IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO

BRUCE A. VANCE, *et al.*,	)	CASE NO. 16CVH-04-3295
	)	
Plaintiffs,	)	
	)	JUDGE JENIFER FRENCH
v.	)	
	)	
THE TAX COMMISSIONER OF OHIO,	)	**REPLY BRIEF IN SUPPORT OF**
	)	**DEFENDANT'S MOTION FOR**
Defendant.	)	**SUMMARY JUDGMENT**

Defendant, The Tax Commissioner of Ohio ("Tax Commissioner"), respectfully submits this Reply Brief in support of his Motion for Summary Judgment.

I. LAW & ARGUMENT

A. Plaintiffs' Attempts at Obfuscation Ignore the Dispositive Jurisdictional Question Presented by the Tax Commissioner's Motion for Summary Judgment

Plaintiffs' Memorandum in Opposition to the Tax Commissioner's Motion for Summary Judgment begins with a lengthy and irrelevant discussion about the mechanics of Ohio school funding. As Plaintiffs' repeated citations to "front page headline news," unauthenticated legislative testimony, and "intense scrutiny by the legislature" would suggest, this is nothing more than an exercise in obfuscation designed to distract from Plaintiffs' otherwise disjointed and unsupported legal arguments.[1] Suffice it to say, and as Plaintiffs concede, these policy issues

[1] For example, in an attempt to manufacture support for the misplaced argument that the State somehow benefitted from tax money Plaintiffs paid to their local government ***prior to the year 2015*** (the year in which the original Complaint was filed), Plaintiffs inexplicably rely on unauthenticated legislative testimony concerning the potential impact of various budget bills that formed the basis for the State's operating budget for fiscal years ***2016 and forward***. There is no causal connection between analysis of potential ***future*** impacts of a post-Complaint budget bill and the ***prior*** conduct complained of that allegedly gives rise to this action.

have been and will continue to be debated by the legislative branch as part of the legislative process. However, they are of no import here.[2]

Instead, the sole dispositive question is the one framed by this Court's November 2, 2016 Order; namely, whether the State has in fact "assessed and retained" the property tax dollars that Plaintiffs demand in restitution. Plaintiffs alleged that the State of Ohio, through the Department of Taxation, "unjustly enriched itself ***by assessing and retaining*** the illegitimate property taxes paid as a result of the ODT's misapplication of CAUV." Plfs.' First Am. Compl. (July 27, 2015) at ¶ 117 (emphasis added), and have relied on this allegation to invoke this Court's jurisdiction over claims for "equitable restitution" against the State.

Accepting Plaintiffs' allegations as true for the purposes of Civ. R. 12(B)(6) review, this Court denied the Tax Commissioner's Motion to Dismiss with the understanding that "Defendants' contention that they do not have the funds that were allegedly wrongfully taken from Plaintiffs, is a matter that may be resolved by a motion for summary judgment in the future [...]." Decision and Entry Denying Defs.' Mtn. to Dismiss (Nov. 2, 2016) at 6-7. Following this Court's Order, Plaintiffs filed a Second Amended Complaint that recited verbatim the jurisdictional allegations that allowed their First Amended Complaint to survive in the Court of Common Pleas. *See* Plfs.' Second Am. Compl. (Nov. 10, 2016) at ¶ 111.

Plaintiffs have since repeatedly admitted that the State has not "assessed and retained" the property tax dollars they demand in restitution. *See* Plfs.' Mtn. for Extension of Time to

[2] Nonetheless, the Tax Commissioner urges the Court not to take any of Plaintiffs' representations at face value, as the Brief in Opposition is replete with misstatements of fact. For example, there is no record evidence of a direct causal connection between CAUV taxes and the amount of money "kept by the State". This is the unsubstantiated argument of counsel. The actual testimony and record evidence shows that when CAUV values change, the shift in tax burden is between CAUV taxpayers ***and their residential neighbors***, not CAUV taxpayers and the State. (Q. And as a general matter, all other things being equal, if CAUV values go down, ***it shifts some of the tax burden to the residential taxpayers? A. Yes***. Testimony of Executive Administrator, Tax Equalization Division, Shelley Wilson 38:2-6, emphasis added); and (Q. ***So the shift [when CAUV values increase] is that people in residential and other areas are getting a decrease in their actual paid taxes every year? A. Correct.*** Q. So they're linked. A. That's correct. Testimony of Deputy Tax Commissioner, Stanley Dixon 55:16-21, emphasis added.)

Respond to Defendant's Mtn. for Summary Judgment (May 26, 2017) at 3 (admitting that CAUV property taxes were paid and collected "at the local level."); Plf.'s Initial Br. in Opp. to Def.'s Mtn. for Summary Judgment (July 23, 2017) at 18 (conceding that Plaintiffs cannot "identify particular funds directly taken from them by the State and identify the accounts in which they are held."); Plfs.' Br. in Opp. to Def.'s Mtn. for Protective Order (Oct. 27, 2017) at 5 ("Plaintiffs have never disputed the fact that property taxes are collected by the County Auditors, by checks payable to County Treasurers [...]."). Instead, Plaintiffs are now arguing that the "State" has "saved" money that would otherwise be paid ***not to the Plaintiffs***, but to local school districts. *See, e.g.*, Plfs.' Mem. in Opp. to Def.'s Mtn. for Summary Judgment (Jan. 15, 2018) at 4 ("...by artificially inflating CAUV values for years, the state of Ohio was able to pay less to local school districts."). Plaintiffs' attempt to recover these funds – which were never possessed by or owed to the Plaintiffs in the first place – is ***not*** "equitable restitution."

As the Supreme Court of Ohio held in *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, ¶ 13 (2004), Courts of Common Pleas only have jurisdiction over claims for monetary relief against the State when "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." (*quoting Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002)). The "typical case for equitable restitution" involves "an instance where the plaintiff transfers identifiable funds or property to the defendant and the law orders the breaching defendant to return that specific property." *Alexander v. Bosch Automotive Systems, Inc.*, 232 Fed.Appx. 491, 500 (6th Cir.2007). In their simplest terms, these cases stand for the proposition that when a plaintiff transfers specific, identifiable, and traceable property to the defendant, a claim to recover ***that same property*** sounds in equity. When a plaintiff attempts to

recover ***some other money or property*** as compensation for a suffered loss, that claim is for legal relief. *See Measles v. Indus. Comm.*, 128 Ohio St.3d 458, 2011-Ohio-1523, 946 N.E.2d 204, ¶ 9 (2011) (holding that a claim for legal restitution is one "in which the plaintiff ***could not assert title or right to possession of particular property***, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him.") (emphasis added).

This Court need not look beyond Plaintiffs' admission that the Tax Commissioner has never "assessed and retained" the property tax dollars that Plaintiffs seek to recover. Because this concession deprives this Court of subject matter jurisdiction over Plaintiffs' claims for monetary relief against the State, Plaintiffs' Second Amended Complaint should be dismissed.

B. Seeking the "Enforcement of Statutory Rights" (Which Plaintiffs *Are Not* Doing in this Case) Does Not Transform a Claim For Legal Relief Into a Claim for "Equitable Restitution"

Unable to dispute that the State has never possessed the particular funds at issue in this litigation, Plaintiffs' Memorandum in Opposition rests on an entirely new definition of "equitable restitution" that is completely detached from the holding of *Santos*. Specifically, Plaintiffs now argue that because they seek to enforce "statutory rights," their claims are *per se* "equitable," and belong in this Court. Nothing could be further from the truth.

In support of their argument, Plaintiffs interpose a misleading citation to the Supreme Court's decision in *Cristino v. Ohio Bur. of Workers' Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013, 886 N.E.2d 857 (2008). In *Cristino*, the Supreme Court held that a claim for the statutorily-mandated reimbursement of specific funds in the State's possession sounds in equity. *Cristino* at ¶¶ 10-11. To arrive at this conclusion, the Court looked to its prior decision in *Ohio Hosp. Assn. v. Ohio Dept. of Human Services*, which held that a plaintiff "seeking funds ***to***

which a statute allegedly entitles it, rather than money in compensation for [a] loss[]," is seeking equitable relief. 62 Ohio St.3d 97, 105, 579 N.E.2d 695, 700-01 (1991) (*quoting Bowen v. Massachusetts,* 487 U.S. 879, 895 (1988) (emphasis added)). In other words, "[t]he reimbursement of monies withheld pursuant to an invalid administrative rule is equitable relief, not money damages." *Ohio Hosp. Assn.*, 62 Ohio St.3d at 105, 579 N.E.2d at 701.

Unlike the Plaintiffs in *Ohio Hosp. Assn.* and *Bowen*, the Plaintiffs in this case have not alleged a statutory right to reimbursement of specific funds in the Tax Commissioner's possession. If anything, they are attempting to recover monies that the State has purportedly "saved" and which would have otherwise been paid to local school districts – not to the putative Plaintiff class. Absent a statutory right to the reimbursement of these specific funds, *Cristino* is inapplicable and Plaintiffs cannot rely on it to salvage their claims against the State.

C. The Tax Commissioner Does Not "Collect" CAUV Property Taxes

Despite their prior admission that CAUV property taxes are collected and retained "at the local level," Plaintiffs now argue that the State "collects" all CAUV property taxes because county auditors and treasurers are the Tax Commissioner's "deputy assessors." The Supreme Court of Ohio has already rejected this argument. *See Ohio Utilities Co. v. Collins*, 48 Ohio St.2d 169, 171, 357 N.E.2d 1077 (1976) (rejecting the argument that "county treasurers only happen to be collection agents for the Department of Taxation," and refusing to "equate payment to a county treasurer with payment to the Treasurer of State."). Additionally, Plaintiffs have yet to contest the Affidavit of Shelley Wilson, which conclusively establishes that the Department of Taxation has never collected or possessed Plaintiffs' CAUV property tax dollars. *See* Affidavit of Shelley Wilson (May 12, 2017) at ¶ 4. Because Plaintiffs cannot dispute this testimony with ***any*** record evidence, the Tax Commissioner's Motion for Summary Judgment should be granted.

D. The Tax Commissioner Does Not "Hold" CAUV Property Taxes

As discussed in greater detail above, Plaintiffs do not dispute that the State has never possessed or retained the property taxes that are the subject of this litigation. Instead, their unsupported allegation that the State "holds" CAUV property taxes is based on their theory that an increase in CAUV taxes has allowed the State to retain funds that would otherwise be paid to school districts. Plaintiffs' claim that this money (which they ***never*** possessed) belongs to them in "good conscience" is insufficient to state a claim for equitable restitution. As the U.S. Supreme Court held in *Great West* and the Supreme Court of Ohio reaffirmed in *Santos*, a plaintiff can "seek restitution in *equity* [...] where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002); *see also Santos* at ¶ 13.

Claiming that "other" funds "saved" by the State should be paid to Plaintiffs as compensation for their "inflated" taxes is fails to satisfy the traceability requirement of *Great-West* and *Santos*. As courts applying these cases have repeatedly held, "traceability" requires evidence that particular funds belonging to the plaintiff were transferred to the defendant. *See Alexander*, 232 Fed.Appx. at 500 (a claim for equitable restitution "involves "an instance where the plaintiff transfers identifiable funds or property to the defendant and the law orders the breaching defendant to return that specific property."); *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 597 (8th Cir.2005) ("Specific funds are traceable when one party overpays and sues [...] to recover the specific amount that was overpaid into a particular account."). Simply stated, the Court lacks jurisdiction to order the Tax Commissioner to "return" funds that the Plaintiffs never paid to the Tax Commissioner, and that the Tax Commissioner never possessed.

E. R.C. 2723.01, *et seq.* Provides the Exclusive Means for Plaintiffs to Recover Taxes Which They Expressly Allege Were "Illegally Collected"

In their January 15, 2018 Memorandum in Opposition to the Tax Commissioner's Motion for Summary Judgment, Plaintiffs state that "[t]he remedies set forth at O.R.C. Sections 2723.01-05 have no application to Plaintiffs' claims here." There is little the Tax Commissioner can state in rebuttal to this conclusory assertion. For the reasons given in the Tax Commissioner's Motion for Summary Judgment, R.C. 2723.01, *et seq.* provides the exclusive remedy for the recovery of taxes and assessments, and Plaintiffs' failure to comply with its provisions is fatal to their attempt to recover past taxes under a theory of unjust enrichment.

II. CONCLUSION

It is undisputed that the Tax Commissioner does not "assess and retain" the property tax dollars that were demanded by the Plaintiffs in their Second Amended Complaint. Because this Court lacks subject matter jurisdiction to order the State to compensate the Plaintiffs for their alleged loss with "other" funds purportedly "saved" by the State, the Tax Commissioner's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2018, a copy of the foregoing was filed electronically. 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.

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