 5 L.Ed.2d 838.

Almota, 409 U.S. 470, 473–74 (1973).

Plaintiff believes that the Sixth Circuit has rejected Defendants' argument that their voluntary and discretionary decision to designate the county treasurer to be and act as the FGU absolves their constitutional responsibility for the resulting unconstitutional taking of their citizens' equity. (M.C.L. § 211.78(3)-(6)).[2] Plaintiff maintains that, if a municipality voluntarily decides to utilize a state law that does not require a municipality to act (e.g., M.C.L. § 211.78(3)-(6)), the decision of the municipality to do so becomes the adopted policy and custom of the municipality itself, sufficient to impose *Monell* liability. Citing *DePiero v. City of Macedonia*, 180 F.3d 770, 787 (6th Cir. 1999); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993); *Cooper v. Dillon*, 403 F.3d 1208, 1222-1223 (11th Cir. 2005); *Vives v. City of New York*, 524 F.3d 346, 351 (2nd Cir.

[2] Plaintiff also argues that the Supremacy Clause mandates that "public officials have an obligation to follow the Constitution even in the midst of a contrary directive." *Kennedy v. City of Cincinnati*, 595 F3d 327, 337 (CA 6, 2010); see also Const 1963, art XI, § 1. For that reason, Plaintiff argues that saying "the statute made me do it" is not a legal defense.

2008). A local government and its officials are liable for constitutional violations when following and utilizing a discretionary-granting state statute, which is what Plaintiff contends the County of Isabella expressly chose here. Citing FGU List https://www.michigan.gov/documents/2005_V_2006_FGU_116385_7.pdf . Plaintiff states that choice to be the FGU pursuant to M.C.L. § 211.78(6) (and thereby destroying and retaining equity) was a deliberate, meaningful, voluntary policy choice of the county and became a "county" policy sufficient to meet *Monell*.

3. Analysis

For the following reasons, the Court concludes that Plaintiff is entitled only to the "surplus proceeds" realized from the tax-foreclosure sale of the Property, both under the Michigan Constitution – which the Michigan Supreme Court clearly expressed in *Rafaeli* -- and. under the federal takings clause of the U.S. Constitution.

In *Rafaeli*, the Michigan Supreme Court held that defendant's failure to give the foreclosed property owners the surplus from the tax-foreclosure sale constituted an unconstitutional taking under the Michigan Constitution. *Rafaeli*, 505 Mich. at 437. The *Rafaeli* court did, however, ask the parties to brief a takings claim under the federal Constitution, *id.*, and cited both the federal and state Constitutions before recognizing that the Michigan Constitution is generally more protective of property rights than the

U.S. Constitution. *Id.* at 454 ("While we draw on authority discussing and interpreting both clauses, we must keep in mind that Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain."). *Id.* at 457 61, 476-77 (addressing federal cases and noting that the state takings clause had been interpreted as offering broader protection than the federal takings clause).

As Judge Jonker stated, "[t]he Takings Clause of the Fifth Amendment states that 'private property' [shall not] be taken for public use, without just compensation." Western District, ECF No. 119, PageID.1357 (quoting *Knick*, 139 S.Ct. at 2167). To establish federal taking claim, a plaintiff must show: (1) a cognizable property interest; and (2) that a taking occurred. The Fifth Amendment, however, does not create property rights, it enforces them. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law."); *Leis v. Flynt*, 439 U.S. 438, 441 (1979); *Freed v. Thomas*, 2021 WL 942077, at *3 (E.D. Mich. Feb. 26, 2021). State, federal, and common law generally are the sources of the property interests that are protected. *See, e.g., Phillips*, 524 U.S. at 164; *Coalition for Gov't*

Procurement v. Fed. Prison Indus., Inc., 365 F.3d 435, 481 (6th Cir. 2004).

As explained above, the Michigan Supreme Court expressly stated that there was a property right in the "surplus proceeds," but it "reject[ed] the premise that just compensation requires that plaintiffs be rewarded the fair market value of their properties so as to be put in as good a position had their properties not been taken at all." *Rafaeli*, 505 Mich. at 483.

Plaintiff has not submitted any constitutional, statutory, precedential, or other authority to support his theory that he is entitled to the equity amount (fair market value less tax debt) of the tax-foreclosure sale. Judge Jonker's opinion does not do so, as he stated only that: "Under *Rafaeli* [the county] may not retain proceeds of the foreclosure sale exceeding Plaintiff's tax liability." Western District, ECF No. 119, PageID.1357. The Michigan Court of Appeals likewise has concluded that *Rafaeli* clarified that the property interest for Fifth Amendment purposes in cases such as this one is the "surplus proceeds." *Proctor*, 2022 WL 67248, at **1, 5.

Based on the conclusions of the other courts that "surplus proceeds" is the property interest held by former property owners such as Plaintiff, together with the absence of any authority cited by Plaintiff to support his equity argument, the Court concludes that: (a) there was an unconstitutional taking; and (b) Plaintiff is entitled to the surplus proceeds (tax-

foreclosure sale price less the tax debt owed, which includes delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property) from tax-foreclosure sale of the Property. Plaintiff also is entitled to interest from the date of the foreclosure sale. See *Knick*, 139 S.Ct. at 2170; *Freed*, 2021 WL 942077, at *4; *Proctor*, 2022 WL 67248, at **9-13.

Accordingly, Plaintiff's motion for summary judgment is granted to the extent that he is entitled to the "surplus proceeds" of the tax-foreclosure sale of the Property, as well as interest from the date of the foreclosure sale, but denied to the extent that Plaintiff seeks excess equity from the tax-foreclosure sale (measured by the fair market value of the property less the tax debt owed, which includes delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property).

B. Motion to Compel

Plaintiff has filed a lengthy Motion to Compel addressing many discovery requests it made. In light of the Court's rulings in this Order and another Order to be issued shortly after this Order, all claims asserted in Plaintiff's Second Amended Complaint will be resolved and judgment will be entered. Accordingly, the Court denies as moot Plaintiff's Motion to Compel.

V. CONCLUSION

Accordingly, pursuant to and consistent with the findings above,

IT IS ORDERED that Plaintiff's Motion to Compel [ECF No. 7] is DENIED AS MOOT.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment [ECF No. 8] is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment is DENIED AS MOOT with respect to Count III.

IT IS FURTHER ORDERED that Count IV is DISMISSED WITH PREJUDICE with respect to Pickens.

IT IS FURTHER ORDERED that, as to Isabella County, Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART with respect to Counts IV and V.

IT IS FURTHER ORDERED that, under the United States Constitution and Michigan Constitution (Counts IV and V, respectively), Plaintiff is entitled to "surplus proceeds" from the tax-foreclosure sale (i.e., the difference between the tax-foreclosure sale price and the tax debt that is owed) and is not entitled to the equity amount from the tax-

closure sale (i.e., the difference between the fair market value of the Property and the tax debt that is owed), such that Defendant County of Isabella shall pay Plaintiff the "surplus proceeds" amount of $73,767.07 ($76,008.00 - $2,241.93).

IT IS FURTHER ORDERED that Plaintiff is entitled to interest on $73,767.07, measured from the date of the tax-foreclosure sale.

IT IS ORDERED.

s/ Denise Page Hood
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

Dated: September 29, 2022

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL PUNG,
as personal representative of the
Estate of Timothy Scott Pung,
Plaintiff,

v.

PETER M. KOPKE, *et al.,*
Defendants.

Case No. 1:18-cv-1334
September 29, 2020

OPINION AND ORDER

HON. ROBERT J. JONKER

INTRODUCTION

Plaintiff is the personal representative of the estate of his brother, Timothy Scott Pung, one asset of which was a homestead in Isabella County. Timothy Pung died in 2004. His wife survived him and continued living in the house until her death in 2008, immediately after which his son, Marc Pung, lived continuously in the house. In 2013, Isabella County began a tax foreclosure process against the property over what it said was about $2,200 in unpaid real estate taxes. That process culminated in a final foreclosure judgment in June 2018. The ensuing foreclosure sale yielded about $76,000. Plaintiff says there were never actually any unpaid taxes due at all, and that the County therefore never had a lawful basis to foreclose. But even if the foreclosure itself was proper, Plaintiff says that at a minimum the County had an obligation to account to Plaintiff for the excess sale proceeds above the amount necessary to satisfy the unpaid tax bill. This has spawned two sets of currently pending claims.

FIRST SET OF CLAIMS

Plaintiff's first set of claims assert that he was unfairly targeted by the County Assessor (Defendant DePriest) and the County Treasurer (Defendant Pickens) because of an earlier round of tax litigation over the homestead exemption in which he prevailed. According to Plaintiff, this so angered defendants DePriest and Pickens that they conspired with a State ALJ (Defendant Kopke) to concoct a tax bill that unlawfully failed to apply the homestead exemption

despite plaintiff's litigation win. To add insult to injury, Plaintiff says these defendants kept the inflated tax bill a secret from Plaintiff until after a critical deadline, lulling Plaintiff into believing he had paid the full tax properly assessed with credit for the homestead exemption.

Plaintiff says the scheme was retaliation for his success in the first round of homestead exemption litigation, a potential First Amendment violation; and contrary to the notice requirements built into Michigan law and inherent in due process, a potential violation of his Procedural Due Process rights. Plaintiff also says the fact pattern states a claim for a potential Class of One theory under the Equal Protection Clause as applied in Willowbrook v. Olech, 528 U.S. 562 (2000). According to Plaintiff, Defendants DePriest and Pickens were the main actors who hatched and executed the scheme together. But Plaintiff says this was "possibly" after a phone call with Defendant Kopke regarding how the homestead exemption works in Michigan, and so Plaintiff alleges Defendant Kopke, too, is potentially liable for the scheme as a co-conspirator.

SECOND SET OF CLAIMS

Plaintiff's second set of claims asserts that the County itself unconstitutionally kept all the proceeds from the tax sale, rather than just the relatively small amount necessary to satisfy the balance of the tax bill allegedly still due. Plaintiff says this is either a Fifth

and Fourteenth Amendment takings claim; or failing that for some reason, a violation of the Eight Amendment'sprohibition on excessive fines. The defendants' position throughout most of this litigation has been that Michigan law expressly permits a County to retain the full amount of any tax foreclosure proceeds, not just the amount necessary to satisfy an outstanding bill; and that this does not amount to an unconstitutional taking because the taxpayer forfeited any protected property interest as a result of the order of foreclosure that necessarily preceded the tax sale itself.

The Michigan Supreme Court recently rejected the defense view of Michigan tax foreclosure law in a unanimous decision holding that a municipality in Michigan is obligated to account for all sale proceeds above the amount necessary to satisfy any unpaid tax obligation. *Rafaeli LLC v. Oakland County*, Docket No. 156849, 2020 WL 4037642, ---Mich.--- (July 17, 2020).

MOTIONS BEFORE THE COURT

Defendants now move to dismiss on multiple grounds. (ECF Nos. 72, 74, 77.) Plaintiff seeks partial summary judgment on its takings and excessive fines claims. (ECF No. 99.) The parties filed comprehensive briefs on these issues before the Michigan Supreme Court decision in *Rafaeli*, and supplemented their positions in light of *Rafaeli*. (ECF Nos. 15, 16, 22, 24, 28, 34-37, 39, 40, 44, 47, 48, 55, 56, 108, 110, 113-117.)

The Court finds oral argument unnecessary to decide the motions. This is the decision of the Court.

LEGAL STANDARDS AND DISCUSSION

1. Jurisdictional and Affirmative Defenses

Defendants say some or all the claims are barred by a variety of jurisdictional barriers or prudential considerations. Defendants invoke the Tax Injunction Act, Rooker-Feldman doctrine, res judicata, collateral estoppel, and comity. The Court finds none of these provide a meritorious basis to dismiss at this point.

The *Rooker-Feldman* doctrine "prohibits the lower federal courts from reviewing appeals of state-court decisions" and "applies only to an exceedingly narrow set of cases." *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 400 (6th Cir. 2020). Defendants argue that Plaintiff's case amounts to an appeal of a 2017 decision of the Michigan Court of Appeals rejecting Plaintiff's challenge to the judicial foreclosure on the property. (See ECF No. 15-2.) The Michigan Court of Appeals found that the process used in the foreclosure satisfied Plaintiff's constitutional right to due process. (*Id.*, PageID.90). In the case before this Court, Plaintiff is not seeking to unwind or otherwise challenge the foreclosure. Instead, Plaintiff claims that the Defendants unlawfully refused to apply the homestead exemption to the Property and deliberately failed to notify Plaintiff that the homestead exemption would not

apply. This case simply does not fall within the "exceedingly narrow" scope of Rooker-Feldman. See *VanderKodde*, 951 F.3d at 409 (Sutton, J., concurring) ("Absent a claim seeking review of a final state court judgment, a federal court tempted to dismiss a case under *Rooker-Feldman* should do one thing: Stop.").

Neither the Tax Injunction Act nor the comity doctrine bars Plaintiff's claims. The TIA provides that "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The TIA "creates a jurisdictional barrier to the federal courts for claims of declaratory or injunctive relief brought by a party aggrieved by a state's administration of its taxing authority." *Pegross v. Oakland County Treasurer*, 492 F.App'x 380, 384 (6th Cir. Nov. 18, 2014). Courts have interpreted the TIA "broadly. . . to bar suits for declaratory relief, injunctive relief, as well as monetary relief when there is an adequate remedy in state court." *Hedgepeth v. Tennessee*, 215 F.3d 608, 612, n.4 (6th Cir. 2000). The comity doctrine, which is "more embracive than the TIA," restrains federal courts from entertaining claims in state taxation cases that risk disrupting state tax administration. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). Neither the TIA nor the comity doctrine applies in the case before this Court. The administration of the state tax collection process is not an issue here. No one disputes that the tax was imposed and collected and that the

property was foreclosed. Plaintiff is not seeking to unwind the foreclosure. The essence of Plaintiff's claims is that Defendants conspired to take the benefit of the homestead exemption away from him without notice or an opportunity for hearing; singled him out for this treatment; and retained excess proceeds from the foreclosure sale. None of these claims implicate the TIA or comity doctrine.

An earlier iteration of the *Rafaeli* case over which the U.S. District Court for the Eastern District of Michigan declined to exercise jurisdiction is distinguishable. *Rafaeli v. Wayne County*, No. 14-13958, 2015 WL 3522546 (E.D. Mich., June 4, 2015). In that case – a putative class action – the plaintiff was "[e]ssentially . . . seek[ing] to enjoin Oakland and Wayne Counties from proceeding with any future tax delinquency foreclosures, forfeitures and sales." *Id.* at *3. That is a direct attack on the county tax collection process, which is the heart of the TIA and comity doctrine. Moreover, that plaintiff was continuing to challenge the validity of the foreclosure sale itself and seeking to unwind it in a state court proceeding that was still pending. *Id.* Here, Plaintiff is mounting no attack on future collections, and is making no effort here, or elsewhere, to unwind the foreclosure. He is simply seeking money damages to compensate for dollars the County kept beyond the amount necessary to satisfy the tax it claimed was due.

Defendants' res judicata and collateral estoppel arguments likewise fail, at least on a motion to

dismiss. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 5, 81 (1984). "Federal courts routinely recognize the claim-preclusion effects of state-court judgments, both as to claims that arise under state law and as to federal statutory and constitutional claims. Issue preclusion is also recognized. . . ." 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE §4469 (3d ed. 2019).

The doctrine of res judicata exists to prevent multiple suits litigating the same claim. *Adair v. State*, 470 Mich. 105, 121, 680 N.W.2d 386 (2004). Under Michigan law, the claim preclusion aspect of res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the matter in the second case was, or could have been, resolved in the first." *Id.* Michigan courts "take[] a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*

Res judicata may or may not ultimately have bearing on some facts or claims, but it is not a basis supporting dismissal at this time. As already noted,

Plaintiff is not challenging any aspect of the foreclosure process, which was the only subject of his earlier litigation. A foreclosure proceeding is an *in rem* proceeding against the property itself. Nor were the parties the same. In the earlier case, the Isabella County Treasurer was the sole named defendant. Defendants DePriest and Kopke were not parties to the suit, and Defendant Pickens was a defendant only in his official capacity as Isabella County Treasurer, the functional equivalent of the County. He was not sued in his personal capacity. Further factual development is needed to determine whether any factual issues pertinent here were fully litigated in the state, or whether any claims here were merged into any earlier state court judgment. With further factual development, it may emerge that earlier decisions of fact or law necessary for the earlier judgment bear on this case. But any finding of issue or claim preclusion would be premature at this stage.

2. Rule 12(b)(6) Regarding the First Set of Claims

On the merits of the first set of claims, which the Court originally dismissed with leave to re-plead, the defense says the Second Amended Complaint still comes up short of stating a *Twombly*-plausible claim. Each defendant moves to dismiss.

The Federal Rules provide that a claim may be dismissed for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To survive a Rule 12(b)(6) motion, "a complaint must

contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In determining whether a claim has facial plausibility, a court must construe the complaint in the light most favorable to the plaintiff, accept the factual allegations as true, and draw all reasonable inferences in favor of the plaintiff. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion so long as they are referred to in the Complaint and are central to the claims contained therein." *Id.*

As to the first set of claims, the Court continues to believe that Plaintiff's allegations come up short as to Defendant Kopke. The only count involving Defendant Kopke is Plaintiff's claim of a conspiracy to violate Plaintiff's right to procedural due process. Plaintiff bases his claim against Defendant Kopke on nothing more than an alleged telephone conversation with Defendant DePriest "and possibly Defendant [Pickens]" during which, according to Plaintiff, Mr. Kopke directed Defendant DePriest to deny the homestead exemption. (ECF No. 65, PageID.513,

514.) Without any supporting factual allegations, Plaintiff alleges that Defendant DePriest removed the homestead exemption from the Property tax calculation "[b]y an agreement between [Defendants DePriest, Kopke, and Pickens] for the political benefit of Defendant [Pickens] due to his embarrassment and humiliation in losing the prior legal challenges." (*Id.*, PageID.513.) Any alleged role Defendant Kopke may have played in the purported conspiracy is simply too skeletal and attenuated to support a claim against him.[1]

As to Defendants DePriest and Pickens, the Court is satisfied that for *Twombly* purposes, Plaintiff has articulated enough to survive Rule 12(b)(6) on his Procedural Due Process, and *Olech* Equal Protection theories. To state a claim for violation of procedural due process rights, a plaintiff must plausibly allege that "(1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). "The essential elements of due process are notice and an opportunity to be heard." *Silvernail v. County of Kent*, 385 F.3d 601 (6th Cir.

[1] Indeed, when the Court inquired at the Rule 16 proceeding about Plaintiff's theory of Mr. Kopke's involvement in the alleged conspiracy, Plaintiff's counsel acknowledged that "Kopke is difficult because I don't know either." (ECF No. 62, PageID.480.)

2004). Plaintiff alleges that Defendants DePriest and Pickens conspired to withhold the benefit of the homestead exemption to which a court had found him entitled, and to do so without notifying him or giving him an opportunity to be heard. That is enough to state a claim for conspiracy to violate procedural due process rights.

Under the Equal Protection Clause, "the states cannot make distinctions [that] . . . burden a fundamental right, target a suspect class, or intentionally treat one different[ly] from others similarly situated without any rational basis for the difference." *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 312 (6th Cir. 2005); see also *Olech*, 528 U.S. at 565 (2000). "Where, as here, a plaintiff alleges a violation of the third type, it is said to proceed on a 'class of one' theory." *Taylor Acquisitions, L.L.C. v. City of Taylor*, 313 F.3d App'x 826, 836 (6th Cir. 2009) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 298 (6th Cir. 2006)); see also *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010). Under this theory, a "plaintiff may demonstrate that government action lacks a rational basis either by negativing every conceivable basis which might support government action, or by showing that the challenged action was motivated by animus or ill-will." *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005). Plaintiff alleges Defendants DePriest and Pickens singled him out by withholding the benefit of the homestead exemption to which he was entitled, and

that Defendants' animus arising out of Plaintiff's earlier litigation win motivated their actions. This is enough to state a claim for violation of Equal Protection rights under a class of one theory.[2]

3. Summary Judgment Regarding the Second Set of Claims

On the merits of the second set of claims, the defense recognizes that the Michigan Supreme Court decision has changed the liability landscape, but it says Plaintiff has over-estimated the actual relief to which it is entitled under either *Rafaeli* or on its takings claims. Plaintiff seeks partial summary judgment on the takings and excessive fines claims.

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[2] Plaintiff has not asserted a First Amendment retaliation claim directly, but the alleged fact pattern may support a retaliation theory. To prevail on a First Amendment retaliation claim, a plaintiff must show three elements: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two – that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). Plaintiff's earlier litigation was indisputably protected conduct; he alleges that he lost the benefit of the homestead exemption to which he was entitled under a court decision; and he alleges that this adverse action was motivated by Defendants' retaliatory animus based on his success in the earlier litigation. Accordingly, his factual allegations appear to support a First Amendment retaliation claim.

Summary judgment is proper where the evidence presents no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A fact is material if it is so defined by substantive law and will affect the outcome of the suit under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute exists if the court finds that a reasonable jury could find in favor of the non-moving party. *Id.* Summary judgment is required where "after adequate time for discovery and upon motion … a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, the court draws all inferences in the light most favorable to the non-moving party. *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992).

"The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation.'" *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019). In *Rafaeli*, the Michigan Supreme Court unanimously "conclude[d] that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property." *Rafaeli LLC v. Oakland County*, Docket No. 156849, 2020 WL 4037642, at * 19, --- Mich.--- (July 17, 2020). The court

"also recognize[d] this right to be 'vested' such that the right is to remain free from unlawful governmental interference." *Id.* Under *Rafaeli*, Isabella County may not retain proceeds of the foreclosure sale exceeding Plaintiff's tax liability. Because Isabella County did not follow that process here, but kept the full amount of the sale proceeds, not just the $2,200 necessary to satisfy the allegedly unpaid taxes, it has taken property in violation of Plaintiff's constitutionally protected property interest and is obligated to account to Plaintiff for it.[3] Accordingly, as to the second set of claims, the Court finds Plaintiff entitled to summary judgment as to liability on his Fifth and Fourteenth Amendment

[3] Now that the Michigan Supreme Court has ruled that Michigan law does not permit a municipality to retain excess sale proceeds, future claims to recover excess proceeds will presumably be unnecessary. It is also possible that Plaintiff now has an available remedy under Michigan law as interpreted by the Michigan Supreme Court in *Rafaeli*. But even if that is theoretically true, it is not clear how that would necessarily apply for this plaintiff at this time. Moreover, after *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019), it would not appear that Plaintiff has an obligation to exhaust that option, especially since it just potentially became available. Finally, in addition to those considerations, there remains a potential dispute over whether the Fifth and Fourteenth Amendments require an accounting for not only the excess proceeds, but also for the full fair market value of the property, which could be a higher amount. The Court is not resolving that issue at this time. The parties may litigate the issue in the context of determining the proper amount of damages on these claims.

takings claims,[4] leaving only the question of damages for further litigation.[5]

CONCLUSION

For these reasons, the Court will dismiss the claims against Defendant Kopke under Rule 12(b)(6) and deny the defense motions to dismiss these claims against Defendants DePriest and Pickens. As to the Fifth and Fourteenth Amendment claims against the County, the Court will grant summary judgment in favor of Plaintiff on liability, leaving open all questions of damages. The Court will also dismiss the Excessive Fine claim that Plaintiff asserted against the County on an alternative basis.

ACCORDINGLY, IT IS ORDERED:

1. Defendant Kopke's Second Motion to Dismiss (ECF No. 74) is GRANTED. Defendant Kopke is terminated from the case.

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[4] This makes it unnecessary to rule on the Excessive Fines claim, which Plaintiff brought in the alternative.

[5] As noted above, the damages issues include without limitation the question of whether the County is accountable for only the excess proceeds of sale, or for the excess equity measured by the fair market value of the property. Also as noted above, the Excessive Fines claim is dismissed without prejudice because plaintiff expressly raised this as only an alternative theory.

2. The Motion to Dismiss filed by Defendants Isabella County and Defendant Pickens (ECF No. 72) is DENIED.

3. Defendant DePriest's Motion to Dismiss (ECF No. 77) is DENIED.

4. Plaintiff's Motion for Summary Judgment (ECF No. 99) is GRANTED to the extent Plaintiff seeks summary judgment as to liability on Plaintiff's Fifth and Fourteenth Amendment claims against the County; is DENIED as moot with regard to Plaintiff's Excessive Fines claim; and is DENIED without prejudice in all other respects.

5. Dated: Plaintiff's Objection (ECF No. 116) is DISMISSED AS MOOT.

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

Dated: September 29, 2020

APPENDIX D

Nos. 22-1919/1939

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL PUNG,
Personal Representative of the
Estate of Timothy Scott Pung,
Appellant,

v.

PETER M KOPKE, et al.,
Defendants-Appellees

ORDER

FILED
Feb 26, 2025
KELLY L. STEPHENS, Clerk

BEFORE:
McKEAGUE, KETHLEDGE, and NALBANDIAN,
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/ Kelly L. Stephens
Kelly L. Stephens, Clerk

* Judge Davis is recused in these cases.