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IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO
GENERAL DIVISION

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

Defendant, The Tax Commissioner of Ohio (hereinafter, "Tax Commissioner"), by and through undersigned counsel and pursuant to Civ. R. 56, hereby moves this Court for an order granting summary judgment on all counts of Plaintiffs' Second Amended Complaint.

A memorandum in support of the instant Motion is attached hereto and incorporated by reference herein.

Respectfully submitted,

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Attorney General of Ohio

/s/ Robert A. Hager

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MEMORANDUM IN SUPPORT

I. STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

Pursuant to Article II, § 36 of the Ohio Constitution, farmland devoted exclusively to commercial agriculture may be valued for property tax purposes according to its current use rather than at its "highest and best" potential use. In accordance with this constitutional provision, the General Assembly has authorized the Ohio Department of Taxation to maintain a Current Agricultural Use Value ("CAUV") program for the benefit of Ohio farmers. *See* R.C. 5715.01. Under the CAUV program, "the [county] auditor disregards the highest and best use of the property and values the property according to its current agricultural use. This usually results in a lower valuation and a lower real property tax." *Renner v. Tuscarawas Cty. Bd. of Revision*, 59 Ohio St. 3d 142, 572 N.E.2d 56, 56 (1991); *see also Wetland Res. Ctr., L.L.C. v. Marion Cty. Aud.*, 157 Ohio App. 3d 203, 2004-Ohio-2470, 809 N.E.2d 1202, ¶ 5 ("CAUV permits land that is devoted exclusively to agricultural use to be valued for tax purposes at its agricultural use rather than its highest and best use. This generally results in lower taxes than valuing the land at its market value.").

To participate in the CAUV program, property owners must submit an application to the auditor of the county in which the property is situated "[a]t any time after the first Monday in January and prior to the first Monday in March of any year." R.C. 5713.31. Thereafter, "[e]ach application filed in ensuing consecutive years after the initial application by that owner shall be in the form of a renewal application." *Id.*

To implement the CAUV program, the Tax Commissioner has been authorized to "adopt, prescribe, and promulgate rules [...] for the determination of the current agricultural use value of land devoted exclusively to agricultural use." R.C. 5715.01(A). The Tax Commissioner, in turn,

has promulgated regulations governing the creation of CAUV Land Tables to value the current agricultural use value of land at O.A.C. §§ 5703-25-30 through 5703-25-36. *See* O.A.C. § 5703-25-36 ("Rules 5703-25-30 to 5703-25-36 of the Administrative Code shall be applied in valuing and assessing land that has qualified to be valued at the current value such land has for agricultural use under the provisions of sections 5713.30 to 5713.38 of the Revised Code [...]."); *see also Johnson v. Clark Cty. Bd. of Revision*, 2nd Dist. Clark No. 2013 CA 32, 2014-Ohio-329, ¶ 37 ("Ohio Adm.Code 5703–25–33 sets forth the Current Agricultural Use Value of Land Table or Tables created by the tax commissioner to value the current agricultural use value of land.").

Using the CAUV Land Tables prepared by the Tax Commissioner, county auditors appraise the taxable value of CAUV property and include that value in the general tax list prepared in accordance with R.C. 319.28. *See* Affidavit of Shelley Wilson (hereinafter, "Wilson Aff.") at ¶¶ 5-7; *see also* R.C. 5713.01(A) ("Each county shall be the unit for assessing real estate for taxation purposes. The county auditor shall be the assessor of all the real estate in the auditor's county for purposes of taxation."); R.C. 5713.31 (upon determination that land is devoted exclusively to agricultural use, "the auditor shall appraise it for real property tax purposes in accordance with rules adopted by the commissioner" and include such valuation on the general tax list compiled under R.C. 319.28).

CAUV property taxes, like all other real estate taxes, are then collected by each of Ohio's 88 county treasurers. *See* Wilson Aff. at ¶ 8; *see also* R.C. 323.12 (providing that real estate taxes shall be paid to the county treasurer). From there, county treasurers disburse the collected taxes to various local entities. *See* R.C. 321.33 (requiring the county treasurer to pay over to the treasurer of a municipal corporation twice each year all funds arising from taxes levied and assessments made). At no point from appraisal through collection and distribution are CAUV

property taxes collected and/or possessed by the Tax Commissioner or the Ohio Department of Taxation. *See* Wilson Aff. at ¶ 9.

Plaintiffs are owners of CAUV property located in various counties throughout Ohio. Their Second Amended Class Action Complaint alleges that the Tax Commissioner has failed to abide by the regulations governing the preparation of CAUV Land Tables used to appraise the value of qualifying agricultural properties from 2005 through the present. As a result, Plaintiffs claim to have overpaid CAUV property taxes and demand a declaratory judgment and "equitable restitution" of the taxes allegedly overpaid under a common-law theory of unjust enrichment. Plaintiffs' demand for "equitable restitution" is rooted in the allegation that the Tax Commissioner has "assess[ed] and retain[ed] the illegitimate property taxes paid as a result of the ODT's misapplication of CAUV." Plfs.' Second Am. Compl. at ¶ 111.

For the reasons that follow, Plaintiffs' claims against the Tax Commissioner fail as a matter of law and should be dismissed.

II. LAW & ARGUMENT

A. Plaintiffs' Claim for Equitable Restitution Against the Tax Commissioner Fails as a Matter of Law Because the Ohio Department of Taxation Never Collected or Possessed the Funds to Which Plaintiffs Claim Entitlement

Because the Tax Commissioner has never collected or possessed the CAUV property taxes allegedly "overpaid" by Plaintiffs, their claim for equitable restitution against the Tax Commissioner fails as a matter of law.

The Supreme Court of Ohio has long acknowledged that "restitution can be either a legal or an equitable remedy." *Cristino v. Ohio Bur. of Workers' Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013, 886 N.E.2d 857, ¶ 7. In *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, for example, the Supreme Court of Ohio relied on the U.S.

Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson* to hold that restitution is an "equitable" remedy when a plaintiff "seeks the return of specific funds wrongfully collected or held by the state." *Santos* at ¶ 13 (emphasis added) (*citing Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002)). This "equitable" restitution must consist of "money or property identified as belonging in good conscience to the plaintiff," that can be clearly "traced to particular funds or property ***in the defendant's possession***." *Id.* (emphasis added). The Supreme Court subsequently reaffirmed this rule in *Cristino*, where it cited to *Great-West* to hold once again that "an equitable restitution claim [is] one in which money or property identified as belonging in good conscience to the plaintiff [can] clearly be traced to particular funds or property ***in the defendant's possession***." *Cristino* at ¶ 8 (emphasis added); *see also Measles v. Indus. Comm.*, 128 Ohio St. 3d 458, 2011-Ohio-1523, 946 N.E.2d 204, ¶ 9 (holding that "an action in equity for restitution is one in which 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.").

Federal courts applying the U.S. Supreme Court's decision in *Great-West* have likewise held that a claim for equitable restitution must seek the recovery of specific, identifiable, and traceable funds in the defendant's control or possession. *See Cent. States, Se. & Sw. Areas Health & Welfare Fund v. First Agency, Inc.*, 756 F.3d 954, 960 (6th Cir. 2014) ("A court awards equitable restitution when it imposes a constructive trust or lien on particular funds or property in the defendant's possession but legal restitution when it holds the defendant liable for a sum of money."); *Alexander v. Bosch Auto. Sys., Inc.*, 232 F. App'x 491, 500 (6th Cir. 2007) ("our task of determining whether we can award Plaintiffs with equitable restitution turns on whether Plaintiffs seek to recover particular property or particular and identifiable funds in

[defendant]'s possession."); *Abrahamson v. Jones*, S.D. Ohio No. 1:16-CV-712, 2016 WL 3855204, at *7 (July 15, 2016) ("An equitable restitution claim was one in which 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.").

That mandatory requirement goes to the heart of this Court's equitable jurisdiction. As the Supreme Court of the United States explained in *Great-West*, a court sitting in equity may "order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner." 534 U.S. at 213. Where, however, "the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor," whose remedy is an action for legal damages to substitute for the suffered loss. *Id.* at 213-14. Therefore, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property ***in the defendant's possession***." *Id.* at 214 (emphasis added).

If the defendant has never possessed the funds to which the plaintiff claims entitlement, a claim for "equitable" restitution will not lie. Thus, in *Great-West*, the U.S. Supreme Court held that the plaintiffs' claim was *not* equitable in nature because the funds to which the plaintiffs claimed entitlement were not in the defendants' possession (the funds were in a trust). *Id.* Under these circumstances, the Court recognized that "[t]he basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are [...] entitled to *some* funds for benefits that they conferred." *Id.* (italics in original). Because the defendants were never in possession of the funds to which the plaintiffs claimed entitlement, the Supreme Court properly held plaintiffs' claims were not for equitable

restitution, but for legal damages – "the imposition of personal liability for the benefits that [plaintiffs'] conferred upon respondents." *Id.*

With respect to this case, it cannot be disputed that the Tax Commissioner never collected or possessed the CAUV property taxes paid by the Plaintiffs and the members of their putative class. *See* Wilson Aff. at ¶ 9. As described in the attached Affidavit of Shelley Wilson, the taxable value of CAUV property is appraised by the auditor of the county in which the property is situated. *Id.* at ¶ 7; *see also* R.C. 5713.01(A); R.C. 5713.31. CAUV property taxes, like all other real estate taxes, are then paid directly by the taxpayer to each of Ohio's 88 county treasurers. Wilson Aff. at ¶ 8; *see also* R.C. 323.12. From there, county treasurers disburse the collected taxes to various local entities. *See* R.C. 321.33. At no point from appraisal through collection and distribution are CAUV property taxes collected, maintained, or possessed by the Tax Commissioner or the Ohio Department of Taxation. Wilson Aff. at ¶ 9.

To the extent Plaintiffs claim that county treasurers are simply the "agents" of the Tax Commissioner for purposes of collecting and retaining CAUV taxes,[1] this argument is bereft of any statutory support and has already been rejected by the Supreme Court of Ohio. In *Ohio Utilities Co. v. Collins*, 48 Ohio St.2d 169, 357 N.E.2d 1077 (1976), for example, the Court was called upon to construe the provisions of R.C. 5703.05(B), which authorizes the Tax Commissioner to issue a certificate of abatement to any person who has overpaid taxes to the Treasurer of State. As in this case, the Plaintiff in *Ohio Utilities Co.* did not pay the taxes at issue to the Treasurer of State, but to the local county treasurer. Nevertheless, the plaintiff argued that the Tax Commissioner could issue a certificate of abatement because "county treasurers only happen to be collection agents for the Department of Taxation." *Ohio Utilities Co.*, 48 Ohio

[1] Plaintiffs previously argued in their Brief in Opposition to Defendant's Motion to Dismiss that county auditors and treasurers are "nothing more than [the Commissioner's] agents in carrying out the CAUV program." Plfs.' Br. in Opp. to Def.'s Mtn. to Dismiss at 23.

St.2d at 171. Rejecting this argument, the Supreme Court held that the Tax Commissioner has no jurisdiction to issue a certificate of abatement for taxes paid into county treasuries. Quite properly, the Court refused to "equate payment to a county treasurer with payment to the Treasurer of State." *Ohio Utilities Co.*, 48 Ohio St.2d at 171. Likewise, this Court should decline Plaintiff's unfounded invitation to equate their payments to local county treasurers with payments to the Tax Commissioner or the Treasurer of State.

The fact that the Tax Commissioner has *never* possessed or controlled the CAUV property taxes paid by the Plaintiffs distinguishes their claim from cases where the aggrieved parties sought equitable restitution from the agency that actually collected and/or possessed the funds at issue. *See, e.g., Judy v. Ohio Bur. of Motor Vehicles*, 100 Ohio St. 3d 122, 2003-Ohio-5277, 797 N.E.2d 45 (action for restitution of license reinstatement fees wrongfully collected and retained by the Ohio Bureau of Motor Vehicles); *San Allen, Inc. v. Buehrer*, 2014-Ohio-2071, 11 N.E.3d 739 (8th Dist.) (equitable restitution claim against the Ohio Bureau of Workers' Compensation to recover workers' compensation premiums collected by the BWC and retained by the BWC in the State Insurance Fund); *LaBorde v. Gahanna*, 2015-Ohio-2047, 35 N.E.3d 55 (10th Dist.) (City residents sought refund of municipal taxes from regional tax authority that collected the taxes and city that retained the funds). In each of these cases, the defendant actually collected and/or retained the funds to which the plaintiffs claimed entitlement. That is not the case here, as the Tax Commissioner did not collect and has never possessed Plaintiffs' CAUV property taxes. Those taxes were appraised and assessed by county auditors and paid to county treasurers, who are *not* "collection agents for the Department of Taxation." *Ohio Utilities Co.*, 48 Ohio St.2d at 171.

To the extent Plaintiffs rely on *San Allen, Inc. v. Buehrer* for the proposition that a claim for equitable restitution may proceed even if the state agency does not possess the funds in question, their reliance is misplaced. In *San Allen*, the Eighth District relied on the Tenth District's opinion in *Dunlop v. Ohio Dep't of Job & Family Servs.*, 10th Dist. Franklin No. 11AP–929, 2012-Ohio-1378 to hold that BWC's subsequent distribution of the premiums it *collected* from the plaintiff class did not defeat the plaintiffs' claim for equitable restitution. *See San Allen* at ¶ 61. *Dunlop*, in turn, recognized that a state agency's subsequent distribution of funds will not defeat a claim for equitable restitution so long as those funds were either "wrongfully *collected* or wrongfully *held* by the state," regardless of how they were ultimately disposed of. *Dunlop* at ¶ 13 (emphasis added).

In this case, the Tax Commissioner has neither *collected* nor *held* the CAUV property taxes that Plaintiffs demand in restitution. Wilson Aff. at ¶ 9. On that basis, *San Allen* and *Dunlop* are readily distinguishable. In both cases, there was no dispute that the defendant agencies actually collected and/or possessed the funds in question – even if they subsequently disbursed those funds elsewhere. *See Cullinan v. Ohio Dept of Job & Family Servs.*, 10th Dist. Franklin No. 12AP–208, 2012-Ohio-4836, ¶ 14 (noting that "the plaintiff in *Dunlop* sought a refund of money ***paid directly to*** and ***retained*** and ***disbursed by the state***.") (emphasis added). Here, by contrast, the Tax Commissioner has not collected, possessed, or distributed the CAUV property taxes paid by members of the putative class. Wilson Aff. at ¶ 9. Those taxes are appraised, assessed, collected, and distributed by local auditors and treasurers at the county level. *Id.* at ¶ 8. Because these funds were never "in the defendant's possession," *Santos* at ¶ 13, Plaintiffs' claim for equitable restitution fails as a matter of law.

B. Because Plaintiffs' Claim for Equitable Restitution Fails, this Court is Deprived of Subject Matter Jurisdiction Over Plaintiffs' Remaining Claim for Declaratory Judgment

Because the Tax Commissioner never collected or possessed the funds at issue, Plaintiffs' claim for "equitable" relief fails. Therefore, and to the extent Plaintiffs are seeking any monetary restitution from the Tax Commissioner, they are seeking *legal* (not equitable) relief. In other words, Plaintiffs are seeking money damages as a substitute remedy for the "benefits" that they have allegedly conferred upon the State. *See Great-West*, 534 U.S. at 214.[2] This is a claim for *legal* (as opposed to *equitable*) restitution. *See Measles* at ¶ 9 ("an action in law for restitution is a claim 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.") (internal quotations omitted).

The fact that Plaintiffs' claim for restitution is legal, rather than equitable in nature, divests this Court of subject matter jurisdiction. *See Measles* at ¶ 7 ("[t]he Court of Claims [...] has exclusive jurisdiction over civil actions against the state for money damages that sound in law.") (*citing* R.C. 2743.02 and 2743.03). Although Plaintiffs have also asserted a claim for declaratory judgment, "[t]he Court of Claims has exclusive, original jurisdiction in all civil suits for money damages even where ancillary relief such as an injunction or declaratory judgment is sought." *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.*, 62 Ohio St.3d 97, 103, 579 N.E.2d 695 (1991). Therefore, and because the restitution that Plaintiffs seek is legal rather than

[2] Indeed, Plaintiffs' Second Amended Complaint alleges that they have conferred a benefit on the State by "overpaying" CAUV property taxes, thereby relieving the State of the need to fund rural local school districts. *See* Plfs.' Second Am. Compl. at ¶¶ 81-83. While the Tax Commissioner fully denies these vague, unsubstantiated, and conspiratorial allegations, these same allegations reveal that Plaintiffs are actually seeking legal relief from the Tax Commissioner for an alleged "benefit" conferred on the State, not "equitable restitution" of the actual CAUV property taxes paid (which are not and never have been in the Tax Commissioner's possession).

equitable, this Court lacks subject matter jurisdiction and all of Plaintiffs' claims, including their claim for declaratory judgment, should be dismissed.

C. Plaintiff's Exclusive Remedy for the Restitution of Illegally Collected Taxes is An Action Under R.C. 2723.01, Which Carries With It a One Year Statute of Limitations.

Ohio law provides an exclusive, statutory mechanism for the recovery of illegally-collected taxes and assessments. *See generally* R.C. 2723.01, *et seq.*; *see also Norfolk & W. Ry. Co. v. Grimshaw*, 85 Ohio Law Abs. 372, 174 N.E.2d 282, 284 (4th Dist.1958) ("The legislature, [...], has provided adequate relief to protect a taxpayer from the payment of illegal taxes.").

Specifically, R.C. 2723.01 provides that "[c]ourts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof." To bring an action under R.C. 2723, a taxpayer must pay the illegally-collected tax under protest by submitting "a written protest as to the portion sought to be recovered, specifying the nature of his claim as to the illegality thereof, together with notice of his intention to sue under sections 2723.01 to 2723.05, inclusive, of the Revised Code." R.C. 2723.03. Absent from Plaintiffs' Second Amended Complaint is any allegation that Plaintiffs' CAUV taxes were paid under protest in accordance with this provision. Additionally, actions under R.C. 2723.01 may only be "brought against the officer whose duty it is to collect" the tax. *Id.* As developed above, that *is not* the Tax Commissioner. Finally, any action pursuant to R.C. 2723.01 must be filed within one year from the date that the assessment is collected. R.C. 2723.01; *see also Marchionda v. City of Youngstown*, 7th Dist. Mahoning No. 90 C.A. 175, 1991 WL 191648, at *2 (Sept. 23, 1991) ("Under 2723.01, the time when the statute of limitations begins to run is when the assessment is collected.").[3]

[3] Even if Chapter 2723 of the Revised Code were not applicable, and assuming *arguendo* that this Court has jurisdiction, Plaintiffs' common-law claim for unjust enrichment is subject to a six-year statute of limitations. *See*

As the Supreme Court of Ohio held in *Ryan v. Tracy*, 6 Ohio St. 3d 363, 366, 453 N.E.2d 661, 664 (1983), "R.C. 2723.01 *et seq.* provide the ***exclusive means*** by which a taxpayer may, with the approbation of the court, demand that the county auditor refund erroneously collected taxes." (emphasis added); *see also Premier Empire v. Brown*, 69 Ohio App. 3d 144, 146, 590 N.E.2d 296, 298 (9th Dist.1990) ("[…] the taxpayer's exclusive means to demand that the county auditor refund the taxes, with approbation of the court, is under R.C. 2723.01 *et seq.*").

This exclusive remedy forecloses any common-law claims for the recovery of taxes, such as Plaintiffs' claim for unjust enrichment. As the Tenth District held in *Paramount Film Distrib. Corp. v. Tracy*, 118 Ohio App. 29, 32, 193 N.E.2d 283, 285 (10th Dist.1962), *aff'd,* 175 Ohio St. 55, 191 N.E.2d 839 (1963), any interpretation of Chapter 2723 as "a cumulative remedy in the alternative with the common-law remedies, either being available at the taxpayer's option, is ***incompatible*** with the structure, operation and purpose of the statute." (emphasis added). Accordingly, "the statutory remedy is not in the alternative but is in lieu and exclusive of the common-law remedies where applicable." *Paramount Film Distrib. Corp.*, 118 Ohio App. at 32; *see also State ex rel. Bowers v. Maumee Watershed Conservancy Dist.*, 98 Ohio App. 111, 114, 128 N.E.2d 208, 210 (3rd Dist.1954) ("This tax having been illegally levied and collected and having been paid over to the county treasurers of the district could be recovered, if at all, only by the remedies set forth in Chapter 2723, Revised Code […] no other remedy is provided.").

In an attempt to avoid their failure to comply with the provisions of R.C. 2723.01, Plaintiffs may rely on the Tenth District's recent opinion in *LaBorde v. Gahanna*, 10th Dist.

R.C. 2305.07; *LeCrone v. LeCrone*, 10th Dist. Franklin No. 04AP-312, 2004-Ohio-6526, ¶ 20 ("A claim for unjust enrichment is subject to a six-year statute of limitations * * * The claim accrues on the date when the money or property is wrongly retained."). Therefore, and although Plaintiffs' Second Amended Complaint purports to seek relief for taxes assessed since 2005, *see* Plfs.' Second Am. Compl. at ¶ 110, restitution for taxes paid prior to June 26, 2009 would be time-barred even in the absence of R.C. 2723.01, *et seq.* and its one-year statute of limitations.

Franklin Nos. 14AP–764, 14AP–806, 2015-Ohio-2047, 35 N.E.3d 55. There, the Court of Appeals acknowledged that "R.C. Chapter 2723 governs the enjoining and collection of illegal taxes and assessments," but nonetheless held that the statute was inapplicable to the plaintiffs' claim for the restitution of municipal taxes. *LaBorde* at ¶ 28.

LaBorde is distinguishable for at least two reasons. First, the plaintiff class in that case alleged the improper collection of *municipal* taxes, for which R.C. 2723.01 does not provide the exclusive remedy. *See Ryan*, 6 Ohio St.3d at 366 (holding that R.C. 2723.01 provides the exclusive means by which a taxpayer may seek restitution of taxes from "the county auditor"); *see also Conrad v. Mathews*, 4th Dist. Highland No. 585, 1986 WL 8186, *1 (noting that the Supreme Court's decision in *Ryan* "does not state whether R.C. 2723.01 is the exclusive method for collecting municipal income taxes wrongfully collected."). As the *LaBorde* court acknowledged, actions to recover *municipal* taxes are governed by R.C. 718.12, which has a three-year statute of limitations. *LaBorde* at ¶¶ 30-31. Unlike *LaBorde*, this case involves the assessment and collection of property taxes by county auditors and treasurers. *See* R.C. 5713.01(A); *Gen. Elec. Co. v. DeCourcy*, 60 Ohio St.2d 68, 71, 397 N.E.2d 397, 399 (1979) ("the collection of real property taxes is controlled by county authorities."). Therefore, and pursuant to *Ryan*, R.C. 2723.01 is Plaintiffs' exclusive remedy and *LaBorde* does not compel a contrary result.[4]

[4] It would be strange indeed for the legislature to have prescribed an express statutory remedy for the recovery of taxes with a one-year statute of limitations while simultaneously permitting common-law unjust enrichment claims for the recovery of those same taxes for up to six years (the statute of limitations for unjust enrichment). *See Paramount Film Distrib. Corp.*, 118 Ohio App. at 32 (holding that the availability of "common-law remedies, either being available at the taxpayer's option, is incompatible with the structure, operation and purpose of [R.C. 2723.01]."). As the Tenth District noted in *Paramount*, the General Assembly's conscious choice to permit claims for the recovery of illegally-collected taxes with a one-year statute of limitations "is a recognition of the fact that while the taxpayer needs a remedy against illegal exactions [...] the government must be provided with a reasonable basis for estimating revenues and making appropriations, and the collecting officer deserves protection from prolonged contingent liability." *Id.* This rationale would be completely undermined if Plaintiffs were allowed to seek restitution of taxes collected over a six-year period.

Moreover, the Supreme Court of Ohio has expressly held that R.C. 2723.01 provides the proper remedy where, as here, a plaintiff alleges a failure to comply with statutory requirements governing the collection of a tax. *See State ex rel. Corron v. Wisner*, 25 Ohio St. 2d 160, 163, 267 N.E.2d 308, 311 (1971) (holding that R.C. 2723.01 provided "an adequate remedy with respect to [plaintiffs'] contention that the 1969 taxes were illegal ***because of the failure of the auditor to comply with statutory requirements***.") (emphasis added). Similarly, the Plaintiffs in this case are alleging that CAUV property taxes were illegally assessed as a result of the Tax Commissioner's failure to comply with the statutes and rules governing preparation of the CAUV land tables used by county auditors to appraise the taxable value of agricultural land. *See* Plfs' Second Am. Compl. at ¶ 4 (alleging that "the ODT has flouted the legislative and statutory mandates that govern the computation of CAUV."); *id.* at ¶ 42 (alleging that "All taxes collected on Land Capability Classes V-VIII were illegally collected."); *id.* at ¶ 110 (alleging that Plaintiffs and putative class members "have paid billions in property taxes that they did not lawfully owe."); *id.* at ¶ 111 ("The State of Ohio has unjustly enriched itself by assessing and retaining the illegitimate property taxes paid as a result of the ODT's misapplication of CAUV.").

According to Plaintiffs' own allegations, this is an action for the recovery of "illegitimate" and "illegally collected" property taxes. Because the funds that Plaintiffs seek in restitution were appraised by county auditors and collected by county treasurers, they can only be recovered from those officers pursuant to the provisions of R.C. 2723.01, *et seq.* Plaintiffs have not alleged any cause of action under R.C. 2723, and their backdoor attempt to obtain a refund of their property taxes under a common law theory of unjust enrichment is foreclosed by

the statute's exclusive remedy. Accordingly, Plaintiffs' Second Amended Complaint should be dismissed.

III. CONCLUSION

Pursuant to the undisputed facts and authorities set forth above, Plaintiffs' Second Amended Class Action Complaint should be dismissed for three reasons:

1) First, there is no dispute that the Tax Commissioner has never collected or possessed the CAUV property taxes that Plaintiffs claim to have "overpaid." Because the funds that Plaintiffs claim entitlement to are not "in the Defendant's possession," *see Santos* at ¶ 13, their claim for "equitable" restitution fails as a matter of law.

2) Because Plaintiffs have no claim for "equitable" restitution against the Tax Commissioner, their claim for restitution is *legal* in nature and this Court lacks subject matter jurisdiction. Therefore, Plaintiffs' ancillary claim for declaratory judgment should also be dismissed.

3) Finally, Plaintiffs have failed to avail themselves of the remedies afforded under Revised Code Chapter 2723. No cause of action under R.C. 2723.01, *et seq.* was pleaded in Plaintiffs' Second Amended Complaint, and Plaintiffs have not alleged any attempt to comply with the statute's mandatory prerequisites to filing suit. Because Plaintiffs' common-law claims are foreclosed by the General Assembly's decision to create an exclusive remedy for the restitution of illegally collected taxes, Plaintiffs' Second Amended Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2017, 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.

/s/ Robert A. Hager
Counsel for Defendant Tax Commissioner of Ohio

4822-5201-6455, v. 2