21-3801

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TARRIFY PROPERTIES LLC,

Plaintiff-Appellant,

v.

CUYAHOGA COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Ohio

MERIT BRIEF OF APPELLANT TARRIFY PROPERTIES, LLC

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I. STATEMENT REGARDING ORAL ARGUMENT

The facts and legal arguments in this case are of precedential value and the decisional process would be significantly aided by oral argument. The questions presented in this appeal concern certification of a class of property owners who were deprived of their surplus equity pursuant to a novel property tax foreclosure scheme by which Ohio counties directly transfer vacant, tax-delinquent properties to county land banks for economic development, thereby extinguishing both the existing tax lien and the property owner's equity. Oral argument would provide an opportunity to clarify the record and legal arguments.

II. STATEMENT OF JURISDICTION

In this action, Plaintiff-Appellant Tarrify Properties LLC ("Tarrify" or "Appellant") brings federal claims on behalf of itself and others similarly situated under 42 U.S.C. § 1983 for violations of rights afforded under the 5th and 14th Amendments to the United States Constitution. As such, the District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

On December 21, 2020, the District Court entered an order ("Order Denying Motion") denying Tarrify's Motion for Class Certification ("Motion"). (Order Denying Motion, Dist. Ct. Dkt. # 77, Page ID ## 3715-3725; Motion, Dist. Ct. Dkt.

50, Page ID ## 785-819).[1] On January 5, 2021, Appellant's petitioned this Court for leave to appeal the District Court's denial of the Motion, pursuant to Fed. R. Civ. P. 23(f). (Rule 23(f) Petition, Dist. Ct. Dkt. # 78, Page ID ## 3726-3753).

On September 8, 2021, this Court granted Appellant's petition to appeal the District Court's denial of the Motion. (September 8, 2021 Order, App. Ct. Dkt. # 12-2). Accordingly, this Court has jurisdiction to consider an interlocutory appeal pursuant to 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f), which together provide for discretionary appellate review of a district court's interlocutory class certification decision.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellant presents the following issues for review:

1. Whether the District Court erred in holding that Defendant-Appellee Cuyahoga County, Ohio (the "County") was *not* judicially or collaterally estopped from asserting that the market value of Tarrify's and putative class members' properties was different than the value previously determined by its Board of Revision ("BOR") and its auditor ("Auditor");

[1] Citations to the record from the District Court will be denoted as "Dist. Ct. Dkt." Citations to the record in the instant appeal will be denoted as "App. Ct. Dkt."

2. Whether the District Court erred in holding that the County Auditor's determinations as to the value of Tarrify's and putative class members' properties was inadmissible to prove the market value of those properties at the time they were transferred;

3. Whether the District Court erred in denying Tarrify's Motion on ascertainability, predominance, and superiority grounds.

IV. STATEMENT OF THE CASE AND FACTS

In this civil rights action, Tarrify asserts that the County's direct transfers of tax-foreclosed properties to third-parties—without holding foreclosure sales, and without paying *any* compensation to the former owners of those properties—constituted takings without just compensation in violation of the Fifth Amendment to the United States Constitution. Pursuant to 42 U.S.C. § 1983, Tarrify, on behalf of itself, and similarly situated property owners, seeks just compensation for their surplus equity—*i.e.*, the value of the properties over and above the amount of taxes and other impositions—that was taken by the County through this statutory direct-transfer tax foreclosure process.

In each and every tax foreclosure case, the County successfully argued that tax impositions based upon the "true value" of the property were "good and valid" liens upon the property. In the case of Tarrify and every other putative class member, the County determined that the value of the property exceeded the tax impositions,

and the County elected to use a statutory procedure to directly transfer the properties to the County land bank, extinguishing the tax liens as well as each property owner's surplus equity.

However, after having prevailed in each tax foreclosure action, the County now asserts in this action that the tax value is too unreliable and must be precluded. The District Court agreed, and denied class certification on the grounds that individual property appraisals would be too burdensome, without considering proposed alternatives including mass appraisal of similarly situated properties.

A. Factual and Legal Background.

1. Ohio's Direct Transfer Tax Foreclosure Process.

In 2016, the Ohio General Assembly enacted O.R.C. §§ 323.65, *et seq*., which provides counties with an alternative to the "traditional" tax foreclosure process for "abandoned" tax delinquent properties. Unlike "traditional" tax foreclosure cases, foreclosure cases brought under the statute may be commenced before county boards of revision rather than a court, and are not required to offer foreclosed-upon properties for sale at public auction for the purpose of collecting taxes. Instead, the statute allows counties to *forego* tax collection, and directly transfer properties to county Land Reutilization Programs or other political subdivisions—as defined in O.R.C. § 5722.01—for the purpose of redevelopment in lieu of tax collection. *E.g.*, O.R.C. § 323.78.

Where the BOR finds that the amount of tax impositions against a particular property exceed the market value of that property, the property can be directly transferred to county Land Reutilization Programs or other political subdivisions pursuant to O.R.C. § 323.73(G). However, the statute *also* permits direct transfers even where the fair market value of a property *exceeds* the total amount of the impositions thereon (*i.e.*, all taxes, assessments, and other amounts certified as a lien against the property). *See, e.g.*, O.R.C. § 323.78(B). In other words, the statute permits counties to appropriate properties that are worth *more* than what is owed, yet does not require counties to pay the former owners of those properties—such as Tarrify and members of the class—*any* compensation for this surplus equity.

2. Cuyahoga County's Direct Transfer Policy and Practice.

In each and every direct transfer tax foreclosure case before the BOR, the County seeks a judgment that the impositions are a good and valid first lien on the property. (County's Complaint in Tarrify's BOR Case ("County's BOR Complaint"), Dist. Ct. Dkt. # 29-5, Page ID # 412). Additionally, in each and every BOR tax foreclosure case, the County submits a tax certification attesting to the value of the property at issue. (County's BOR Complaint, Ex. A, Page ID # 414). And, at every BOR foreclosure hearing, the County calls a witness who testifies to the amount of impositions against a property and the fair market value of that property. This witness is almost always Mary Beth Smith ("Smith"), the employee

of the County Treasurer's office primarily tasked with testifying at BOR foreclosure hearings. (*See,* excerpts from transcript of deposition of Mary Beth Smith ("Smith Dep."), 12:20-23, 27:13-22, Dist. Ct. Dkt. # 60-2, Page ID ## 2160, 2165 (testifying that she "pretty much" attended all BOR tax foreclosure hearings over the past 4 years, and that she "really didn't miss any hearings")).

According to Smith, prior to each BOR hearing, she would create worksheets that reflected the amount of impositions against the property at issue and the fair market value of that property. (Smith Dep., 23:23-24:20, Page ID ## 2161-62 (Smith describing how she created her worksheets)). The valuation information on Smith's worksheets was derived solely from the Auditor's then-current valuation of a given property. (Smith Dep., 25:23-26:8, Page ID ## 2163-64). Using her worksheets, Smith would then testify as to a given property's market value at each BOR hearing. (Smith Dep., 63:6-64:1, Page ID ## 2179-80).

Smith confirmed that her testimony "was the same for all hearings that [she] participated in" (Smith Dep., 58:23-64:1, Page ID ## 2174-80), and that "every file that went before the [BOR] was treated the same" (Smith Dep., 26:9-12, Page ID # 2164). Accordingly, Smith's testimony was dispositive as to which type of direct transfer order the BOR would enter—either a direct transfer pursuant to O.R.C. § 323.73(G) or O.R.C. § 323.78(B). (*E.g.*, excerpt from report of proceedings in Feltner BOR case ("Feltner Transcript"), 2:12-22, Dist. Ct. Dkt. # 60-3, Page ID #

2181 (Smith testifying that "the property would transfer via the alternative right of redemption"—*i.e.*, pursuant to O.R.C. § 323.78(B), instead of O.R.C. § 323.73(G)—because "the impositions do not exceed the fair market value," before specifically stating those values)).

3. The Direct Transfer of Tarrify's Property.

In August 2018, the County Treasurer filed an expedited foreclosure case against Tarrify before the County's BOR, concerning a delinquent tax certificate on a property owned by Tarrify. (First Amended Class Action Complaint ("Complaint"), ¶ 28, Dist. Ct. Dkt. # 20, Page ID # 276; County's BOR Complaint, Page ID ## 409-427). In its prayer for judgment, the County Treasurer requested relief in the alternative—either judicial sale of the property, or transfer to a municipality or land bank. (County's BOR Complaint, Page ID # 413). Consistent with its policies and practices, the County attached to the pleadings a tax lien certificate including the following sworn statement:

> I hereby certify that the taxes, assessments, and penalties upon the tract of land. . . have not been paid for a period of one year and said tract of land, city or town lot is now certified delinquent and placed on the list of delinquent lands, and that taxes, assessments, and penalties amount to $7,570.77.
>
> $109,200 LAND VALUE
>
> $67,600 BUILDING VALUE
>
> $176,800 TOTAL VALUE

(County's BOR Complaint, Ex. A, Page ID # 414).

The County did not contest the validity of the tax lien, nor did it exercise its right under O.R.C. § 323.71(A)(2) to challenge the presumption that the Auditor's fair market value of the property was accurate.

Consistent with the County's policies and practices, the County elected to pursue a direct transfer of the property because the value of the property exceeded the impositions. Following a hearing, on June 3, 2019, the BOR issued two orders: (1) *Adjudication of Foreclosure (Direct Transfer–Alternative Right of Redemption)* ("Adjudication of Foreclosure"), which found that foreclosure was appropriate and that the Treasurer had invoked the alternative redemption period of R.C. 323.78; and (2) *Order to Sheriff: Order of Direct Transfer To CCLRC Pursuant to R.C. 323.65(J); 323.78 With Alternative Right of Redemption* ("Order of Direct Transfer"), which ordered the Sheriff to issue a deed transferring the property to the Cuyahoga County Land Revitalization Corporation ("Land Bank"). (Adjudication of Foreclosure, Dist. Ct. Dkt. # 29-7, Page ID ## 446-450; Order of Direct Transfer, Dist. Ct. Dkt. # 29-9, Page ID # 456). In the Adjudication of Foreclosure, the BOR also noted that the Land Bank had indicated its desire to acquire the property and ordered that the alternative redemption apply to the case. (Adjudication of Foreclosure, Page ID # 447). The County Sheriff transferred the property to the

Land Bank by sheriff's deed dated July 19, 2019. (Sheriff's Deed transferring Tarrify's property ("Sheriff's Deed"), Dist. Ct. Dkt. # 29-13, Page ID ## 468-471).

As a result of this adjudication, the tax liens against Tarrify's property were extinguished, and the property was transferred to the County Land Bank twenty-eight days after the order was journalized. (Adjudication of Foreclosure, Page ID # 448; Order of Direct Transfer, Page ID # 456; Sheriff's Deed, Page ID ## 468-471). Despite the fact that the BOR found that the market value of the property was $176,800, and the amount of the impositions was $18,638.45—meaning that Tarrify had $158,161.55 in surplus equity in the property—Tarrify did not receive any compensation in connection with the direct transfer of its property. (Complaint, ¶¶ 30-33, Page ID ## 276-77).

B. Procedural Background.

Pursuant to 42 U.S.C. § 1983, Tarrify, on behalf of itself, and similarly situated property owners, commenced this action to seek just compensation for surplus equity that was taken by the County through this statutory direct-transfer tax foreclosure process.

On July 8, 2020, Tarrify filed its Motion, seeking to certify the following class pursuant to Fed. R. Civ. P. 23:

> All persons whose interest in real property located in Cuyahoga County, Ohio was directly transferred to another entity through the invocation and use of the procedures set forth in O.R.C. § 323.78, where the total value of that property exceeded the

> amount of the impositions on that property at the time the transfer occurred.

(Motion, Page ID # 785).

The District Court denied class certification, holding that the Auditor's valuations were not reliable, and therefore the BOR's findings were not preclusive against the County. As a result, the District Court denied the Motion, holding that because "the parties must undertake the fact-intensive adversarial process of establishing each property's fair market value[,] these fact-intensive inquiries [would] undermine[Tarrify's] Motion on ascertainability, predominance, and superiority grounds." (Order Denying Motion, Page ID # 3724). The District Court did not address Tarrify's alternative argument regarding the other methods that could be used to determine the market values of Tarrify's and putative class members' properties on a classwide basis. This appeal followed.

V. SUMMARY OF THE ARGUMENT

In this "takings" case, property owners who lost their properties to tax foreclosure proceedings proposed to use the same measurement that was used to take their properties—*i.e.*, tax valuation—to provide the measure of damages to determine just compensation for their surplus equity. In response, the County asserted that the same tax valuations it utilized to successfully foreclose on its tax liens in each foreclosure case are so unreliable that they are inadmissible to prove value for just compensation purposes.

In denying class certification based on the exclusion of the tax valuation determinations, the District Court abused its discretion and turned what could be a straightforward adjudication based upon prior judicial findings of value in prior cases into unmanageable and complicated individual fact determinations for each individual property owner.

The District Court abused its discretion in denying class certification. First, the District Court erred in finding that the County's tax value was unreliable. Such a holding is contrary to the Ohio Constitution and tax valuation statutes, which require that property taxes be based upon a determination of the "true value" of property, and modern tax valuation based upon mass appraisal methodology is not unreliable. Second, even if tax valuation is found to be unreliable in other cases, the tax value should be given preclusive effect in this case for purposes of determining just compensation to be given by the party who used the same tax valuation to effect the taking. Third, in the alternative, the District Court abused its discretion by denying class certification where mass appraisal (and/or other methods) could be used to accurately, equitably, and efficiently establish value for similarly situated properties.

VI. STANDARD OF REVIEW

An appeal from the denial of class certification is reviewed under an abuse of discretion standard. *E.g., In re Whirlpool Corp. Front-Loading Washer Products*

Liab. Litig., 722 F.3d 838, 850 (6th Cir. 2013). "An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *E.g.*, *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012).

VII. ARGUMENT

The District Court abused its discretion in denying class certification. First, the District Court erred in finding that the County's tax value was unreliable. Such a holding is contrary to the Ohio Constitution and Ohio's tax valuation statutes, which require that property taxes be based upon a determination of the "true value" of property. Additionally, it is factually incorrect because modern tax valuation based upon mass appraisal methodology is reliable. Second, even if tax valuation is found to be unreliable in other cases, the tax value should be given preclusive effect in this case for purposes of determining just compensation to be given by the party who used the same tax valuation to effect the taking. Third, in the alternative, the District Court abused its discretion in denying class certification where mass appraisal (and/or other methods) could be used to accurately, equitably, and efficiently establish value for similarly situated properties.

A. The District Court Erred in Excluding Tax Valuation Determinations as Unreliable Because the Auditor's Valuations Reliably Reflect Market Value.

The District Court's denial of class certification was based in part on its conclusion that a property's tax valuation is not the same as its fair market value, and also that tax valuation is inherently unreliable. Both conclusions are incorrect as a matter of law, and as a matter of fact.

1. Ohio Tax Valuation is Based on Market Value as a Matter of Law.

Ohio law, including the Ohio Constitution, requires that property taxes be based upon the "true value" of a property and determined by "uniform rule." Ohio Constitution Art. XII, Sec. 2 ("No property, taxed according to value, shall be so taxed in excess of one percent of its *true value* in money for all state and local purposes... Land and improvements thereon *shall be taxed by uniform rule according to value*...") (emphasis added); O.R.C. § 5713.03 ("The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the *true value* of the fee simple estate.") (emphasis added); O.R.C. § 5715.01(C) ("The commissioner shall neither adopt nor enforce any rule that requires true value for any tax year to be any value other than the true value in money on the tax lien date of such tax year or that requires taxable value to be obtained in any way other than by reducing the true value..."). As used in those statutes and the Ohio Constitution, "'true value' means either the amount the property recently sold for on the open

market or the amount of an appraisal predicting what that sale price would be." *Dublin City Sch. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St. 3d 212, 217 (Ohio 2014) (collecting authorities); *Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc.*, 2009-Ohio-3806, ¶ 22 ("The 'true value' of real property is considered to be the amount for which that property would sell on the open market by a willing seller to a willing buyer.").

The District Court also rejected the use of the Auditor's valuations—and the BOR's findings based thereon—because "tax appraisals occur only once every six years." (Order Denying Motion, Page ID # 3722). While it is true that Ohio law requires the Auditor to determine the true value of a given property to determine taxable value "at least once in each six-year period," Ohio law also requires the auditor to "revalue and assess at any time all or any part of the real estate…where the auditor finds that the true or taxable values thereof have changed." O.R.C. § 5713.01(B). In other words, Ohio law mandates that the Auditor's valuation of a given property be adjusted whenever its taxable value changes.

Simply put, under Ohio law, the Auditor's valuations are *required* to always reflect a given property's fair market value, as these figures are one in the same. *E.g.*, *Dublin City*, 139 Ohio St. 3d at 217; *D&J Distrib.*, 2009-Ohio-3806 at ¶ 22; O.R.C. § 5715.01; O.R.C. § 5713.03; O.R.C. § 5713.01(B). Therefore, the District

Court's conclusion that there is a distinction between a given property's valuation for tax purposes and its true market value was incorrect as a matter of law.

2. Tax Valuations Using Mass Appraisal Methods Are Reliable.

The District Court further justified its decision by concluding that tax valuation is unreliable, reasoning that "tax valuations, by necessity, are performed with limited information using mass statistical appraisal methodology"—*i.e.*, "using different methodologies and evidence"—and that "sale appraisals, on the other hand, conduct more in-depth review of an individual property's physical characteristics." (Order Denying Motion, Page ID ## 3722-23). These observations were also incorrect, as both a factual and legal matter.

As a legal matter, Ohio law does not limit the evidence that the Auditor may consider in determining the "true value"—*i.e.*, fair market value—of a property. To the contrary, Ohio law *requires* that:

> …**in determining the *true value* of lands or improvements thereon for tax purposes, all facts and circumstances relating to the value of the property**, its availability for the purposes for which it is constructed or being used, its obsolete character, if any, the income capacity of the property, if any, and **any other factor that tends to prove its true value *shall* be used**.

O.R.C. § 5715.01(A)(1) (emphasis added); *see also*, O.R.C. § 5713.03 ("The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of the fee simple estate…") (emphasis added).

Moreover, while tax valuations are determined using mass appraisal methodology, it does not follow that "tax valuations[] give a courser [sic] ballpark

value adequate for property tax purposes that would likely be inadequate to determine fair market sale value." (Order Denying Motion, Page ID # 3722). To the contrary, as noted by Tarrify's expert witness—Mark Linné ("Linné")—"mass appraisal can provide equally accurate and more consistent value estimates" as individualized appraisal methods. (*See*, Expert Report of Mark R. Linn*é* ("Linné Report"), ¶ 28, Dist. Ct. Dkt. # 62-1, Page ID # 2593). For this reason, mass appraisals are frequently relied upon in the private sector, and the analysis techniques employed in performing mass appraisals have actually supplanted certain techniques used in performing single-property appraisals. (*See, e.g.*, Linné Report, ¶¶ 32-38, Page ID ## 2594-96).

Put another way, "both mass appraisal and single-property appraisal produce individual value estimates for each property," and are merely two different—but still equally valid—methods that can be used to arrive at the same conclusion. (*See, e.g.*, Linné Report, ¶¶ 13, 22-31, 46-51, Page ID ## 2589, 2591-94, 2598-2600). In fact, there are really only two key differences between mass appraisals and single-property appraisals: (1) "mass appraisal [focuses] on comprehensive, regularly maintained databases; systematic procedures and calibrated models; and statistical testing," whereas "single-property appraisal usually involves explicit consideration of fewer comparable properties but more general market factors" and subjective criteria (*See, e.g.*, Linné Report, ¶¶ 13, 28-29, Page ID ## 2589, 2593); and (2)

interior inspections are unnecessary for mass appraisals, whereas single-property appraisals can, if requested, involve such inspections (*See*, Linné Report, ¶ 47, Page ID # 2599 (comparing the two appraisal methods)). Otherwise, these two methods of appraisal "require[] the same general type of analysis" using the same data. (*Id*.).

Consistent with the foregoing, Ohio law recognizes that mass appraisals and single-property appraisals are two coequal methods of determining a given property's fair market value. As noted above, under Ohio law, a property's taxable value must be the same as its fair market value. To that end, Ohio law mandates that any method used to determine a given property's taxable value must *also* be acceptable to determine its fair market value. O.R.C. § 5715.01(A)(1) ("The *uniform rules* shall prescribe methods of determining the true value *and* taxable value of real property.") (emphasis added). If mass appraisals and single-property appraisals resulted in *different* valuations, then the use of mass appraisal would violate O.R.C. § 5715.01(A)(1). As such, the only reason that the Auditor is permitted to use mass appraisals in determining properties' taxable values is precisely *because* mass appraisals and single-property appraisals result in the same valuations.

The inherent reliability of the Auditor's valuations is also reflected in the statute itself. In tax foreclosure proceedings before the BOR, "it is prima-facie evidence and a rebuttable presumption that may be rebutted to the [BOR] that the auditor's then-current valuation of that [property] is the fair market value of the land,

regardless of whether an independent appraisal has been performed." O.R.C. § 323.71(B) (emphasis added). If, as the District Court implied, single-property appraisals are *always*[2] more reliable than mass appraisals, then the BOR would be compelled to rely on any single-property appraisal over an auditor's valuation. But, such is not the case, as the statute makes clear that an auditor's valuation may still be controlling, even when rebutted by countervailing evidence in the form of another appraisal of a given property.

Simply put, Ohio law does not draw any distinction between mass appraisals and single-property appraisals, and, in fact, treats them as coequal. This conclusion is further bolstered by the facts of this case. In his expert report, Linné notes that "Cuyahoga County has one of the most sophisticated commercial and residential valuation programs in place that I have seen in any jurisdiction in the United States." (*See*, Linné Report, ¶ 39, Page ID # 2596). In fact, according to Linné, "the processes employed [by the Auditor] are consistent with industry standards of mass appraisal, and represents a reliable and accepted methodology for property valuation." (*Id*.).

The County is also well below the national average in terms of tax valuation appeals. (*See*, Linné Report, ¶ 17, Page ID # 2590 (noting that, in general, "5% to

[2] At least to the extent that a single-property appraisal is "a good faith appraisal of the parcel from a licensed professional appraiser." O.R.C. § 323.71(A)(2).

10% of all properties across the country are appealed before various tax appeal tribunals," but that, in Cuyahoga County, only 3.7% of valuations are appealed)). This further demonstrates the accuracy of the Auditor's valuations.[3]

If anything, the sophistication of the County's valuation process, and the robust set of market data upon which that process relies, render the Auditor's valuations *more* reliable than valuations obtained through single-property appraisal methods. As noted above, the only aspect of mass appraisal that can arguably be considered a "weakness" as compared to single-property appraisal is the lack of an interior inspection of a given property, but this aspect of single-property appraisal is merely *optional for single-property appraisals*, largely subjective, and has been

[3] The District Court pointed to the existence of this appeals process as evidence that the Auditor's valuations are unreliable. (Order Denying Motion, Page ID # 3722). However, this observation is incorrect for two reasons. First, "the process of incorporating a review mechanism is a virtually universal feature across the United States." (*See*, Linné Report, ¶ 16, Page ID # 2590). Indeed, if a jurisdiction did *not* offer such an appeals process, it would almost certainly raise due process issues. *See, e.g.*, *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 543 (6th Cir. 2004) (noting that the purpose of the Tax Injunction Act and comity are to give deference to state proceedings "at which the taxpayer may raise any federal constitutional objections to the tax"). Therefore, the fact that this appeals process exists does not demonstrate any implicit understanding that the Auditor's valuations are inaccurate or unreliable. Second, because "an appraisal is still only an estimate of market value," even two "qualified appraisers following [all applicable] guidelines may arrive at different, yet equally valid, opinions of a property's value." (*See*, Linné Report, ¶ 70, Page ID # 2605). As such, although the *lack* of an appeal can indicate the reliability of an Auditor's valuation—since it would show that the Auditor's valuation was *consistent* with an independent valuation—the presence of an appeal does not necessarily indicate that an Auditor's valuation was incorrect—since both valuations could still be accurate.

waning in use over recent years. (*See, e.g.*, Linné Report, ¶¶ 13, 28-29, 47, 53, 54, 59, Page ID ## 2589, 2593, 2599, 2600-02). Even then, since all of the properties at issue in this case were, by definition, abandoned and of relatively low value even when occupied, "an interior inspection would be unlikely to provide any additional, meaningful insight."[4] (*See, e.g.*, Linné Report, ¶¶ 20-21, 63, 66, Page ID ## 2591, 2603-04).

For these reasons, the District Court's conclusion that the Auditor's use of mass appraisal methods renders the Auditor's valuations somehow less reliable than valuations obtained through single-property appraisals was incorrect, both as a factual and as a legal matter. Indeed, as made clear by the foregoing, the Auditor's valuations are just as, if not more, reliable than valuations obtained through single-property appraisals.

B. The BOR's Findings as to the Properties' Market Values Are Preclusive Against the County.

Even if the District Court was correct in holding that tax valuation is generally inadmissible to prove a property's market value, in this case, the validity of the tax value (as reflective of market value) was asserted and successfully litigated in each tax foreclosure case before the BOR. Because the County uses property tax values

[4] Indeed, as Linné notes, it is typically only "houses at [higher] valuation levels" that those at issue in this case which "have significantly varying characteristics" that necessitate interior inspections. (*See*, Linné Report, ¶ 66, Page ID # 2604).

to win each tax foreclosure case that resulted in a taking of surplus equity, those values should be given preclusive effect against the County in determining just compensation for those same property owners. The preclusive effect of the BOR's findings is particularly appropriate under the circumstances present here because these determinations were made no more than 30 days before the date of transfer triggering the taking. O.R.C. § 323.65(J); O.R.C. § 323.76(C)(2).

1. Collateral Estoppel Precludes the County From Relitigating the Issue of the Properties' Market Values.

Collateral estoppel, or issue preclusion, bars relitigating issues that have already been litigated between two parties:

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co. v. Shore*, 439 U. S. 322, 326 n.5 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation of attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153-54 (1979).

"When asked to give preclusive effect to a prior state court judgment, a federal court must look to the law of the rendering state to determine whether and to what extent that prior judgment should receive preclusive effect in a federal action."

Apseloff v. Family Dollar Stores, Inc., 236 Fed. Appx. 185, 187 (6th Cir. 2007) (quoting *Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir. 1997)) (internal alterations and quotations omitted); *Abbott v. Michigan*, 474 F.3d 324, 330 (6th Cir. 2007); *Wenglor Sensors, Ltd. v. Baur*, 847 F.Supp.2d 1041, 1045 (S.D. Ohio 2012). As recently noted by this Court in *CHKRS* (and then *Peroli*), the Sixth Circuit "has not been consistent in how [it has] described the elements of Ohio issue-preclusion law, sometimes using a three-part test and other times a four-part test."[5] *CHKRS*,

[5] Under the three-part formulation, "issue preclusion is applicable if: 1) the fact or issue was actually litigated in the prior action; 2) the court actually determined the fact or issue in question; 3) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior action." *E.g.*, *Wenglor*, 847 F.Supp.2d at 1045 (quoting *Osborn v. Knights of Columbus*, 401 F.Supp.2d 830, 832-33 (N.D.Ohio 2005) (in turn citing *Rizvi v. St. Elizabeth Hosp. Med. Cent.*, 146 Ohio App. 3d 103 (2001))); *Brown v. Florida Coastal Partners, LLC*, 2017 WL 76940, at *3 (S.D. Ohio 2017) (quoting *Osborn*, 401 F.Supp.2d at 832-33); *Proctor v. DialAmerica Mktg.*, 2007 WL 1394153, at *8 (N.D. Ohio 2007) (same); *Thompson v. Wing*, 70 Ohio St. 3d 176, 183 (Ohio 1994); *State v. Hill*, 177 Ohio App. 3d 171, 181 (11th Dist. 2008) (same). In comparison, the four-part formulation requires: "(1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary in the final judgment; (3) The issue in the present suit must have been identical to the issue in the prior suit; (4) The party against whom estoppel is sought was a party or in privity with the party to the prior action." *E.g.*, *Smith v. Lerner, Sampson & Rothfuss, L.P.A.*, 658 Fed. Appx. 268, 278-79 (6th Cir. 2016) (quoting *In re Wilcox*, 229 B.R. 411, 415-16 (Bankr. N.D. Ohio 1998)); *Bowman v. City of Olmsted Falls*, 756 Fed. Appx. 526, 531 (6th Cir. 2018). Nevertheless, in spite of these different formulations, this Court has noted that "we do not think the different tests establish different rules." *CHKRS*, 984 F.3d at 491; *see also*, *Peroli*, 2021 WL 5411215 at *7.

LLC v. City of Dublin, 984 F.3d 483, 490 (6th Cir. 2021) (comparing cases); *Peroli v. Huber*, 2021 WL 5411215, at *7 (6th Cir. 2021).

In this case, however, the District Court applied *neither* of these collateral estoppel tests, and instead applied a wildly different test, drawn from dicta in the Ohio Supreme Court's decision in *Goodson*. (Order Denying Motion, Page ID # 3723 (quoting *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 198 (Ohio 1983))). But, in the portion of *Goodson* upon which the District Court relied, the Ohio Supreme Court was merely providing an *overview* of collateral estoppel tests applied "in federal courts and other jurisdictions" (and in the Restatement), as opposed to explicitly *adopting* a controlling test under Ohio law. *Goodson*, 2 Ohio St.3d at 198. It is not until later in the *Goodson* decision that the Ohio Supreme Court actually mentions Ohio's controlling collateral estoppel test. *Goodson*, 2 Ohio St.3d at 201 (collecting cases). To the extent that subsequent cases have relied upon *Goodson*, it has almost exclusively been based on this latter portion of the *Goodson* decision. *E.g.*, *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St. 3d 280, 287 (Ohio 1999) (citing *Goodson*, 2 Ohio St.3d at 201).

As made clear by other, more recent Ohio state court decisions, and this Court's recent decision in *CHKRS*, the proper collateral estoppel test under Ohio law requires: (1) "the parties in the second case must be identical to or in privity with the parties in the first suit"; (2) "the prior case must have ended in a final judgment";

and (3) "the relevant 'issue' must have been 'actually' and 'necessarily' litigated in the prior case (meaning that the court resolved the issue and that its resolution was essential to the judgment rather than dicta)." *CHKRS*, 984 F.3d at 491 (collecting Ohio Supreme Court cases); *Thompson*, 70 Ohio St. 3d at 183; *Hill*, 177 Ohio App. 3d at 181.

As explained below, when the proper test is applied, it is clear that all applicable collateral estoppel elements are satisfied with respect to the issue of the properties' fair market values at the time they were directly transferred under the statute. Accordingly, the District Court's determination that collateral estoppel did not apply in this case was in error. (Order Denying Motion, Page ID # 3723).

a. The Values of the Properties at the Time They Were Directly Transferred Was Actually and Necessarily Litigated in Each BOR Tax Foreclosure Case.

The issue of property value was actually and necessarily litigated in Tarrify's tax foreclosure case, and in the tax foreclosure case of every similarly situated property owner. The fair market value of real property is a key issue in each and every tax foreclosure because the value of the property is used to calculate the amount of property taxes owed, and it is the basis for the certification of the tax lien that is the basis of the tax foreclosure.

"In deciding what was actually and necessarily litigated in a prior decision, [the Court is to] look not only to the judgment itself, but also to the record as a

whole." *Nat'l Acceptance Co. of Am. v. Bathalter*, 1991 WL 263474, *2 (6th Cir. 1991) (citing *Spilman v. Harley*, 656 F.2d 224, 228 (6th Cir. 1981) (The "court should look at the entire record of the state proceeding, not just the judgment.")); *In re Trost*, 735 Fed. Appx. 875, 880 (6th Cir. 2018) ("We 'look at the entire record of the [prior] proceeding, not just the judgment.'") (quoting *Spilman*, 656 F.2d at 228). This is because collateral estoppel extends to issues *implicitly* decided in a prior action, even where the holding on that issue is not explicitly articulated. *Nat'l Acceptance*, 1991 WL 263474 at *4 ("That the [prior] court did not specifically denominate the basis for its summary judgment determination of liability does not prevent the application of issue preclusion…One may conclude that even though the [prior] court did not state explicitly that it found liability on the fraud issue, the court must have done so because the complaint, in its most elementary form, alleged a massive scheme to defraud.") (internal citations omitted); *Trost*, 735 Fed. Appx. at 880-81; *see also*, *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997) ("This requirement, however, is not so narrow as to require the courts to have framed their conclusion in the exact same manner.").

Here, in each and every BOR tax foreclosure case, the County submits a tax certification attesting to the taxable value of the property at issue, and calls a witness who testifies to the amount of impositions against a property and the Auditor's valuation of that property. *See*, Section IV-A-2, *supra*. Since the Auditor's valuation

of a given property, its taxable value, and its fair market value are all coextensive as a matter of law (*See*, Section VII-A-1, *supra*), this evidence and testimony makes clear that the market values of Tarrify's and class members' properties were actually litigated before the BOR.

In addition to being actually litigated before the BOR, the market value of each of the properties was *necessary* to the outcome of those proceedings for two reasons. First, when the County forecloses a tax lien through tax foreclosure proceedings before the BOR, the BOR is required to determine that such a lien is valid. O.R.C. § 323.70(A) ("A county board of revision shall conduct a final hearing on the merits…including the validity or amount of any impositions alleged…. If, after a hearing, the board finds that the validity or amount of all or a portion of the impositions is not supported by a preponderance of the evidence, the board may [nullify] amounts the board finds invalid or not supported by a preponderance of the evidence."). For this reason, in each and every BOR tax foreclosure case, the County specifically "demands judgment. . .that all such impositions be *declared to be a good and valid first lien* against the premises." (County's BOR Complaint, Page ID # 412).

Since, as noted above, Ohio law requires that property taxes be levied in accordance with a given property's "true value"—which is its fair market value—the BOR is necessarily required to determine a foreclosed-upon property's market

value in order to certify that the amount of impositions against the property are correct. O.R.C. § 323.70(A). Otherwise, the BOR could not reach the conclusion "that for all such impositions, the [County] has a good a valid first lien." Adjudication of Foreclosure, Page ID # 446; *see also*, O.R.C. § 323.70(A). Therefore, the precise market value of a given property is necessary to the BOR's foreclosure judgment, and *must* be determined by the BOR before such a judgment can be rendered.

Importantly, since the precise market value of Tarrify's property was implicit in the BOR's judgment, the BOR need not explicitly state its finding on that issue in its foreclosure order in order for collateral estoppel to apply. *Trost*, 735 Fed. Appx. at 880-81. Indeed, as in *Nat'l Acceptance*, the fact that the County prevailed on the allegations in its complaint makes clear that the BOR made such a finding. *Nat'l Acceptance*, 1991 WL 263474 at *4. The same is true with respect to all class members, and therefore, collateral estoppel applies to the BOR's findings as to value.

Second, in foreclosure proceedings where the County seeks to directly transfer a foreclosed-upon property to a third party, the BOR is required to make a finding as to whether "the impositions against a [given property] exceed the fair market value of that parcel" to determine whether it can be directly transferred pursuant to O.R.C. § 323.73(G), or if it is required to be directly transferred pursuant to O.R.C.

§ 323.78(B). O.R.C. § 323.71(A)(1). While it is true that O.R.C. § 323.78(B) states that a direct transfer can be ordered "regardless of whether the value of the [impositions] exceed the fair market value of the parcel," it does not mean that the fair market value of the parcel is unnecessary to the BOR's decision.

When the statute is viewed as a whole, it is clear that the two types of direct transfers it authorizes are mutually exclusive: with O.R.C. § 323.73(G) reserved for properties where "the total of the impositions against the [property] are greater than the fair market value of the [property] as determined by the auditor's then-current valuation of that land," and O.R.C. § 323.78(B) applicable where the opposite is found to be true. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole."); *United States v. Brown*, 536 F.2d 117, 121 (6th Cir. 1976); *State v. Wilson*, 77 Ohio St. 3d 334, 336 (Ohio 1997) ("In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.").

For example, the first paragraph of O.R.C. § 323.71(A)(1) states that where "the county board of revision. . . determines that the impositions against a [property]

exceed [its] fair market value. . . the parcel may be disposed of as prescribed by" O.R.C. § 323.73(G), without mentioning O.R.C. § 323.78(B). As such, the legislature intended for O.R.C. § 323.73(G) to be the exclusive method through which these types of properties are transferred. This interpretation is consistent with the second paragraph of O.R.C. § 323.71(A)(1), which frames a direct transfer pursuant to O.R.C. § 323.78(B) as a remaining *alternative* to a direct transfer pursuant to O.R.C. § 323.73(G), in the event that "the board of revision. . . determines that the impositions against a parcel do not exceed the fair market value of the parcel as shown by the county auditor's then-current valuation of the parcel."

Similarly, relative to direct transfers pursuant to O.R.C. § 323.73(G), the statute provides for no redemption period, making an ordered transfer effective immediately. O.R.C. § 323.76(C)(1). In contrast, relative to direct transfers pursuant to O.R.C. § 323.78(B), an ordered transfer is not consummated until the 28-day alternative redemption period expires. O.R.C. § 323.65(J); O.R.C. § 323.76(C)(2).

When viewed in this context, it is clear that O.R.C. § 323.78(B)'s use of the phrase "regardless of whether the value of the [impositions] exceed the fair market value of the parcel" is simply meant to denote that a direct transfer can still be ordered "regardless" of the BOR's initial finding—as required by O.R.C. § 323.71(A)(1)—as to whether O.R.C. § 323.73(G) applies. However, since O.R.C. §

323.78(B) is reserved for situations where a given property's market value exceeds the amount of impositions thereon, the BOR's finding of market value is still determinative as to which provision of the statute will govern a particular direct transfer. Indeed, as noted in Section IV-A-2, *supra*, Smith's testimony as to the Auditor's valuation of a given property was *dispositive* as to which type of direct transfer order the BOR would enter—either a direct transfer pursuant to O.R.C. § 323.73(G) or O.R.C. § 323.78(B). (*E.g.*, Feltner Transcript, 2:12-22, Page ID # 2181).

In sum, for each and every transfer at issue in this case, the BOR made a finding as to the fair market value of the property at issue to determine that (1) the impositions thereon were valid, and (2) its fair market value exceeded the amount of impositions thereon. Since these two issues are present in every BOR proceeding under the statute, the issue of the properties' respective market values was actually and necessarily litigated in Tarrify's BOR tax foreclosure case, and in the tax foreclosure case of every class member. Therefore, this collateral estoppel factor is satisfied.

b. The Remaining Collateral Estoppel Factors Are Satisfied.

During each foreclosure proceeding before the BOR at issue in this case, the County succeeded in obtaining a judgment that declared that its tax lien—which was based upon the Auditor's valuation—was valid for impositions. (County's BOR

Complaint, Page ID # 412 (demanding judgment that "all such impositions be declared to be a good and valid first lien"); Adjudication of Foreclosure, Page ID # 446 ("The BOR finds that for all such impositions, the [County] has a good a valid first lien.")). The County also successfully obtained judgments ordering the properties to be transferred pursuant to O.R.C. § 323.78(B), instead of O.R.C. § 323.73(G)—which is only available when the impositions against a property exceed its market value (O.R.C. § 323.71(A)(1)). (Order of Direct Transfer, Page ID # 456). As explained above, the market value of the properties was *essential* to both of these outcomes. Therefore, all other factors frequently considered in connection with the application of collateral estoppel—*e.g.*, the existence of a final judgment, identity of the parties, and the issue being essential to the judgment—are satisfied.

c. The District Court's Justifications for Refusing to Apply Collateral Estoppel Were Incorrect.

Regardless of the collateral estoppel test employed, the District Court's justifications for refusing to adopt the BOR's findings as preclusive were in error. Simply put, while it may be true, as a general matter, that "property tax and eminent domain proceedings employ different rules of law in different judicial settings with different controlling evidence" (Order Denying Motion, Page ID # 3723), these differences are immaterial with respect to the issue upon which Tarrify seeks to invoke collateral estoppel—*i.e.*, the market values of the properties—as that *factual* issue is identical between the two proceedings.

First, before the BOR determines how a foreclosed-upon property will be disposed (*e.g.*, sold at auction, directly transferred), it must determine, at a hearing, "the validity or amount of any impositions alleged in the complaint" and find that "the validity or amount of all or a portion of the impositions is[] supported by a preponderance of the evidence." O.R.C. § 323.70(A). As explained above, the *factual* issue of the market value of a given property is necessary to this finding.

Since the market values of the properties was at issue before the BOR, and the BOR received testimony and evidence on that issue, it makes no difference that BOR determined the market values of the properties for purposes of foreclosure proceedings, as opposed to in connection with takings claims. Indeed, collateral estoppel applies so long as a fact or matter was *at issue* in the first case and conclusively determined by a prior tribunal—*e.g.*, a court or an administrative agency acting in a judicial capacity—"even if the second suit is for a different cause of action." *United States v. Moser*, 266 US 236, 241 (1924); *see also, United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 422 (1966) (holding that collateral estoppel applies "when an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"); *Earley v. Comm'r of Soc. Sec.*, 893 F.3d 929, 933 (6th Cir. 2018) (citing *Utah Const.*, 384 U.S. at 422); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (same)). For example, although bankruptcy

proceedings are of a different character than civil proceedings, this Court has not hesitated to apply collateral estoppel where issues of fact overlap. *See, e.g.*, *Trost*, 735 Fed. Appx. at 880-81; *Nat'l Acceptance*, 1991 WL 263474 *4.

Second, the BOR was required to determine the validity of the impositions — and, by extension, their fair market values—by a preponderance of the evidence. O.R.C. § 323.70(A). This is the same evidentiary standard as is applicable in this case.

Third, the fact that the BOR relied upon the Auditor's valuations in making its findings as to value is not a reason to abstain from giving its determinations preclusive effect. As noted above, under Ohio law, and in practice, an auditor's valuation reliably reflects a given property's fair market value. *E.g.*, *Dublin City*, 139 Ohio St. 3d at 217; *D&J Distrib.*, 2009-Ohio-3806 at ¶ 22; O.R.C. § 5715.01; O.R.C. § 5713.03; O.R.C. § 5713(B); Linné Report, ¶¶ 13, 22-31, 39, 46-51.

Moreover, even assuming, *arguendo*, that the District Court was correct that the Auditor's valuations are insufficient to establish a given property's market value, Tarrify does not seek to give preclusive effect to the Auditor's valuations themselves, but instead to the BOR findings based on those valuations. This distinction is important because, for purposes of collateral estoppel, the factual correctness of a prior decision is irrelevant. *E.g.*, *Moser*, 266 U.S. at 242 ("A *fact*, *question* or *right* distinctly adjudged in the original action cannot be disputed in a

subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.") (emphasis in original) (cited with approval by *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction & Mental Health Services*, 979 F.2d 1131, 1134 (6th Cir. 1992)); *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("An 'erroneous conclusion' reached by the court in the first suit does not deprive [parties] in the second action 'of their right to rely upon the plea of *res judicata*.") (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927)); *Allen v. McCurry*, 449 U.S. 90, 101 (1980) (rejecting argument that collateral estoppel "allow[s] relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous"); *Bar-Tec, Inc. v. Akrouche*, 959 F. Supp. 793, 797 (S.D. Ohio 1997) ("Even assuming that the decision of the state court of appeals on the due process or other issues was erroneous, this does not provide an exception to the application of res judicata.") (citing *Allen*, 449 U.S. at 101).

Put another way, although the District Court did not believe that the Auditor's valuations are sufficient evidence of the properties' fair market values, the fact remains that the BOR did, which is all that is required for the purpose of issue preclusion.[6] *Id*. Accordingly, there is simply no factual or legal basis for the District

[6] Notably, the BOR was *not* limited to considering *only* the Auditor's valuations in determining the fair market values of the properties. O.R.C. § 323.70(A); *see also*, O.R.C. § 323.71(A)(2). If it so chose, the BOR could have deemed a single-property

Court's conclusion that collateral estoppel was inappropriate because "property tax valuation and fair market sale value are calculated using different methodologies and evidence." (Order Denying Motion, Page ID # 3723).

In sum, regardless of the collateral estoppel test employed, the District Court's decision was in error. Therefore, this Court should hold that issue preclusion applies in this case.

2. Judicial Estoppel Precludes the County From Relitigating the Issue of the Properties' Market Values.

The preclusive doctrine of judicial estoppel bars a party from taking a contrary position with respect to an issue in litigation that it prevailed on in a prior proceeding. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotations omitted). This "doctrine of judicial estoppel prevents a party who successfully assumed one position in a prior legal proceeding from assuming a contrary position in a later proceeding." *Mirando v. U.S. Dept. of Treasury*, 766 F.3d 540, 545 (6th Cir. 2014) (citing *New Hampshire*,

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appraisal necessary to establish the fair market value of a given property by a preponderance of the evidence before rendering a judgment in favor of the County. *Id*. But, instead, the BOR was willing to accept the Auditor's valuations as conclusive on this point.

532 U.S. at 749); *Lewis v. Weyerhaeuser Co.*, 141 Fed. App'x 420, 424 (6th Cir. 2005) (same).

Here, the County levied taxes against the properties of Tarrify and similarly-situated property owners based on the Auditor's valuations. Then, in the proceedings before the BOR, the County similarly relied upon the Auditor's valuations in order to effectuate the takings at issue in this case. Based on these positions, the County clearly established, and prevailed upon, the position that the Auditor's valuations accurately reflected the properties' "true values," as required by Ohio law.

Despite being perfectly content to rely on the Auditor's valuations when it worked to the County's benefit, the County then reversed course and claimed that the Auditor's valuations were inaccurate as soon as it faced the possibility of being required to give something back. This is the precise type of "cynical gamesmanship" judicial estoppel is intended to prohibit, as the County already "achiev[ed] success on one position" and now seeks to assert a different position due to "an exigency of the moment." *E.g., Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008).

Either the Auditor's valuations reflect the "true value" of the properties or they do not. In the proceedings before the BOR, the County presented sworn testimony that the Auditor's valuations did, in fact, reflect the "true value" of the

properties. The County's new assertion to the contrary, if accepted, would "create the perception that either the [BOR] or th[is] Court was misled." *Lewis*, 141 Fed. App'x at 425.

Moreover, the County's change in position is deeply unjust. If the County were permitted to change its position, it would call into question the validity of the County's property tax collection, as it would amount to an admission that the County is failing to honor its constitutional and statutory obligation to tax properties based on their true value.

The County's change in position is also prejudicial to Tarrify and other members of the proposed class. For example, based on the County's prior position that the Auditor's valuation of Tarrify's property (and, correspondingly, the amount of the impositions thereon) accurately reflected its market value, Tarrify did not challenge the Auditor's valuation of its property, or the validity of impositions thereon in proceedings before the BOR. Nor did Tarrify exercise its right under O.R.C. § 323.71(B) to rebut the statutory presumption of the validity of the Auditor's valuation through an independent appraisal. But, had Tarrify known that the County would subsequently change its position on these points, Tarrify may have exercised those rights and proceeded differently.[7]

[7] Indeed, if, as the County now claims, Tarrify's property was actually worth less than the Auditor's valuation thereof, the impositions owed would have also been correspondingly lower. In that case, Tarrify may have been able to avoid a transfer

In sum, the tax valuation that formed the basis for the taking should be used to determine the value of just compensation.[8] *E.g.*, *Louisiana Highway Comm'n v. Giaccone*, 19 La. App. 446, 452 (La. Ct. App. 1932) ("If the valuation stated was the proper standard by which the owners should pay money to the state, it certainly should not be ignored when they call upon the state to pay money for it."); *City of Muskegon v. Berglund Food Stores, Inc.*, 50 Mich. App. 305, 311 (Mich. Ct. App. 1973) ("We see no error in [deriving a property's market value from its assessed value] as it only makes meaningful to the jury the value which the condemnor has in fact placed upon the property for tax purposes. Stated otherwise, it is the adjusted assessment upon which the city relied to collect its share of the tax burden."). Therefore, the District Court abused its discretion in precluding Tarrify (and class members) from relying on the BOR's findings to prove the values of their properties at the time of transfer, and in denying class certification based on this evidentiary determination.

C. The District Court's Decision to Exclude the Auditor's Valuations From Evidence Entirely Was in Error.

To the extent that the BOR's findings are *not* preclusive against the County, the Auditor's valuations are still competent evidence that can be used, on a classwide

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altogether by paying off the impositions against its property. But, in reliance on the County's prior position, Tarrify did not pursue that option.

[8] The arguments in support of the application of judicial estoppel are also equitable arguments in favor of the application of collateral estoppel.

basis, to determine class membership and damages. Indeed, as explained in Section VII-A, *supra*, Ohio law *requires* the Auditor's valuations to reflect a given property's fair market value, and the assertion that they are somehow less precise than "sale appraisals" is simply wrong. Therefore, the District Court's ruling that the Auditor's valuations were inadmissible for purposes of proving the properties' market values was an abuse of discretion.

D. The District Court's Denial of Class Certification Was an Abuse of Discretion.

The District Court's erroneous determinations on the foregoing issues led it to conclude that Tarrify failed to demonstrate the satisfaction of predominance and superiority under Fed. R. Civ. P. 23(b)(3), as well as Fed. R. Civ. P. 23's implicit ascertainability requirement, because it "would essentially have to factually adjudicate each class plaintiff's claim to ascertain their class membership" and damages on an individualized basis, and these "individualized property-value at the time of transfer questions would be the core of any future litigation proceedings or trial." (Order Denying Motion, Page ID # 3724). As explained below, however, individualized inquiries may not even be necessary, and, to the extent that individualized issues do exist, they do not preclude class certification in this case.

1. If the BOR's Findings Are Preclusive Against the County, Then There Are No Individualized Issues at All.

If, for the reasons set forth above, the BOR's findings as to the properties' fair market values are preclusive against the County (*See*, Section VII-B, *supra*), then determining the properties' market values at the time they were directly transferred[9] would be as simple as reviewing the Auditor's valuations, which, in virtually every instance, were adopted by the BOR as reflective of the properties' market values. In that scenario, since the properties' market values would have *already* been conclusively established, no individualized inquiries would be necessary at all—in fact, they would be prohibited—and ascertainability, predominance, and superiority would be unquestionably satisfied. Therefore, to the extent that this Court agrees with Tarrify as to the preclusive effect of the BOR's findings—and, by extension, the Auditor's valuations—class certification is appropriate, and the District Court's denial of class certification should be reversed.

[9] Importantly, since the BOR's findings as to value were rendered concurrently with its foreclosure judgments—which in turn triggered the commencement of the twenty-eight (28) day alternative right of redemption period, at the end of which the properties were directly transferred (O.R.C. § 323.65(J); O.R.C. § 323.76(C)(2))—those findings reflect the properties' fair market values at the time that they were transferred.

2. Mass Appraisal Can Be Used to Establish the Properties' Market Values Collectively.

In light of its erroneous determination that Tarrify and class members could not rely on mass appraisal at all, the District Court essentially concluded that the only way in which Tarrify and class members could prove the properties' market values at the time they were transferred was through the use of individual single-property appraisals. However, as set forth in Section VII-A-2, *supra*, mass appraisals are just as, if not more, accurate than single-property appraisals. Therefore, mass appraisal can be used to establish, on a classwide basis, the properties' market values at the time they were transferred.[10]

As a result of its refusal to consider the use of mass appraisal for this purpose, the District Court never performed crucial parts of the class certification analysis. For example, based on its incorrect assumption that the properties' market values would need to be established through single-property appraisals, the District Court concluded that this case presented almost exclusively individualized issues. But, if Tarrify and class members can rely on mass appraisal to establish, in the first

[10] If this Court rules that the District Court incorrectly excluded the Auditor's valuations from evidence (*See*, Section VII-C, *supra*), then sufficiently reliable mass appraisals *already* exist, and can be used to meet Plaintiff's and class members' burden of proving class membership and damages. But, even if this Court holds that the Auditor's valuations cannot be used for this purpose, new mass appraisals can be performed and entered into evidence instead. Either way, the properties' market values can be established through the use of *common* evidence.

instance, their properties' market values at the time they were transferred, the "predominate issue central to each of" Tarrify's and class members' claims would be "subject to generalized proof," and, thus satisfy predominance. *E.g.*, *Young*, 693 F.3d at 544; *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1124 (6th Cir. 2016) ("Common questions are those 'that can be proved through evidence common to the class.'") (quoting *In re Whirlpool*, 722 F.3d at 858 (in turn citing *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 467 (2013))); *see also*, *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 468 (6th Cir. 2017) ("If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.") (internal citations and quotations omitted).

In addition, since the valuations upon which Tarrify and class members would rely would be obtained through the use of mass appraisal, any purported flaw in the underlying methodology employed by the appraiser would be equally applicable to all class members' claims. This would also present a *common* "issue that is central to the validity of each one of the claims" that can be resolved "in one stroke," further weighing in favor of class certification. *E.g.*, *In re Whirlpool*, 722 F.3d at 852 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

Similarly, because the District Court summarily concluded that the properties' market values could not be established though common evidence, the District Court

never reached the issue of how the use of mass appraisal could substantially reduce (or eliminate) the need for individualized determinations. For one, given the reliability of mass appraisal (*See*, Section VII-A-2, *supra*), it is entirely possible that the County would not even attempt to refute the evidence proffered by Tarrify and class members in most cases. As such, individualized determinations may not even be necessary, or at the very least, would not predominate over the common questions in this case. *See, e.g.*, *Young*, 693 F.3d at 544 ("Potential individual inquiries do not defeat the predominance of common questions.").

Moreover, although the County could, if it so chose, seek to challenge the accuracy of a particular Auditor's valuation (or a valuation obtained through a new mass appraisal) with respect to an individual property, this Court's "precedent is clear that a possible defense, standing alone, does not automatically defeat predominance." *Bridging Communities*, 843 F.3d at 1125-26 (citing *Young*, 693 F.3d at 544; *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007); *In re HCA Holdings, Inc.*, 2015 WL 10575861, at *2 (6th Cir. 2015)). Indeed, "even where defendants point to some evidence that a defense will indeed apply to some class members…courts routinely grant certification because 'Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.'" *Bridging Communities*, 843 F.3d at 1126 (quoting *Smilow v. Sw. Bell. Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003)).

Put another way, while this case *may* require the resolution of individualized issues, it is well-settled that the mere presence of individualized issues does not defeat class certification; rather, the question is whether those individualized issues will predominate over common ones. *E.g. In re Whirlpool*, 722 F.3d at 858 ("A plaintiff class need not prove that each element of a claim can be established by classwide proof."); *Young*, 693 F.3d at 544 ("Potential individual inquiries do not defeat the predominance of common questions."); *Beattie*, 511 F.3d at 564; *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("Rule 23(b)(3) itself contemplates that such individual questions will be present," and "requires only that those questions not predominate over the common questions affecting the class as a whole."). But here, due to the District Court's incomplete analysis, it is unclear how prevalent such individualized issues would be, and whether those individualized issues (if any) would predominate over common issues.

In sum, the District Court's ruling that Tarrify and class members could not rely upon mass appraisal to prove class membership and damages—whether in the form of the Auditor's valuations or in the form of a different mass appraisal—was in error. As a result of that error, the District Court abused its discretion in evaluating Tarrify's Motion. Therefore, this Court should reverse the District Court's denial of

class certification and remand this matter for further consideration on the issues set forth herein.

3. The District Court Failed to Consider Other Alternatives That Would Alleviate the Burdens Associated With Individualized Issues.

Finally, assuming, *arguendo*, that Tarrify and class members will be required to prove the market values of the properties on an individual basis, "Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Indeed, "courts should not refuse to certify a class merely on the basis of manageability concerns," such that "refusing to certify on manageability grounds alone should be the last resort." *E.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663-64 (7th Cir. 2015).

In the proceedings below, Tarrify presented the District Court with a variety of options to consider in the event that it determined that mass appraisal was wholly unacceptable. For example, Tarrify proposed the appointment of a special master, pursuant to Fed. R. Civ. P. 53. Fed. R. Civ. P. 53(a)(1) (providing that the court may appoint a special master to, *inter alia*, "perform duties consented to by the parties" and/or "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury"); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 526 (6th Cir. 2015) (approving the use of "a special master to review individual claims").

In short, an appointed special master could stand in for the District Court in presiding over hearings during which class members and the County could present evidence as to properties' the market values. A special master—or panel of special masters—could even determine class members' damages directly, such as if the appointed special master(s) was/were a real estate appraiser(s) jointly selected by the parties, who would then appraise Tarrify's and class members' properties to determine their market values at the time of transfer. To the extent that any party disagrees with the special master's valuation determination, the District Court could hold a hearing, and make a final determination, as contemplated by Fed. R. Civ. P. 53(f). However, such disputes are likely to be minimal, thus reducing the burden on the District Court.

Tarrify also proposed the use of subclasses, which is another method courts can use to ease manageability issues. *See*, *e.g.*, *Carnegie*, 376 F.3d at 661; *Bridging Communities*, 843 F.3d at 1126. As explained in Tarrify's briefing below, "the Auditor's valuation of approximately 40% of the properties at issue in this case exceeded the amount of impositions by less than $10,000, with half of that 40% being less than $5,000." (Tarrify's reply in support of the Motion, Dist. Ct. Dkt. # 62, Page ID # 2573). Since these relatively low value claims are unlikely to be subject to much dispute, the District Court could have created subclasses based on potential recovery, thus limiting the need to perform individual valuation inquiries

to only properties likely to be disputed. *See, e.g.*, *Bridging Communities*, 843 F.3d at 1126 (noting that a court "can place class members with potentially barred claims in a separate subclass").

The District Court failed to consider any of these options. Accordingly, the District Court abused its discretion in denying Tarrify's Motion.

VIII. CONCLUSION

For the foregoing reasons, the Court should:

1. Reverse the District Court's ruling that the Board of Revision's findings as to value are *not* preclusive against the County, and instead hold that the fair market values of Tarrify's property and the properties of putative class members are as determined by the Auditor through his valuations, and as accepted and adopted by the County's Board of Revision, and that the Board of Revision's finding on this point precludes the County from arguing any alternative value;
2. Hold that, because the Board of Revision's findings as to value are preclusive against the County, the market values of Tarrify's and class members' properties need not be determined on an individualized basis, thus rendering certification of the class in this case appropriate;

3. Reverse the District Court's ruling that the Auditor's valuations are inadmissible to prove the market values of Tarrify's and class members' properties, and instead hold that mass appraisal methodology—whether employed by the Auditor in making his valuations, or as employed in connection with new mass appraisals to be performed strictly for purposes of this case—is sufficiently reliable, such that Tarrify and class members may rely on mass appraisal to prove the market values of their properties at the time they were transferred;

4. Hold that Tarrify's and class members' reliance on mass appraisal to prove the market values of their properties at the time they were transferred will render this case sufficiently manageable to allow for certification of the class;

5. Reverse the District Court's denial of class certification in this case;

6. Remand this matter to the District Court for further proceedings consistent with these conclusions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Merit Brief of Appellant Tarrify Properties, LLC complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 11,709 words, excluding the items exempted pursuant to Fed. R. App. P. 32(f) and Local Rule 32(b)(1).

/s/ *Thomas A. Zimmerman, Jr.*

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS PURSUANT TO 6TH CIRCUIT RULES 28(B)(1)(A)(II) AND 30(G)(1)

Dist. Ct. Dkt. #	Description of Document	Page ID #
20	Plaintiff's First Amended Class Action Complaint	270-285
29-5	County's Complaint in Plaintiff's BOR Case	409-427
29-7	Adjudication of Foreclosure in Plaintiff's BOR Case	446-450
29-9	Order of Direct Transfer in Plaintiff's BOR Case	456
29-13	Sheriff's Deed Directly Transferring Plaintiff's Property	468-471
50	Plaintiff's Motion for Class Certification	785-819
60-2	Transcript of Deposition of Mary Beth Smith	2160-2180
60-3	Report of Proceedings in Feltner BOR Case	2181
62	Plaintiff's Reply in Support of Motion for Class Certification	2546-2579
62-1	Expert Report of Mark R. Linné	2583-2631
77	Order Denying Motion for Class Certification	3715-3725
78	Appellant's Petition for Leave to Appeal Pursuant to Rule 23(f)	3726-3753

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2021, a copy of the foregoing Merit Brief of Appellant Tarrify Properties, LLC, which was filed electronically, was served upon counsel of record in this case. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Thomas A. Zimmerman, Jr.*