**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF MICHIGAN**

TONYA BOWLES, DOUGLAS C. MYERS, GERRILYN SUTTON, and MARCIA JOHNSON, for themselves and all those similarly situated,
Plaintiffs,

v.

COUNTY OF WAYNE also sometimes known as CHARTER COUNTY OF WAYNE,
Defendant
_______________________________/

Case No. 23-cv-10973
Hon. Linda V. Parker

*** CLASS ACTION ***

**SECOND AMENDED CLASS ACTION COMPLAINT[1]**
**WITH JURY DEMAND**

Plaintiffs TONYA BOWLES, DOUGLAS C. MYERS, GERRILYN SUTTON, and MARCIA JOHNSON, both individually and as representative(s) of those individuals and entities similarly situated in Wayne County, Michigan, by and through counsel, and assert the following complaint—

[1]Defendant Sabree was previously sued in his personal and official capacities, but those allegations are not re-pled due to the District Court and the Sixth Circuit prior rulings. The District Court dismissed the Fifth Amendment "arising under" claim (formerly Count II); the direct Michigan constitutional takings claim (formerly Count IV); and the Eighth Amendment Excessive Fines claim (formerly Count V). Although these claims are not re-pled in this pleading, the failure to plead these claims is not a waiver or abandonment of the claim(s). Each are fully preserved for any potential appeal in the future or reconsideration based on additional decisions of the Sixth Circuit and United States Supreme Court. See Mike Chak Hin Tsoi, *Raise It (Again) Or Waive It, Preserving Claims for Appellate Review When They Are Dismissed With Leave to Amend*, 38 WM MITCHELL L REV 1406 (2012) (available at https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1469&context=wmlr).

## INTRODUCTION

1. This is a case of gross governmental abuse that cries out for a class wide resolution and remedy. The Wayne County Defendant ("Wayne County" or "Defendant") has illegally seized property in the form of surplus proceeds from private individuals and entities without paying just compensation.

2. The abuse stems from the aftermath of the counties' tax foreclosure process.

3. Michigan law generally authorizes a foreclosing governmental unit ("FGU") -- like Wayne County -- to foreclose on parcels to satisfy outstanding unpaid property taxes.

4. Thus, the law would empower Wayne County to foreclose on the parcel, keep the amount of outstanding taxes plus reasonable attorney fees, and return the rest of the "surplus proceeds" (including interest) to the property owner.

5. However, Wayne County has not followed the law. Instead, Wayne foreclosed on the parcel, sold the property (often at a reduced market price), and kept *all* of the surplus proceeds for itself.

6. As a result, property owners lost the entire value of their property, which is often many times more than the outstanding tax bills.

## RELEVANT PROCEDURAL EVENTS, CASE LAW, AND BACKGROUND

7. Several important court decisions have been issued since Plaintiff filed her original complaint over four years ago, including decisions from the Sixth Circuit Court of Appeals in this case, all of which have "clarified" the "landscape of takings law and class action law" since Plaintiff first filed her complaint.

8. The Sixth Circuit Court of Appeals in *Bowles* recognized the importance of, and listed, several of the key events and decisions since the *Rafaeli* decision was first issued in July of 2020:

> "It's worth spelling out those developments. Intervening caselaw from this Court, the Michigan Supreme Court, and the U.S. Supreme Court, as well as amendments to the GPTA, have clarified or altered the landscape of takings law and class-certification law since Bowles first sued. Here's a timeline of events.
>
> - In July 2020, the Michigan Supreme Court held in Rafaeli that the (old) GPTA's operation with respect to tax foreclosure sales violated Michigan's Takings Clause. 952 N.W.2d at 460–61.
> - That October, Bowles sued the county under § 1983 in federal district court.
> - That same month, a district court certified a putative class in a similar takings suit against other Michigan counties. *Fox v. County of Saginaw*, No. 19-cv-11887, 2020, WL 6118487 (E.D. Mich. Oct. 16, 2020).
> - In December 2020, the Michigan legislature passed PA 256, effective January 1, 2021. 2020 Mich. Pub. Acts No. 256 (codified at Mich. Comp. Laws § 211.78t). PA 256 created the

process that former property owners could use to request surplus proceeds from tax sales.

- In April 2021, Bowles asked the district court to certify her proposed class. Her class definition included former property owners seeking both surplus proceeds (the difference between the sale price and the tax debt) and surplus equity (the difference between the fair market value and the tax debt).

- In January 2022, the district court certified Bowles's putative class. The court's analysis relied on the *Fox* decision from another judge in the same district court. *See* R.47, Op. and Order, p.32 n.11, 34, 42–43, PageID 714, 716, 724–25 (citing *Fox*, 2020 WL 6118487).

- In June 2022, we decided *Tarrify Props., LLC v. Cuyahoga County*, 37 F.4th 1101 (6th Cir. 2022), a class-action challenge to Ohio's tax-foreclosure system, which roughly mirrored Michigan's GPTA. A putative class of former landowners sued to get back the surplus equity of their properties. *Id*. at 1105. The district court denied class certification. *Id*. We affirmed because determining the fair market value of each potential class member's property—no easy task, even for experts—would have led to difficulties figuring out class membership and would have undercut the "efficiencies and ease of administration that might otherwise favor classwide resolution." *Id*. at 1105–07.

- In October 2022, we decided *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022). Finishing what *Rafaeli* started, we held that a Michigan county's refusal to pay compensation under the old GPTA violated the federal Takings Clause. *Id*. at 188. The county never sold the plaintiffs' foreclosed property at auction and so had no surplus proceeds; it transferred the property (so the complaint alleged) to other municipalities for the amount of the tax debt. *Id*. at 188–89. We explained how doing so effected a taking of the plaintiffs' equitable title, as recognized for centuries by Anglo-American property principles. *Id*. at 190–92.

- In March 2023, we permitted a Rule 23(f) appeal from the district court's certification of Bowles's putative class. See *Sabree*, 2023 U.S. App. LEXIS 6218. We stated that our decision in *Tarrify* presented a "significant obstacle" to certifying a class of plaintiffs seeking surplus equity. *Id*. at *3. And we observed that Bowles's proposed class also included those claiming surplus proceeds and noted that a class action seeking surplus proceeds might not "present the same administrative difficulties present in a class action seeking surplus equity." *Id*. at *4–5.

- In April 2023, we decided *Fox v. Saginaw County*. 67 F.4th 284. The plaintiff in Fox sued not only the county that took his property, but also twenty-six other counties that took other potential class members' properties. *Id*. at 290–91. We reversed the district court's class certification because Fox lacked standing to sue counties that had not injured him. *Id*. at 300. We also provided guidance for any renewed certification proceedings. And we questioned whether the district court had provided a "rigorous analysis" of the requirement that issues common to the class predominate over individual issues. *Id*. at 300–02. We suggested that the district court deal with at least these questions: (1) Would landowners prove damages by formulaic calculation or fact-specific mini-trials that would overwhelm common questions? (2) Would the county have unique defenses, like res judicata or standing, against class members? (3) How would third-party lienholders, like banks, factor in? *Id*.

- In May 2023, the Supreme Court decided *Tyler v. Hennepin County*, 598 U.S. 631, holding that the retention of surplus proceeds was a "classic taking" without compensation. *Id*. at 639. The case came up from Minnesota and the Eighth Circuit, but the Court's decision cited with approval Judge Kethledge's opinion for this Court in *Hall*. *Id*. at 638 (citing *Hall*, 51 F.4th at 190).

- In September 2023, we decided *Freed v. Thomas*, 81 F.4th 655 (6th Cir. 2023). We clarified that when the government sells foreclosed property at a properly conducted public auction, a plaintiff can seek only the return of the surplus proceeds—not the surplus equity. *Id.* at 658–59. Because "the best evidence of a foreclosed property's value is the property's sales price, not what it was worth before the foreclosure," we held that plaintiffs are entitled to "the amount of the sale above [their] debt and no more." *Id*. at 659.

- In July 2024, the Michigan Supreme Court decided *Schafer*, 2024 WL 3573500, holding that its decision in Rafaeli applied retroactively. *Id*. at *17. The court also ruled on the retroactivity and prospectivity of various parts of the 2020 amendments to the GPTA. Id. at *21–22."

9. The proposed class includes all foreclosures occurring *before* the effective date of Public Act 256 of 2020 (December 22, 2020) which created the 78t process and thus presents unique arguments and criteria compared to foreclosures that occurred after July 18, 2020.

10. The above-captioned Plaintiffs are named directly and as proposed class representatives as being the former owners of real improved property in Wayne County, Michigan each of whom were foreclosed upon due to a tax delinquency but were injured by the unconstitutional similar acts or actions of defendant via its unlawful retention of excess/surplus proceeds.

**JURISDICTION**

11. This is a civil action brought seeking unpaid "just compensation," return of full proceeds, and other monetary relief for violations of the United States Constitution.

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

U.S.C. § 1331 (CAFA); 28 U.S.C. § 1343 and 42 U.S.C. § 1983, which authorizes federal courts to hear and decide civil rights cases; and 28 U.S.C. § 2201.

13. Venue is proper in this Court as Defendant conducts or has conducted its business in the Eastern District of Michigan.

**GENERAL ALLEGATIONS**
**MICHIGAN'S TAX FORECLOSURE PROCESS**

14. Like many states, Michigan provides for the taxation of real property to finance local governments such as counties, municipalities, and school districts, and empowers these local governments – FGU's -- to collect delinquent taxes through a foreclosure process.

15. This case focuses on what happens after a tax-foreclosed property generates surplus proceeds in excess of what FGUs like Wayne County are owed for validly-incurred delinquent taxes, interest, penalties, and fees.

16. Wayne County administered, and continues to administer, the *General Property Tax Act* foreclosure-and-auction process so that after it regularly sold a parcel at auction it retained the *entire* amount of the surplus proceeds.

**GENERAL ALLEGATIONS**

17. As described more fully herein, each Plaintiff and member of the

Class was an owner of real property within the County of Wayne.

18. Agents and officials of Wayne County successfully petitioned for and seized ownership of property belonging to Plaintiffs and Class Members through an in-rem judgment of foreclosure in favor of Wayne County due to delinquent property taxes.

19. In the late summer or early fall for the year of foreclosure, Wayne County conducted a tax auction and sold the foreclosed-upon properties.

20. For each member of the class, the sale price was usually (far) below the fair market value but nevertheless above the valid amount of the tax delinquency as specific and narrowly authorized by the General Property Tax Act.

21. As part of the auction sale, each successful <u>*buyer*</u> of each sold property paid Wayne County at least the “minimum bid” (a defined term under the General Property Tax Act) which must consist of only valid delinquent taxes, interest, penalties, and fees due on the property, plus any additional valid expenses incurred in connection with the forfeiture, foreclosure, maintenance, repair, or remediation of the property or the administration of this act for the property, including, but not limited to, foreclosure avoidance, mailing, publication, personal service, legal, personnel, outside contractor, and auction expenses.

22. Immediately following the sale and the receipt of the successful auction price at or in excess of the minimum bid, Wayne County thereinafter seized and sought to forever retain surplus proceeds belonging to the former property owners by failing to return the total amount of the surplus proceeds plus interest due to the delay of immediate payment.

23. Wayne County refused, and continues to refuse, to pay the total amount of constitutionally-required just compensation (i.e. the surplus proceeds, plus interest from that time) owed to each member of the class.

24. Wayne County failed to initiate any condemnation action or process for the taking of the surplus proceeds and/or interest it is keeping.

**THE CONDUCT AT ISSUE REFLECTS COUNTY POLICY**

25. The actions described herein is the respective voluntary policy, custom, and/or practice of Wayne County, and/or its final policymaker.

26. Wayne County had and has a voluntary policy and/or practice sufficient to impose damages and other relief pursuant to *Monell v New York City Department of Social Services*, 436 U.S. 658 (1978), and its progeny.

27. Specifically, Wayne County made the affirmative, voluntary, and discretionary decision to select itself to be the Foreclosing Governmental Unit and designate its own treasurer to act as its agent. See MCL 211.78(3)-(6).

28. Moreover, Wayne County, either through enactment of laws or regulations, official agency or governmental entity policy, and/or actions taken by an official or officials with final decision-making authority, administered its foreclosure and auction process generally, including through M.C.L. § 211.78m(8), so that after it sold a parcel at auction, it retained the entire amount of the proceeds, even if the proceeds exceeded the amount of the tax delinquency, and never returned anything to the property owner, nor provided any mechanism by which the property owner could secure a return of total "just compensation" as required by the Fifth Amendment to the United States Constitution and/or the parallel taking provisions of the Michigan Constitution.

## PARTIES

### *Plaintiff Tonya Bowles*

29. Plaintiff Tonya Bowles was the owner of the real property commonly known as 14730 East State Fair in Detroit, Michigan (hereinafter the "East State Fair Property").

30. On or around March 29, 2017, agents/officials of Wayne County successfully petitioned for and foreclosed upon the East State Fair Property through a judgment of foreclosure.

31. Wayne County sold the East State Fair Property at tax auction to

a private buyer on or around November 11, 2017 for $14,000.00, which was a sale price below the fair market value but above the tax delinquency.

32. Wayne County seized Plaintiff Tonya Bowles' surplus proceeds deriving from East State Fair Property when foreclosing upon said property, selling it at auction for an amount much lower than its fair market value, but still far more than the tax delinquency, and failing to immediately return the surplus proceeds.

33. Wayne County has not paid or returned Plaintiff Tonya Bowles surplus proceeds or the interest that is due for the delay of payment as required by the Fifth Amendment.

***Plaintiff Douglas C. Myers***

34. Plaintiff, Douglas C. Meyers, was the owner of the real property commonly known as 8729 Hipp in Taylor, Michigan (hereinafter the "Meyers Property").

35. On or around March 31, 2019, agents/officials of Wayne County successfully petitioned for and foreclosed upon the Meyers Property through a judgment of foreclosure.

36. Wayne County sold the Meyers Property at tax auction to a private buyer on or around October 10, 2019 for $89,100.00, which was a sale price below the fair market value but above the tax delinquency.

37. Wayne County seized Plaintiff Douglas C. Meyers' surplus proceeds deriving from the Meyers Property when foreclosing upon said property, selling it at auction for an amount much lower than its fair market value, but still far more than the tax delinquency, and failing to immediately return the surplus proceeds.

38. Wayne County has not paid or returned Plaintiff Douglas C. Meyers' surplus proceeds or the interest that is due for the delay of payment as required by the Fifth Amendment.

***Plaintiff Gerrilyn Sutton***

39. Plaintiff Gerrilyn Sutton f/k/a Gerrilyn Fields was the owner of the real property commonly known as 16175 Sunderland in Detroit, Michigan (hereinafter the "Sutton Property").

40. On or around March 31, 2019, agents/officials of Wayne County successfully petitioned for and foreclosed upon the Sutton Property through a judgment of foreclosure.

41. Wayne County sold the Sutton Property at tax auction to a private buyer on or around October 10, 2019 for $59,123.00, which was a sale price below the fair market value but above the tax delinquency.

42. Wayne County seized Plaintiff Gerrilyn Sutton's surplus proceeds deriving from the Sutton Property when foreclosing upon said

property, selling it at auction for an amount much lower than its fair market value, but still far more than the tax delinquency, and failing to immediately return the surplus proceeds.

43. Wayne County has not paid or returned Plaintiff Gerrilyn Sutton's surplus proceeds or the interest that is due for the delay of payment as required by the Fifth Amendment.

***Plaintiff Marcia Johnson***

44. Plaintiff Marcia Johnson was the owner of the real property commonly known as 16244 Cherrylawn in Detroit, Michigan (hereinafter the "Johnson Property").

45. On or around March 31, 2018, agents/officials of Wayne County successfully petitioned for and foreclosed upon the Johnson Property through a judgment of foreclosure.

46. Wayne County sold the Johnson Property at tax auction to a private buyer on or around November 16, 2018 for $57,000.00, which was a sale price below the fair market value but above the tax delinquency.

47. Wayne County seized Plaintiff Marcia Johnson's surplus proceeds deriving from the Johnson Property when foreclosing upon said property, selling it at auction for an amount much lower than its fair market value, but still far more than the tax delinquency, and failing to immediately

return the surplus proceeds.

48. Wayne County has not paid or returned Plaintiff Marcia Johnson's surplus proceeds or the interest that is due for the delay of payment as required by the Fifth Amendment.

***Defendant County of Wayne***

49. Defendant County of Wayne (also sometimes known as Charter County of Wayne) is a named legal entity formed and/or existing under the laws of the State of Michigan.

**CLASS ACTION ALLEGATIONS**

50. The preceding paragraphs are incorporated by reference as if fully set forth at length herein.

51. This action is brought by Plaintiffs, individually and on behalf of all other respective individuals and entities during the relevant statutorily-limited time period who were subject to the same unconstitutional practices and unlawful processes by Wayne County which resulted in the taking of surplus proceeds without the payment of just compensation.

52. The proposed class consists of all the former owners of real property in Wayne County whose real property (during the tolled, extended, and relevant statute of limitations period) was seized through a real property tax foreclosure by agents/officials of Wayne County and which was sold at

tax auction for more than the total tax delinquency and was not returned the full surplus proceeds, as well as not paid the total amount of "just compensation" as required by the Fifth Amendment to the United States Constitution and/or the parallel taking provisions of the Michigan Constitution.

53. The number of persons who have been injured by the practices discussed herein is sufficiently numerous to make this class action the most practical method to secure redress for the injuries sustained and to provide class wide equitable relief.

54. There are clear questions of fact raised by the claims common to, and typical of, those raised by the class sought to be represented.

55. There are clear questions of law raised by the pled claims common to, and typical of, those raised by the proposed class.

56. The violations of law and resulting harms alleged by the named Plaintiffs are typical of the legal violations and harms suffered by all class members.

57. Plaintiffs, as class representatives, will fairly and adequately protect the interests of the class members and will vigorously prosecute the suit on behalf of the class; and they are represented by highly experienced counsel.

58. Individual issues, *if any*, do not predominate over the common issues of law and fact that each class member would be required to prevail on if proceeding individually.

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

60. Wayne County and its agents/officials have acted, failed to act, and/or are continuing to act on grounds generally against Plaintiffs and all members of the class in the same manner.

61. Plaintiffs propose to represent the class (collectively referred to within this Complaint as the "Class" or "Class Members").

62. Excluded from the Class are: (a) Defendant and any entity or division in which Defendant has a controlling interest, and their legal representatives, officers, directors, assigns, and successors; (b) the Judge to whom this case is assigned and the Judge's staff; (c) the attorneys representing any parties to this Class Action; (d) any State or any of its agencies; and (e) the cities, towns, counties, townships, municipalities, and government entities of Wayne County.

63. Plaintiffs reserve the right to amend the class definitions set forth

above if discovery and/or further investigation reveal that any class should be expanded or modified in any way.

***Sixth Circuit Direction on Class Certification***

64. The Sixth Circuit has reviewed the question of certification of a class asserting claims for unpaid surplus on several occasions. See *Tarrify Props., LLC v. Cuyahoga County*, 37 F.4th 1101 (6th Cir. 2022)*; Fox v. Saginaw County*. 67 F.4th 284 (6th Cir. 2023); and *Bowles v. Sabree,* 121 F.4th 539 (6th Cir. 2024).The Sixth Circuit has never categorically held that certification is improper, and in fact, they have done just the opposite.

65. For example, in *Fox,* the Sixth Circuit confirmed that class certification was still viable on remand:

> On remand, the district court must conduct a more thorough analysis and "forecast how the parties will conduct the litigation." Fox, 67 F.4th at 302.

66. In *Tarrify*, the Sixth Circuit acknowledged that it was not digging "too deep into the weeds of class action law" because there was one glaring "key impediment to certifying the class—identification of proposed members of the class" *Id* at 1106. Specifically, class certification was denied based on the plaintiff's pursuit of surplus as measured by a fair market value assessment, rather than the actual, objective and readily identifiable sale price.

67. The *Tarrify* Court held that:

> "The impediment in this case is that the court must ask whether a given property's fair market value exceeds the taxes owed at the time of the transfer to determine who is in the class. Determining fair market value requires an independent and individualized assessment of each absent class member's property." *Tarrify Props. v. Cuyahoga Cnty.*, 37 F.4th 1101, 1106 (6th Cir. 2022).

68. In the end, all the Sixth Circuit held in *Tarrify* was that "the problem that this case will boil down to [is] mini-trials over each property's value upon transfer." *Id*. at 1110.

69. In this case, the Sixth Circuit said that "our decisions in *Tarrify* and *Fox* clarified how class-action takings cases should work." Class actions, in the Sixth Circuit's view, can "work".

70. The Sixth Circuit specifically left open the question of class certification, and further offered specific direction to this court as to any upcoming Rule 23 motion:

> Whether a class action would serve best to right these wrongs remains to be seen. We do not prejudge whether Bowles can make one out. The district court now has the benefit of four extra years' caselaw finetuning our takings doctrine and its interaction with Rule 23's demands. *Bowles,* at 17.

71. However, the Sixth Circuit made clear that takings class actions cannot work if plaintiffs seek fair market value, or equity, as the measure of their surplus. *Id*. ("surplus equity claims are unmanageable in takings class

actions (*Tarrify*)…"). The Court recognized that Plaintiffs in this case do not face the same impediment to certification of their takings case as did the plaintiffs in *Tarrify* because Plaintiffs here have dropped their surplus equity claim and seek only surplus proceeds (plus interest):

> In light of *Tarrify* and *Freed*, Bowles's proposed class definition fails. It includes former property owners seeking both surplus proceeds and surplus equity, and we cannot permit the latter. Bowles's recent briefing admits as much, and she has signaled her willingness to amend the class definition.

72. The Court also confirmed its holding in *Fox*: that certification of the taking claims in this case "require a rigorous analysis of Rule 23's requirements (*Fox*)." *Id* at p. 6.

73. The three criteria that the Sixth Circuit identified for rigorous analysis by this court when deciding a Rule 23 motion, based on actual ***discovery***, include: 1) would landowners prove damages by formulaic calculation or fact-specific mini-trials that would overwhelm common questions? (2) would the county have unique defenses, like res judicata or standing, against class members? (3) how would third-party lienholders, like banks, factor in? *Fox, supra*.

74. The Sixth Circuit offered the same direction to this court, calling this case a "*Fox* redux."

75. The Class satisfies the criteria of Rule 23(a) and (b)(2) and (3).

### *Numerosity*

76. Although the exact number of Class Members is uncertain and can only be ascertained through appropriate discovery, the number is great enough such that joinder is impracticable.

77. Classes of over 40 people are presumed to meet the test for numerosity. Indeed, as the Sixth Circuit has made clear, the "sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1)." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir.2004).

78. Further, Class Members will be readily identifiable from publicly available information regarding property ownership and/or residential history.

79. The Sixth Circuit confirmed that discovery in this case should include the number of properties Wayne County sold and realized surplus proceeds in order for this Court to measure the numerosity element in its Rule 23 analysis:

> On remand, the district court should require Bowles to provide something more to prove numerosity. There could be a class-in-waiting here. There may be a few thousand (or more) foreclosed properties that Wayne County sold for more than the former owners owed. And numbers in the thousands can make joinder impracticable and satisfy the numerosity requirement. *See Daffin*, 458 F.3d at 552.

### *Typicality and Commonality*

80. Plaintiffs' claims are typical of the claims of the Class as all are based on the same legal and remedial theories arising from Wayne County's policies, practices and actions, including retaining surplus proceeds and class member rights pursuant to the Fifth Amendment, inverse condemnation, 78t, and 42 U.S.C. §1983. *Young v. Nationwide Mut. Ins. Co*., 693 F.3d 532, 542-543 (6th Cir. 2012); *Hicks v. State Farm*, 2019 WL 646044 (E.D. Ky. 2019) *aff'd* 965 F3d 452 (2020); *Speerly v. Gen. Motors, LLC,* 343 F.R.D. 493, 512-522 (E.D. Mich. 2023).

81. All members of the Class are similarly affected by Defendant's conduct resulting in injury to all members of the Class by causing them to be denied their right to just compensation.

82. The factual bases of Defendant's misconduct are common to all Class Members and represent a common thread of misconduct resulting in injury to all members of the Classes.

83. When class members share the same operative facts, legal theories and causation arguments, the Rule 23 criteria for commonality and typicality are easily met. *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir.2007). This is because the legal issues apply to all class members equally, and any factual disputes will turn on the same evidence –

documents, testimony, and experts.

### *Predominance of Common Questions*

84. The Sixth Circuit has held that cases involving a course of conduct or standard in a statute favors a finding of predominance "because the defendant's liability to all class members turned on whether it violated the applicable federal statute, not whether any individual customer requested the wire-maintenance program." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 566 (6th Cir. 2007); *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 462 (6th Cir. 2020). Liability will be tested under the same standard, equally applicable for all class members, making certification appropriate under Rule 23(b)(3).

85. In *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (2013), the Sixth Circuit Court of Appeals explained predominance as requiring common proof that will advance the litigation by resolving this issue "in one stroke" for all members of the class.

86. There are questions of law and fact which are common to all Class Members, which questions predominate over any question affecting only individual Class Members. The answers to these common questions will advance resolution of the litigation for all Class Members. The common legal and factual issues include (but are not limited to):

a. Whether Defendant has retained surplus proceeds in violation of class member's rights;

b. How to calculate the amount of surplus proceeds, giving Wayne County due credit for permissible charges;

c. Whether the total amount of surplus proceeds owed to class members is susceptible to class wide modeling by expert(s). *Daubert v. Merrill Dow Pharm*., 509 U.S. 579 (1993); *Sterling v. Velsicol Chem. Corp*., 855 F.2d 1188, 1199 (6th Cir. 1988) (confirming courts may rely upon modeling techniques to predict injury where the model was both properly conceived and constructed);

d. What the recovery periods are, including their statute of limitations;

e. What interest rate is applicable to class members;

f. Whether as a matter of federal procedural law, 78t claims should be included in this case as opposed to a separate independent process for some class members;

g. Whether affirmative defenses asserted by Wayne County apply to any, some or all of the class members; and

h. Other questions and issues uncovered during discovery.

87. In contrast, there are no individual issues beyond determining each class member's surplus proceeds and interest amount. That question may be resolved through expert modeling. "Courts have permitted experts to proceed using aggregate damage calculations, 'as long as the calculation is based on reasonable methodology and the individual damage calculations that follow can be made according to a common methodology'". 4 NEWBERG ON CLASS ACTIONS, § 12.2. That includes use of averages, as Plaintiffs' expert proposes here. *Speerly*, 343 F.R.D. at 523 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 446 (2016)).

88. Predominance does not require Plaintiffs to prove an absence of individualized damage questions, or even proof of class wide damage in the aggregate. *Kuchar v. Saber Healthcare Holdings LLC*, 340 F.R.D. 115, 123 (N.D. Ohio 2021) (finding individualized damages questions also do not defeat a predominance finding and noting "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.")(citing *Hicks*, 965 F.3d at 460).

89. The need to conduct additional post certification stage discovery, such as further file review or class member surveys, to eliminate uninjured persons after trial, does not act as a *de facto* bar to certification. *Nixon,* 2021

WL 4037824, at *8 (citing *Young,* 693 F.3d at 540); *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 145 (2d Cir. 2001); *Perez v. First Am. Title Ins. Co.,* 2009 WL 2486003, at *7 (D. Ariz. Aug. 12, 2009) ("Even if it takes a substantial amount of time to review files and determine who is eligible for the [denied] discount, that work can be done through discovery."); *Slapikas v. First Am. Title Ins. Co.,* 250 F.R.D. 232, 250 (W.D. Pa. 2008) (finding class action manageable despite First American's assertion that "no database exists easily and efficiently to make the determination that would be required for each file").

90. Upon completion of discovery, and with the assistance of expert(s), Plaintiffs will "prove damages by formulaic calculation" and avoid fact-specific mini-trials that would overwhelm common questions", thus complying with the guidance of the Sixth Circuit and case law as stated in *Fox*, *supra*, and this case.

91. Affirmative defenses that involve individual questions can be resolved in post class proceedings, including summary judgment.

92. Wayne County cannot merely raise speculation of individualized questions and/or issues as an argument against certification, but rather they must demonstrate the likelihood of any such defenses actually applying to class member claims. *Fox v. Saginaw County*, 67 F.4th 284, 301 (6th Cir.

2023).

93. The Supreme Court requires more than Defendant can provide in this regard. In *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. 258, 276 (2014) the Supreme Court concluded that so long as plaintiffs could show that their evidence is capable of proving the key elements to plaintiffs' claim on a class-wide basis, the fact that the defendants would have the opportunity at trial to rebut that presumption as to some of the plaintiffs did not raise individualized questions sufficient to defeat predominance. "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Id.*

94. The same is true in the Sixth Circuit, which requires more than what Defendant can provide as to individual issues, including alleged fraud of class members. In *Bridging Communities Inc. v. Top Flite Financial Inc.*, 843 F.3d 1119, 1125-1126 (6th Cir. 2016), the Sixth Circuit held that a defendant cannot avoid certification merely by raising the possibility of defenses that apply to some class members, or otherwise characterized as individual defenses:

> "Our precedent is clear that a possible defense, standing alone, does not automatically defeat predominance. See *Young*, 693 F.3d at 544; *Beattie*, 511 F.3d at 564; see also *In re HCA Holdings, Inc.*, No. 14–0511, 2015 WL

> 10575861, at *2 (6th Cir. Feb. 26, 2015). Even where defendants point to some evidence that a defense will indeed apply to some class members, which is more than Top Flite did here, courts routinely grant certification because "Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class." *Smilow v. Sw. Bell. Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003); see also *Avio, Inc.*, 311 F.R.D. at 437-46."
>
> *Bridging Communities Inc.,* 843 F.3d at 1125–1126.

95. Discovery will include exploring Wayne County's defenses, which will enable Plaintiffs to respond to, and comply with, the Sixth Circuit's directive on any "unique defenses, like res judicata or standing" that Wayne County may assert against class members as stated in *Fox, supra*, and this case.

96. Any remaining disputes on membership or class members' damages can be left to a special master's decision. *Whitlock v. FSL Mgmt., LLC*, 2012 WL 3274973, at *12 (W.D. Ky., 2012), *aff'd,* 843 F.3d 1084 (6th Cir. 2016).

97. The existence of "third party lienholders, like banks" as identified by the Sixth Circuit will be determined through discovery, and, just like with Wayne County's affirmative defenses, Plaintiffs will be in a position to respond to the Sixth Circuit's directive on the issue. *See Fox, supra*, and this case.

98. Examples of methods to accommodate the existence and claims of third-party lienholders have already been identified by Plaintiffs. *See* ECF No. 46, pp 23-24. They include recognizing the extinguishing of liens; creating a lienholder class as was done in the Oakland County case (*Dover Glen Condo. Ass'n v. Oakland Cnty*., 2022 WL 17337815, (E.D. Mich. Nov. 30, 2022)); or using a special master as was approved in the WDMI case of *Wayside Church v. Van Buren County*.

99. By placing validation of the injury (damages) step at the end of the class trial process, no injured class members are left out, and at the same time, Defendants are not at risk for paying any uninjured class members.

100. Several of the assertions pleaded in the superiority section apply equally to the predominance analysis and are incorporated herein.

***Adequate Representation***

101. Plaintiffs will fairly and adequately protect the interests of all Class Members in the prosecution of this action and in the administration of all matters relating to claims stated herein. Plaintiffs are similarly situated with, and have suffered similar, if not identical, injuries as the members of the Class who Plaintiffs seek to represent.

102. Plaintiffs have retained counsel with substantial experience litigating both constitutional law, tax, and class action lawsuits such as this

one.

103. Plaintiffs and their counsel have demonstrated their commitment to vigorously prosecuting this action on behalf of the Classes, have the resources to do so, and do not have any interest, conflicting or otherwise, adverse to the Classes.

104. This Court has already recognized and appointed interim class counsel pursuant to Rule 23(g)(3) and each of the interim class counsel are adequate and proper counsel for the class.

***Superiority***

105. The superiority analysis required to certify a class is designed to achieve economies of time, effort, and expense, and to promote uniformity of decisions as to persons similarly placed, without sacrificing procedural fairness or bringing about other undesirable results. *Martin v. Behr-Dayton Thermal Parts LLC*, 896 F.3d 405, 415 (6th Cir. 2018) (citing *Amchem Prods v. Windsor.* 521 U.S. 591, 615 (1997)).

106. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable.

107. Absent a class action, some of the class members would likely find the cost of litigating to be prohibitively high and, therefore, would have

no effective remedy at law, and the expense and burden of individual litigation would render it impossible for members of the Class to individually redress the wrongs done to them.

108. Wayne County has lost all its arguments as to the takings claim, i.e. on liability. The question of whether they violated property owners' Fifth Amendment rights by retaining surplus funds has been resolved against them by both the Michigan and United States Supreme Courts, which both ruled that the taking of surplus proceeds by the FGU violated property owners' constitutional rights. *Rafaeli, LLC v. Oakland Co.,* 505 Mich. 429; 952 N.W.2d 434 (2020); *Tyler v. Hennepin County, Minnesota,* 598 U.S. 631 (2023).

109. The remaining issues (both fact and law) all revolve around determining who is entitled to surplus proceeds; calculating and returning the surplus funds to the owners plus interest, including determining what costs Wayne County may legally deduct from the sale proceeds to retain without violating class members rights; and use of expert witness modeling. There are neither individual issues, nor a superior method for bringing to conclusion the claims of class members.

110. Wayne County, ***to this day***, refuses to stipulate to return the surplus proceeds and interest to class members in this lawsuit.

111. Wayne County continues to work against the class members' by insisting that this court adopt the "inferior" 78t process in lieu of class certification and Plaintiffs' taking claim.

112. In fact, the Sixth Circuit opinion in this case on class certification pointed out that the question of superiority is not dependent upon whether 78t provides relief, but rather, the question is whether thousands of individual taking claims, under Section 1983 for example, is superior to collecting them all in a class.

> "Asking whether the GPTA's "exclusive mechanism" provision preempts a federal suit is the wrong question. (It does not and cannot. See id.6) Again, the fact that an *individual* litigant can bring a § 1983 claim without exhausting state processes does not tell us whether a § 1983 *class action* is superior to all alternatives. Rule 23 asks whether collective litigation trumps other options, not whether it's permitted by them. *Id.* at *17. (emphasis in original)." *Bowles v. Sabree, et. al.,* Docket No. 23-1256, 6th Cir. (2024) at Pages 16-17

113. Promoting 78t as the exclusive remedy available to class members, to the exclusion of a judgment in a certified class action under Rule 23, demonstrates Wayne County's singular goal of maximizing how much of the unconstitutionally retained surplus funds it can keep from the rightful owners.

114. Wayne County has no further interest to protect at this point. *They are holding money that does not belong to them*. The Sixth Circuit in

*Bowles* (p. 17) agreed, stating:

> "Wayne County expropriated property from Michiganders and pocketed cash that it owed them in return. In other contexts, we might call that 'theft.' *Hall,* 51 F.4th at 196. And to some observers, the county might now appear to be dragging its feet in hopes of running out the clock on any claimants."

115. Wayne County is merely the passive holder of funds that do not belong to them, who awaits instruction from the Court in the form of a class action judgment as to who is owed and how much to pay in damages, plus interest for holding the money for the past several years.

116. Once the questions of law have been decided, the parties can turn their attention to the Wayne County data and engage in the process of calculating the total amount of surplus funds and required constitutionally-required interest for the class members and class period. Any disputes will of course be brought to the court's attention for resolution, and the court's decision would in all likelihood apply to all similarly situated property owners affected by the dispute and resolution.

117. Calculating the interest will first require the court to rule on what is the proper method to use in calculating interest. There is no point in each class member challenging the interest calculation method; it can and should be done once for all class members, and the courts' ruling should be applicable to all class members. Thus, class certification is superior to all

alternative methods.

118. In addition, the same calculation method applied to the surplus funds will determine the total amount of interest owed by Wayne County to class members.

119. Class treatment of common questions of law and fact will conserve the resources of the court and the litigants and will promote consistency and efficiency of adjudication.

120. There will be no difficulty in the management of this action as a class action and many examples of similar cases certified as class actions are readily available.

121. The prosecution of separate actions by individual class members raises the likelihood of a risk of (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

122. Proper and sufficient notice of this action may be provided to the Class Members through the mail, notice published in appropriate

publications and/or by broadcast in appropriate media, and/or posted on Defendant's internet web site(s).

123. Plaintiffs and the members of the Class have suffered damages as a result of Defendant's wrongful conduct as alleged herein and are entitled to recover those damages.

124. Absent representative action, Plaintiffs and the Class Members will continue to suffer losses, thereby allowing these violations of law to proceed without remedy.

**COUNT I**
**FIFTH AMENDMENT TAKING**
**42 U.S.C. § 1983**

125. The prior paragraphs are restated herein.

126. Plaintiffs and putative members of class are former Wayne County property owners (within the tolled, extended, and relevant statute of limitations period) who were foreclosed upon and had their surplus proceeds not returned *before* December 22, 2020.

127. The Fifth Amendment, made applicable to the states via the Fourteenth Amendment, is a constitutional provision and right requiring the payment of "just compensation" upon a taking by the government. See *Knick v. Twp. of Scott*, 588 U.S. 180 (2019).

128. Wayne County has taken Plaintiffs' and the similarly situated

class members' property interests in the form of surplus proceeds (a property right) and required interest and have appropriated this property for public use without the payment of just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

129. This violation of the Fifth Amendment can be remedied by this Court "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available." *Knick v. Twp. of Scott*, 588 U.S. 180, 190 (2019)

130. Wayne County refused and continues to refuse to take any action for the payment of just compensation for their seizure of surplus proceeds (a property right) from Plaintiffs and the similarly situated class members.

131. By refusing to take any action for the payment of just compensation at the time of the taking, Wayne County deprived Plaintiffs and the similarly situated class members of their constitutional right to "just compensation" (i.e. the "total value of the property when taken, plus interest from that time") in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

132. Plaintiffs and the similarly situated class members are entitled to relief against Wayne County as provided by 42 U.S.C. § 1983 and § 1988.

133. Wayne County has not paid full, complete, and total just

compensation.

134. Wayne County will not now pay full, complete, and total just compensation.

135. Wayne County does not intend to pay full, complete, and total just compensation in the future.

136. Plaintiffs and the similarly situated class members have been injured and have suffered damages.

## RELIEF REQUESTED

137. WHEREFORE, Plaintiffs and all members of the class respectfully request this Court to enter an order and final judgment:

a. for the return of surplus proceeds and interest for Plaintiffs and those similarly situated class members ;

b. for an award of any and all damages required and available under state and federal Constitution obligation(s) to pay full, complete, and total just compensation (including all interest as required in *Jacobs*, *Seaboard*, and *Knick*) for all members of the class;

c. for an order certifying the proposed Class; designating Plaintiffs as the named representatives of the respective Class Members; and appointing Class Counsel;

d. for all such other legal and equitable relief which the Court deems proper, including but not limited to, an injunction, declaratory relief, disgorgement and a surcharge;

e. for an award of pre-judgment and post judgment interest as provided by law; and

f. for an award of attorney fees and expenses pursuant to all applicable laws, rules, and statutes.

## JURY DEMAND

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

Date: June 20, 2025

RESPECTFULLY SUBMITTED:

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## CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of and a copy of such filing to counsel of record at their email address(es) of record.

Date: June 20, 2025

RESPECTFULLY SUBMITTED:

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