UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYSIDE CHURCH, *et al.*, Plaintiffs,	)	
	)	No. 1:14-cv-1274
v.	)	
	)	Honorable Paul L. Maloney
VAN BUREN COUNTY, *et al.*, Defendants.	)	

OPINION AND ORDER APPROVING SETTLEMENT AND APPOINTING SPECIAL MASTER

This matter comes before the court on Plaintiffs' and Defendants' joint motion for final approval of the class action settlement. (ECF No. 410). Objectors to the settlement filed a response to the joint motion (ECF No. 446) as well as scores of objections. (ECF Nos. 345-3, 356, 357-1, 433, and 436). Defendants also moved to appoint a special master to facilitate the settlement. (ECF No. 510). Objectors filed a response opposing the special master. (ECF No. 516).

"After all, settlements are exactly that—a compromise." *Albright v. Ascension Michigan*, No. 23-1595, 2024 WL 1114606, at *2 (6th Cir. Mar. 14, 2024). The court will approve the settlement, overrule the objections, appoint a special master, and decline to extend the claims period.

I. Background

This case has been before this court for nearly ten years. It concerns the recovery of sale proceeds from counties that foreclosed on properties with delinquent tax debts pursuant to the pre-amended Michigan General Property Tax Act ("GPTA"). The counties kept the

excess proceeds, which the Michigan Supreme Court deemed a taking. *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434 (Mich. 2020).

Plaintiffs originally filed their complaint in 2014, seeking recovery of surplus proceeds following a tax-foreclosure sale. Between 2014 and 2020, this case was dismissed for failure to state a claim upon which relief could be granted. (ECF No. 38). That order was appealed, and the circuit instructed this court to dismiss for lack of jurisdiction based on plaintiffs' failure to seek a remedy in state court first. *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 822 (6th Cir. 2017). The case was then reopened and stayed pending decisions in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) and *Rafaeli, LLC v. Oakland County*, 952 N.W.2d 434 (Mich. 2020). The case reopened following the decisions of *Knick* and *Rafaeli*. These decisions held that (1) state takings claims may be brought in federal court without first seeking relief in state court, *Knick*, 139 S. Ct. at 2167, and (2) the retention of surplus proceeds following a tax-foreclosure sale constitutes a taking under Michigan's 1963 Constitution. *Rafaeli*, 952 N.W.2d at 437.

This court then lifted the stay, and Defendants filed a motion to dismiss on immunity grounds. (ECF No. 94). Defendants' motion was granted in part and denied in part. (ECF No. 140). The court dismissed the claims against the Van Buren County Treasurer in her official capacity, as well as the claims against counties in the Eastern District of Michigan but denied Defendants' motion to dismiss on sovereign immunity grounds. (*Id.*). Defendants appealed the latter holding (ECF No. 160), and the court stayed the case again pending the appeal. (ECF No. 162).

While on appeal, the parties engaged in extensive mediations beginning in April 2021 and ending in December 2022. The parties undertook more than 30 mediation sessions, including two long in-person sessions with the Sixth Circuit Mediation Office. As the mediation progressed, Plaintiffs, the original Defendants, and the other counties' counsel agreed to try to negotiate a global resolution of all surplus-proceeds claims against all of the Western District counties (except Charlevoix, Branch, Clinton, Keweenaw, Luce, and Mecosta Counties).[1] Finally, in late 2022, the Defendant Counties each formally approved an agreement to settle this case as a global resolution of all claims related to the sale of tax-foreclosed properties that generated surplus proceeds (the "settlement").

The Plaintiffs and Defendants specifically seek: (1) final approval of the settlement; (2) certification of a settlement class; (3) appointment of lead counsel as class counsel for the settlement class; and (4) entry of the Proposed Order Granting Final Approval to the Settlement. (ECF No. 410 at PID 8337).

A. Settlement Terms

The settlement is a claims-made settlement, which provides for payments of 80% of the surplus proceeds arising from the sale of property as to which there is at least one eligible Claim made, in consideration of a release of the claims in this litigation. Plaintiffs' attorneys' fees will be for a fee award equal to 20% of the amount to be paid to each claimant, which will be deducted from each Class Member's distribution. Administrative costs necessary to

[1] Branch, Clinton, Keweenaw, Luce, and Mecosta Counties are excluded because the county treasurers in those counties did not act as the foreclosing governmental unit under the GPTA. Charlevoix County is excluded because the Charlevoix County Circuit Court certified a class of former property owners whose properties were foreclosed for non-payment of property taxes.

facilitate the settlement, such as the costs necessary to provide notice to the class, will be paid by the Defendants. The court's preliminary approval order provided class members 135 days to submit a claim form. (ECF No. 234). The claims-filing period was later extended until September 5, 2023 (ECF No. 366), giving class members 165 days to file a claim.

The proposed settlement class consists of the following: "All Persons, their heirs and successors, who held a non-contingent interest in an Eligible Property at the time that property was foreclosed by a County and which was sold during the Class Period by that County." An "Eligible Property" is a parcel of real property foreclosed by a county for the nonpayment of real-property taxes, and which was sold during the Class Period by a county for an amount in excess of the Minimum Sale Price. The "Minimum Sale Price" means the sum of all delinquent taxes, interest, penalties, fees, costs, and estimated pro rata expenses of administering the sale of an Eligible Property as calculated at the time of sale by the county.[2]

Prospective class members could either file a claim or opt out of the settlement. After the claims administrator received claims, it determined which claims are eligible claims, with assistance from the parties as necessary. The claims administrator will then make payments to eligible claimants from the settlement fund, which will be funded by the Defendants. For circumstances in which there are multiple eligible claims for one property, eligible claimants can consent to have a Special Master allocate the proceeds "based on considerations of law and equity" in a manner "similar" to how claims would be considered by "a Michigan Circuit

[2] To avoid the standing issues in the juridical-link doctrine, *Fox v. Saginaw County*, 67 F.4th 284 (6th Cir. 2023), the parties agreed to settlement sub-classes with a separate sub-class representative as to each County and a subclass definition tied to each County.

Court Judge under [Mich. Comp. Laws § 211.78t]." The resolution of claims by the Special Master will be reviewable pursuant to the Federal Arbitration Act or the Michigan Uniform Arbitration Act. The costs associated with the Special Master will be paid out of the administration costs and by Defendants.

B. Class Notice and Settlement Administration

Following preliminary approval from this court, the settlement administrator, Kroll, started administrating Notice to the class. On May 8, 2023, Kroll mailed the first of 27,932 Summary Notices to the last known address of every class member identified by the County Defendants. (Finegan Decl. ¶ 7, ECF No. 352-1 at PID 7088). The notices were sent by postcard. In six separate places those postcard summary notices encouraged recipients to visit the settlement website. Consistent with this court's Preliminary Approval Order, the settlement website included the full text of the summary notice, along with access to the long form notice, the claim form and many other case-related documents. The settlement website provided full disclosure of the rights and options of class members, including the right to obtain independent counsel. The parties and Kroll Settlement Administration also undertook a publication notice campaign, which included publication in 45 local newspapers throughout Michigan, a full-page ad in *Reader's Digest*, online ads targeting potential class members, Google search ads, a social media ad campaign targeting Michigan adults over 35 years of age, a national press release, a toll-free information line, and the creation of the official settlement website at www.TaxForeclosureSettlement.com. (Finegan Decl. ¶¶ 14-29, ECF No. 352-1 at PID 7092-97).

Then, on June 26, 2023, Kroll mailed a letter notice to every known class member, except for those who were known to have opted out and those whose attorneys had asked to be excluded. That notice provided additional information, including the net amount that would be paid for each property, if the settlement is approved by the court. That mailing, which was sent both to class members who had not made claims and to class members who had already made claims, also enclosed the long form notice and a claim form to every class member. (Finegan Decl. ¶ 12 at PID 7092).

On August 10, 2023, Kroll sent 6,958 email reminder notices to all class members whose email address Kroll had not yet determined to be undeliverable, that Kroll had determined have surplus proceeds, that counsel had not directed Kroll to remove from the mailing list, and who had not yet filed a claim. On August 18, 2023, Kroll mailed 17,719 additional reminder letter notices to all class members who had not requested exclusion or filed a claim. At the direction of counsel, Kroll performed an advanced relative search to locate 760 potential heirs and performed an advanced address search to obtain the most current mailing addresses for such individuals. On August 25, 2023, Kroll sent 760 reminder letter notices to these potential heirs. (Second Fenwick Decl. ¶¶ 8-10, ECF No. 392-3 at PID 8083-84.)

As of July 18, 2023, Kroll determined that direct notice likely reached "22,255 of the 27,932 persons to whom notice was mailed, which equates to a reach rate of the direct mail notice of approximately 79.7%." (Finegan Decl. ¶ 13, ECF No. 352-1 at PID 7092). When combined with indirect notice, Kroll determined that the notice "ultimately reach[ed] an estimated 94.9% of potential Class Members." (*Id.* at PID 7087). Notably, the 94.7%

estimated reach was calculated before 6,958 email notices were sent on August 10, 2023, and *before* 17,719 reminder letter notices were sent on August 18, 2023. (Second Fenwick Decl. ¶¶ 8-9, ECF No. 392-3 at PID 8083). The notice program also resulted in 2,794 calls to the Kroll interactive voice response system, with 1,477 calls to a live operator. (*Id.* at PID 8084). And "[a]s of September 22, 2023, the settlement website has had 171,436 page views." (*Id.* ¶ 12).

C. Claims Made

In all, notice was effectively delivered to individuals and businesses believed to have interests in over 7,000 eligible properties. Those notices resulted in claims being submitted by nearly 6,000 claimants, with claims relating to 3,406 unique parcels. (Second Fenwick Decl. ¶ 17, ECF No. 392-3 at PID 8085). As of September 1, 2023, the settlement administrator had "received 417 timely requests for exclusion from the settlement," and noted that it was "still in the process of determining the validity of all such requests." (Fenwick Decl. ¶ 4, ECF No. 385 at PID 7860). Since filing the initial Fenwick Declaration, one Class Member revoked their request for exclusion; the current count of requests for exclusion is 416. (Second Fenwick Decl., ¶ 20 ECF No. 392-3 at PID 8086.) While the final entry and vetting of all claims was not yet complete, early indications show that at least one claim has been made for almost 3,300 of the 7,299 parcels in the class—a claims rate well over 40%. In addition, the settlement administrator had received thirty-nine (39) timely and proper objections to the settlement. (Fenwick Decl. ¶ 5, ECF No. 385 at PID 7860). There was approximately a 5.7% opt-out rate, and a 0.53% objection rate. Of the 416 timely requests for exclusion from the settlement, 403 were filed by individuals represented by objectors'

counsel. (Second Fenwick Declaration, ¶ 21 at PID 8086). Likewise, of the 39 timely objections, 36 were filed by individuals represented by the same group of attorneys.[3] (*Id.* ¶ 22).

The latest declaration from the settlement administrator indicates that the claims rate has increased. "Of the 7,263 Eligible Properties . . . Kroll has identified Claims for 3,728 parcels with total surplus proceeds of approximately $43,274,883.03. (ECF No. 517 at PID 11890). But requests of exclusion removed 420 parcels and 131 claimants, leaving 6,843 relevant parcels and 3,597 claimants. Therefore, the claims rate by the parcel is 3,597/6,843 or 52.56%. When calculating the claims rate by the numbers of dollars, the claims rate grows. Claims total $39, 135,422 of the $53,140,945 available surplus proceeds (less exclusions)—leaving a claims rate of 73.6%. Whether the claims rate is calculated by parcel or by funds available, a majority of claims were made. (ECF Nos. 517; 521 at PID 11906-10).

This case has had it all: novel developments in the law, good lawyering, voluminous motions, trips to the circuit, dramatic in court outbursts, weighty pecuniary interests, sanctions, complex proceedings, and now—a court approved settlement.

II. Settlement Approval and Objections

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. Rule 23 requires a two-stage analysis for determining whether class certification is appropriate. At stage (a), the plaintiff

[3] Objecting counsel includes lawyers from Visser and Associates PLLC, Smith Haughey Rice & Roegge PC, Miller Law Firm, Gronda, PLC, Outside Legal Counsel PLC, Shea Law Firm PLLC, as well as former Michigan Supreme Court Justice Stephen Markman.

must establish four elements—numerosity, commonality, typicality, and adequacy of representation. Subsection (a) of Rule 23 provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Rule 23(e)(2) then requires courts to consider: (1) the adequacy of the representation, (2) the existence of arm's length negotiations, (3) the adequacy of the relief, and (4) the equitable treatment of the class members. Fed. R. Civ. P. 23(e)(2). A court must determine whether a settlement agreement is "fair, reasonable, and adequate." *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1093 (6th Cir. 2016); *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). The Sixth Circuit factors are:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Id. The Sixth Circuit factors and Rule 23(e) factors complement one another, and courts consider both. At this stage, the court's role is to protect the class and public from an unfair settlement. *See e.g.*, *Berry v. Sch. Dist. of City of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998). "Once preliminary approval has been granted, a class action settlement is presumptively reasonable, and an objecting class member must overcome a heavy burden to

prove that the settlement is unreasonable." *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 550 (S.D. Ohio 2000) (citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)).

The Rule 23 factors are addressed first and are followed by the Sixth Circuit factors. Finally, the relevant objections are grouped together as practicable.

A. Rule 23 Prerequisites

Objectors maintain that including the lienholders in the class destroys commonality and typicality, which renders class representation inadequate. In objectors' view, lienholders cannot be a part of this class because their interests are adverse to the class members who took out the loans on the foreclosed properties. In other words, if there are competing claims to the same surplus proceeds stemming from the same foreclosure sale of an individual parcel of land, then those class members are antagonistic. The settlement would require that if a lienholder makes a claim, then the former property owner would either engage with a special master or litigate that issue without assistance of class counsel. The settling parties counter that lienholders must be accounted for in the settlement otherwise far more litigation could spawn from their claims. Additionally, not including the lienholders in the settlement would amount to a windfall for the class members who borrowed. The Sixth Circuit recently addressed this issue in part:

> Lastly, many landowners might have liens on their property from sources other than the government, such as the bank from which they took out a mortgage. If a landowner with $30,000 in surplus proceeds has a $20,000 mortgage, should the landowner get the full amount? Or only $10,000? Because lienholders are not class members, should an entity like the bank be able to sue separately? Or would that permit double recovery? The district court suggested in conclusory fashion that this lienholder problem did not suffice to bar class certification. *See Fox*, 2020 WL 6118487, at *8, *10. But it did not explain how it planned to handle the problem.

Fox v. Saginaw Cnty., 67 F.4th 284, 302 (6th Cir. 2023). Here, inclusion of lienholders would remedy this issue. The settlement provides a remedy to reconcile competing claims in the same property through the special master.

Rule 23 requires that a class must be sufficiently numerous, have common questions of law and fact, typical claims and defenses, and that representative parties fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). At bottom, the common question here is simply whether the counties wrongfully retained surplus proceeds from the class members after a tax foreclosure sale. Commonality "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rule 23 does not require "all questions of law or fact raised in litigation to be common." *Rodriguez by Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009, 1015 (W.D. Mich. 1987) (citing *Port Auth. Police Benevolent Assn. v. Port Auth.,* 698 F.2d 150 (2d Cir. 1983)). *See also In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 854 (6th Cir. 2013) (explaining that "no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment") (cleaned up).

First, there are many common issues for class members: (1) whether the class member had a property interest that survived foreclosure, contrary to MCL 211.78i; (2) if so, whether that interest includes an interest in the proceeds of any sale of a tax-foreclosed property that exceeds the unpaid taxes, fees, interest, and costs; (3) whether under Michigan law, the

counties are legally entitled to retain any excess or surplus proceeds without paying just compensation; (4) whether the same is true under federal law; (5) what is the value of the surplus property interest taken; (6) whether lienholders and other interest holders' interests in property tracked in the same manner as property owners; (7) are property interest holders required to follow the claims process identified in MCL 211.78t(1)-(6); and (8) are interest holders whose surplus proceeds are "taken" entitled to prejudgment interest.[4] A "determination of [the] truth or falsity" of the counties' liability will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350.

Second, to the extent class members *could* become adversarial, that issue would only arise *after* the county forked over the surplus funds. But up until that point, every member of the class is united to reclaim as much of the surplus funds as possible. Further, a former owner seeking to recover excess funds must not be "rewarded" with money owed to another who had a property interest in the land via a recorded lien. "[The tax foreclosure] sale does not extinguish the taxpayer's debts. Instead, the borrower remains personally liable." *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 637 (2023). If lienholders were not included in the class, then resident class members could earn an economic windfall; the jurisprudence here runs counter to that prospect.

[4] Objectors make references to typicality as well but argue these issues together. *See e.g.*, *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) (commonality and typicality inquiries tend to merge). The court will decide them the same. "[F]or the district court to conclude that the typicality requirement is satisfied [,] a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Beatie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (cleaned up). If plaintiffs allege "both [1] a single practice or course of conduct on the part of each [d]efendant . . . that gives rise to the claims of each class member and [2] a single theory of liability," plaintiffs' claims satisfy the typicality requirement. *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012). Here, the claims are typical, and all extend from the same sort of GPTA grievances.

Third, differing remedies for individual members of a class does not render a class uncertifiable:

> The procedural device of a Rule 23(b)(3) class action was designed not solely as a means for assuring legal assistance in the vindication of small claims but, rather, to achieve the economies of time, effort, and expense. . . . However, the problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct. In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196–97 (6th Cir. 1988) (affirming a district court's class certification "where the defendant's liability [was] determined on a class-wide basis because the cause of the disaster [was] a single course of conduct which [was] identical for each of the plaintiffs"). Like in the context of mass torts, the counties' exercise of the GPTA serves as a single course of conduct, with the exercise of a single procedure. And the class member's remedy---reclaiming the surplus proceeds—resembles damages. The factual and legal issues relating to the counties' liability do not differ from class member to class member. The settlement would resolve the counties' liability, which is the prevailing common consideration in this case.

Finally, this objection was also raised by Cody Yannott in his objections. (ECF No. 433). He asserts that lienholders must fall outside the class definition because the class is

defined to include those who held a "noncontingent" interest in an eligible property. Michigan law defines mortgages as contingent interests. *See Prime Fin. Servs. LLC v. Vinton*, 761 N.W.2d 694, 703 (Mich. Ct. App. 2008) ("But, although a mortgage is a contingent interest in real property, a note secured by a mortgage is itself personal property.").

The settling parties countered with a Sixth Circuit case that reasoned that a mortgage lien is not a contingent interest in the bankruptcy context:

> *Fourth,* these [mortgage] liens are "noncontingent." "[A debt] is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy." *In re Mazzeo*, 131 F.3d at 303; *see* 2 Collier on Bankruptcy ¶ 109.06[2][b], p. 109–44 ("[I]f a debt does not come into existence until the occurrence of a future event, the debt is contingent."). In this instance, no future events need to occur in order for the creditors to have an interest in Glance's properties. The creditors secured their claims to Glance's properties when Glance signed the respective mortgage papers, and he signed those papers long before he sought bankruptcy protection.

In re Glance, 487 F.3d 317, 322 (6th Cir. 2007). The court continued and explained that once someone signs the mortgage papers, creditors immediately "obtained a host of present rights in the two properties." *Id.* Creditors have the right to reasonable inspections, the right to force a debtor to pay all taxes and fees, a right to force a debtor to insure the property, and of course—the right to foreclosure. *Id.* Class counsel leverages *In re Glance* for the proposition that mortgages have numerous noncontingent interests associated with them.

The court is satisfied that lienholders fall within the definition of the class.[5] And even if the court were to scrutinize the settling parties for using a legal phrase in an arguably improper manner, the parties intended to include lienholders following the Sixth Circuit's

[5] "All Persons, their heirs and successors, who held a non-contingent interest in an Eligible Property at the time that property was foreclosed by a County and which was sold during the Class Period by that County."

posed questions in *Fox*. There is an entire apparatus, complete with a special master, baked into the settlement to account for competing claims among class members, which could necessarily include lienholders. The settlement expressly excluded certain lienholders. (ECF No. 220-2 at PID 3602). The court will give force to the settlement as evidenced by the settling parties' intent. *See e.g.*, *K.S. v. Detroit Pub. Sch.*, 153 F. Supp. 3d 970, 975 (E.D. Mich. 2015) (citing *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992)). For these reasons, the court finds the Rule 23(a) prerequisites are met.

B. Rule 23(e) Factors

1. Adequacy of the Representation

This factor weighs in favor of approving the settlement. This factor focuses on "'the actual performance of counsel acting on behalf of the class.'" *Busby v. Bonner*, No. 2:20-CV-2359-SHL-ATC, 2021 WL 4127775, at *3 (W.D. Tenn. Jan. 28, 2021) (quoting Fed. R. Civ. P. 23(e)(2) advisory committee note to 2018 amendments). "[C]lass-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 309 (6th Cir. 2016) (quoting *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013)). District courts are to "carefully scrutinize" whether class counsel have met their fiduciary obligations to the class. *Shane Grp., Inc.*, 825 F.3d at 309.

In August 2014, James Shek, a self-described country lawyer, attended a tax foreclosure auction where the county retained over $180,000 in surplus proceeds following the sale of the property. Shek took issue with that scenario, which the Sixth Circuit would later call "theft," *Hall v. Meisner*, 51 F.4th 185, 196 (6th Cir. 2022), and he started drafting a complaint with attorneys Ramey and Ryan. Eventually, the law firm of Fink Bressack would join the team to provide additional class action experience.

Class counsel are experienced class-action litigators, and they are some of the first to bring this type of case, which spawned many similar lawsuits.[6] Class counsel has litigated this subject matter through several appeals in both state and federal court. Given this extensive work and subject-matter knowledge, by the time the settlement was reached, Plaintiffs and their counsel "had sufficient information to evaluate the strengths and weaknesses of the case and the merits of the Settlement." *New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 237 (E.D. Mich. 2016). Class counsel was adequate in this regard.

Objectors first argue that multiple class representatives were "prima facie inadequate." Class representatives are charged with "vigorously prosecut[ing] the interests of the class through qualified counsel." *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996). The record revealed that two of the over forty class representatives were dead at the time the court preliminarily approved the settlement. Class counsel acknowledged those deficiencies, and filed a motion to substitute six new class representatives who had either passed away or were

[6] The court has scores of similar actions on its docket.

otherwise ill-suited to serve the class. (ECF Nos. 498, 499). The court granted that motion. (ECF No. 508).

Courts have discretion to effectuate the class action settlement process. *See* Fed. R. Civ. P. 23(d). "The Supreme Court has stated that a court can re-examine a named plaintiff's ability to represent the class, and if it is 'found wanting, the court may seek a substitute representative . . .'" *Heit v. Van Ochten*, 126 F. Supp. 2d 487, 495 (W.D. Mich. 2001) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 416 (1980)). Courts routinely allow the substitution of class representatives in class actions. *Arvelo v. Fid. Nat'l Fin., Inc.*, No. SA-06-CA-0265-OG, 2007 WL 9712070, at *2 (W.D. Tex. Feb. 14, 2007); *Robinson v. Sheriff of Cook Cnty.*, No. 95 C 2205, 1996 WL 417559, at *1 (N.D. Ill. July 22, 1996), *aff'd*, 167 F.3d 1155 (7th Cir. 1999). "In general, when a certified or putative class is left without adequate representation, courts hold that adding a new class representative is appropriate, even required, to protect class interests." *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2017 WL 5504531, at *1 (S.D.N.Y. Nov. 15, 2017). "[S]hould the class representative become inadequate, substitution of an adequate representative is appropriate to protect the interests of the class." *In re Currency Conversion Fee Antitrust Litig.*, No. M 21-95, 2005 WL 3304605, at *3 (S.D.N.Y. Dec. 7, 2005). All parties, including objectors, agree that courts can and do exchange class representatives with some degree of regularity, so the court permitted the swaps.

Objectors' contention is not without its merit on this point. Ideally, all class representatives would be perfect all the time. But several reasons lead the court to believe that class representation was adequate. First, there are numerous class representatives in this

matter, and a handful of poor representatives do not spoil them all. Second, another reality for members of this class is that many are elderly.[7] It is not unexpected that some class representatives would pass over this case's ten-year march toward settlement. Third, the factual background for this action, which would typically be aided by present class representatives, was not necessary here. The facts were the same for all members of the class: a county retained their surplus proceeds after a foreclosure sale. Fourth, the faulty class representatives were swapped before final approval of the settlement. Finally, courts generally permit the addition of new class representatives to address any perceived shortcomings with incumbent representatives. *See Arvelo*, 20017 WL 9712070, at *2. Overall, the standard here is adequate, not perfect. Class representatives were adequate.

2. The Existence of Arm's Length Negotiations

This factor supports final approval. Both parties were represented by counsel at the negotiations, and the extensive negotiations took place before a mediator. While on appeal, the parties engaged in extensive mediations with the Sixth Circuit Mediation Office beginning in April 2021 and ending in December 2022. The parties undertook more than 30 mediation sessions, including two long in-person sessions. Third party mediators represent strong evidence of adversarial proceedings and arm's length negotiations. *In re Flint Water Cases*, 571 F. Supp. 3d 746, 780 (E.D. Mich. 2021) (citing 4 *Newberg* § 13:48 (5th ed. June 2021 update)). Another point to consider is that counsel for Defendants had to get numerous counties on board with the settlement, which was no small feat.

[7] One class representative died shortly after the final fairness hearing. (ECF No. 519).

The settlement was not quick, and it does not include overly generous fees. As the Sixth Circuit has asked, "why," if the parties "were all in cahoots, did it take months of mediation with an independent mediator to resolve the case?" *In re Wendy's Co. S'holder Derivative Litig.*, 44 F.4th 527, 536 (6th Cir. 2022). Finally, the settlement does not include weak relief, generous fees, or "ineffectual lawyers," which are typically present in settlements made not at arm's length. *See Reynolds v. Beneficial Nat'l. Bank*, 288 F.3d 277, 282 (7th Cir. 2002). This issue is addressed further below as objectors' key objection is that the settlement was collusive.

3. Adequacy of the Relief

Rule 23(e)(2)(C) requires the court to consider whether the relief is adequate, considering several factors:

> (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).

Here, the settlement is a claims-made settlement, which provides for a payment of 80% of the surplus proceeds arising from the sale of property where there is at least one Eligible Claim made, in consideration for a release of the claims in this litigation. Class counsel has filed a motion for a fee award equal to 20% of the amount to be paid to each eligible claimant. Administration costs necessary to facilitate the settlement, such as the costs required to provide notice to the class, the costs associated with the special master, and the

costs incurred by class counsel will not come out of the relief available to eligible claimants; instead, the counties will pay administrative costs.

"Courts routinely recognize that settlements never equal the full value of the loss claimed by the plaintiffs." *IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 596 (E.D. Mich. 2006). Moreover, "the fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate." *Olden v. LaFarge Corp.*, 472 F. Supp. 2d 922, 933 (E.D. Mich. 2007) (cleaned up).

The settling parties assert that the 80% recovery here exceeds the fractions of potential recovery approved in other claims-made settlements. *See, e.g., In re: Whirlpool Corp. Frontloading Washer Prod. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *16 (N.D. Ohio Sept. 23, 2016) (approving a settlement that provided claimants "a weighted average somewhere near 25%" of the "damages they could have recovered at trial"); *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 454 (C.D. Cal. 2014) (holding that settlement affording claimants "5% to 30% of the recovery that might have been obtained [at trial]" was reasonable); *Park v. Carlyle/Galaxy San Pedro, L.P.*, No. CV09-00793MMM, 2009 WL 10669742, at *7 (C.D. Cal. Oct. 8, 2009) (approving settlement that gave plaintiffs 54.5% of amount remaining in escrow related to such deposits).

Objectors argue that the relief is inadequate because the settlement operates as a "claims made" settlement in which unclaimed funds are reverted to Defendants. But courts routinely approve claims-made settlements. *See, e.g., Gascho v. Global Fitness Holdings, LLC*, 2014 WL 1350509 (S.D. Ohio 2014), *R&R adopted*, 2014 WL 3543819 (S.D. Ohio

2014), *aff'd*, 822 F.3d 269 (6th Cir. 2016); *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA WMC, 2012 WL 5392159, at *9 (S.D. Cal. Nov. 5, 2012) (observing that "courts routinely approve" claims-made settlements). And here, the claims rate is quite high, and the relief provided for the class is substantial.

a. Costs risks, and delay of trial and appeal

This subfactor favors settlement. This case is ten years old. Additionally, the parties point to several unanswered legal questions in this area:

- Whether *Rafaeli* will be applied retroactively and to whom.[8]
- What the appropriate statute of limitations is for unnamed putative class members.
- Whether the Michigan Legislature's post-*Rafaeli* amendments to the foreclosure-and-sale process bar class claims.
- How surplus proceeds are to be distributed among competing claimants where more than one person held an interest in a property.
- How other equitable defenses including unclean hands, unjust enrichment, and laches apply to each class member's claims.

The risks associated with continuing to litigate this case are apparent. Given the several outstanding legal questions, Plaintiffs' claims could be dramatically changed in the future.

Objectors raise a series of objections related to the 2020 claimants and argue that some of these legal ambiguities do not apply to them. These objections are addressed below, but the reality is that there is a lack of binding appellate authority to adequately support their legal theories. In short, their objections do not diminish the risks associated with not settling; courts may reasonably disagree for years to come. The class is best served with their

[8] This issue is pending before the Michigan Supreme Court and was set for oral argument in March 2024. *Schafer v. Kent Cnty.*, No. 164975.

(adequate) recovery sooner rather than later. The court notes that some of the class is elderly and their time is not infinite.

b. Distribution of Relief

Courts have found that this sub-factor weighs in favor of approval where claims are evaluated based on "objective criteria," which are a "hallmark of fairness." *In re Flint Water Cases*, 571 F. Supp. 3d at 781. Here, each payout is specific to each eligible claimant. Each individual Plaintiff's claim can be readily calculated; each will be entitled to 80% of their excess proceeds less the settlement of their delinquent taxes and fees. Claims-made settlements are regularly approved by courts within the Sixth Circuit. *See, e.g.*, *Gascho,* 2014 WL 3543819 (S.D. Ohio 2014), *aff'd*, 822 F.3d 269 (6th Cir. 2016). "Courts around the country have approved settlements where the claims rate was less than one percent." *Pollard*, 320 F.R.D. at 214 (collecting cases), *aff'd*, 896 F.3d 900 (8th Cir. 2018). The claims rate exceeded 50%, which is more than six times greater than the 6.3% claims rate projected by objectors' counsel in *Bowles v. Sabree*, No. 2:20-cv-12838-LVP-KGA (E.D. Mich.). This subfactor supports approval because the class members are treated equitably under the settlement.

c. Attorney's Fees (20%)

The focus of the third subfactor is "whether there are signs that counsel sold out the class's claims at a low value in return for [a] high fee.'" *In re Flint Water Cases*, 571 F. Supp. 3d at 781 (cleaned up). Here, class counsel seeks an award equal to 20% of the amount paid to each class member. This is well within the range of the 20-30% range of reasonable attorneys' fees generally awarded. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532

(E.D. Mich. 2003) (finding a 17% fee reasonable for a common settlement fund). It's also important to note that class counsel only gets paid to the extent that class members get noticed, file claims, and get relief themselves. Therefore, class counsel's award is directly tied to the relief of the class. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). This is unlike the settlement in *Bowles*, which assured objectors' counsel got paid regardless of whether class members received their excess surplus.

Objectors aver that this modest fee is evidence of collusion:

> Class Counsel might respond that, at 20 percent, its fee is modest. But it still represents a windfall for Wayside's counsel, who never even managed to sue most of the defendants until those defendants agreed to let them do so. The prospect of this windfall gave these un-sued defendants enormous leverage over Wayside's counsel and put Wayside's counsel in an irredeemably conflicted situation. The result is the inadequate proposed settlement. The motion to finally approve the proposed class action settlement is an effort to put lipstick on a pig.

(ECF No. 446 at PID 8901). This argument is conclusory. It is hard to see how a modest fee is anything but good for the class; it ensures more funds go to claimants. The requested attorneys fees support approval.

d. Side Agreements

In determining whether the relief was adequate, Rule 23 has courts contemplate whether any side agreements were made in connection with the proposed settlements. Parties maintain there are no side agreements in this case. When no side agreements are apparent, this factor has no bearing on the court's analysis. *Johnson v. Rausch, Sturm, Israel, Enerson, & Hornik, LLP*, 333 F.R.D. 314, 322 (S.D.N.Y. 2019). Objectors do not comment on this factor, and it has no bearing on this analysis.

4. Degree of Equity

The inquiry for this factor is whether the settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Notably, there are no service rewards for named plaintiffs. Additionally, the settlement provides each Plaintiff with 80% of the surplus proceeds arising from the sale of the property in which they claim an interest (less attorney's fees). In other words, every claimant will receive the same percentage of their surplus proceeds.

Objectors argue that the apportionment of relief is irredeemable because lienholders claimants are members of the class, which would necessarily take away proceeds from certain claimants. The court disagrees. *See Tyler*, 598 U.S. at 637; *supra* section II.A.

C. Notice

The notice process was more than adequate and complied with due process. The settlement administrator determined that notice reached approximately 96.4% of the class one way or another. The Sixth Circuit has held that an 80% notice rate is adequate. *Fidel v. Farley*, 534 F.3d 508, 514 (6th Cir. 2008) (finding notice adequate despite allegations that 20% of the class received untimely notice). "Due process does not, however, require *actual* notice to each party intended to be bound by the adjudication of a representative action." *Id.* "All that the notice must do is 'fairly apprise the prospective members of the class of the terms of the proposed settlement' so that class members may come to their own conclusions about whether the settlement serves their interests." *Int'l Union*, 497 F.3d at 630 (quoting *Grunin v. Int'l House of Pancakes,* 513 F.2d 114, 122 (8th Cir. 1975)). The court finds that the settlement met the notice requirements of Rule 23(e) because of the high notice figure,

the various forms of notice, and the continued follow up by the settlement administrator and class counsel.

Objectors argue that the notice program was defective because the first round of notice was sent on a postcard, which didn't include every conceivable settlement detail. While the court doubts that the postcard notice was deficient, the settlement administrator mailed out more formal long form notice within a few weeks of the postcard notice. Whatever inadequacy stemmed from the postcard notice was quickly remedied with no harm to the class.

D. Sixth Circuit Factors

As outlined above, Rule 23(e)(2) requires that courts evaluate certain factors before the court can find that a settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Rule 23(e)(2)'s factors overlap with many of the Sixth Circuit's factors for determining whether a class settlement is fair, reasonable, and adequate. *See Int'l Union*, 497 F.3d at 631. For the reasons set forth below, the Sixth Circuit factors weigh in favor of granting final approval.

1. Likelihood of Success on the Merits

This factor favors settlement. The Sixth Circuit indicated that the likelihood of success on the merits is the most important factor in this analysis. *Does 1-2 v. Deja Vu Servs., Inc.*, 925 F.3d 886, 895 (6th Cir. 2019). This factor does not require the court to "decide the merits of the case or resolve unsettled legal questions," but, it recognizes that the court cannot reasonably "judge the fairness of a proposed compromise" without "weighing the plaintiff's

likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Int'l Union*, 497 F.3d at 631. In evaluating this factor, the court's

> task is not to decide whether one side is right or even whether one side has the better of these arguments. Otherwise, we would be compelled to defeat the purpose of a settlement in order to approve a settlement. The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement.

Id. at 632.

The settling parties argue that the "complexity, expense, and likely duration of the litigation" and "likelihood of success on the merits" factors are met for the same reasons as Rule 23(e)(2)'s factor examining the "costs, risks, and delay of trial and appeal." (ECF No. 410 at PID 8369).

Objectors spend a lot of time arguing that the settlement figure is inadequate. In their view, 80% is too low when considering class counsel's 20% fee and because these claims are exceptionally strong. Some objectors seek fair market value for their clients. But the fair value argument was squarely rejected by the Sixth Circuit. *See Freed v. Thomas*, 81 F.4th 655, 658 (6th Cir. 2023) ("[N]either this court nor the Supreme Court has ever held that a plaintiff whose property is foreclosed and sold at a public auction for failure to pay taxes is entitled to recoup the fair market value of the property."). The Michigan Supreme Court, in addressing this issue, held that awarding the fair market value of a property instead of the price obtained at a public tax foreclosure sale "would run contrary to the general principle that just compensation is measured by the value of the property *taken*" and would "not only ... [take] money away from the public" but would also allow plaintiffs to "benefit from their tax delinquency." *Rafaeli, LLC*, 952 N.W.2d at 465–66; *see also Tyler*, 598 U.S. at 637.

Putting the fair market argument aside, objectors argue that *Rafaeli* and *Tyler* squarely show likely success on the merits. As a general matter, 80% is a relatively high number to settle on, especially in a class action. Objectors argue as if *Tyler* and *Rafaeli* were decided in a vacuum and as if these two opinions were judgments in favor of anyone who was subject to the GPTA. Claimants face other potential issues like res judicata, time bars, or whatever other equitable defenses the counties may assert.[9] As previously mentioned, the court has scores of similar claims on its docket, and each claimant is a little different—with potential individualized issues to overcome. It is possible that some members of the class would get nothing if all these claims were adjudicated individually. The class faces risks if it does not settle.

2. The Risk of Fraud and Collusion

This factor favors settlement. Because this factor is the subject of several objections, and implicit in several more, the court will address this issue under the first objection. Overall, the court finds a lack of collusion, and instead, lengthy negotiations and all the criteria that would suggest there was no collusion.

3. The Complexity, Expense and Likely Duration of the Litigation

The court finds that this factor weighs in favor of settlement for the same reasons the court found that the Rule 23(e)(2) factor was met. *See supra* II.B(3)(a). Further litigation

[9] It is worth mentioning that counsel for the Defendant counties are some of the best in the state of Michigan. The court has little doubt that if this matter were to continue, class counsel and claimants alike would face strong opposition. Given the money at stake, and the general status of the court's docket, it seems likely that the counties will litigate these claims for years to come.

would have been complex, costly, and risky. Objectors do not disagree on this issue. This litigation is obviously complex and favors settlement.

4. The Amount of Discovery

The essential "question is whether the parties had adequate information about their claims." *In re Auto. Parts Antitrust Litig.*, No. 2:12-CV-00203, 2018 WL 11373135, at *7 (E.D. Mich. Nov. 8, 2018). Like other tax foreclosure matters, the material facts were discoverable in the public domain. Objectors concede that the claims are not fact sensitive and do not object to the lack of discovery with respect to the Class's claims against the Defendants. Objectors maintain that they should have received discovery, however. But this court has held multiple times that objectors failed to raise a "colorable claim" warranting discovery. (ECF Nos. 354, 460, 503). This factor favors settlement to the extent it is relevant.

5. The Opinions of Class Counsel and Class Representatives

The opinions of class counsel and of the class representative favor final settlement approval because they all support the settlement. Objectors assert it is difficult to determine the class representative's opinions because they were denied discovery. This factor favors settlement.

6. The Reaction of Absent Class Members

In evaluating the reaction of absent class members factor, "courts often cite to the absence of opt-outs as evidence in support of settlement approval." *In re Flint Water*, 571 F. Supp. 3d at 783. Here, the settlement administrator received 39 timely and proper objections to the settlement, although many are duplicative. There was approximately a 5.7% opt-out

rate and a .53% objection rate. The vast majority of objections stem from objectors' counsel. 403/416 opt outs were represented by objectors' counsel; 36/39 timely objections were filed by the objectors' counsel.

Parties cite several cases for the proposition that courts give little weight to objections that are driven by the same groups of competing counsel. *See, e.g.*, *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 318 (3d Cir. 1998) (finding that the district court correctly considered that, of 300 objections, the "most vociferous" objectors were represented by "a handful of litigants represented by counsel in cases that compete with or overlap the claims asserted" by class counsel). Courts have also routinely approved settlements with higher rates of opposition. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 174 (5th Cir. 1983) (finding that a "settlement can be fair notwithstanding a large number of class members who oppose it" and affirming approval of settlement "over the objections of . . . nearly forty percent of the 1,517 member class"); *Huguley v. Gen. Motors Corp.*, 925 F.2d 1464 (table), 1991 WL 22013, at *3 (6th Cir. 1991) (finding a 15% rate of dissatisfaction as insufficient to upend a settlement).

Objectors argue that their objections are *per se* evidence of a negative response from absent class members, but the court disagrees. Not only is that argument self-serving, but as discussed below and throughout, most of the objections are without merit and bear little on this factor. Still, the court appreciates the objectors' efforts to protect the class. Following a marathon final fairness hearing and months of contemplating this settlement, the court concludes that the record supports the fact that many absent class members approved of the settlement as plainly evidenced by the high claims rate. This factor is a wash.

7. The Public Interest

"Public policy generally favors settlement of class action lawsuits." *Harney v. Parrott*, 617 F. Supp. 2d 668, 679 (S.D. Ohio 2007); *see also In re Cardizem CD Antitrust Litig.*, 218 at 530 ("[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources."). This litigation started ten years ago. Because the court finds that the settlement is adequate, the court also finds that it serves the public interest.

E. Objections to the Settlement

Objector filed several hundred pages of objections to the settlement. (ECF Nos. 345-3, 356, 357-1, 433, and 436). The relevant objections are grouped together below, and many have already been implicitly rejected above. The objections are duplicative, speculative, and have little bearing on the adequacy of the settlement; some objections contain elements of all three.

1. Speculations of a Collusive Reverse Auction

Objectors allege that the settlement was a collusive "reverse auction." They allege that the counties chose the weaker counsel and that the negotiations weren't adversarial. They argue the Defendants had 100% veto power over any settlement with the Wayside Plaintiffs. Objectors rely on (1) the class counsel leadership contest; (2) that lead counsel was not appointed prior to the proposed settlement; (3) that Wayside relied on a "risky defendant class mechanism"; (4) that Wayside "effectively appointed themselves to negotiate for a putative class"; (5) the fact that the settlement was district wide as opposed to just for Van Buren County; (6) Wayside never filed a brief while on appeal; (7) the Miller team was

suspicious that Wayside was negotiating a district wide settlement; (8) this court denied motions to intervene; (9) Counsel for a competing class action were excluded from the negotiations; (10) a state court judge's comments that there seemed to be tampering with *Grainger* because Kent County was negotiating with Wayside.

To the contrary, the parties argue that several facts indicate a lack of collusion. The parties insist that class counsel are not ineffectual lawyers, the settlement negotiations took place under the Sixth Circuit Mediation Office, and that the settlement provides strong value for the class.

The court finds a lack of collusion. A review of the objectors' evidence reveals more speculation than concrete evidence of collusion. Competition among lawyers for the same class nor objecting counsel's absence from the negotiations evidences collusion. *See e.g.*, *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1100 (9th Cir. 2008) (citing *Rutter & Wilbanks Corp. v. Shell Oil Co.,* 314 F.3d 1180, 1189 (10th Cir. 2002). And the viability of similar lawsuits brought by objectors' counsel was at least questionable. *See e.g.*, *Grainger, Jr. v. Cnty. of Ottawa*, No. 1:19-CV-501, 2021 WL 790771, at *16 (W.D. Mich. Mar. 2, 2021) (denying a motion to certify the class). As for the state court judge's comments, the court has no doubt the judge relied on what he was told when he expressed his opinions regarding this settlement's negotiation process. But this court has managed this case for nearly a decade, is well acquainted with this matter, and respectfully disagrees.

Objectors also leveraged an expert, Professor Brian Fitzpatrick, to bolster their collusion theory with analysis and legal conclusions. Professor Fitzpatrick opined that this settlement was a reverse auction. Fitzpatrick argues that claims-made settlements are

disfavored and articulated that this settlement would revert approximately 90% of the surplus proceeds to the counties. But that assertion is unfounded because it relied on a projected claims rate of 9%. (ECF No. 345-9 at PID 6492). At this stage, we know that the claims rate exceeds 50%, depending on how one runs the numbers. Fitzpatrick did not provide an updated analysis nor testify at the final approval hearing. Fitzpatrick's report did summarize a similar class action settlement brought by objecting counsel in *Bowles v. Sabree*, 2:20-cv-12838-LVP-KGA (E.D. Mich.):

> Although the per capita settlement proceeds here are greater than in a typical consumer settlement and claims rates tend to be correlated with the magnitude of proceeds, in a claims made, surplus-proceeds class action settlement against Oakland County, the claims rate was, at last count, only 6.3 percent . . . Thus, 9 percent may be a rosy estimate of the claims rate here.

(ECF No. 345-9 at PID 6493). Obviously, the claims rate here was much higher than in *Bowles*—presumably because class members received adequate notice and thought the settlement was worthwhile. Much of Fitzpatrick's analysis actually undermines objecting counsel's other settlement and not this one.

The examples of collusive reverse auctions cited in the briefing demonstrate the extremes, and the allegations here fall well short of those examples. In *Technology Training Assocs., Inc. v. Buccaneers Ltd. Partnership*, 874 F.3d 692, 695 (11th Cir. 2017), a competing plaintiff's firm engaged in a "Machiavellian plan" to undercut a pending class action. An attorney left the original settling firm, which wanted to settle the matter for $75,000,000 and joined a competing firm which ultimately filed a motion to settle the claims for just $19,000,000. *Id.* In the other case, a group of attorneys settled a case at lunch before even filing the action or before one of the settling attorneys "bought a client from another

lawyer." *Reynolds*, 288 F.3d at 281 (7th Cir. 2002). Not only was this case filed long before any other competing class actions, but class counsel did not swoop in and settle the case for less than 25% of what another class was seeking as in *Technology Training*. Here, the parties settled for 80% of the surplus proceeds, and objectors contend they should get at least 100% of the funds. As for the conduct in *Reynolds*, the record here demonstrates that this case was not settled during a lunch break or on a whim; the case settled over several months of negotiations with a mediator. The court wholeheartedly rejects the collusion speculation.

2. Objections Regarding Class Counsel's Adequacy

Objectors argue that class counsel (1) has unethically invaded established attorney-client relationships; (2) has improperly employed and acted in concert with a third-party non-attorney who engaged in unethical solicitation of class members; (3) has violated Rule 23 by eschewing the court-approved notice. Objectors want the court to deny final class certification based upon the inadequacy of counsel; further, objectors assert their disqualification is the appropriate remedy for class counsel's behavior.

First, class counsel contacted class members who were purportedly retained by Visser and Associates. Class counsel previously brought a motion to communicate with class members who had retained other counsel. The court denied that motion. (ECF No. 354). *See Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) (quoting *Kleiner v. First Nat'l Bank of Atlanta*, 37 F.R.D. 754, 769 (N.D. Ga. 1983), *rev'd in part on other grounds*, *Kleiner*, 751 F.2d at 1193 ("[I]t cannot truly be said that [class counsel] fully 'represents' prospective class members until it is determined that they are going to participate in the class action."); *In re Potash Antitrust Litig.*, 162 F.R.D. 559, 561 n.3 (D. Minn. 1995) ("[C]ounsel

for the class has an obligation to diligently and competently prosecute the class claims, but whether a full attorney-client relationship shall materialize will depend upon the putative class member's decision to accept or reject class standing."). The court has already previously denied that these permissive contacts warranted a protective order. (ECF No. 381). Again, objectors have failed to identify any purposeful violation by class counsel since the court denied class counsel's motion to communicate with class members who had retained other counsel.

Second, as it relates to class counsel's employment of a private investigator, objectors allege that class counsel employed Carl Clatterbuck to contact represented class members and urge them to file a claim. This merits some pause on the court's part as class counsel does not deny these allegations. Even so, it is not enough to warrant disqualification of class counsel. The court has already found that this conduct, if it occurred, did not warrant disqualification. The primary appellate authority cited by objectors, *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489 (7th Cir. 2013), held that disqualification of class counsel was not warranted, despite unethical solicitation letters, because the alleged misconduct did not prejudice the class or "jeopardize[] the court's ability to reach a just and proper outcome in the case." *Id.* at 499. These solicitations did not hurt the class and have little bearing on the material provisions of the settlement and this court's focus now: whether the figure is adequate. Class counsel must be adequate, not perfect. At the end of the day, class counsel's potential shortcoming on this issue will not derail the settlement.

Finally, objectors argue that class counsel violated Rule 23 by sending notice via a postcard originally instead of sending long-form notice as required by the court. Class counsel

explained that this issue was remedied by mailing the long-form notice to those class members afterwards. Further, the postcard notice included several references to the website where the entire notice was posted. This issue is relatively immaterial. This objection is overruled.

3. Objections Regarding Service Awards

Objectors assert a lack of service awards for class representatives indicates the settlement was negotiated from a distressed position because service awards are typical in class actions. Class counsel counters that this class action was not heavily fact dependent, but instead was largely legal in nature. Class representatives were not needed for depositions or to respond to other discovery requests.

This argument is quite peculiar because large service awards for class representatives could indicate that they sold out the class for a larger fee themselves. *See, e.g.*, *In re Flint Water Cases*, 571 F. Supp. 3d at 781 (focusing on "whether there are signs that 'counsel sold out the class's claims at a low value in return for [a] high fee.") (citing 4 *Newberg* § 13:54 (5th ed.)). A lack of service fees for class representatives does not render this settlement faulty.

4. Notice Objections

To comply with due process requirements, notice must be "reasonably calculated to reach interested parties." *Karkoukli's, Inc. v. Dohany*, 409 F.3d 279, 283 (6th Cir. 2005). "Due process does not, however, require *actual* notice to each party intended to be bound by the adjudication of a representative action." *Fidel*, 534 F.3d at 514 (emphasis in original). Moreover, due process "does not require the notice to set forth every ground on which class members might object to the settlement." *Vassalle*, 708 F.3d at 759.

Objectors argue that the original postcard notice was inadequate because it did not comply with this court's preliminary approval order or the notice requirements under Federal Rule of Civil Procedure 23. As discussed above, class counsel remedied the issue by sending a long-form notice afterwards. Further, there are several means of indirect notice through the website, hotline, and ad campaigns. Overall, notice was adequate. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 968 (N.D. Ill. 2011) (finding postcard notice in concert with other forms of notice as "more than adequate"). The high claim rate also indicates that the notice was adequate. And here, unlike in *Bowles*, class counsel's fee was tied to the number of claims filed—there was plenty of incentive to provide adequate notice. The notice objections are rejected.

5. Objections Regarding Unclaimed Funds and a "Reversionary Settlement"

Objectors argue that courts disfavor settlements that result in the reversion of funds to the settling defendants. This is plausibly true when claim rates are low. *Rikos v. Procter & Gamble Co.*, 2021 WL 9097962 (S.D. Ohio Nov. 30, 2021). But here, the claim rate exceeds 50%. The average claims rate among class actions is usually around 10%. *See Florida Educ. Ass'n. v. Dep't. of Educ.*, 447 F. Supp. 3d 1269, 1275 (N.D. Fla. 2020). The high claims rate leads the court to disagree. This objection is overruled.

6. Objections Regarding the Claims Process

First, objectors argue that the claims process is a "black box" with no specified criteria for determining the validity of claims or the value of a claimant's interest. They assert that the settlement includes no apparent standards. Second, objectors allege that the class members who submit claims are subject to burdensome "investigation and discovery."

Finally, objectors allege that the claims of class members are limited to "the value of the class member's interest" without "any explanation."

Class counsel counters that there is no legal authority requiring a settlement agreement to expressly delineate all the criteria necessary to process a claim. When each claim is potentially different, this makes sense. The factual basis for each claim is simply whether a claimant had an interest in the property that a county foreclosed on under the GPTA. If the parties disagree with the claims administrator's finding regarding a particular claim, the settlement permits parties to seek a determination from the court.

As it relates to the discovery "burden," the settling parties explain that it is not unreasonable to require claimants to substantiate their claims. In fact, it would deter frivolous claims and streamline the settlement process. *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *30 (N.D. Ga. Mar. 17, 2020), *aff'd in part, rev'd in part and remanded*, 999 F.3d 1247 (11th Cir. 2021) ("And, there is nothing unfair about requiring a claimant to meet the eligibility requirements for a particular benefit."). Again, class counsel had every incentive to ensure valid claimants could make their claims.

7. Objections Regarding the Size of the Class

The settlement defines the class as "All Persons, their heirs and successors, who held a non-contingent interest in an Eligible Property at the time that property was foreclosed by a county and which was sold during the Class Period by that County." The Class Period is limited "to the time for each County during which that County acted as a foreclosing governmental unit, beginning no earlier than January 1, 2013, and ending on December 31,

2020." Objectors argue that the settlement fails to account for the excluded members of the as-pled class, which poses risks that their claims could be time barred.

Objectors lack standing to allege harm from those not in the class. The scope of the class has shrunk. Amended complaints supersede earlier pleadings. The current class scope reflects the scope as pled in the amended complaints. This objection is rejected.

8. Objection Regarding Discovery

Objectors argue that they should have been entitled to discovery throughout the settlement process. This objection is devoid of any legal citation and is rejected for the same reasons the court denied objectors' several motions for discovery. (ECF Nos. 354, 460, 503).

9. Objection Regarding the Mediation Process

Objectors argue that the settling parties are employing the mediation process as a sword and a shield to further conceal information. As for the "sword" allegation, there is nothing improper with relying on the fact that a case was mediated for months under the supervision of the Sixth Circuit Mediation Office. Courts routinely rely on such findings when approving settlements. Turning the "shield" allegations, the settling parties only employed their mediation privilege to protect against a meritless motion for discovery. These objections are rejected.

10. *Mercury* Rule Objection

Objectors argue that the fee application should have been filed before the objection deadline because other jurisdictions have adopted that rule. *See e.g.*, *Redman v. Radioshack Corp.*, 768 F.3d 622, 637-38 (7th Cir 2014); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 446 (3d Cir. 2016). Rule 23(h) controls fee applications in class

actions. The rule provides that a "claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Fed. R. Civ. P. 23(h). "Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." *Id.* Here, class counsel's motion for fees was filed by the date set in the court's preliminary approval order. (ECF No. 401). Objecting counsel was able to file a response in opposition to the motion. (ECF No. 428). Even if this was an error, it was harmless. This objection is rejected.

11. Objections Regarding the "Clear Sailing" and "Kicker" Provisions

The settlement includes a "clear sailing" provision, (ECF No. 220-2 at PID 3628) "which is one 'where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling.'" *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 425 (6th Cir. 2012) (quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 520 n. 1 (1st Cir. 1991)). As the Sixth Circuit observed, clear sailing provisions garner mixed views from reviewing courts, but are not themselves evidence of inadequate representation. *Gooch*, 672 F.3d at 425. And here, class counsel's motion for fees will not go unopposed. The settlement's 20% fee falls to the bottom of the 20-30% range of reasonable attorneys' fees generally awarded. *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 532 (E.D. Mich. 2003). The inclusion of the clear sailing and kicker provisions, "absent more," does not establish collusion, but rather a "heightened scrutiny" from the reviewing court. *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 291 (6th Cir. 2016). This settlement has faced a great deal of scrutiny, and it seems that every conceivable issue has been brought to the court's attention for review. The court has spent a significant amount

of time reviewing this settlement and applied a heightened scrutiny. This objection is overruled.

12. Objections Related to 2020 Claimants and PA 256

Objectors argue that 2020 claimants face less risk and any compromise with the counties is unwarranted. Objectors argue that PA 256 cannot be applied retroactively to eliminate the claimants' vested property rights. Objectors engage in a statutory interpretation analysis to argue that PA 256 does not apply retroactively. To the contrary, class counsel argues that a court may disagree, and they cite authority indicating that the usual statutory analysis may not be applicable to statutes that are remedial in nature. Objecting counsel may be correct, and they may not. But when the settling parties reached an agreement, there was no binding authority one way or the other. Also, as referenced earlier, claimants face alternative barriers to recovery.

Second, objectors argue that PA 256 is not applicable to 2020 claimants. But this issue is the subject of further litigation, and objecting counsel failed to cite any definitive authority to the contrary.

Third, objectors raise conversion and constructive trust theories to ensure 100% recovery for the class. Objecting counsel acknowledged that immunity could stand in the way of that theory, however. Additionally, class counsel points to PA 256 as a potential bar to recovery. *See In re Muskegon Cnty. Treasurer for Foreclosure*, No. 363764, 2023 WL 7093961, at *3 (Mich. Ct. App. Oct. 26, 2023) (upholding MCL § 211.78t(11) and its exclusive remedy provision).

Fourth, objectors argue that the 2020 claimants do not face a statute of limitations barrier. But the statute of limitations issue was only one of many issues raised as warranting a settlement with the counties. Overall, these objections are inherently speculative and depend on further litigation. If a claimant thought these legal theories were strong enough, they were free to opt out of the settlement during the time allotted by the court. These objections are overruled.

13. Objection Regarding Opt-Out Period

Objectors argue that it was improper for the court to not extend the opt out period. Objectors argue that this "resulted in an impermissible and unfair Sophie's choice"—either accept the settlement or receive nothing at all. This decision was ultimately made by the court and does not bear on the settlement itself. The court denied objectors' motion to opt-out of the settlement because those who failed to opt-out during the relevant period failed to show excusable neglect. This argument is rejected.

14. Miscellaneous Objections

The court has reviewed all the objections to the settlement. Many of the objections are duplicative. Those objections not explicitly addressed were implicitly rejected by the court's analysis of Rule 23 and the Sixth Circuit factors. In the court's judgement, no one objection, nor their sum total, show that this settlement is inadequate.

III. Appointment of a Special Master

The settlement provides for a special master to resolve competing claims among claimants. (ECF No. 220-2 at PID 3627, 3632). The counties moved to appoint Judge

Michael J. Talbot as special master to assist with administering and facilitating the settlement. (ECF No. 510). If appointed and if all claimants consent to the special master's arbitration, the special master would resolve competing claims to surplus proceeds arising from a particular parcel and determine how much each claimant receives.

A court may issue orders that "(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument" or "(E) deal with similar procedural matters." Fed. R. Civ. P. 23(d)(1).

Judge Talbot spent 40 years on the bench before his retirement from the Michigan Court of Appeals, where he sat as Chief Judge. Judge Talbot presided over nearly all levels of the Michigan court system, from the old Detroit Common Pleas Court to the Michigan Court of Claims. He spent 20 years on the Michigan Court of Appeals. Judge Talbot is also an active member of the bar and has served the state bar in several capacities. Objectors do not dispute Judge Talbot is qualified to serve as special master, nor could they. The court finds that Judge Talbot would be an ideal special master to resolve competing claims.

Objectors filed a response in opposition to the appointment of a special master wherein they "oppose the appointment of a Special Master because they oppose the final approval of the proposed settlement for all of the reasons that they have explained throughout the briefing." (ECF No. 516 at 11822). The court will overrule the objections for the same reasons it approved the settlement.

IV. Motion to Accept Late Claims

Pending before the court is a motion by class counsel to amend the court's prior order to extend the deadline for class members to submit a claim form. (ECF No. 529). The court

already extended the claims period. (ECF No. 362, 366). Upon due consideration of the motion, the court will deny an extension of the deadline for class members to file a claim because class counsel failed to establish excusable neglect. The motion was filed months after the final fairness hearing, and further extension of the claims period would prejudice the counties. *See e.g.*, *Pigford v. Johanns*, 416 F.3d 12, 21–22 (D.C. Cir. 2005).[10]

[10] A forthcoming order regarding class counsel's fee request will issue in the coming weeks. Class counsel is granted leave to file a reply brief if they so choose.

IT IS ORDERED that the joint motion for final approval of the class action settlement. (ECF No. 410) is **GRANTED**. Class counsel is ordered to file an updated proposed final approval order similar to (ECF No. 410-1) to reflect the latest amended complaint.

IT IS FURTHER ORDERED that the objections to the settlement (ECF Nos. 345-3, 356, 357-1, 433, and 436) are **DENIED**.

IT IS FURTHER ORDERED that the motion to appoint a special master (ECF No. 510) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's motion for an order allowing late claims (ECF No. 529) is **DENIED.**

IT IS FURTHER ORDERED that the motion for leave to file supplemental authority (ECF No. 523) is **GRANTED**.

IT IS FURTHER ORDERED that the motion for leave to file a supplemental objection (ECF No. 535) is **DENIED** as moot.

IT IS SO ORDERED.

Date: June 27, 2024

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge