

OD690 U78

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

BRUCE A. VANCE, et al.	CASE NO. CV 16)	003295
)	
Plaintiffs,	JUDGE: JENIFER)	A. FRENCH
)	
vs.	<u>PLAINTIFFS' INITIAL BRIEF</u>)	<u>IN OPPOSITION TO MOTION</u>
	<u>FOR</u>)	
THE STATE OF OHIO, et al.	<u>SUMMARY</u>)	<u>JUDGMENT FILED BY THE TAX</u>
	<u>COMMISSIONER</u>)	Defendants.

INTRODUCTORY STATEMENT

Given there has been no ruling to date on Plaintiffs' Rule 56(F) Motion to continue discovery, and Defendant's various filings opposing any further discovery, Plaintiffs are filing this Initial Brief In Opposition To Defendant's Motion For Summary Judgment Filed By the Tax Commissioner to place Plaintiffs' initial opposition on the record Plaintiffs reserve the right to file a full brief in opposition at the close of discovery, and are not waiving any right to full discovery, or conceding any argument raised by Defendant.

The State's Motion For Summary Judgment should be denied. The Plaintiffs' claims for equitable restitution belong in this Court. This Court has jurisdiction of Plaintiffs' claims for statutory violations. Cristino v. Ohio Bureau of Workers' Comp., 18 Ohio St. 3d 151. And this Court has jurisdiction of Plaintiffs' claims, if the State "wrongfully collects or holds" money belonging in good conscience to the Plaintiffs. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, cited and followed in Santos v. Ohio Bur. Of Workers' Comp., 101 Ohio St. 3d 74.

OD690 U79

The wholly unique laws, rules and regulations comprising Ohio's CAUV program create genuine issues of material fact concerning the State's collection and holding the amount of Plaintiffs' property tax monies, which can only be resolved by a jury. There is no dispute Plaintiffs' claims are for statutory violations, which alone forms the basis for this Court's jurisdiction. But, separately, the jury alone, after a full development of the factual record, must resolve genuine issues of material fact regarding the State's collection and retention of monies belonging in good conscience to Plaintiffs, specifically.

1) WHETHER THE STATE "COLLECTS" ALL CAUV PROPERTY TAXES

The State Tax Commissioner has statutory responsibility to direct and supervise the appraisal of all real property, and the collection of property taxes, statewide. While local Auditors appraise all non-CAUV properties under rules prescribed by the Commissioner, with respect to CAUV lands, the Commissioner himself performs the actual appraisals of, and thus has complete, unfettered control and authority to determine the property tax appraisal value of every square foot of each of the sixteen million acres of land enrolled in the CAUV program. No County Auditor, Treasurer or other official of any subdivision of the State has authority to deviate from the Tax Commissioner's appraisal values set forth in the annual Soil Tables. With respect to CAUV property taxes, the County Auditors & Treasurers are simply automatons collecting every penny of CAUV property tax exactly per the direction and control of the Tax Commissioner. Even the Commissioner refers to the County Auditors as his "Deputy Assessors", in his Appellee Brief in the Ohio Supreme Court.

2) WHETHER THE STATE RETAINS AND HOLDS THE AMOUNT OF TAXES IT CAUSES CAUV OWNERS TO OVERPAY AS A RESULT OF THE STATE'S OVERAPPRAISAL OF THEIR LANDS

OD690 U80

2

When its Tax Commissioner breaches his legal and fiduciary duty to properly calculate the values of CAUV lands, the State retains in its Treasury the amount of taxes overpaid on CAUV lands, by unlawfully shifting its payment obligations for local education funding and local government funding:

A. EDUCATION FUNDING

Legal responsibility for funding education is a joint obligation of the State and the local School District, and as between them, is a "zero sum game," that is, whatever one does not pay the other must pay. Like a see-saw, however much one goes down, the other goes up. As determined by statutory State Share Index and Capacity Measure formulas, the State's percentage of that obligation is mathematically dependent, to a high degree, on the total taxable value of real property in the School District. When the Tax Commissioner calculates property appraisal values of CAUV lands in excess of the values allowed by the CAUV formula, it also calculates and reports those higher valuations and tax revenue to the Department of Education. Per the statutory formulas, the State's respective share of education funding goes down, and the local farmers' tax burden goes up, by amounts capable of mathematical determination. The State's Education fund has the money the farmers' overpaid; the fact that the farmers did not pay their excess taxes to the State first, before the monies flowed to the local School District is immaterial. The resulting decreased State Department of Education funding to poor and rural school districts has been studied and reported to Ohio Legislature by Dr. Howard Fleeters, a pre-eminent authority on Ohio education funding.

About 2/3 of the taxes Plaintiffs and the class have overpaid goes to local education funding.

B. LOCAL GOVERNMENT FUNDING

The remaining 1/3 or so of overpaid CAUV taxes goes to local governments: counties, park districts, and small rural towns, villages, and townships. The Tax Commissioner must also send his detailed reports outlining increased CAUV valuations and local tax revenue to the State Office of Budget and Management. Like the see-saw of education funding, as the Tax Commissioner's appraisals of the value of CAUV lands skyrocketed 639⁰ 0, from \$1.8 billion in 2005 to \$11.5 billion, the State has cut its funding of local governments by over \$300 million per year, or nearly by half. The State's general fund and local government fund have monies which the knowingly forced the CAUV landowners to pay.

STATEMENT OF FACTS

A. The Tax Commissioner Is Responsible For The Collection of All Property Taxes In The State

The Ohio Tax Commissioner directs, supervises and controls all property tax collection in every political subdivision of the State. The Tax Commissioner's absolute power and control over statewide property tax collection, including CAUV tax collection, is found at O.R.C. § 5715.01 , titled "Assessment of real property; rules and procedure; county board of revision":

OD690 U82

„The tax commissioner shall direct and supervise the assessment for taxation of all real property. The commissioner shall adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule for

4

such values and for the determination of the current agricultural use value of land devoted exclusively to agricultural use." (emphasis added)

The Tax Commissioner's power specifically includes the power to classify all property for purposes of taxation, including the classification of agricultural property. O.R.C. Section 5713.041. For example, Tax Commissioner makes the Final Determination of every application for exemption from real property taxation, e.g., by a church, school, or government body (See Exhibit 30). The Tax Commissioner alone has the power to remit payment of property taxes. The local Auditors and Treasurers may only remit penalties, not taxes. O.R.C. Section 5715.39.

B. The Legal & Regulatory Framework of Ohio's CAUV Property Tax Program

The taxation of agricultural lands through the CAUV program depends not at all on its market value, but exclusively upon its agricultural productivity. This method of appraisal is so different from "true value," or fair market value, that an Amendment to the Ohio Constitution was placed on the ballot, and passed by an overwhelming majority of Ohio voters in 1974. Since then, Article II, 36 of the Constitution provides that

laws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax purposes at the current value such land has .
such agricultural use. (emphasis added)

The General Assembly then exercised its authority under Article II, 36 to create a system of Current Agricultural Use Valuation ("CAUV") property taxation, which is fundamentally

OD690 U83

different from the system of "true value" property tax valuation and collection performed at the County level on all other real property.

5

- 1) Every acre continuously devoted to agricultural use, and enrolled in the program, is valued solely by the agricultural productivity of the class and condition of its soil.
- 2) The actual agricultural activities being performed on those acres is irrelevant to the appraisal value of the soil, so long as the activities being performed meet the State's definition of "agricultural activity," set forth at O.R.C. Section 5713.30 (A)(l)(a).
- 3) For any given class or condition of soil, the per acre appraisal value for real property taxation is the same throughout the state, regardless whether the land is being used to raise soybeans, graze cattle, operate a greenhouse, grow grapes, or manage hardwood trees for timber, and regardless whether that acre is located half a mile off the road, in the most underpopulated area of the State, or behind McDonalds at the Delaware/Rt. 23 Exit off 1-71 .
- 4) With respect to all CAUV acreage, the Legislature expressly departed from the system of allowing the local County Auditors to appraise real property (under rules for determining "true value" prescribed by the Tax Commissioner; O.R.C. Section 5713.03), and delegated the task of ensuring the uniform appraisal of the agricultural productivity of soil classes throughout the State, solely to the Tax Commissioner. The Tax Commissioner, and the Tax Commissioner alone, conducts the appraisal of, and thus sets the taxable value of, each and every acre of land in the CAUV program, and publishes those uniform, statewide values in the annual CAUV Soil Tables, which are distributed to the County Auditors. O.R.C. Section 5713.31.

OD690 U84

- 5) The County Auditors have no jurisdiction, power or authority whatsoever to deviate from the Tax Commissioner' s appraisal value of even a single acre of CAUV land,

6

1but must collect all property taxes based on the Commissioner's appraisal. With respect to the collection of property taxes on CAUV acreage, all 88 County Auditors are automatons, under the complete control and direction of the State:

"If the auditor determines, which determination shall be made as of the first Monday of June, annually, that the land is land devoted exclusively to agricultural use he shall appraise itfor real property tax purposes in accordance with rules adopted by the commissioner for the valuation of land devoted exclusively to agricultural use and such appraised value shall be the value used by the auditor in determining the taxable value of such land for the current tax year under section 5713.03 of the Revised Code and as shown on the general tax list compiled under section 319.28 of the Revised Code. O.R.C. Section 5713.31. (emphasis added)

The Ohio Department of Taxation' s public website contains including annual official reports, including the Commissioner' s calculation of CAUV values, the total acreage and number of parcels enrolled in the CAUV program, the total appraisal value of CAUV lands statewide, levels of the State's funding of local governments, and other matters relevant to this case. Those official government documents reveal the following information from 2005 onward:

- 1) The total number of acres enrolled in the CAUV program has remained steady at 16 million acres, +/- a small percentage. (Exhibits 3-13)
- 2) The total appraised value calculated by the Tax Commissioner for those acres has risen from 1.8 billion dollars in 2005, to 11.5 billion dollars in 2015, an increase of 639⁰0. The most dramatic increases came under the current Governor' s

OD690 U85

Administration. (See Exhibit 2, a graph based on Exhibits 3-13)

- 3) The statewide average appraised value per acre of CAUV land rose from \$123 in 2005 to \$1,310 in 2016, per one ODT publication (Exhibit 14), and to \$2,081 per acre

in 2016, per another ODT publication (See Exhibit 15). This is an increase of 1,065⁰⁰ or 1,692⁰⁰, depending on which 2016 ODT figure is used.

C. The State Retains Funds Equivalent to Increased CAUV Taxes Imposed By The Tax Commissioner

Legal responsibility for funding education is a joint obligation of the State and the local School District, and as between them, is a "zero sum game," that is, whatever one does not pay the other must pay. Like a see-saw, however much one goes down, the other goes up. Since at least the 1850's the State's fundamental, constitutional obligation to fund public education has been the law:

"Section 2 -Article VB of the Ohio Constitution requires the state to provide and fund a system of public education and includes an explicit directive to the General Assembly.

'The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State *** "

„According to statute, the revenue available to a school district comes from two primary sources: state revenue, most of which is provided through the School Foundation Program, and local revenue, which consists primarily of locally voted school district property tax levies. Federal funds play a minor role in the financing scheme. Ohio relies

OD690 U86

more on local revenue than state revenue, contrary to the national trend." (emphasis added)

Derolph v. state, 1997-Ohio-84, 78 Ohio St. 3d 193, 199, 677 N.E.2d 733, 738

And as the Ohio Department of Taxation itself states on its official website:

'Since the 1800s, the property tax has been the single most important source of funding for Ohio's schools. In fact, of all property taxes levied in Ohio, approximately two-thirds go to fund schools. The remainder is split among all other local governments in the state.'

8

School funding in Ohio is a shared responsibility between the state and local school systems. Excluding federal dollars, slightly more than half of all funding statewide is locally generated, with virtually all of the local money coming from the property tax.

[http://www.tax.ohio.gov/portals/0/research/propertv taxation school fundin 2012c. d?](http://www.tax.ohio.gov/portals/0/research/propertv%20taxation%20school%20fundin%202012c.pdf)

The State's share of local school funding is determined by the State Share Index, and Capacity Measure, two mathematical formulas. Under the SSI, there is a mathematical correlation between the amount of money the State will provide to any given school district, and the total property tax valuation within the district (as well as local income). The State's share can vary from 5 00 in a wealthy district, to 95 00 in a poor district. As the State Board of Education states on its website:

"State Share Index of each school district reflects the wealth of the school district as measured by property valuation and the income of the residents of the district calculated for the purposes of the distribution of the state funds through the foundation formula. The state share index is calculated based on a sliding scale that ranges from 5 00 to 95 00 with the wealthiest districts having an index of 5 00 and the least wealthy districts having an index of 95 00. The state share index is meant to equalize the distribution of the funds among school districts." See [http://www.education.ohio.gov/To Dics/Finanee.-aud,](http://www.education.ohio.gov/To%20Disc/Finance/aud)

OD690 U87

Ch. 3317 sets forth the State Department of Education's local education funding obligations, aka "The School Foundation Program." In relevant part, O.R.C Section 3317 01 reads as follows:

"This chapter shall be administered by the state board of education. The superintendent of public instruction shall calculate the amounts payable to each school district and shall certify the amounts payable to each eligible district to the treasurer of the district as provided by this chapter. . . . Certification of moneys pursuant to this section shall include the amounts payable to each school building, at a frequency determined by the superintendent, for each subgroup of students, as defined in tion 3317 40 D! he Revised Code, receiving services, provided for by state funding, from the district or school. No moneys shall be distributed pursuant to this chapter without the approval of the controlling board.

9

The state board of education shall, in accordance with appropriations made by the general assembly, meet the financial obligations of this chapter." (Emphasis added).

In order to for the Department of Education to calculate its obligations, the Tax Commissioner is required to annually file extensive, certified reports with the Department of Education and Office of Budget and Management:

"A) On or before the first day of June of each year, the tax commissioner shall certify to the department of education and the office of budget and management the information described in divisions (A)(1) to (5) of this section for each city, exempted village, and local school district, and the information required by divisions (A)(1) and (2) of this section for each joint vocational school district, and it shall be used, along with the information certified under division (B) of this section, in making the computations for the district under this chapter.

- (1) The taxable value of real and public utility real property in the school district subject to taxation in the preceding tax year, by class and by county of location.
- (2) The taxable value of tangible personal property, including public utility personal property, subject to taxation by the district for the preceding tax year.
- (3) o (a) The total property tax rate and total taxes charged and payable for the current expenses for the preceding tax year and the total property tax rate and the total taxes charged and payable to a joint vocational district for the preceding tax year that are limited to or to the extent apportioned to current expenses.

OD690 U88

- (b) The portion of the amount of taxes charged and payable reported for each city, local, and exempted village school district under division (A)(3)(a) of this section attributable to a joint vocational school district.
- (4) The value of all real and public utility real property in the school district exempted from taxation minus both of the following.
 - (a) The value of real and public utility real property in the district owned by the United States government and used exclusively for a public purpose, o (b) The value of real and public utility real property in the district exempted from taxation under Chapter 725. or 1728. or section 3735.67, 5709.40, 5709.41, 5709.45, 5709.62, 5709.63, 5709.632, 5709.73, or 5709.78 of the Revised Code.
- (5) The total federal adjusted gross income of the residents of the school district, based on tax returns filed by the residents of the district, for the most recent year for which this information is available, and the median Ohio adjusted gross income of the residents of the school district determined on the basis of tax returns filed for the second preceding tax year by the residents of the district.'

10

Ohio Rev. Code Ann. 3317.021.

The Tax Commissioner's burden includes calculating, for each school district, whether it is meeting its basic obligations to remain eligible for State funding, i.e., levying at least 20 mills for education. O.R.C. Sections 3317.021 (D), 3317.01. And, the Commissioner must even adjust his property tax revenue figures downward to account for bankrupts, and port authorities who are behind on their taxes. O.R.C. Sections 3317.0210, 3317.0211.

The Commissioner's reports are used to calculate the State Share Index, and the Capacity Measure, for each school district, two mathematical formulas by which the State's share of local education funding are calculated. O.R.C. Sections 3117.017, 3117.018.

The State Share Index formula is set forth at O.R.C. Section 3317.017. The total property tax valuation of a school district is an integral part of the formula:

OD690 U89

"The department of education shall compute a school district's state share index as follows:

(A) Calculate the district's valuation index, which equals the following quotient:

(The district's three-year average valuation / the district's total ADM) / (the statewide three-year average valuation for school districts with a total ADM greater than zero / the statewide total ADM)" (Emphasis added)

The Capacity Measure formula is set forth at O.R.C. Section 33 17.018, and the district's property is an integral factor in the formula; in fact, for all districts within upper and lower limits of income (See O.R.C. Section 33 17.019), the property valuation index is the Capacity Measure. Under O.R.C. Section 3317.018, the Tax Commissioner shall, inter alia:

.(C) Determine the district's capacity measure as follows:

- (1) If the district's median income index is less than the lower limit, then the district's capacity measure shall be equal to [the district's valuation index - (the lower limit - the district' s median income index)].
- (2) If the district's median income index is greater than or equal to the lower limit and less than or equal to the upper limit, then the district's capacity measure shall be equal to the district's valuation index.
- (3) If the district's median income index is greater than the upper limit, then the district's capacity measure shall be equal to {the district's valuation index + [(the district's median income index — the upper limit) X (0.20 in fiscal year 2016 or 0.40 in fiscal year 2017)]}.

Ohio Rev. Code Ann. 3317.018 (Emphasis added)

The Tax Commissioner therefore has a statutorily mandated, non-delegable duty to determine and calculate the exact monetary amount of and income from increased property tax valuations, which it provides to both the Department of Education and the Department of Budget and Management. When the Tax Commissioner calculates new and higher CAUV Soil Table values, it reports higher local property tax revenue (the "valuation" and "capacity measure") from which both the Tax Commissioner and the Department of Education can predict, with mathematical certainty, the amount of money the State can retain in its Treasury, by shifting the

OD690 U90

burden of local education funding through higher CAUV property taxes. The amount(s) retained by the State in its Foundation Program funds are mathematically traceable by application of the statutory formulas set forth in O.R.C. Sections 3317.017 and 3317.018. With regard to CAUV taxes only, the local Auditors and Treasurers are the State's automatic collectors.

It is a matter of public record, of which this Court can take judicial notice, that the Commissioner has increased the overall taxable value of the 16,000,000 acres of Ohio that are in the CAUV program more than 639⁰0 from 2005 to 2015, and the per acre value has increased IO-

12

16 times, depending on which ODT publication is relied on. (Compare the 2016 figure in Exhibit 14 to Exhibit 15).

The State has thereby shifted much of the burden of financing education to the farmers and landowners whom the CAUV program is supposed to serve. There is a causal connection between the deviations in the State's calculations of CAUV property values, the enormous rise in property values in rural districts and small towns, and the drastic reductions in State education aid. The March 15, 2015, testimony by Dr. Howard Fleeter of the Ohio Educational Policy Institute before the House Finance Primary and Secondary Education Subcommittee of the Ohio Legislature concerning H.B. 64 (attached hereto as Exhibit 29), demonstrated that:

- 1) The total taxable value of Ohio CAUV lands rose from over \$1.8 billion per year in Tax Year 2005 to over \$6.8 billion in Tax Year 2013, a nearly four-fold increase. Prior to the current administration, values rose from 14⁰0 to 22⁰0 per year, but in three years under Governor Kasich, CAUV increases were 31⁰0, 32.6⁰0 and 37.6⁰0.

OD690 U91

- 2) In some areas of the State, CAUV values now approach fair market value, undermining the entire purpose of the CAUV program.
- 3) "Poor Rural Districts" and " Small Towns" were receiving the lowest percentages of increases in the State Education Budget for 2015-2017. Even "Wealthy Suburbs" were receiving more. Every other group would 3-4 times as much, except "Rural Districts," the only group whose State funding was reduced. These 3 types of District have seen overall property value increases from 4.9⁰ 0 to 10.8⁰ 0, while 3 of the 5 other types have seen decreases, and even "Wealthy Suburbs" only saw an increase of only 2.6⁰ 0 in their property values.
- 4) For Tax Years 2014-2017, the taxable value of property in "Poor Rural [School] Districts" increased \$1.3 billion, in "Rural School Districts" by \$1 billion, and in "Small Towns" by \$800 million. All other groups show losses, except "Wealthy Suburbs," which show a meager 1.1⁰ 0 increase. These increases are almost due to the enormous increase in CAUV tax values.
- 5) "Rural School Districts" fared the worst under the Governor's proposed plan; these districts have seen the second highest increase in property values and a decrease in State Aid.

13

The State has the money equivalent of what CAUV landowners were and are forced to overpay; the fact that the farmers did not pay that excess to the State before it went to the School District (or local government fund, see below) is immaterial.

D. As The State's Tax Commissioner Has Imposed Skyrocketing Local CAUV Property Taxes, The State Has Retained Money Allocated For Local Governments

As the State Department of Education pronounces on its official website, approximately about 2/3 of property taxes goes to education funding. The remaining 1/3 or goes to local governments: counties, park districts, cities, villages, and townships. Like the see-saw of education funding, as local property tax revenues have gone up as a result of the ODT's failure to calculate CAUV soil values according to law, the State has retained hundreds of millions in funds formerly

OD690 U92

earmarked for local governments. To repeat, the Tax Commissioner's appraisal values of CAUV lands has increased overall by 639⁰0 since 2005, rising at rates over 32⁰0 per year under the Kasich Administration.

State funding of local governments averaged around \$670 million per year until 2011, when it dropped on average of more than \$300 million per year, down to about \$360 million per year. The Tax Commissioner's own "Tax Data Series" demonstrate this in the public record at:

,www.vvww.iax.ohio.gov/tax/analysis/tax_data_series/local_government_income_tax_distribution_of_editions_of_local_lg1-?.CY as-m. (See Exhibits 15-28, and Exhibit 16, a graphic summary of Exhibits).

LAW & ARGUMENT

1. PLAINTIFFS SEEK ENFORCEMENT OF STATUTORY RIGHTS AND THEREFORE THEIR CLAIMS ARE FOR EQUITABLE RESTITUTION OVER WHICH THIS COURT HAS JURISDICTION UNDER O.R.C. SECTION R.C.

The essence of Plaintiffs' claims is the enforcement of the body of statutes which the Legislature has enacted to carry into effect the electoral mandate to amend the Ohio Constitution to allow agricultural property to be valued according to use, and the recovery of the funds overpaid as a result of violation of statute. The statutes include, inter alia, O.R.C. Sections 5713.01, 5713.03, 5713.30 and 5713.31. (See, Second Amended Complaint, Paragraphs 20-23) Both the United States Supreme Court and the Ohio Supreme Court have held that claims against the Federal or State government seeking to enforce statutes, and the recovery of funds which were overpaid due to a violation of statutes, are claims for equitable, not legal, restitution.

In Cristino v. Ohio Bureau of Workers' Comp., 118 Ohio St. 3d 151, a years-long case, in which the Ohio Supreme Court took jurisdiction twice, the question before the Supreme Court in the second appeal was the State's argument that the Court of Common Pleas had no subject matter jurisdiction, because Plaintiffs' claims were for legal, not equitable restitution. In a 7-0

OD690 U93

opinion, the Court resolved the issue by holding that claims against the State seeking to enforce statutory rights are claims for equitable restitution over which Courts of Common Pleas have express jurisdiction under O.R.C. Section 2743.03, while claims for the enforcement of contractual rights were under the jurisdiction of the Court of Claims. 1 18 Ohio St. 3d at 154.

The foundation of the Ohio Supreme Court's unanimous decision in Citrino was a line of U.S. Supreme Court decisions analyzing the distinction between legal and equitable restitution:

'The [U.S. Supreme] court distinguished its decision in Great-West from Bowen v. Massachusetts (1988), 487 U.S. 879, 108 S.Ct. 2722,

1 5

101 L.Ed 2d 749, in part on the basis of the distinction between statutory and contractual entitlement to past due funds. The court, which had allowed the plaintiffs claim for specific relief in Bowen, held that the case was inapplicable to the plaintiffs' claims in Great-West: "Bowen, unlike petitioners' claim, did not deal with specific performance of a contractual obligation to pay past due sums. Rather, [the plaintiff in Bowen] claimed * * * that the Federal Government failed to reimburse it for past expenses pursuant to a statutory obligation * * * "(Emphasis sic.) Id. at 212, 122 S. Ct. 708, 151 L.Ed.2d 635. We find the Supreme Court's discussion of legal and equitable restitution in Great-West applicable here."

Citrino, 151 Ohio St. 3d at 152.

Here, there is no dispute that Plaintiffs are seeking to enforce statutes, namely the statutes which comprise Ohio's CAUV tax system, and are seeking the recovery of monies overpaid due to violation of this unique, statutory scheme of real property taxation. Therefore, Plaintiffs' claims are for equitable restitution, and this Court has express, statutory jurisdiction under O.R.C. Section 2743.03.

11. THIS COURT HAS JURISDICTION BECAUSE THE STATE "COLLECTS" ALL CAUV PROPERTY TAXES

OD690 U94

With respect to CAUV property taxes, the Tax Commissioner is the collector of real property taxes, and Plaintiffs' claims for wrongfully excessive collection(s) are claims for equitable restitution. As the Tax Commissioner points out in his Motion for Summary Judgment, in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, the U.S. Supreme Court held that restitution is an equitable remedy when the Plaintiffs seek monies either wrongfully collected by the state, or wrongfully held by the state. 534 U.S. at 213. This reasoning has been adopted by the Ohio Supreme Court in Santos v. Ohio Bur. Of Workers' Comp., 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E.2d 441.

16

The County Auditors cannot and do not determine the appraisal value of even one square inch of one parcel of land in the CAUV program. The Tax Commissioner annually sets the value of every type and classification of soil in the State, and publishes those values in the Soil Tables. No County Auditor has any authority to deviate from those appraisal values (See, O.R.C. Section 5713.31, OAC 5703-25-30 through 5703-25-36.), but merely performs elementary arithmetic (Parcel X has 23 acres of soil type Y; the Tax Commissioner has decreed soil type Y to be worth \$3,000 per acre this year, therefore the value of Parcel X is 23 times \$3,000).

With respect to CAUV property taxes, the County Auditors are under the complete direction and control of the State, and are collecting tax based on values decreed by the Tax Commissioner; they are for this purpose agents and/or loaned employees of the Tax Commissioner, or, as the Commissioner himself says, his "Deputy Assessor." Appellee Brief in Adams et al. v. Testa, Ohio Supreme Court Case No.2016-0256, at pp. 20-21. The Tax

OD690 U95

Commissioner readily admits he "is the statewide official charged with overseeing the CAUV program." ¹ (Ibid, at p. 8)

At the very least, there is a genuine dispute of material fact, as to whether the Tax Commissioner, "collects" the CAUV taxes, given his mandate to direct and supervise all real property taxation, his absolute direction and control of the CAUV tax appraisal and collection process, and the absolute statutory obligation of the Auditors to follow the mandates of the Commissioner regarding CAUV taxes.

17

111. THE STATE HOLDS THE AMOUNT OF TAXES IT CAUSES CAUV OWNERS TO OVERPAY AS A RESULT OF THE STATE'S OVERAPPRAISAL OF THEIR LANDS

Plaintiffs' claims are for equitable restitution because the State "holds" monies properly which in good conscience belong to Plaintiffs. As detailed in II above, under the U.S. Supreme Court holding in Great-West, adopted in Ohio in Santos, Plaintiffs have a claim for equitable restitution if the State wrongfully collects and/or wrongfully holds money due the Plaintiffs.

The State would have the Court conclude that the Plaintiffs cannot claim equitable restitution unless they can identify particular funds directly taken from them by the State and identify the accounts in which they are held, i.e., the burden of proof a prosecutor has to prove the serial numbers of currency possessed by a Defendant match those robbed from a bank. Neither the U.S. Supreme Court nor the Ohio Supreme Court has imposed any such burden. In

¹ The State's Merits Brief is not attached as it is 128 pages long, and is available to the Court online at <http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2016/256>.

OD690 U96

Cristino, supra, Ohio Supreme Court adopted the following definition of claims for equitable restitution, the definition articulated by the U.S. Supreme Court in Great-West quoting I

Dobbs, Law of Remedies (2d Ed 1993) 571, Section 4.20):

“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.'" (emphasis added)

Citrino, 118 Ohio St. 3d 151, at 152, quoting Great-West Life & Annuity Ins. Co. v. Knudson, (2002), 534 U.S. 204, 213, 122 S.Ct. 708, 151 L.Ed.2d 635.

Here, there is no dispute that whatever portion of the 639⁰0 increases in CAUV property taxes were in excess of the amounts which would have resulted had the Commissioner and the State complied with statutory CAUV scheme, "belong in good conscience to the Plaintiffs.'

18

As detailed above, the Tax Commissioner has complete control over CAUV taxation, and calculates and reports all increased valuation and tax revenue therefrom to the State Department of Education, and Office of Budget and Management.

The monies at issue can "clearly be traced" to the State's Treasury. The Commissioner's highly detailed analyses form the basis for the Department of Education's calculations of the State's share of education funding, using the State Share Index and Capacity Measure formulas. There exists a direct, mathematically traceable and predictable relationship between the amount overpayment of CAUV taxes at the local level, and education monies the State "holds" at the expense of the Plaintiffs. In "good conscience," it is not the Auditors or Treasurers who calculated and imposed these taxes, or benefit from their overpayment, but the State alone. The

OD690 U97

Fleeters Report (Exhibit 29) demonstrates this, and the funds now in the possession of the State can be traced with mathematical precision by application of the SSI and Capacity Measure formulas. At the very least, there exist genuine issues of material fact whether there is a traceable, quantifiable, cause and effect relationship between CAUV overtaxation and education funds held by the State.

To repeat, 1/3 of CAUV property tax revenue goes to local government entities. There is also a cause and effect relationship between the huge increases in CAUV tax money raised at the local level, caused by the State's violation of the CAUV statutes, and the huge sums of money now in the State Treasury which were otherwise earmarked for Local Government funding. The Tax Commissioner's annual analyses of the tax base, expenses and tax revenue available to every city, exempted village, school district and joint vocational school in Ohio were and are reported to the Office of Budget and Management, who then knew exactly how much more local revenue is available due to higher CAUV taxation. As CAUV valuations increased 639⁰0, state funds to local governments plummeted (Exhibits 16-28). Comparing the graphs at Exhibits 2 and 16, there is an obvious and direct relationship, particularly in the Kasich Administration, between the massive increases in local CAUV taxation, and the nearly 50⁰0 decrease in state distribution of Local Government funds, from nearly \$760 million per year to \$350 million per year. At the very least, there exists a genuine issue of material fact whether the State possesses and holds Local Government funds as a result of the Tax Commissioner having overcharged Plaintiffs

IV. O.R.C. SECTION 2723.01 IS NOT APPLICABLE TO PLAINTIFFS' CLAIMS

The remedies set forth at O.R.C. Sections 2723.01-05 have no application to Plaintiffs' claims here.

OD690 U98

It is worth noting the Tax Commissioner failed to make this argument for the first eighteen-plus months this matter was pending. There is no mention of it in his Motion To Transfer Venue & Dismiss, filed in October, 2015, in this case. This argument newly filed argument in this Court is completely inconsistent with the Commissioner's arguments in his Appellee Brief in the Ohio Supreme Court in Adams et al. v. Testa and in oral arguments this past June 6, that.

- 1) the Commissioner's determination of CAUV values is an executive, discretionary act which cannot be second-guessed by the "ill-equipped" Board of Tax Appeals,
- 2) the Supreme Court should not countenance any remedy which allows individual landowners the right to appeal, as it would mangle the statutory process, grind assessments to a halt, and make an executive function just another job of the courts, and
- 3) the only legal remedy available to CAUV landowners is a mandamus action.

3 See footnote 2 for the web location of the Commissioner's Appellee Brief.

20

In fairness, here are exact quotes from pp. 21-22 of the Commissioner's Brief in the Supreme Court:

"In the CAUV context, no statute requires — let alone allows — the Tax Commissioner to adjudicate an individual protest by a given taxpayer. Nor do the statutes permit the holding of an adjudicatory hearing or a final determination. This is so, because the Tax Commissioner's role in CAUV is not one of an adjudicator, and the CAUV statutory scheme does not intend to impart appeal rights upon an individual taxpayer. CAUV is not set parcel-by-parcel, as with commercial or residential real property valuations. Instead, CAUV valuation is entrusted to the executive administrative process — the Tax Commissioner acts as the statewide tax administrator performing his executive role to set values to be used for agricultural property valuation — as applied by his deputy assessors, the county auditors"

"The Tax Commissioner is entrusted with the task of performing regular evaluations of statewide agricultural values and setting those values for all the counties in Ohio. Appellants' attempt to inject an appeal right for every affected landowner into the Tax

OD690 U99

Commissioner's process would mangle the statutory process, grind county assessments to a halt, and make an essentially executive function just another job of the courts. If a claimant believes that the county auditor has wrongly classified his property for CAUV purposes or has made an error in computation, he may appeal to his county's board of revision. R.C. 5715.11; 5713.31; 5713.03. And, if a claimant believes that the Tax Commissioner has erred in performing his discretionary executive function, then a mandamus action may lie to compel the proper exercise of his judgment. In a long line of cases, this Court has held that, where an administrative agency's decision is discretionary and not subject to appeal, mandamus is the appropriate remedy." (Emphasis added)

The Commissioner's claims here that O.R.C. Sections 2723.01-05 provide the "exclusive means" for Plaintiffs' recovery ring hollow for reasons as well:

First, this subchapter of the Code is titled "Enjoining and Recovering Illegal Taxes and Assessments" (emphasis added); it only provides a procedure for enjoining and recovering taxes which are claimed to be completely illegal either per se, and/or because they have no application to the complainant whatsoever, and/or are being billed for the wrong tax years. Let's be clear:

21.

Plaintiffs in no way claim the CAUV tax scheme is illegal per se, or that they should not be assessed under the CAUV program, or that they are being harmed by being levied with CAUVbased taxes for the wrong tax years. Plaintiffs have consistently claimed that the Commissioner's conduct is illegal, not the tax itself: he has failed to assess the CAUV taxes in compliance with a constitutional and statutory scheme which, when properly applied, is of great benefit to them and allows them to continue farming. This is what Plaintiffs have meant by "illegal" conduct of the Commissioner.

The Courts consistently take jurisdiction under Subchapter 2723 only of claims that a tax is illegal per se, or as applied, not of claims of that a valuation was too high. See, Paramount Film Distrib. Corp v. Tracy, 118 Ohio App. 29 (claim that Ohio's collection of a censorship tax on films was unconstitutional), Gottlieb v. City of S. Euclid, 2004-Ohio-2705, 157 Ohio App. 3d

OD690 U100

250, 810 N.E.2d 970 (constitutionality of certificate of occupancy license fee), Shanahan v. City of Toledo, 2009-Ohio-5991 (Ct. App.) (dispute over the legality of a newly enacted trash collection fee), Hammond v. Winder, 112 Ohio St. 158, 147 N.E. 94 (1925) (illegal, second valuation was in excess of true, market value), and Peoples Rights Org. v. Montgomery, 142 Ohio App. 3d 443, 756 N.E 2d 127 (2001) (dispute over a new "Brady" tax on gun sales).

Second, the Tax Commissioner has previously argued in this matter that O.R.C. Section 5703.38 expressly prohibits any injunction of any action taken by the Tax Commissioner. See, Motion To Transfer Venue & Dismiss, filed in October, 2015, at p. 4. For the Commissioner to now plead that one of Plaintiffs' only remedies is to seek Subchapter 2723 injunction of illegal taxes assessed by action of the Commissioner is simply not credible, particularly in light of the Syllabus in Hakim v. Kosydar, 49 Ohio St. 2d 161, 162, 359 N.E.2d 1371, 1372 (1977):

"R.C. 5703.38 prohibits a Court of Common Pleas from entering an order which has the effect of suspending or staying an order, determination, or direction of the Department of Taxation. (*Torbet v. Kilgore*, 6 Ohio St. 2d 42, approved and followed.)

Third, the case law interpreting and applying O.R.C. Sections 2723.01-05 makes clear that those sections only provide subject matter jurisdiction for claims that the taxing authority had no right to impose the tax or assessment, because it was completely illegal per se, or as applied to the complainant. There is no common pleas jurisdiction for disputes over the amount of valuation, until administrative remedies have been exhausted, as the Eighth District Court of Appeals held in a claim filed by BP against the City of Cleveland's tax collector, the Central Collection Agency.

"R.C. 2723.01 gives the court of common pleas original jurisdiction to determine the illegality of taxation. *Fox v. Lakewood* (1992), 84 Ohio App. 3d 202, 205, 616 N.E.2d 588. A number of cases hold that a party does not have to pursue administrative remedies when seeking to enjoin the illegal collection of taxes under R.C. 2723.01. See, e.g., *Smith v. Ohio Dept. of Taxation* (1975), 46 Ohio App. 2d 132, 346 N.E.2d 349; *Rocca v. Wilke* (1977), 53 Ohio App. 2d 8, 371 N.E.2d 223.

But we distinguish those cases because they questioned the legal authority to collect a tax and did not concern the amount of the tax. For example, in *Conn v. Jones* (1926), 115 Ohio St. 186, 152 N.E. 897, cited by BP as supporting its position, the court stated •

The apparent conflict in the decisions arising between the line of cases ending with *Hammond v. Winder*, 112 Ohio St. 158, 147 N.E. 94, and the line of cases indicated, is quite simply explained when we note that the cases in which injunction is denied are cases concerning valuation, or amount of assessment, and the cases in which injunction is granted are cases which contest the very power to lay the tax.

Like *Conn*, the distinction here is that the city has the legal authority to collect taxes from affiliates who choose to file a consolidated return. BP agrees the city has authority to collect tax from affiliates with a nexus to the city, so its power to levy a tax in the first instance is not in question. That being the case, exhaustion of administrative remedies would apply since the question becomes the amount of tax that could be collected.

„Some might argue we are making a fine distinction, but we believe exhaustion of administrative remedies is particularly applicable in this case. The board of tax of appeals has special expertise in tax matters and would be able to compile an adequate record, thus preparing "the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court * * * " *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St. 3d at 110 (internal quotation omitted)....

"We can further defend our fine distinction by noting that were we to interpret R.C. 2723.01 as suggested by BP, we would permit a R.C. 2723.01 action for any claim that a tax was wrongfully computed, as opposed to limiting it to those levied with no authority whatsoever. BP's argument, taken to its logical extreme, would mean that any incorrectly computed tax would necessarily be "illegal" because overtaxation would exceed the power of the taxing authority. In fact, any complaint about taxation would conceivably fall under the "illegal" heading and would be subject to a R.C. 2723.01 action. This would effectively nullify the doctrine of exhaustion of administrative remedies. The doctrine is too well-established for us to countermand, particularly when, as here, the administrative agency has special expertise. There must be a distinction, and we find the distinction must be the power of the municipality to tax at all versus mistakes made while levying the tax. This presents a clear line of demarcation and upholds the administrative review process.'

BP Communs. Alaska v. Cent. Collection Agency, 136 Ohio App. 3d 807, 814-16, 737 N.E.2d 1050, 1055-56 (2000) (Emphasis added).

Plaintiffs here are, like BP, disputing the amounts of the valuations, not the right of the State to levy CAUV taxes. More importantly, Plaintiffs are in the unfortunate position of having no administrative remedies to exhaust before invoking Subchapter 2723, as the Tax Commissioner has articulated at length before the Board of Tax Appeals and in the Ohio Supreme Court in Adams et al v. Testa where at p. 20-21 of its Merit Brief of Appellee, it stated:

'In the CAUV context, no statute requires — Ict alone allows — the Tax Commissioner to adjudicate an individual protest by a given taxpayer. Nor do the statutes permit the holding of an adjudicatory hearing or a final determination.'

In other words, CAUV landowners have no right to file appeals before local Boards of

Revision, and the Board of Tax Appeals has no jurisdiction to hear any direct appeal by any

OD690

CAUV landowner of the values calculated by the Tax Commissioner and set forth in the Soil Tables, as the statutory scheme for filing complaints against the valuation of real property, set forth in O.R.C. Section 5715.19, only allows CAUV landowners to file a complaint disagreeing with the Auditor's determinations that land was not devoted to agricultural use, disputing that land was converted out of agricultural use, disputing the amount of recouped taxes if lands were no longer in agricultural use, or simple math errors. O.R.C. Sections 5715.11, 5715.19, 5713.32, 5713.35.

Finally, as a practical matter, requiring the owners of over 400,000 CAUV parcels to each file their own protest letter and individual tax complaint in the Court of Common Pleas whenever they felt their CAUV valuation was too high, would wreak havoc in the Courts, and „grind the assessment process to a halt."

CONCLUSION

The Court should allow full discovery before ruling on the Tax Commissioner's Motion For Summary Judgment. Should the Court conclude that no further discovery is necessary, Plaintiffs submit — without waiving their right to object the denial of full discovery that the Court, after reviewing the public records and other admissible evidence submitted herewith, and the inferences to be drawn from such evidence, in the light most favorable to Plaintiffs, should deny the Tax Commissioner's Motion For Summary Judgment.

There is no dispute that Plaintiffs' claims are for violations of the statutory scheme implementing the CAUV tax program, and this Court has jurisdiction of such claims under the holding in Cristino v. Ohio Bureau of Workers' Comp., 118 Ohio St. 3d 151.

There exist genuine disputes of material fact as to whether the Tax Commissioner wrongfully collected and/or wrongfully holds monies, which in "good conscience" belong to the CAUV landowners whose taxes have risen over 639⁰ 0 in ten years, monies which can be calculated and traced mathematically, by, inter alia, examining the Commissioner's own detailed CAUV reports, Tax Data Series reports, Ch. 3317 reports to the Department of Education and Office of Budget and Management, applying the State Share Index and Capacity Measure formulas, and evaluating the drastic drop in local government funding. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, cited and followed in Santos v. Ohio Bur. Of Workers' Comp., 101 Ohio St. 3d 74.

The Commissioner's position Motion seeks dismissal of all of Plaintiff s claims. More importantly, contrary to the position of the Attorney General in earlier briefing, the Tax Commissioner's new outside counsel takes the position that the Plaintiffs are not simply in the wrong court, they have no restitution claim or remedy in any Court. (See Affidavit of Kevin T . Roberts, filed separately). There is no statutory or regulatory avenue for CAUV owners to obtain an administrative appeal, seek a refund, or an abatement. This Court is a court of law and equity. Plaintiffs' claims for equitable restitution and declaratory judgment belong here, not in the Court of Claims. For every right there must a remedy, and the Plaintiffs have the right to be free from unfair and burdensome real property taxation which puts their livelihood and property, and

OD690

Ohio's largest industry, in jeopardy.

Respectfully Submitted,

[s/ Kevin T. Roberts
KEVIN T. ROBERTS (0037479)
The Roberts Law Firm
7622 Columbia Road
Olmsted Falls, Ohio 44138
(440) 793-6255
ktr@kevinrobertslaw.com
Co-Counsel for Plaintiffs

JOSHUA R. COHEN (0032368)
Cohen Rosenthal & Kramer LLP
700 W. St. Clair Avenue, Suite 400
Cleveland, Ohio 44113
216-781-7956 j
cohen@crklaw.com
Co-Counsel for Plaintiffs

JANIES ROSENTHAL (0062872)
Cohen Rosenthal & Kramer LLP
700 W St. Clair Avenue, Suite 400
Cleveland, Ohio 44113 216-
781-7956 jbr@crklaw.com
Co-Counsel for Plaintiffs

ANTHONY J COYNE (0039605) EDWARD
O. PATTON (0042004)
Mansour Gavin Gerlack
Manos North Point Tower
1001 Lakeside Avenue East
Suite 1400
Cleveland, Ohio 44114
(216) 523-1500
ACoyne@mggmlpa.com
EPatton@mggmlpa.com
Co-Counse/för PlainliJJÄ'

OD690

DENNIS E. MURRAY JR. (0038509)
WILLIAM H. BARTLE (0008795)
Murray & Murray Co.
111 East Shoreline Drive
Sandusky, OH 44870
(419) 624-3000
dmi@murrayandmurray.com
bill@murrayandmurray.com
Co-Counsel for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on July 24, 2017 I caused the foregoing document to be filed in accordance with the Court's Electronic Filing Guidelines. The Appendix will be filed Monday, July 25, 2017. Notice of this filing will be sent to the Defendants by operation of the Court's Electronic Filing System. Parties may access the filing through the system.

/s/ Kevin T. Roberts _____
KEVIN T. ROBERTS (0037479)