IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

THADD TIDWELL; BELINDA WALLS, individually, and for a class of similarly situated individuals or entities,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION NO. CV 08-000761
DAN WEINRIB, THE TAX ASSESSOR OF JEFFERSON COUNTY; J.T. SMALLWOOD, THE TAX COLLECTOR OF JEFFERSON COUNTY, ALABAMA; JENNIFER CHAMPION THE TREASURER OF JEFFERSON COUNTY, ALABAMA.	)	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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The Plaintiffs, submit the following brief in support of their Motion for Summary Judgment. The material facts are not in issue. The supporting factual citations are largely to the Defendants' documents and testimony of their representatives.

STATEMENT OF UNDISPUTED FACTS

1. The Jefferson County Tax Collector (Tax Collector hereafter), (Boyd Depo 11/17/05 at 8), conducts yearly sales of real estate in Jefferson County, Alabama, to satisfy past due ad valorem taxes owed by the property owners.

2. In addition to collecting taxes, the Tax Collector has for many years also accepted funds in excess of the taxes, penalties, interest and costs due at these sales. (Boyd Depo 11/17/05 at 28-30)

3. Large excesses at tax sales began occurring in the mid 1990's and this has increased in volume in recent years. (Boyd Depo 11/17/05 at 29-30)

4. In May of 2005, the County sold approximately 3,500 properties at the tax sale and 2,500 of those were sold to investors who paid excess funds accepted by the County. (Boyd Depo 11/17/05 at 30-31)

5. The excess funds are a relatively new problem believed to be due to 12% interest being paid to purchasers on the excess funds. (Boyd Depo 11/17/05 at 44, 108; Smallwood Depo 3/4/08 at 39)

6. According to J. T. Smallwood, the Jefferson County Tax Collector, these excess bids came about from his predecessor in office encouraging out of state investors to bid at the tax sales. (Smallwood Depo at 38-39)

7. The Tax Collector collects approximately 99.8% of the taxes due before the tax sale and does not see any need in having excess bids at the tax sale. (Smallwood Depo at 37)

8. According to J. T. Smallwood, the Jefferson County Tax Collector, the interest rate of 12% on these excesses is the culprit and "People who were already behind the eight ball, were delinquent on their taxes, having a difficult time, had an

even more difficult time with the excess bid interest compounding." (Smallwood Depo at 39)

9. According to J. T. Smallwood, the Jefferson County Tax Collector, the process of allowing excess bids is a burden on his office, provides no benefit to the county and instead benefits only the investor. (Smallwood Depo at 41-42)

10. The County's tax sale process is administered consistently and uniformly (Boyd Depo 11/17/05 at 66-67; Stephenson Depo 12/15/05 at 80) under color of State law and to carry out State action. (Boyd Depo 11/17/05 at 33-35)

11. During Mr. Boyd's deposition, he provided specimens of the various notices, documents and court orders involved in the process leading up to a tax sale. (Boyd Depo 11/17/05 at 48 and Exhibit 2)

12. Dan Weinrib was the elected Jefferson County Tax Assessor and head of that department. (Weinrib depo at 13)

13. Part of the Tax Assessor's office is the assessment section that deals with new assessments and exemptions. (Weinrib depo at 31)

14. The Bessemer Tax Assessor's office is structured and operates the same as the Birmingham office concerning reassessments following tax sales. (Weinrib depo at 34-35)

15. The Jefferson County Tax Assessor's office is across the hall from the Tax Collector and down the hall from the Probate Court Land records. (Weinrib depo at 37)

16. The Tax Assessor's office deals with claims of homestead and other exemptions. (Weinrib depo at 42)

17. Homestead exemptions only need to be claimed once for the owners primary residence and as long as the owner or homesteader remains there, the homestead exemption remains in effect from year to year. (Weinrib depo at 42)

18. Age or disability exemptions after being claimed have to be verified each year on a postcard mailed to the assessee/owner for that purpose. (Weinrib depo at 42-44)

19. When someone attempts to reassess a property, the Tax Assessor requires the new assessee to show a deed and to sign and verify under oath a change of assessment sheet and any claim of homestead exemption. (Weinrib depo at 45-47)

20. A change of assessment requires the new assessee to provide a deed or proof of ownership and to swear under oath to the correctness of the change request. (Weinrib depo at 53-54)

21. The assessee listings and addresses compiled by the Tax Assessor are used by the Tax Collector for purposes of sending out tax bills and any delinquency notices. (Weinrib depo at 55)

22. If a property is sold for delinquent taxes, the Tax Collector gives the Tax Assessor a list of the properties sold which the Tax Assessor uses to reassess those properties to the name of the purchaser at the tax sale. (Weinrib depo at 58)

23. The reassessment after the tax sale removes any existing exemptions on the property. (Weinrib depo at 58-59)

24. The removal of a homestead exemption effectively doubles the tax on the property. (Weinrib depo at 60)

25. After the tax sale and reassessment, the tax bills and notices are thereafter sent to the purchaser at the tax sale which is listed as the new assessee. (Weinrib depo at 26, 62)

26. If a homeowner who had claimed a homestead exemption has his property sold for taxes, this reassessment removes the exemption so that if later redeemed, the homeowner, even though they had never left the property, would have to reapply for homestead exemption. (Weinrib depo at 62-63)

27. For those properties sold to the state at the tax sale, the exemptions are also removed but the owner remains as the assessee of record so that the tax notice is not redirected to the state and is instead still sent to the owner. (Weinrib depo at 68-70)

28. For those properties sold to purchasers other than the state, the purchaser will become the new assessee and thereafter be sent tax notices. (Weinrib depo at 70)

29. After the tax sales and the reassessments, the Tax Assessor does not notify the owner that their property has been reassessed or that their exemptions have been erased. (Weinrib depo at 70-71; Smallwood depo at 20; Exhibit 16)

30. There are no notices sent to the taxpayer from the Tax Collector telling

the taxpayer that they will lose their exemptions after a tax sale. (Smallwood depo at 23)

31. There is no court order requiring that the properties sold at tax sale be reassessed. (Smallwood depo at 25)

32. After the tax sale, the purchaser does not request reassessment in their name, instead the reassessment is done automatically. (Weinrib depo at 72; Smallwood depo at 43)

33. After the tax sale, the Tax Collector prepares two spreadsheets, one with a list of properties sold to the state and the other with a list of properties sold to others and carries these across the hall to the Tax Assessor. (Smallwood depo at 34)

34. Each year between three and five thousand properties are reassessed under this system. (Smallwood depo at 37)

35. When property values are reappraised, this is done by the Board of Equalization which also uses the Tax Assessor lists of names and addresses for notices. (Weinrib depo at 73)

36. If reappraisal by the Board of Equalization occurs after a tax sale, notice of the reappraisal and any opportunity to challenge that is sent to the purchaser at the tax sale. (Weinrib depo at 74)

37. The system used is a uniform system of automatic reassessment following tax sales that affects many hundreds of people each year in Jefferson County. (Weinrib

depo at 80)

38. In May 2003, Thadd Tidwell's home place located at 4850 Tidwell Circle, in Jefferson County, Alabama, was sold for taxes due of $329.26. (Tidwell affidavit)

39. Thadd Tidwell's property was sold at a tax sale and then reassessed with his homestead exemption being removed in a typical fashion under this system. (Weinrib depo at 88; Smallwood depo at 38)

40. After the sale of Tidwell's property, he received no notice of the reassessment of his property, nor of the taxes due for the 2003 tax year or any later years which also resulted in subsequent tax sales. (Tidwell Affidavit)

41. Tidwell redeemed his home in April of 2006 and was required to pay money over and above the actual taxes, interest and fees which would not have been incurred but for the reassessment of his property, the loss of his homestead exemption, the redirection of notices to others and subsequent tax sales that resulted from the lack of notice. (Tidwell affidavit)

42. Belinda Walls owns a home located at 1014 Fourth Terrace, Pleasant Grove in Jefferson County, Alabama, on which she had claimed a homestead exemption and which was sold for taxes due for the tax year 2006 at a sale in May 2007. (Walls' affidavit)

43. After the tax sale of Belinda Walls' home, her homestead exemption was removed and the property was reassessed to the purchaser without her knowledge or

consent. (Walls' affidavit)

44. Belinda Walls redeemed her home on October 17, 2008 and was then required to reclaim her homestead exemption. (Walls' affidavit)

45. As a result of the reassessment of Belinda Walls' home and the resulting loss of her homestead exemption, her ad valorem tax was increased from $1,230.40 for 2007 to $2,443.47 for 2008. (Walls' affidavit)

46. There is no opportunity for the taxpayer to object to the reassessment of their property. (Weinrib depo at 90)

47. After a tax sale and automatic reassessment, the taxpayer cannot reassess the property back to their name without first redeeming the property. (Weinrib depo at 92)

48. Ad valorem tax collection begins each year with a regular mail notice being sent to the assessed owner. (Boyd Depo 11/17/05 Exhibit 3).

49. Typically, the tax notices go out shortly after October 1 to inform the taxpayer of the assessed value of the property, the tax due and that payment should be made no later than December 31. (Boyd Depo 11/17/05 at 73)

50. If, for whatever reason, the ad valorem taxes are not paid by December 31, the Tax Collector mails a delinquency notice. (Boyd Depo 11/17/05 Exhibit 4)

51. The Delinquency notice is sent to the assessee notifying him once again of the assessed market value, the amount of taxes due, and giving him until February

15 to pay the outstanding taxes, a collector's fee and interest due until that date. (Boyd Depo 11/17/05 Exhibit 4)

52. If the taxes are still not paid, the Tax Collector petitions the Probate Court to sell the property, and the Probate Court enters a series of orders, all specified by statute. (Boyd Depo 11/17/05 Exhibit 6)

53. The result of these Probate Orders is to set a hearing before the Probate Court to determine whether or not the property should be sold (Boyd Depo 11/17/05 at 78-81).

54. The assessee will be mailed a Citation Notice about the Probate Court hearing, its date and the purpose thereof. (Boyd Depo 3/14/08 Exhibit 2)

55. If thereafter the taxes are not paid, the Probate Court will enter a Decree of Sale directing the Tax Collector to sell the property for the payment of the amount of taxes and for penalties, interest and costs. (Boyd Depo 11/17/05 Exhibit 6)

56. Once the Decree of Sale is entered, the Jefferson County Tax Collector handles the mechanics of conducting the sale (Boyd Depo 11/17/05 at 83-84).

57. Each of the notices and procedures is uniform in an attempt to comply with the statutory requirements. (Boyd Depo 11/17/05 at 60)

58. The addresses used by the Tax Collector to give the tax sale notice to the property owner are the addresses of the assessee for the property on the records at the County Tax Assessor's office. (Boyd Depo 11/17/05 at 83-88)

59. At the point of the tax sale each May, Mr. Boyd, on behalf of the Tax Collector, receives the bids on the properties, collects the money and then provides a certificate of purchase to the purchaser. (Boyd Depo 11/17/05 at 35, 36, 54)

60. A Certificate of Purchase is not a deed to the property, but can ripen into a tax deed at the end of three years unless the property is redeemed in the intervening time. (Boyd Depo 11/17/05 at 55)

61. Once the land is sold for taxes by the County, the Alabama statutes provide a framework for redemption by the owner for up to three years following the tax sale. § 40-10-120, *Code of Alabama* (1975).

62. Redemption within three years after the tax sale requires the property owner to pay the County "the amount of money for which the lands were sold" plus 12% interest thereon and all taxes due since the sale with 12% interest, penalties and costs. § 40-10-121, *Code of Alabama* (1975).

63. After three years following the tax sale, the purchaser at the tax sale is entitled to a tax deed. § 40-10-29, *Code of Alabama* (1975).

64. Redemption by the owner after the issuance of a tax deed to the purchaser is also protected so long as the owner has remained in possession. *McGuire v. Rogers,* 794 So.2d 1131 (Ala. Civ. App. 2000); *Daugherty v. Restor*, 645 So. 2d 1361 (Ala. 1994).

65. If the owner desires to redeem his or her property *after three years* and the

issuance of the tax deed, he or she is first required by the County to acquire the property interest of the holder of the tax deed. (Boyd Depo 11/17/05 at 154, 162-64)

66. In order to acquire a quit claim deed from the purchaser, the owner must first pay the holder of the tax deed the excess funds and interest thereon at 12% in addition to all taxes paid, penalties, costs and interest thereon plus 12% thereon. (Boyd Depo 11/17/05 at 163-164)

ARGUMENT

Overview

Without statutory authority, constitutional justification or court order, the defendants maintain a policy under which properties sold at tax sales are automatically reassessed to the tax certificate purchaser and all existing exemptions are removed. Though three years remains following a tax sale before a tax deed can be issued, this reassessment is done immediately following the sale. The taxpayer is given no prior notice of this practice or its effect nor any notice whatsoever that their existing exemptions were removed. After the reassessment, all future notice of taxes due, land appraisals, delinquency and subsequent tax sales are all sent to the certificate holder. The effect increases the tax burden on the property and the costs of redemption. Finally, the lack of notice to the property owner greatly increases the likelihood that the property will suffer further tax sales while hindering the possibility for redemption.

The defendants' practice of automatically reassessing properties after tax sales

and removing existing exemptions is unconstitutional in violation of 42 U.S.C. § 1983, as well as the due process and equal protection clause of the Fourteenth Amendment. Plaintiffs bring this action asking that the Defendants be permanently enjoined from reassessing property to certificate purchasers after tax sales and for the Court to declare that any tax exemptions due the owner at the time of the tax sale to continue in effect throughout the redemptive period. Since under the Defendants' practice the owners are deprived of all notice concerning their property after this reassessment, Plaintiffs ask the Court to declare void any tax sale of the owners' property occurring after the property's reassessment. Plaintiffs also ask for a refund of the money charged by the Defendants to redeeming class members due to loss of exemptions from this reassessment policy, together with interest thereon, attorneys' fees and costs.

A. THE ELEMENTS OF § 1983 ARE MET

The Defendants acted under Color of State Law

Title 42 U.S.C. Section 1983 is the statutory enforcement of the Fourteenth Amendment. *Lynch v. Household Finance, Corp.*, 405 U.S. 538, *at* 545 (1972). One element of that action is that the Defendants acted under color of state law or authority in depriving the Plaintiffs of a right, privilege or immunity secured by the Constitution and laws of the United States. *Sykes v. California et al.*, 497 F.2d. 197, 201 (9th Cir. 1974); *Rinker v. Sipler*, 264 F. Supp. 2d. 181, 187 (M. Pa. 2003). To act "under color of state law," it is not necessary that the action taken was authorized by the state;

however, facts must show that the Defendants were clothed with the authority of the state and were purporting to act thereunder. *Sykes v. California, supra, at* 201. *See also Green v. Dumke, 480 F. 2d 624 (9th Cir. 1973) citing with approval, United States v. Classic*, 313 U.S. *at* 325-326.

It is undisputed here that the challenged actions were taken by the Tax Assessor and Tax Collector of Jefferson County who are all clothed with the authority of state law.

The Plaintiffs' property interests are protected by Due Process

Ownership interest in real estate is a constitutionally protected right under the Fourteenth Amendment. *See Jones v. Flowers,* 547 U.S. 220 (2006); *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Chertkof v. Baltimore*, 497 F. Supp. 1252 (D. Md. 1980); *Federal Deposit Insurance Corp. v. Morrison*, 747 F.2d. 610, 615 (11th Cir. 1984); extending such constitutionally protected property rights to substantially less than full legal title, under the authority of *Fuentes v. Chevin,* 407 U.S. 67 (1972); *Fisichelli v. Town of Methun*, 653 F. Supp. 1494, 1497 (D.M.1987); *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612, 619 (D. Md. 1998).

B. DEFENDANTS AUTOMATIC REASSESSMENT VIOLATES DUE PROCESS

There are no statutory or constitutional provisions nor any court order which direct or require the Tax Assessor or Tax Collector to automatically reassess real estate to the certificate purchaser following a tax sale. (Smallwood Depo at 25) Similarly,

there is no such directive which mandates the removal of existing exemptions after the sale. In fact, the Tax Assessor is charged by statute with the duty to assess property in the name of the owner. Section 40-7-1, *Code of Alabama*(1975). Under the system challenged here, neither the purchaser nor the taxpayer makes any request for the reassessment. On normal assessment changes, the Tax Assessor requires proof of ownership and a sworn affidavit attesting to the correctness of the requested assessment change. (Weinrib depo at 45-47; 53-54) Only following a tax sale is a change in assessment done automatically and without request or verification. (Weinrib depo at 58, 72) And, contrary to the requirement of Section 40-7-1, *Code of Alabama* (1975), after the change, the assessee is only the holder of a tax certificate – not the owner of the property.

No Notice of Taking

The owners of property are not told before the sale that a tax sale of their property will result in automatic reassessment and removal of all exemptions. (Smallwood depo at 23) As a result, the owner has no way to know that the tax sale would involve anything other than the taxes owed. *After* the sale, the Defendants provide a notice to the taxpayer/owner that their property was reassessed. (Exhibit 16) However, there is no opportunity for the taxpayer to object or to change the assessment back unless they redeem the property and apply for reassessment. (Weinrib depo at 90-92) In summary, this policy removes existing exemptions, reassesses the property

and redirects all future notices concerning the property to a mere certificate holder – all without any notice to the taxpayer/property owner. The effect of this policy raises the tax burden on the property causing greater cost on redemption. Additionally, since the subsequent tax bills and notice are redirected to the certificate holder, the taxpayer gets no notice of future valuations, tax bills, delinquency or subsequent tax sales against the property by the Defendants. (Weinrib depo at 26, 62, 73-74) Plaintiffs urge that any tax sale occurring after this reassessment is void for lack of notice to the owner because the defendants instead send notices only to the certificate holder.

In *Ex parte Powell,* 763 So. 2d 230 (Ala. 1999) the Supreme Court ruled on a similar issue regarding tax assessor's actions and declared subsequent sales void when the true owner had not received notice of taxes due.

> The current tax deed is defective, and the Ervins cannot receive land based on a defective tax deed. This Court has held that "[a] tax deed is void and conveys no interest where the underlying sale was invalid." *Almon v. Champion Int'l Corp.,* 349 So. 2d 15, 17 (1977). In *Almon,* this Court also held that, "***Where taxes are assessed to one who has no interest in the property, a subsequent sale of the property for nonpayment of taxes is void because under these facts, as here, the true owner would receive no notice of the proceedings against his property.***" *Id* at 232 (emphasis added).

Even though our statutes provide that a tax sale does not ripen into a tax deed for three years, this policy of the Defendants effectively clothes the certificate holder with the rights of ownership immediately after the tax sale. Furthermore, this is done

without any legal authority much less notice to the property owner.[1]

In *Mennonite Board of Missions. v. Adams,* 462 U.S. 791, 793 (1983), Justice Marshall, in the contest of a tax sale for which the mortgagee of the property did not receive actual notice, cited *Mullane,*[2] with approval for the rule that,

> "Prior to an action that will affect an interest in life, liberty or property protected by the Due Process Clause of the Fourteenth Amendment, the State must provide 'notice reasonably calculated, under all the

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[1] During the pendency of this suit, Section 40-10-19 was amended to prevent the removal of homestead exemptions following tax sales. Though only partially correcting these problems that amendment was effective September 1, 2009:

> **(b)** In the event of the tax sale of owner-occupied property that is taxed as Class III, the certificate shall provide notice that (1) the Class III tax status shall remain in effect for the property throughout the period allowed for redemption as long as the property is used as an owner-occupied residence, and (2) for any period or periods following the tax sale that the property is not used as Class III property, as defined in *Section 40-8-1*, the property will be classified, assessed, and taxed as Class II property.
>
> *Code of Alabama,* Section 40-10-19(1975)

That amendment does not address other exemptions are concerns about reassessment and notice.

[2] In *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, *at* 314 (1950), the Supreme Court found that notice by publication was inadequate to inform those who could be notified by more effective means:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation, the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. *In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint."*

Ibid, at 315.

> circumstances to apprise interested properties of the pendency of the action and afford them an opportunity to present their objections'."

In *Dusenbery v. United States,* 534 U.S. 161, *at* 169-170 (2002), the Court again applied the *Mullane* test to the lack of the notice of a cash forfeiture. The Court there stated the due process notice test as follows:

> "Was the notice in this case 'reasonably calculated under all these circumstances' to apprise petitioner of the pendency of the cash forfeiture?"

These principles were recently reaffirmed by the Supreme Court in *Jones v. Flowers,* 547 U.S. 220 (2006). That case also involved a tax sale where property was taken. There the Court quoted *Mullane* with approval stating that the adequacy of a particular form of notice requires a balancing of the interests of the State against the individual interest sought to be protected by the Fourteenth Amendment. *Flowers citing Mullane at* 314, 70 S.Ct. 652.

An analogous situation was presented in *Special Assets, L.L.C. v. Chase Home Finance*, 991 So. 2d 668 (Ala. 2007) There a mortgagee sought a declaration that its interests in two mortgaged properties had not been impaired by foreclosure from two fire-service districts in county. Judge Vance of this Circuit agreed. On appeal, our Supreme Court affirmed his ruling and held that mortgagee had a due-process right to actual presale notice, rather than mere constructive notice through published notice in local newspaper.

"The trial court found that Chase Finance, which held duly recorded

> mortgages on the properties before the foreclosure sales, was a "readily identifiable" mortgagee. Relying on *Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983)*, the trial court held that the failure of the fire districts to use "reasonable efforts to identify the mortgagees of the properties and to provide actual notice of the upcoming foreclosure sales" violated the due-process rights of Chase Finance. First Properties and Special Assets challenge that ruling of the trial court....***We affirm the summary judgment of the trial court holding that the fire districts' foreclosure sales of the properties violated the due-process rights of Chase Finance."(emphasis added)***
> *Id* at 672 and 680.

As discussed hereinafter, the Defendants have no legitimate interests beyond collection of the taxes against which to balance removing lawful exemptions and forcing reassessment much less this denial of notice. Furthermore, as the *Flowers* court reaffirmed, common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property. *Id at* 8. The "taking" here cannot be justified as legitimate taxes due because this policy removes lawfully claimed exemptions such as homestead statutorily provided for the taxpayers. The result raises the tax burden on the property even though the taxpayer continues to live in their home. On other exemptions such as age and disability, the taxpayer is robbed of the ability to reaffirm entitlement because the post card sent each year to the assessee for that purpose is redirected to the certificate holder after the tax sale.[3] This

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[3]*See* Section 40-7-2.1*Code of Alabama*(1975) which provides:
Any person who has qualified for the homestead exemption because of age or disability and income shall not be required to reapply for the personal exemption based on age, disability, and income until the eligibility ceases.

policy, done without notice and due process, cannot be justified by any state interests.

No Post-Taking Remedy

The Defendants send a notice *after the sale* that daily interest is accruing and that the property will be assessed to the investor at the tax sale. (Exhibit 16) However, the notice does not inform the owner that their exemptions have been erased or provide any opportunity to reassess their property. (Smallwood depo at 23) Even if the owner somehow on his own learns that their exemptions have been erased, there is no procedure by which he can reverse the reassessment and loss of exemptions short of redemption. (Weinrib depo at 89-90)

Thus, for the plaintiffs, there has been no notice before this "taking" nor any post taking remedy either. Instead, the owner is offered only the right to redeem the property to halt further damage from the removal of exemptions and interest accruing on the suddenly higher taxes. Not surprising, there is no statute supporting this policy. Tax statutes are, and rightfully should be, strictly construed to protect the taxpayer. *See Reuter v. Mobile Building Council*, 150 So.2d 699 (Ala. 1963). In summary, there is no post-deprivation remedy to cure this egregious denial of due process.

C. THE DEFENDANTS' AUTOMATIC REASSESSMENT POLICY DENIES EQUAL PROTECTION

Thousands of properties are sold for taxes each year in Jefferson County. Under

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The person shall only be required to verify by signature, on a form provided by the county tax assessor, that the qualifying conditions continue to exist and return the form by mail.

the system used by the Defendants, properties sold to private purchasers are automatically reassessed and all exemptions are removed with future notices about the property being redirected to the purchaser at the tax sale. (Weinrib depo at 58-59; 26, 62) However, other properties at the same tax sale which are sold to the State are treated differently. While exemptions are removed on sales to the state as well, the taxpayer remains as the assessee of record such that future tax bills and notices pertaining to that property will continue to be sent to them. (Weinrib depo at 68-70)

On sales to private purchasers, the taxpayer not only loses their exemptions, they are deprived of any future notice of taxes due, delinquency, reevaluation or sales affecting their property, even though they continue to own and occupy the same. (Weinrib depo at 70) On property sales to the state, the taxpayer remains as assessee of record and thus continues to be notified concerning actions affecting their property, including an opportunity to object to reevaluations. (Weinrib depo at 68-70)

Both classifications suffer from unjustified loss of exemptions. As a result of that loss, the redemptive rights of the Plaintiffs in the Class are harmed because the redeeming taxpayer is then required to pay additional taxes from the removal of exemption plus interest on the higher amount. However, the added loss of notice about future taxes denies due process and invalidates subsequent tax liabilities and sales. Tax sales, reevaluations and penalties occurring after this change of assessment all burden that property owner without providing any notice or opportunity to be heard. Multiple

statutory and constitutional provisions establish the mandates needed to sell and appraise private property for taxes due. All of these are predicated on notice to the owner. Under the current system of the Defendants, following the automatic reassessment, no notice is given the owner and is instead sent only to the purchaser of the tax certificate.

There is no rational basis or any compelling state interest for this discriminatory classification.

The Equal Protection Clause is designed, "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445, (1923) *quoting Sunday Lake Iron, Co. v. Wakefield*, 247 U.S. 350 (1918).

For classifications not involving suspect criteria or fundamental rights, the classification still must be rationally related to a legitimate state purpose. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *U.S. v. King,* 972 F.2d 1259 (11th Cir. 1992). That is, the classification must have a legitimate purpose and it must have been reason to believe that the classification would further that purpose. Here, the state interest is the same with both classifications. That interest is collecting the taxes owed and nothing more, whether the buyer at the tax sale is the state or an investor. There is no legitimate reason for the discriminatory classification wrought by the practice

which denies notice to one class but allows it another. Only a very small percentage of the tax collection efforts even requires a sale. According the Tax Collector, over 99% of the taxes are collected without any sale. (Smallwood Depo at 38) Without a rational relationship to a legal purpose, the practice establishing this classification must be struck down under the Equal Protection Clause. *Hennessey v. National Collegiate Athletic Association,* 564 F.2d 1136 (5th Cir. 1977).

D. PLAINTIFFS ARE ENTITLED TO RELIEF

Plaintiff class members have clearly suffered damages from: (1) the loss of their exemptions and consequent tax increase; (2) the additional impediments to their rights of redemption due to the increased taxes and required interest thereon; (3) denial of notice concerning taxation, valuation and subsequent sale of their property. The element of damages is established.

Plaintiffs seek restitution of the redemption costs which, but for the improper loss of exemptions would not be required together with interest paid thereon. This Court has ample power to carry out this remedy. *See Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 214-218 (2002). [4]

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[4] While an injunction forcing the Defendants to end the current illegal practices is a key ingredient to the relief requested, other equitable relief in the form of restitution of the excess taxes paid and interest earned thereon may properly be sought without destroying the cohesiveness of the Class. Such monetary relief can be appropriately provided since the awards are either equitable in nature or secondary to the general scheme of injunctive relief described below. *Carnegie,* slip op. *at 23 (*citing *Newberg,* 1 *Newberg on Class Actions'* 4.14 at 4-46 to 47 (1992).

Moreover, equitable remedies in a Class action such as this are well founded where the

The Plaintiffs' request for Declaratory Relief and a Permanent Injunction are predicated on the same operative facts and legal theories. These actions are ongoing. Since the pendency of this suit, the Defendants have conducted another sale using these same approaches. The sale for tax year 2009 is quickly approaching. The uncontroverted facts show the presence of "a real and immediate - as opposed to a merely conjectural or hypothetical-threat of *future injury*." *Church v. City of Huntsville*, 30 F. 3d. 1335, 1337 (11th Cir. 1994).

In order to prevent ongoing future harm to the Plaintiffs and others similarly situated, it is necessary for this Court to declare that the practice of automatically

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Defendants' liability for the equitable relief is rooted in grounds applicable to all members of the defined Class. *Holmes,* 706 F.2d at 1155 (citing *Pettway v. American Cast Iron Pipe,* 494 F.2d 211 (5th Cir. 1974)). Unlike in *Murray infra*, the Class restitution remedy flows directly from liability to the Class as a whole.

In order to eradicate the unconstitutional practice in this case, the Court can establish a constructive trust over the property which the Defendants illegally took from the Plaintiffs and the Class. Title 42 U.S.C. §1998(a) clearly gives this Court full power to fashion effective equitable remedies. *v. Alfred H. Mayer*, 392 U.S. 409, 88 S.Ct.2186. An equitable accounting from a review of the Defendants' records creates the foundation for a constructive trust. *See* Restatement of Restitution, 160; Restatement 2d Trust, 1, 1959 WL 16228; *see also, Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 250-251 (2000). (Whenever *the legal title to property* is obtained through means or under circumstances which render it unconscientious *for the holder of the legal title to retain and enjoy the beneficial interest,* equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitable entitled to the same...')(Emphasis added); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 396, 122 N.E. 378 (1919)(Justice Cardozo stated a constructive trust is the formula through which the conscience of equity find expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him to a trustee.); Pound, *The Progress of the Law, Equity*, 33 Harv. L.Rev. 420 (1920)(A. . . in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment); Restatement (First) of Restitution, 160; Restatement (Third) of Restitution, 4.

reassessing the properties after tax sales and the removal of existing exemptions, is unconstitutional and in violation of 42 U.S.C. § 1983. Similarly, it is necessary for the Court to declare that subsequent tax sales of properties occurring after this unlawful reassessment are void for lack of notice and due process and that the exemptions existing before such reassessment remain in effect.

There will be an ongoing hardship to the Plaintiffs, the Class and others similarly situated if the Court withholds rendering the Declaratory Judgment necessary to put such wrongful conduct to an end. *Clark Const. Co., Inc. v. Pena*, 930 F. Supp. 1470 (M.D. Ala. 1996); *In re Consolidated Non-Filing Ins. Fee Litigation*, 195 F. R. D. 684 (M.D. Ala. 2000). The requested Declaratory Judgment relief is merited.[5]

Without a Permanent Injunction, the Defendants will continue this practice and will continue to inhibit redemption of property by the imposition of additional costs for which the owners should be exempt and will also continue to deny the owners notice and due process concerning their property. As Defendants have shown, they will continue this practice as they deem fit in future sales unless the Court intervenes. This ongoing loss of property will cause further irreparable injury and damage to these

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Section 1983 expressly authorizes a suit in equity to redress deprivation under color of state law of rights secured by the Constitution, bringing it within the "expressly authorized" exception of the Federal Anti-Injunction Statute. *Mitchum v. Foster*, 407 U.S. 225 (1972). In addition, a Civil Rights action for deprivation of rights is an appropriate vehicle for obtaining Declaratory and Injunctive Relief. *Chertkof, supra*, and *Glancy v. Parole Board of Michigan*, 287 F. Supp. 34 (W.D. Mich. 1968).

Plaintiffs and the Class and others likewise situated, by encumbering their ability to redeem their property. *See generally, Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127-28 (11th Cir. 2005). Here, irreparable injury is clearly illustrated by the many class members who are financially unable to redeem their land due to loss of exemptions adding taxes and interest and who have suffered subsequent tax sales of their property without any notice whatsoever.

E. ATTORNEY FEES UNDER § 1988

The Supreme Court has expressly recognized that if a plaintiff prevails in a suit covered by the Civil Rights Attorneys' Fee Statute 42 U.S.C. §1988, such as here, fees shall be awarded as costs unless special circumstances would render such an award unjust. *Kentucky v. Graham*, 473 U.S. 159 (1985). Counsel for the Plaintiffs and the Class respectfully request the opportunity to petition this Honorable Court for an appropriate attorneys' fee under these circumstances.

F. STATUTORY INTEREST

The Plaintiff Class is entitled to prejudgment interest on their recovery. In this case, the amount of money withheld by the Defendants is a liquidated sum and easily calculated for each class member. Under Alabama law, prejudgment interest is available for liquidated claims at the rate of 6% per annum. *§8-8-8, Code of Alabama* (1975). Alternatively, under federal law, prejudgment interest should be awarded where it is necessary for the full compensation of the Plaintiffs. *Miner v. City of Glens*

Falls, 999 F.2d 655 (2nd Cir. 1993). Specifically, numerous courts have allowed prejudgment interest where Section 1983 violations are involved. *Thomas v. City of Mount Vernon*, 1992 W.L. 84560 (S.D.N.Y. April 10, 1992); *RAO v. New York City Health and Hospitals Corp.*, 882 F.Supp. (S.D.N.Y. 1995).

CONCLUSION

Due Process in the taking of property by the government is one of our most fundamental rights. It balances the rights of the individual against those of the state. An old text eloquently discusses these points.

> When we remember the character of inviolability which all just and enlightened governments impute to private property in land, and the sacred regard for such ownership which is manifested in the genius of the common law and the spirit and letter of our constitutions, it is evident that no other solution of the question will bear the test of searching inquiry. The state, therefore, lays a tax upon land, . . . and the same authority gives it power to collect the burden thus imposed . . . . Yet, this right, like all others appertaining to the state, is not without checks and limitations. The seizure and sale must not be arbitrary and unwarranted. Sovereignty imports no power to deprive the citizen of his property except in pursuance of law and for a lawful demand. Where just and legal condemnation ends, confiscation begins. *Black on Tax Titles*, 2nd ed, Sec. 152.

The current application by these Defendants of an automatic reassessment and revocation of exemptions without notice following a tax sale has resulted in an arbitrary burden to these class members by imposing impediments to their property ownership unrelated any legitimate state interest. The result has been a clear taking of funds generated on the additional tax levied on the Plaintiffs' land to which the Tax

Collector has no claim. On redemption, the owners are made to pay additional tax and interest on their property because their exemptions have been improperly removed. There is simply no justification for this unconstitutional approach nor its arbitrary detriment to the plaintiff class members.

Based upon the above cited authorities and reasons, and upon the uncontroverted material facts, Plaintiffs urge that Summary Judgment is due to be granted in their favor.

Respectfully submitted this 12th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of March, 2010, I electronically filed the foregoing with the Clerk of the Court using the efile.alacourt.gov system which will send notification of such filing to the following:

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