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November 13, 1998

Frederick K. Grittner
Supreme Court Administrator
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155-6102

VIA MESSENGER

Re: In re Minnesota Property Tax Litigation Involving the Application of Minn. Stat. § 273.13, subd. 24 to Class 3(a) Commercial, Industrial or Utility Property
Supreme Court File No. C1-98-2035

Dear Mr. Grittner;

Enclosed for filing with the Court, please find an original and three copies of the Response to Hennepin County's "Motion" to Transfer Property Tax Overpayment Cases to Tax Court and Petition for an Extraordinary Writ Pursuant to Minn. R. App. Pro. 120 with regard to the above-entitled matter. Also attached is an affidavit showing that counsel has been served by United States mail.

Very truly yours,

Alan Kildow/AA

Alan L. Kildow, for
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Enclosure

c: All Counsel of Record
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STATE OF MINNESOTA

IN THE SUPREME COURT

FILE NO. C1-98-2035

IN RE: MINNESOTA PROPERTY TAX OVERPAYMENT LITIGATION

RESPONSE TO HENNEPIN COUNTY'S "MOTION" TO TRANSFER PROPERTY TAX OVERPAYMENT CASES TO TAX COURT AND PETITION FOR AN EXTRAORDINARY WRIT PURSUANT TO MINN. R. APP. PRO. 120

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INTRODUCTION

Pursuant to Rule 120.01 of the Minnesota Rules of Civil Appellate Procedure, and Minn. Stat. §§§ 2.724, 480.16, and 480.19, Plaintiffs in the civil actions set forth at Exhibit A, on behalf of themselves and all others similarly-situated (hereinafter referred to collectively as the "Plaintiffs"), submit this memorandum in opposition to Defendant Hennepin County's appellate "motion" to transfer several Minnesota district court property tax overpayment cases to tax court (hereinafter referred to collectively as the "Defendants"[1]). This includes one case that is about to be decided by an experienced district court judge. In addition, Plaintiffs, as Petitioners, also submit this Petition for an extraordinary writ -- or administrative order -- reassigning the cases to a single Minnesota district court judge. This request is made pursuant to Minn. Stat. §§§ 2.724, 480.16, and 480.19, and the Minnesota Supreme Court's decision in In re Minnesota Personal Injury Asbestos Cases, 481 N.W.2d 24 (1991).

Plaintiffs are owners of commercial and industrial property located in various Minnesota counties. Defendants are the taxing authorities responsible for uniformly administering Minnesota's property tax laws. As part of their overall duties, Defendants are required to apply uniformly a 3% "class rate on the first $100,000 of market value" of Plaintiffs' commercial/industrial properties. This calculation is to be made pursuant to Minn. Stat. §§ 273.13, subd. 24, Class 3(a) (the "Class Rate Statute") and 275.08, subd. 1(a) (the "Compliance Audit Statute").

For at least the last 16 years, however, Defendants failed to apply uniformly the proper class rate to thousands of parcels of commercial/industrial property in determining Plaintiffs'

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[1] Defendant Hennepin County's motion was joined by the Counties of Anoka, Carver, Dakota, Ramsey, and Wright.

property tax bills. The county auditors apparently have not conducted compliance audits prior to issuing Plaintiffs' and the Class's property tax bills, as county auditors are statutorily required to perform under Minn. Stat. § 275.08. Consequently, for at least 16 years, thousands of Minnesota commercial and industrial property owners (and taxpayers) received property tax bills containing a discriminatory class rate of 4.65% (or more) on the first $100,000 of market value for their property without any knowledge of the errors.

Throughout the years, Plaintiffs mistakenly overpaid the amounts Defendants represented were due. The counties' undisclosed errors were brought to Defendants' attention but they refuse to repay the property tax overpayments even though the overpayments were due to Defendants' own computational errors and lack of compliance audit(s). Defendants refuse to refund the overpayments under Minn. Stat. § 276.19 which provides a meaningful post-deprivation remedy to cure this problem. This has necessitated the filing of 12 lawsuits to enforce the statutory remedy provided under Minn. Stat. § 276.19, as well as the analogous common-law remedies that traditionally are afforded to any Minnesota property taxpayer who unwittingly overpays property taxes "under mistake of fact." See, e.g., Cooperative Power Ass'n v. Astleford, 386 N.W.2d 313, 315 (Minn. Ct. App. 1986).

Thousands of identical overpayment claims remain outstanding. These claims potentially may result in the filing of thousands of lawsuits identical to the twelve complaints that are filed against these Defendants in district courts. Each of these suits is premised on identical facts and law regarding Defendants' respective obligations to provide meaningful post-deprivation remedies for their failure to abide by state law.

Of the 12 property tax overpayment cases filed thus far, one case, Christian v. Dakota County, was tried on stipulated facts to the Honorable District Court Judge Thomas McCarthy,

the Assistant Chief Judge of the First Judicial District.[2] Since that time -- and pursuant to the parties' trial stipulation and Judge McCarthy's trial order -- Plaintiffs' counsel devoted hundreds of hours preparing their trial memorandum, as well as numerous documentary exhibits, which were duly filed with Judge McCarthy for his consideration. The parties agreed on November 2, 1998, that the case will be argued and submitted to Judge McCarthy on December 1, 1998.

Although Dakota County stipulated on September 15, 1998, that Judge McCarthy would adjudicate the merits of the Christian case, on November 5, 1998, Dakota County decided to disregard its earlier stipulation(s) by joining in Hennepin County's motion to transfer "all pending district court cases" to tax court. Such a tactic abridges Plaintiff Christian's right to have his claim adjudicated in the manner agreed upon by the parties which violates Minn. Stat. § 480.051. See Minn. Stat. § 480.051 ("Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant."). For this reason alone, Defendants' "motion" is inappropriate. It is made even more so by the fact that Defendants' "motion" was brought by and

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[2] On September 15, 1998, Judge McCarthy denied Dakota County's motion to transfer the Christian case to the Minnesota Tax Court and instead chose to retain jurisdiction over the case pursuant to Minn. Stat. § 271.01, subd. 5 (1998). Fifty days later, after each of the Defendant counties had ample opportunity to review Plaintiffs' Trial Memorandum and attached documentary evidence, Defendants made a last-ditch effort to prevent Judge McCarthy from adjudicating the parties' claims in the Christian case. They attempted to do this by bringing a "motion" before this Court seeking extraordinary intervention into the discretionary functions normally reserved to the district courts of this State. Defendants essentially are bringing a second motion to transfer the cases to tax court before this Court, asking that the Chief Justice of the Minnesota Supreme Court overrule Judge McCarthy's decision to exercise his discretion to retain jurisdiction over the Christian case. This desperate attempt to avoid a trial court decision on the merits of Mr. Christian's overpayment claim, a claim that has been ripe for adjudication for some time now, is precisely the reason why the remaining overpayment cases should also be assigned to Judge McCarthy. This is particularly appropriate, since as part of his trial order, Judge McCarthy formally invited each of the Defendant counties to submit amici briefs to be included in the Christian court file. See Exhibit B.

joined in by several other counties whose cases are already in tax court and whose only possible motivation is to derail the adjudication of the Christian case in Dakota County district court.

Because the Christian case must be decided by Judge McCarthy, the remaining 11 property tax overpayment cases should be reassigned to him for numerous reasons. First, judicial economy and justice will be served by the reassignment of these cases to a single district court judge, particularly if Judge McCarthy is chosen for assignment of the remaining property tax overpayment cases.

Second, assigning these cases to a single judicial district court judge ensures Plaintiffs' right to a jury trial. Plaintiffs have brought causes of action for money had and received, money paid by mistake, implied in law contract, unjust enrichment, and for violations of 42 U.S.C. § 1983. Because these causes of action are legal in nature and seek a money judgment against Defendants, Plaintiffs are entitled to have these claims tried to a jury.[3]

Third, Plaintiffs have a right to a jury trial in district court judge because they seek a declaratory judgment. By its own admission, the tax court cannot provide a jury trial.

Fourth, these cases must be assigned to a district court because Plaintiffs are requesting a writ of mandamus pursuant to Minn. Stat. ch. 586 which would require Defendants to process overpayment refunds pursuant to their statutory obligations under Minn. Stat. § 276.19. This

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[3] See Minn. Stat. § 271.06, subd. 6 (1998) ("The tax court shall hear, consider, and determine without a jury every appeal de novo...") (emphasis added). Washington County agreed to retransfer an identical case back to district court for jury trial in recognition that the tax court cannot provide the parties with a jury trial. As set forth at Exhibit C, the Chief Judge of the Minnesota Tax Court also issued a letter confirming that the tax court cannot impanel a jury. This is because the tax court is an independent agency of the Minnesota Department of Finance, not a "court" as that term is defined under Article 6 of Minnesota's Constitution or Minn. Stat. § 480.19 which relates to the "courts" that are subject to the Chief Justice's discretionary authority in assigning judges to multiple lawsuits involving identical claims.

equitable claim for relief is under the sole and exclusive jurisdiction of the district courts. The tax court has no statutory authority to issue such a writ.

Fifth, the doctrine of separation of powers would be violated if these overpayment cases were adjudicated by the tax court, as Defendants' actions -- in failing to conduct an audit so as to ensure compliance with state law prior to issuing the property tax bills -- would be reviewed by a member of their own branch of government. To ensure Plaintiffs' claims are decided by members of an independent judiciary, these cases must be reassigned to a single district court judge for trial by jury.

Sixth, because Judge McCarthy is adjudicating one overpayment case, the prosecution of separate actions by other commercial/industrial property taxpayers creates a risk of inconsistent or varying adjudications with respect to individual members of the class. This is very problematic because it would establish incompatible standards of conduct for the various Defendant counties.[4] In addition, as a practical matter, the outcome of the Christian case in all likelihood will substantially impair or impede other Class members' ability to protect their interests.

Seventh, one of the primary Defendants in the Ramsey County overpayment case, Ms. Dorothy McClung, was also the tax court judge assigned to the first overpayment case

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[4] This result has started to occur. For example, Carver County processed four years of refunds to various taxpayers pursuant to Minn. Stat. § 276.19. Anoka County thus far processed three years of overpayment refunds, and Itasca County returned two years worth of overpayments. Washington County agreed not to oppose class certification for at least 45 parcels and will process refunds for these parcels once the appellate courts determine whether the overpayment statute is the appropriate post-deprivation remedy to cure the auditors' failure to comply with Minn. Stat. § 275.08, subd. 1(a). The other Defendant counties, thus far, steadfastly refuse to repay any of the property tax overpayments they received through their own computational errors and lack of compliance audits.

brought by Plaintiffs' counsel against Anoka, Hennepin, and Ramsey counties in January of 1997. On October 31, 1997, Ms. McClung resigned from the tax court to assume her current responsibilities as Director of Property Taxation for Ramsey County. Under Minn. Stat. § 271.18, Ms. McClung is prohibited from acting as an "agent in connection with any claim or proceeding of which the person terminated has knowledge which was acquired in the course of a term of office or employment in the tax court." Given Ms. McClung's status as both a judge and a litigant/agent of Defendant Ramsey County, adjudication of Plaintiffs' claims in Minnesota tax court would violate the spirit, if not the letter, of Minn. Stat. § 271.18. On the other hand, there would be no hint of impropriety if the property tax overpayment cases are reassigned to a Minnesota district court judge who has no association with any of the litigants in this class action proceeding.[5]

Eighth, because the Minnesota tax court actually is an independent executive agency administered by the Minnesota Department of Finance, the Chief Justice's supervisory power under Minn. Stat. § 2.724, subd. 4 does not include the ability to reassign district court cases to the tax court. Rather, the discretion to transfer "any case" to tax court is reserved to the district courts under Minn. Stat. § 271.01, subd. 5. There is no statutory provision that would allow this Court to overrule the proper exercise of the district court's discretion in this regard.[6]

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[5] In addition, M. Jean Stepan, Ramsey County's counsel of record, and one of the attorneys who joined in Hennepin County's motion to force the district courts to transfer their cases to tax court, is herself a former tax court judge.

[6] Ironically, in their "motion," Defendants rely upon Minnesota Court of Appeals Chief Judge Edward Touissant's recent ruling that appellate courts will not interfere with the exercise of a trial court's discretion in determining whether to transfer a case from district court to the tax court. Apparently, Defendants are only willing to apply this principle of law when it works to their advantage, since they are now suggesting the Chief Justice

On the other hand, the Chief Justice clearly has general supervisory powers over the various district courts in the state and, without question, can assign any district court case to a single district court judge presiding in a judicial district. Therefore, it would promote and secure the more efficient administration of justice if the Chief Justice of the Minnesota Supreme Court assigns the remaining overpayment cases to either Judge McCarth, or any other Minnesota district court judge with the background and judicial experience necessary to address the constitutional, statutory, and common law claims raised in these cases.

For all of these reasons, Defendants' appellate "motion" for an order transferring the district court cases to tax court should be denied. In addition, Plaintiffs' Petition for an extraordinary writ assigning a single district court judge to the remaining property tax overpayment cases should be granted.

STATEMENT OF FACTS

In 1985, the Minnesota Legislature revised Minn. Stat. § 273.13 so that the first $100,000 in market value for every commercial, industrial, and utility property in a county is to be taxed at:

> [A] class rate of 3.3% of the first $100,000 of market value for taxes payable in 1990, 3.2% for taxes payable in 1991, 3.1% for taxes payable in 1992, and 3% for taxes payable in 1993 and thereafter, and 5.06% of the market value over $100,000. In the case of state-assessed commercial, industrial and utility property owned by one person or entity, only one parcel has a reduced class rate on the first $100,000 of market value. In the case of other commercial, industrial, and utility property owned by one person or entity, only one parcel in each county has a reduced class rate on the first $100,000 of market value.

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disregard Judge McCarthy's determination to retain jurisdiction over the Christian case, as opposed to transferring it to tax court. See Exhibit D.

Minn. Stat. § 273.13, subd. 24, Class 3(a) (1989). During the process of calculating the property tax bills of Plaintiffs and the class from 1987 to the present, however, various Minnesota County Auditors failed to apply the appropriate class rate on the first $100,000 of assessed value for Plaintiffs and many other commercial, industrial, and utility real property taxpayers in Minnesota, as required under the compliance audit provisions of Minn. Stat. § 275.08, subd. 1(a). In most cases, the County Auditors were not aware they should have conducted compliance audits under § 275.08. Rather, they simply accepted the assessment role as certified to them by the County Assessors and abandoned their compliance audit function altogether.

As a result of the Auditors' failure to discover the Assessors' calculation errors on the first $100,000 of assessed value, Defendants sent each Plaintiff and the class property tax bills that were incorrect and overstated the amounts due by approximately $2,300 per year. Plaintiffs and the class justifiably relied upon the property tax bills and involuntarily paid the amounts Defendants said were due. These erroneous property tax bills resulted in more than 10,000 overpayments to Defendants for tax years 1991 to 1998.

Plaintiffs and the class were not provided any notice of the Auditors' errors in the application of the tax rate. The Auditors made the mathematicals errors in breach of their duty to apply uniformly the "appropriate [state-mandated] class rate" under Minn. Stat. § 275.08, subd. 1(a), in calculating the net tax capacity for individual parcels of commercial and industrial property. Defendants were advised of the incorrect tax bills that resulted in the overpayments. Some Defendants, such as Carver, Anoka, Itasca, and Washington counties, admitted liability to their taxpayers and processed approximately $1,500,000 in overpayment refunds to date. Others, such as Hennepin, Ramsey, and Dakota Counties, refuse to refund Plaintiffs any of the overpaid amounts. Indeed, in the Hennepin County cases, Defendants argue claimants must file individual

suits to recover their overpayments. This may potentially result in 10,000 to 20,000 claims filed in Hennepin County alone. Assigning these cases to a single district court judge simply makes good sense.

PROCEDURAL BACKGROUND AND NATURE OF THE CASES

I. PLAINTIFFS' CLAIMS AGAINST THE DEFENDANTS IN ALL ACTIONS.

It is against the above-referenced factual background that Plaintiffs filed these suits in various Minnesota district courts, asserting a number of causes of action including deprivations of state and federal constitutional rights, common law claims for a money judgment, a declaratory judgment, and a writ of mandamus. These actions are brought to enforce Plaintiffs' statutory right to obtain refunds of their own money under Minn. Stat. § 276.19 (the "overpayment statute") or, alternatively, pursuant to 42 U.S.C. § 1983. What follows is a brief summary of the nature of the claims Plaintiffs contend must be tried to a jury.

A. Plaintiffs' Claims For The Deprivation Of Their Constitutional Rights.

Plaintiffs assert claims for the deprivation of constitutional and common law rights that are codified in Minn. Stat. § 275.08, subd. 1(a). This statute describes the auditor's duty to conduct a compliance audit by uniformly applying the state-mandated class rates to all subjects of the commercial/industrial property tax in calculating Plaintiffs' property tax bills. Defendants failed to comply with this section and in the process, deprived Plaintiffs of their constitutional due process and equal protection rights, as the following sections demonstrate.

1. Procedural Due Process.

As noted, Plaintiffs' and the class's commercial property taxes were the subject of mathematical errors for a number of years. Defendants provided no notice to Plaintiffs and the class that they were taxed at a discriminatory class rate. Defendants' failure to inform Plaintiffs

of this problem deprived Plaintiffs of their due process rights under Federal and State Constitutions.[7] Plaintiffs have a constitutional right to place these facts before a jury to decide whether Plaintiffs and the class were denied the opportunity to challenge the erroneous and discriminatory real property taxes paid to Defendants. Defendants never provided Plaintiffs and the class with any information regarding 'net tax capacity' or 'class rates' sufficient to place Plaintiffs or the class on notice that a mathematical error occurred in calculating their property tax bills. Nor did Defendants provide Plaintiffs a meaningful opportunity to be heard regarding the constitutional, statutory, and common law deprivations.

It is axiomatic that Due Process under the Fourteenth Amendment requires notice of a need or opportunity to exercise a particular right. A fundamental requirement of due process of law, in any proceeding that is to be accorded finality, is notice reasonably calculated under the circumstances to apprise interested parties of the pendency of the action and afford an opportunity to present objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Meadowbrook, 104 N.W.2d 540; State Dept. of Public Safety v. Elk River Ready Mix Co., 430 N.W.2d 261 (Minn. Ct. App. 1988). The right to be heard is worthless one is informed that the matter is pending and can choose whether to appear or default, to acquiesce or contest. Mullane, 339 U.S. 306; Schulte v. Transportation Unlimited, Inc., 354 N.W.2d 830 (Minn. 1984).

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[7] See, e.g., Meadowbrook Manor, Inc. v. City of St. Louis Park, 104 N.W.2d 540, 544 (Minn. 1960) (citing with approval Walker v. City of Hutchinson, 352 U.S. 112 (1956) ("[n]otice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests")); McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990); Cambridge State Bank v. James, 514 N.W.2d 565 (Minn 1994).

Knowledge of what is at stake is needed to make an intelligent decision whether it is worth the time and effort to take further action. Id. In all cases, procedural due process requires an announcement or warning which supplies information making it reasonably probable that affected parties will realize their rights are being adversely affected. Adequate notice is essential because it affords parties the ability and opportunity to make an informed decision whether to challenge the action being taken by the adverse party.

In the present property tax overpayment cases, Plaintiffs intend to prove they were never provided with any notice, let alone notice which was reasonably calculated to call the discriminatory class rate to their attention. Meadowbrook, 104 N.W.2d at 544. See also Westling v. County of Mille Lacs, 581 N.W.2d 815, 820 (Minn. 1998). ("[A] tax rate must operate without discrimination upon all property within a classification."). Plaintiffs were therefore denied their right to due process in these cases. As Plaintiffs demonstrate below, they are entitled to a jury trial regarding the factual disputes this due process claim presents. Plaintiffs, however, cannot receive a jury trial under the rules applicable to the administrative proceedings conducted in Minnesota Tax Court. Therefore, reassignment of these cases to a single district court judge for trial by jury is highly appropriate.

2. Equal Protection.

In addition to their due process claims, Plaintiffs and the class also allege Defendants violated the Equal Protection Clause of the United States Constitution. Defendants discriminatorily applied the 3% rate that was to be uniformly applied to all commercial/industrial parcels in Minnesota.

The Minnesota Constitution, Article X, § 1 ("Taxes shall be uniform upon the same class as subjects . . .") and the Equal Protection Clause of the Federal Constitution's Fourteenth

Amendment require uniformity and equality in taxation. The uniformity and equal protection clauses do not permit systematic or arbitrary taxation of some property at a substantially higher rate than other property in the same class. Westling, 581 N.W.2d at 820-21; In re Objection to Real Property Taxes, 353 N.W.2d 525, 529 (Minn. 1984); United National Corp. v. Co. of Hennepin, 299 N.W. 2d 73, 75 (Minn. 1980); Hamm v. State, 95 N.W. 2d 649, 654-55 (Minn. 1959). Rather, both the equal protection and uniformity clauses require the rights of all persons must rest upon the same rule under similar circumstances. This constitutional principle applies to the exercise of all the powers of the state affecting an individual or the individual's property, including the power of taxation.[8] Although the constitutional safeguards do not forbid classification, they do require that any classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Moreover, as noted above, "a tax rate must operate without discrimination upon all property within a classification." Westling, 581 N.W.2d at 820; Montgomery Ward and Co. v. Commissioner of Taxation, 216 Minn. 307, 310, 12 N.W.2d 625, 627 (1943). Apartment Operators Ass'n v. City of Minneapolis, 191 Minn. 365, 254 N.W. 443 (1934).

In this case, Defendants' failure to apply uniformly the state-mandated 3% rate resulted in the disparate treatment of Class 3(a) property. The Minnesota Supreme Court recently addressed the same issue and held that such treatment constitutes an equal protection violation. "[A] tax rate [has been allowed to operate to discriminate against property] within a classification." Westling, 581 N.W.2d at 820. Therefore, Plaintiffs are entitled to retroactive relief under the

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[8] Hamm v. State, 255 Minn. 64, 95 N.W.2d 649 (1959). See generally 10 Dunnell's Minn. Digest, Constitutional Law § 5.07 at pp. 335-39 (4th ed. 1990).

equal protection clause of the federal constitution, regardless of any procedural hurdles imposed under state law. Iowa National Bank v. Bennett, 284 U.S. 239 (1931).

3. 42 U.S.C. § 1983.

Plaintiffs contend that Minn. Stat. § 276.19 provides a meaningful statutory remedy to cure the problem associated with Defendants' failure to conduct a compliance audit prior to issuing Plaintiffs' property tax bills. Defendants, however, contend Plaintiffs have no remedy under state law. If this is true, which it is not, 42 U.S.C. § 1983 offers Plaintiffs a meaningful federal remedy for the deprivation of their equal protection and due process rights.[9] See Maine v. Thiboutot, 448 U.S. 1, 4 (1980) (noting a constitutional claim can be the basis for a § 1983 claim); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939) (noting that the constitutional privileges and immunities protected by § 1983 include those secured by the due process and equal protection clauses of the Fourteenth Amendment). It is undisputed that persons acting under the color of state law deprived Plaintiffs of these rights. See Smallwood v. Jefferson County Gov't, 753 F. Supp. 657 (W.D. Ky. 1991) (holding county is a "person" under 42 U.S.C. § 1983); City of Phoenix v. Yarnell, 909 P.2d 377 (Ariz. 1995); Simon v. State Compensation Ins. Auth., 903 P.2d 1139 (Colo. App. 1994). See also Shipley v. First Fed. Sav. & Loan Ass'n of Del., 619 F. Supp. 421 (D.C. Del. 1985) (noting county official sued within official capacity is a "person" for purposes of § 1983).

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[9] 42 U.S.C. § 1983 states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The U.S. Supreme Court has made it clear that if no adequate state remedy is available, 42 U.S.C. § 1983 affords a taxpayer a federal remedy to redress constitutional deprivations. See Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 116-17 (1981) (holding that federal courts may entertain damage actions under § 1983 if state law does not furnish an adequate legal remedy). In the present cases, Defendants claim Plaintiffs have no state remedy to recover the property tax overpayments erroneously paid to Defendants. Even if this were true, which it is not, § 1983 still provides a federal remedy for taxpayers who are taxed discriminatorily and without notice. See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 115 S.Ct. 2351 (1995) (noting that § 1983 offers a remedy when state law does not provide a "clear and certain remedy" either through a predeprivation process (injunction) or post-deprivation relief (refunds)).

Various lower courts throughout the United States note that a § 1983 action is appropriate to remedy a discriminatory application of state tax provisions. See, e.g., Long Island Lighting Co. v. Town of Brookhaven, 889 F.2d 428, 432 (2d Cir. 1989) ("A second procedurally adequate remedy in which [plaintiff] might attack the constitutionality of the [tax] assessment methodology would be a § 1983 action in state court."); Sacks Bros. Loan Co. v. Cunningham, 578 F.2d 172, 176 (7th Cir. 1978) (allowing taxpayer to bring a § 1983 action to challenge a state personal property tax assessment which was allegedly imposed in violation of equal protection rights under the Fourteenth Amendment); Miller v. City of Los Angeles, 755 F.2d 1390, 1391 (9th Cir. 1985) (discussing that property owners may challenge a tax assessment under § 1983 in state court); 423 South Salina St., Inc. v. City of Syracuse, 566 F. Supp. 484, 492 (N.D. N.Y. 1983) (noting the statute of limitation bar may have been relaxed affording more taxpayers the right to challenge property tax assessments in state court under § 1983). These challenges

generally must be made in a state, rather than in a federal district court. See Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 116-17 (1981) (discussing the fact that the availability of a state court § 1983 action in tax cases strongly supports the withholding of federal jurisdiction to determine this state issue based upon principles of comity).

In this case, given Defendants' refusal to provide any form of remedy under state law, Plaintiffs have a cause of action under 42 U.S.C. § 1983. As such, Plaintiffs are entitled to a jury trial regarding the factual disputes giving rise to the deprivation of their Equal Protection and Due Process rights under the federal constitution. This is particularly appropriate in the Hennepin County cases because the Hennepin County Defendants knew for at least seven years they were over-billing thousands of commercial and industrial taxpayers, yet they took no steps to correct the problem and essentially waited to see if their taxpayers would discover the error. Under these facts, a § 1983 claim against those who intentionally decided not to administer uniformly Minnesota's property tax laws is triable to a jury under 42 U.S.C. § 1983. As demonstrated below, Plaintiffs' § 1983 claims must be tried to a jury.

Hennepin County intentionally disregarded the law and their taxpayers' rights. This may explain why the Hennepin County Defendants choreographed their present "motion" to this Court on November 5, 1998. Defendants' "motion" effectively seeks to substitute an executive agency that cannot impanel a jury in lieu of a district court that can ensure a jury trial. Defendants' last-ditch legal maneuvering is not surprising, as they have continually disregarded Plaintiffs' rights over the last 16 years. A jury trial therefore is necessary to adjudicate Plaintiffs' constitutional claims. A jury trial may also be necessary in Hennepin County's case with respect to the issue of whether punitive damages should be assessed against the county officials who knowingly failed to abide by state law in administering Minnesota's property tax laws.

B. Plaintiffs' Claims For A Money Judgment.

1. Common Law Claims For A Money Judgment.

Plaintiffs also assert claims of money had and received, money paid by mistake, unjust enrichment, and implied-in-law contract. These legal theories of recovery have long-imposed liability upon governments for the wrongful collection of taxes. Parties claiming such a money judgment are always accorded the right to a jury trial.

A claim for money had and received will lie when a party possesses money that in equity and good conscience belongs to another and ought to be delivered to the rightful owner. 1 PIRSIG ON MINN. PLEADING *Common Counts: Money Had and Received* § 177, at 114 (5th ed. 1987). The obligation to pay money received to the other party is often referred to as an implied contract. Fargo Foundry Co. v. Village of Calloway, 181 N.W. 584 (Minn. 1921). Privity between the parties is unnecessary in an action for money had and received because the law imposes an obligation to return the money regardless of any privity of contract. Norris v. Cohen, 27 N.W.2d 277 (1947). The elements of a claim for money had and received are not limited by hard-and-fast rules of exclusion, and courts have been willing to extend, rather than restrict, the scope of the claim. 8 DUNNELL MINN. DIGEST *Contracts* § 2.07(b), at 119 (4th ed. 1990).

In an early U.S. Supreme Court case, the Court held that "[w]henever one person has in his hands money equitably belonging to another, that other person may recover it . . . by money had and received." Gaines v. Miller, 111 U.S. 395 (1884). See also United States v. California State Bd. of Equalization, 507 U.S. 746 (1993); Stone v. White, 301 U.S. 851 (1937); City of Philadelphia v. The Collector, 5 Wall. 720 (1867).

Minnesota followed the Supreme Court's lead by also characterizing money had and received as an action at law. This claim is maintainable whenever a party receives money which

the party should in equity and good conscience return to the rightful owner. Brand v. Williams, 13 N.W. 42 (Minn. 1882). See also Crossett Lumber Co. v. United States, 87 F.2d 930, 932 (8th Cir. 1937) ("An action to recover taxes is in the nature of an action for money had and received. Although in form it is an action at law, it is governed by equitable principles."); Cooperative Power Ass'n v. Astleford, 386 N.W.2d 313, 315 (Minn. Ct. App. 1986) ("A tax payment is not considered voluntary when made under a mistake of fact. Such mistake may consist of some official action by the tax collecting officer, the correctness of which the taxpayer has a right to rely. When such a mistake of fact has been made the taxes may be recovered" under a money had and received theory).

Indeed, the claims for money had and received, money paid by mistake, and unjust enrichment contained in Plaintiffs' Complaints are based upon several Minnesota Supreme Court decisions that are applicable to the property tax overpayment cases. For example, in Wheeler v. Hennepin County Bd of Comm'rs, 87 Minn. 243, 91 N.W. 890 (1902), the plaintiff received a property tax statement from the Hennepin County Auditor as provided under the statutory predecessor to Minn. Stat. ch. 276. The Hennepin County Auditor stated in writing the amount owed was $236.98, or $44.30 in excess of the amount actually due. The plaintiff paid this sum to the county treasurer relying upon the statement and believing it to be correct. When Hennepin County refused to repay the excess amount it had mistakenly received through its own computational error, Wheeler sued and obtained a money judgment.

On appeal, the Minnesota Supreme Court affirmed the trial court's decision by stating:

> In view of the fact that before plaintiff could pay his taxes he was required to obtain the auditor's statement as to the amount due, **it is evident that he should be allowed to rely upon the implied assertion therein that the full amount alleged was actually due, and necessary to be paid**. . . . We do not think that when such a

> payment is made it can be regarded as voluntary, or made without any mistake of fact.

Id. (emphasis added); See also Cooperative Power Ass'n v. Astleford, 386 N.W.2d 313, 315 (Minn. Ct. App. 1986) (affirming explicitly the continued viability of common law money had and received remedy for excess property tax payments under Wheeler).

Under Wheeler, Plaintiffs articulate valid claims for money had and received and other legal theories entitling Plaintiffs to a money judgment. As Plaintiffs demonstrate below, such claims are entitled to a jury trial which the Minnesota tax court cannot provide.

2. Statutory Claims for a Money Judgment.

Plaintiffs also assert claims for the recovery of their own money and a declaratory judgment relating to Minn. Stat. § 276.19, under which the state legislature explicitly imposed mandatory obligations upon taxing authorities to disclose all instances of property tax overpayments and explain the process by which to obtain a refund. Defendants' obligations under § 276.19 are mandatory and without qualification:

> If an overpayment of property tax arises on a parcel for **any** reason, the responsible county official **shall** promptly notify the payer by regular mail that the overpayment has occurred. The notice **must** state the amount of overpayment and identify the parcel on which the overpayment occurred. The notice **must also** instruct the payer how to claim the overpayment and advise that the overpayment is subject to forfeiture under this section. If the name or address of the payer is not known, the notice of unclaimed overpayment **must** be mailed to the taxpayer of record in the office of the county Auditor.

Minn. Stat. § 276.19 (emphasis added).

The statute also requires that if a person entitled to an overpayment fails to claim the overpayment, the county Auditor "**shall** cause notice to be published at least once in an English language newspaper of general circulation in the county." Id. (emphasis added). Through use of

the words "shall" and "must" the legislature left no doubt that the taxing authorities have an absolute responsibility and obligation to notify taxpayers of any overpayment, the amount of the overpayment, the parcel on which the overpayment occurred, and how the taxpayer may recover the money. See Minn. Stat. § 645.44(16) (in construing statutes, the word "'[s]hall' is mandatory"). Despite the clear and unambiguous language of Minn. Stat. § 276.19, most of the Defendants refuse to refund Plaintiffs' overpayments. As the "Statement As To Why a Writ Should Be Issued" section of this brief demonstrates, Plaintiffs are entitled to a jury trial for the money judgment which is sought pursuant to Minn. Stat. § 276.19, the declaratory relief sought regarding that statute pursuant to Minn. ch. 555, and the federal relief provided under 42 U.S.C. § 1983.

C. Plaintiffs' Claims for the Issuance of a Writ of Mandamus.

Finally, at trial Plaintiffs will include a claim for relief in the form of "a writ of mandamus or any other applicable writ." A writ of mandamus is a proper remedy to compel the performance of a positive statutory duty. State ex rel. Town of Kratka v. County of Pennington, 2 N.W.2d 41 (Minn. 1942). Plaintiffs will request the district court to compel Defendants by writ of mandamus to refund Plaintiffs' overpaid property taxes pursuant to Defendants' mandatory obligations under Minn. Stat. § 276.19. This type of relief, however, is not within the tax court's power to issue, and therefore, the remaining overpayment cases must be reassigned to a single district court judge who can issue that equitable relief. See Minn. Stat. § 484.03 (authorizing the district courts, but not the tax court, the exclusive power to issue writs).

STATEMENT OF ISSUES

I. WHETHER THE MINNESOTA SUPREME COURT MAY ASSIGN A MINNESOTA DISTRICT COURT JUDGE TO PRESIDE OVER THE PROPERTY TAX OVERPAYMENT CASES PURSUANT TO MINN. STAT. § § 2.724 AND 480.16.

1. Whether the Minnesota Supreme Court may assign a district court judge to preside over the overpayment cases pursuant to Minn. Stat. §§ 2.724 and 480.16.

2. Whether the Minnesota Supreme Court may assign the property tax overpayment cases to the Minnesota tax court by an appellate order when they are properly before a district court judge.

3. Whether the transfer of the property tax overpayment cases to the Minnesota tax court would abridge the Plaintiffs' substantive right to a jury trial.

4. Whether the Minnesota Supreme Court should assign the property tax overpayment cases to a single district court judge because a former member of the Minnesota tax court is now a party to one of the actions.

5. Whether the assignment of the property tax overpayment cases to a Minnesota district court judge would ensure the doctrine of separation of powers is not violated.

6. Whether an extraordinary writ is an appropriate remedy to assign the property tax overpayment cases to a single Minnesota district court judge.

STATEMENT AS TO WHY AN EXTRAORDINARY WRIT SHOULD ISSUE

I. THE SUPREME COURT MAY ASSIGN A DISTRICT COURT JUDGE TO PRESIDE OVER THE OVERPAYMENT CASES PURSUANT TO MINN. STAT. §§ 2.724 AND 480.16.

The Supreme Court may assign a district court judge to preside over cases pursuant to Minn. Stat. § 2.724 which provides in pertinent part:

> Subd. 1. When public convenience and necessity require it, the chief justice of the supreme court may assign any judge of any court to serve and discharge the duties of the judge of any court in a judicial district not that judge's own at such times as the chief justice may determine. . .
>
> A transferred judge shall be subject to the assignment powers of the chief judge of the judicial district to which the judge is transferred.

Minn. Stat. § 480.16 also provides authority for such an assignment:

> The chief justice shall consider all recommendations of the court administrator for the assignment of judges, and has discretionary authority to direct any judge whose calendar, in the judgment of the chief justice, will permit, **to hold court in any county or district where a need therefor exists, to the end that the courts of this state shall function with maximum efficiency, and that the work of other courts shall be equitably distributed.** The supreme court may provide by rule for the enforcement of this section and section 480.17.

Minn. Stat. § 480.16 (emphasis added.)

In In re Minnesota Personal Injury cases, 481 N.W.2d 24 (Minn. 1991) (hereinafter In re Asbestos Litigation), the Minnesota Supreme Court assigned a district court judge to preside over all phases of asbestos litigation pursuant to Minn. Stat. §§ 2.724 and 480.16. See In re Minnesota Asbestos Litigation Order, Minnesota Supreme Court (Dec. 14, 1987). In doing so, the Court stated that because the numerous asbestos cases involved "similar questions of law and fact, problems in discovery, theories of recovery and defense," assignment to a single district court judge was necessary for the convenience and economy of the parties, as well as the judicial system. Id.

Here too, this Court should assign a single district court judge to all the property tax overpayment cases, except the case pending before Judge McCarthy in Dakota County where the parties stipulated to Judge McCarthy's adjudication of that case. The same factors that existed in In re Asbestos Litigation also exist in these cases. In fact, given the tax court's refusal to certify these cases as class actions, there are potentially 20,000 additional claims yet to be brought based upon identical issues of law and fact yet to be filed. Because these cases are more similar to each other than those in In re Asbestos Litigation, this Court should appoint a single district court judge to preside over them.

Assigning these cases to a single district court judge will also aid the judicial process, given the status of the action pending in the First Judicial District of Dakota County. As noted previously, the Christian case was assigned to Judge McCarthy by stipulation of the parties, and in accordance with the parties' stipulation, must be decided by that district court judge. In Minnesota, such stipulations are highly favored because they tend to simplify and expedite litigation "and lessen the labors of both parties as well as the court." Lieberknecht v. Great Northern Ry. Co., 126 N.W.71, 71 (Minn. 1910); National Council of Knights and Ladies of Security v. Scheiber, 169 N.W. 272, 274 (Minn. 1918). Parties entering into such stipulations should be bound by their agreements whether they are made orally or in writing. See, e.g., Minnesota Vikings Football Club, Inc. v. Metropolitan Council, 289 N.W.2d 426, 431 (Minn. 1979) ("oral representation to the court made by an attorney in the course of litigation is a solemn obligation which must be fulfilled without regard to whether it satisfies the strict requirements of commercial contracts"); Anderson v. Connecticut Fire Ins. Co., 43 N.W.2d 807, 816 (Minn. 1950) (enforcing a verbal stipulation); State ex rel Bassin v. District Ct. of Hennepin County, 259 N.W. 542 (Minn. 1935) (holding oral stipulation to the court as to a settlement was binding even though terms had not been incorporated in a written stipulation). This is especially true when the parties enter into the agreement freely and with understanding. Lieberknecht v. Great Northern Ry., 126 N.W. at 71. Therefore, such agreements cannot be set aside merely because one party requests it. Id. Both parties must agree to the withdrawal of the stipulation, or the court may set aside a stipulation of its own accord if it is evident the stipulation was based upon fraud, duress, or mistake. Id.; In re Marriage of Steffan, 423 N.W.2d 729, 731 (Minn. App. 1988); Gran v. City of St. Paul, 143 N.W.2d 246, 249 (Minn. 1966).

The parties in the Christian case have already submitted the case to Judge McCarthy on stipulated facts, nearly completed their briefing of the case, and oral argument is scheduled on December 1, 1998. That case is virtually completed, and it would be a waste of judicial resources, not to mention inherently prejudicial to the litigants, to reassign the Christian case when a final decision is close-at-hand. This is particularly evident when Defendants -- many of whom are not "aggrieved" parties[10] -- filed a "motion" essentially requesting that this Court prevent Judge McCarthy from exercising his discretion to retain jurisdiction over a case that he and the parties already agreed he would adjudicate.

II. THE MINNESOTA SUPREME COURT MAY NOT ASSIGN THE PROPERTY TAX OVERPAYMENT CASES TO THE MINNESOTA TAX COURT BY AN APPELLATE ORDER WHEN THEY ARE PROPERLY BEFORE A DISTRICT COURT JUDGE.

This Court has the authority to assign a district court judge to preside over district court cases. This authority, however, does not allow the Chief Justice to act as a district court judge and transfer cases properly before the district court to the tax court. See Minn. Stat. § 271.01, subd. 5. The authority to assign these cases is found in Minn. Stat. §§ 2.724 and 480.16.

Minn. Stat. § 2.722 divides the state into "ten judicial districts." Minn. Stat. § 2.724, which follows directly after § 2.722, states that the duties of a district court judge assigned by the Chief Justice of the Supreme Court must be "in a **judicial district.**" Minn. Stat. § 2.724, subd. 1 (emphasis added). This provision also emphasizes that the assigned judge "shall be subject to the assignment powers of the chief judge of the **judicial district to which the judge is**

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[10] It is fundamental that an appellant be an "aggrieved party" to seek review. Wenner v. Gulf Oil Corp., 264 N.W.2d 374, 383 (Minn. 1978); Sweep v. Sweep, 358 N.W.2d 451, 453 (Minn. App. 1984). The cases filed against Defendants Carver, Anoka, Ramsey, and Wright Counties (those who joined Hennepin County's "motion") were already transferred to tax court.

transferred." Id. (emphasis added). Section 2.724 falls within the chapter establishing judicial districts and is clearly limited to the assignment of district court judges to hear cases in district courts and not in tax court.

Minn. Stat. § 480.16 similarly authorizes the Chief Justice to assign a judge "to hold court in any **county or district** where a need therefore exists." Minn. Stat. § 480.16 (emphasis added). Minn. Stat. § 480.19 specifically limits the application of Minn. Stat. § 480.16 to the "supreme court, the court of appeals, the district, county, probate, and county municipal courts." This section clearly does not include an executive agency known as the "Minnesota Tax Court." See 2A Sutherland, Statutory Construction § 47.23 ("As the maxim [expressio unius est exclusio alterius] is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.").

As noted, the tax court is not a district court, but is "an independent agency of the executive branch of government." Minn. Stat. 271.01. It does not fall within the definition of "district court" under Minn. Const. Art 6, § 4, is not a court established under Minn. Stat. §§ 2.722 or 480.19, and its members are not officers of the judicial branch. The tax court, therefore, cannot be considered a district court for purposes of Minn. Stat. §§ 2.724 or 480.16. An assignment of a single judge to adjudicate the property tax overpayment cases is therefore limited to the assignment of a single district court judge, and not the members of the Minnesota tax court.

III. THE TRANSFER OF THE PROPERTY TAX OVERPAYMENT CASES TO THE MINNESOTA TAX COURT WOULD ABRIDGE THE PLAINTIFFS' SUBSTANTIVE RIGHT TO A JURY TRIAL.

This Court clearly has the authority to assign district court judges and allocate cases among the district courts. This Court may not, however, re-assign a district court case to an inferior court if the assignment would "abridge, enlarge, or modify the substantive rights of any litigant." Minn. Stat. § 480.051. The tax court is an independent administrative agency that does not have the authority to impanel a jury.[11] If these cases are transferred to the tax court, Plaintiffs will be denied their right to a jury trial.

Plaintiffs' right to a jury trial, however, is guaranteed by Minn. Const. art. I, § 4 which provides "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law." This right is also guaranteed by Minn. R. Civ. P. 38.01 which states that "[i]n actions for the recovery of money only, or of specific real or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered." This rule neither enlarges nor diminishes the historical right to a jury trial. Indianhead Truck Line, Inc. v. Hvidsten Transp. Inc., 268 Minn. 176, 192, 128 N.W.2d 334, 346 (1964). In Rognrud v. Zubert, 282 Minn. 430, 433-34, 165 N.W.2d 244, 247 (1969), the Minnesota Supreme Court interpreted the constitutional right to a jury trial:

> We have often held that the only actions in which Minn. Const. art. 1 § 4 and Rule 38.01. . . guarantee the right to a jury trial are those which were conceived of as 'legal' so that such a right existed with respect to them, at the time the Minnesota constitution was adopted. The language of rule 38.01 is merely an attempt to list those actions which were then, and are now, thought of as "legal" as distinguished from "equitable."

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[11] See letter from Diane L. Kroupa, Chief Judge of the Minnesota Tax Court (Oct. 9, 1998), Exhibit C.

Id. (citations omitted). The controversy's nature and character is determined from all the pleadings and that determination governs the right to a jury trial. Landgraf v. Ellsworth, 267 Minn. 323, 326, 126 N.W. 2d 766, 768 (1964). If a plaintiff's claim is one for the recovery of money, the Minnesota Constitution assures a right to a jury trial. Olson v. Aretz, 346 N.W.2d 178, 181 (Minn. Ct. App. 1984).

The actions in the property tax overpayment cases are entirely legal in nature and seek recovery of a money judgment under various constitutional, statutory, and common law theories. For example, Count V of Programmed Land's Amended Complaint states a cause of action for unjust enrichment which the Minnesota Supreme Court has held is legal and entitles a plaintiff to a jury trial. Roske v. Ilykanyics, 232 Minn. 883, 889, 45 N.W.2d 769, 774 (1951). The same right attaches to the claim for breach of contract, for money had and received, and for money paid by mistake. See, e.g., Crossett Lumber Co. v. United States, 87 F.2d 930 (8th Cir. 1937); Cooperative Power Ass'n v. Astleford, 386 N.W.2d 313, 315 (Minn. Ct. App. 1986). Similarly, Plaintiffs' declaratory judgment claim entitles them to a jury trial. State Farm Mut. Auto. Ins. Co. v. Skluzacek, 294 N.W. 413, 415 (Minn. 1940) ("the right of jury trial in its appropriate sphere is safeguarded under the Declaratory Judgments Act").

Plaintiffs also assert claims under 42 U.S.C. § 1983 for deprivation of their constitutional rights, under which the U.S. Supreme Court has held repeatedly that litigants have a right to a jury trial. Maine v. Thiboutot, 448 U.S. 1, 4 (1980); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939). In Warren v. City of Lincoln, Neb., 816 F.2d 1254, 1261 (8th Cir. 1987), the Eighth Circuit held that if a plaintiff alleges facts that establish a constitutional violation giving rise to a § 1983 claim, the court should first determine whether the alleged conduct violated a clearly established law of which a reasonable official would have known. Id. Once it is

determined as a matter of law that a legal standard governing the governmental action was clearly established, the official does not have qualified immunity. Id. "The factual question whether the officer's conduct violated the established constitutional standard is resolved by the jury at trial." Id. (emphasis added). The Eighth Circuit clearly establishes that once a due process claim survives summary judgment, the claimant has the right to have the factual questions resolved by a jury. Id. See, e.g., Putman v. Smith, 98 F.3d 1093 (8th Cir. 1996) (noting jury question is presented for denial of due process in a § 1983 action); Bailey v. Board of County Comm'rs of Alachua County, Florida, 956 F.2d 1112 (11th Cir. 1992), cert. denied, 113 S. Ct. 98 (1992); Powell v. Gardner, 891 F.2d 1039 (2d Cir. 1989); Anderson v. Gutschenritter, 836 F.2d 346 (7th Cir. 1988); Bailey v. Andrews, 811 F.2d 366 (7th Cir. 1987); Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); McCulloch v. Glasglow, 620 F.2d 47 (5th Cir. 1980). See also Annis v. County of Westchester, 939 F. Supp. 1115 (1996) (noting jury question is presented for denial of equal protection in a § 1983 action).

Not only do federal courts consistently hold there is a right to a jury trial in § 1983 cases but that principle is applied in state courts when an individual alleges due process and equal protection violations. See, e.g., Lee v. Giangreco, 490 N.W.2d 814 (Iowa 1992) (noting jury question is presented for denial of due process in a § 1983 action); Boulder Valley Sch. Dist. V. Price, 805 P.2d 1085 (Colo. 1991) ; Lubcke v. Boise City/Ada County Housing Authority, 860 P.2d 653 (Idaho 1993); Harkness v. City of Burley, 715 P.2d 1283 (Idaho 1986); Creamer v. Raffety, 699 P.2d 908 (Ariz. Ct. App. 1984); City of Riviera Beach v. Fitzgerald, 492 So.2d 1382 (Fla. Ct. App. 1986); Myrick v. Cooley, 371 S.E.2d 492 (N.C. Ct. App. 1988), cert. denied, 373 S.E.2d 865 (N.C. 1988); Stevens v. Stevens, 566 N.E.2d 544 (Ind. Ct. App. 1991). See also

Creamer v. Raffety, 699 P.2d 908 (Ariz. Ct. App. 1984) (noting jury question is presented for denial of equal protection in a § 1983 action).

In light of these precedents, the various property tax overpayment cases must be tried before a tribunal which can impanel a jury. Therefore, these cases must be decided in a Minnesota district court and not the tax court.

IV. THE MINNESOTA SUPREME COURT SHOULD ASSIGN THE PROPERTY TAX OVERPAYMENT TO A SINGLE DISTRICT COURT JUDGE BECAUSE A FORMER MEMBER OF THE TAX COURT IS NOW A PARTY TO ONE OF THE ACTIONS.

In addition to the substantive reasons why a Minnesota district court judge should be assigned to adjudicate these overpayment cases, the Minnesota tax court is also not an appropriate forum because a former member of the tax court is now a party to one of the actions. Specifically, Judge Dorothy McClung was assigned as the tax court judge to the first overpayment case brought by Plaintiffs' counsel in January of 1997. Judge McClung is now the head of property taxation for Ramsey County. Judge McClung's status as a party to one of the pending actions raises the specter of the "appearance of impropriety" based upon an obvious conflict of interest.[12] Any hint of impropriety can be easily avoided by assigning an impartial Minnesota district court judge who has no relationship with any of the parties involved in these actions.

Under Minn. Stat. § 271.18, such an outcome is mandated because "[n]o judge, referee, or employee shall, at any time after the termination of the office employment, act as counsel,

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[12] This appearance of a conflict of interest is further demonstrated by the fact that M. Jean Stepan, Ramsey County's counsel of record in the Ramsey County overpayment case, also is a former tax court judge. This explains why she joined in Hennepin County's transparent attempt to remove Judge McCarthy from the Christian case pursuant to Defendants' "motion."

attorney, or agent in connection with any claim or proceeding of which the person terminated has knowledge which was acquired in the course of a term of office or employment in the Tax Court." Minn. Stat. § 271.18 (emphasis added). This provision is designed to prevent the appearance of conflict by members of the Minnesota tax court. Judge McClung officially resigned her office on October 31, 1997. She has been a party to this case since that time. While Plaintiffs are not alleging, much less accusing, Ramsey County of violating Minn. Stat. § 271.18, the spirit of that provision dictates that the judiciary appoint a district court judge who has no association with any of the parties involved in these cases.

On the other hand, transferring cases that are properly before district court judges, such as the Dakota and Hennepin County cases pending before Judge McCarthy and Judge Larson respectively, would not only abridge and modify the litigants' rights under Minn. Stat. § 480.051 but also would cause the public to question the impartiality of the forum used to resolve this dispute. This should not be allowed since the wrong complained of in these actions relates to the counties' failure to abide by state law. Their actions have deprived thousands of taxpayers of their right to be taxed uniformly with all other similarly-situated Minnesota property owners/taxpayers.

Given the serious nature of the public policy issues at stake in this litigation, this Court should fully exercise its role in adjudicating the conduct of county officials who are agents of the executive branch and are charged with uniformly administering the property tax laws of the State of Minnesota. The best way to accomplish this is by assigning the remaining property tax overpayment cases to a single, impartial district court judge.

V. THE PROPERTY TAX OVERPAYMENT CASES SHOULD BE ASSIGNED TO A MINNESOTA DISTRICT COURT JUDGE TO ENSURE THE DOCTRINE OF SEPARATION OF POWERS IS NOT VIOLATED.

Assigning these cases to the tax court would not only violate Plaintiffs' constitutional right to a jury trial but the doctrine of separation of powers as well.[13] While the Minnesota tax court may exercise certain judicial powers assigned to it by a Minnesota district court judge -- an assignment Judge McCarthy chose not to make in the Christian case -- if these cases are transferred to the tax court, Defendants' conduct would be reviewed by another member of the executive. This is the type of governmental intrusion that should be a concern to the judiciary as it is contrary to the provisions of Minn. Const. Art. 3, § 1. See Minn. Const. Art. 3, § 1. See also In re Lord, 97 N.W.2d 287, 289 (Minn. 1959) ("it is equally vital to our form of government that the executive shall have no power to interfere with the courts in the performance of judicial functions").

Although "taxation is primarily a legislative and executive function," Kalscheuer v. State, 8 N.W.2d 624, 626 (Minn. 1943), the claims in these cases are entirely judicial in nature. Plaintiffs are not claiming the taxation provisions are unconstitutional or that their property assessments were somehow improper under Chap. 278 of the Minnesota Statutes. Rather, they claim the application of the improper Class rate by the County Auditors, in violation of their

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[13] The separation of powers doctrine relies on two different but interconnected ideas: the concept of checks and balances on every branch of the government and the concept of power being dispersed among the legislative, executive, and judicial branches of government. Without some system of separation of powers, a despotic and absolute regime emerges. As political philosopher Montesquieu stated, "There would be an end of everything were the same man or the same body, whether the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of the individuals." 1 Montesquieu, The Spirit of the Laws 152 (1790).

statutory duty under Minn. Stat. § 275.08 to "fix" the rate of taxation by using only the "appropriate" state-mandated class rates, violates both the Equal Protection and Due Process Clauses of the U.S. and Minnesota Constitutions. Furthermore, Plaintiffs are seeking recovery of their own money, not tax refunds as Defendants contend, because Defendants failed to comply with state law.

These claims should not be reviewed by the tax court because this "independent agency of the executive branch of government" would then be adjudicating claims against other members of the executive branch. See Minn. Stat. § 271.01. Both the U.S. Supreme Court and this Court have stated that it is essential that a party has the right to have claims decided by judges who are free from potential domination by the other branches of government.[14] See United States v. Will, 449 U.S. 200, 217-18 (1980); Wulff v. Minnesota Court of Tax Appeals, 288 N.W.2d 221 (1978). If the present cases are assigned to the tax court, however, the executive branch of government would be in the position of adjudicating, in some cases willful, violations by members of its own branch of government. The judiciary would cease to stand independent from the executive: "If the power of making [judicial decisions] was committed to the Executive . . . there would be danger of an improper compliance to the branch which possessed it." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (quoting The Federalist No. 78, at 489 (H.Lodge ed. 1888) (A. Hamilton)). Thus, from a separation of powers standpoint, it would be inappropriate for the tax court to adjudicate the property tax overpayment cases.

Indeed, in Northern Pipeline Co., a decision rendered after this Court's decision in Wulff, the U.S. Supreme Court held that the appointment of bankruptcy judges violated the U.S. Constitution when the only oversight of the bankruptcy court was by way of appeal. Northern

Pipeline Co., 458 U.S. at 58. See also Holmberg v. Holmberg, 578 N.W.2d 817 (Minn. Ct. App. 1998) (citing to Northern Pipeline Co. in support of its contention that "[o]ther courts on both the state and federal level have similarly ruled that certain transfers of judicial authority to administrative agencies violated separation of powers under either state or federal constitutions."). Moreover, the Minnesota Court of Appeals, in analyzing a similar argument based upon separation of powers, concluded it is not enough that a statutory provision provides appellate review of an administrative agency's "final" decision. Holmberg, 578 N.W.2d at 823-24 (Minn. Ct. App. 1998). If this were the case, the legislature could "transfer any traditional judicial function wholesale to autonomous ALJs who are members of the executive branch, without requiring any agency or district court review." Id.

In light of these decisions, which reinforce Plaintiffs' right to have their claims decided in the judicial forum they choose, the property tax overpayment cases should be assigned to and determined by a single Minnesota district court judge. This will ensure that long-standing principles under the separation of powers doctrine are not violated.

VI. AN EXTRAORDINARY WRIT IS AN APPROPRIATE REMEDY TO ASSIGN THE PROPERTY TAX OVERPAYMENT CASES TO A SINGLE MINNESOTA DISTRICT COURT JUDGE.

Minn. R. App. P. 120 provide this Court authority to issue extraordinary writs. An extraordinary writ is the proper remedy in the present action because Plaintiffs have no other means by which to seek an assignment of the property tax overpayment cases to a single district court judge. The authority to make such an assignment rests exclusively with the Chief Justice of the Minnesota Supreme Court pursuant to Minn. Stat. § § 2.724 and 480.16. Because no other adequate remedy at law exists to address this issue, Plaintiffs request that this Court issue an extraordinary writ to address the issues raised by these cases.

This Court has the power to issue extraordinary writs when "necessary to the execution of the laws and the furtherance of justice." Minn. Stat. § 480.04; City of Minneapolis v. Wentworth, 269 N.W.2d 882, 883 n.1 (Minn. 1978). The assignment of the property tax overpayment cases to a single district court judge is necessary and will promote justice. Assignment to a single district court judge is a valuable and important tool of judicial administration. This is especially true in the present case when there are 10,000 to 20,000 potential claims that may be filed in various Minnesota counties. By assigning a single district court judge to handle these cases, that judge will also have the authority to consolidate the cases, thereby streamlining the adjudication of these claims. See In re Asbestos Litigation, 481 N.W.2d 24, (Minn. 1991) (holding that a district court judge presiding over all asbestos-related claims brought in Minnesota may consolidate the cases pursuant to Minn. R. Civ. Proc. 42.01).

In assigning the property tax overpayment cases to a single district court judge, Plaintiffs' claims will be decided in the proper forum. Plaintiffs will be afforded their right to a jury trial. The district court also will have the authority to issue a writ of mandamus if one is appropriate. In addition, there will be no hint of impropriety if a single district court judge adjudicates these claims. On the other hand, if the cases are "transferred" to the Minnesota tax court as Defendants request, one of the primary Defendants in the Ramsey County case is Ms. McClung who also was assigned as a Tax Court judge on the first property tax overpayment case brought by Plaintiffs' counsel. This outcome would needlessly call into question the integrity of the entire judicial process associated with these cases, while assigning a single district court judge to decide these cases will ensure the doctrine of separation of powers is not violated. Thus, an extraordinary writ is needed not only because there is no other adequate remedy at law but, more

importantly, because the issuance of a writ will ensure Petitioners' claims are handled efficiently and fairly.

Due to the respect and weight the Court's words carry and in the interest of fairness to Petitioners and the judicial process as a whole, Petitioners request this Court issue a writ assigning the property tax overpayment cases to a single district court judge.

CONCLUSION

For the foregoing reasons, the property tax overpayment cases with the exception of the Christian case pending in Dakota County, should be assigned to a single district court judge, preferably Judge Thomas McCarthy or any other Minnesota district court judge with the background and experience necessary to address the issues raised by these cases.

Respectfully submitted,

Dated: November 13, 1998

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ATTORNEYS FOR PLAINTIFFS/PETITIONERS

0443788.01

A

CASES TO BE REASSIGNED

Case Name and File No.	Court and Assigned Judge	Status of Case
LGSRG (Burkholder) - DC-97-567	Tax Court/Perez	Trial to be commenced May 3, 1999.
Programmed Land - DC-97-2321	Tax Court/Perez	Indefinite continuance pending outcome of LGSRG case.
Taco Bell - C-5-98-1013	Tax Court	To be assigned
Klegstad - C-9-97-1465	Tax Court/Krause	Stipulated Order signed to stay further proceedings
Burkholder - C-5-97-6090	10th District/None	To be assigned
Multi-Tech Systems - C4-97-3732	Tax Court/Krause	No motions pending
Murray - C1-97-5261	Tax Court/Krause	No motions pending
Lange - 1997-16032	Tax Court/Krause	No motions pending
Zimmerman - C6-97-4440	10th District/None	Case transferred to District Court for trial if necessary; Stipulation to Stay Further Proceedings agreed to by the parties
Fehn - C3-97-3160	Tax Court/Krause	No motions pending
Gores - 98-002164	District Court/None	Motion to Transfer to Tax Court pending

0442712.01

B

STATE OF MINNESOTA

COUNTY OF DAKOTA

IN DISTRICT COURT

FIRST JUDICIAL DISTRICT

Eggum Investments, D & D Investments, Dean Buesing, and Harold Christian, individually and On behalf of all others similarly Situated,

Plaintiffs,

vs.

Thomas Novak, in his capacity as Treasurer and Auditor for Dakota County, Dakota County Board of Commissioners, and Dakota County, Minnesota,

Defendants.

File No. C4-97-9320

The above-entitled matter came on for hearing before the undersigned Judge of District Court on September 15, 1998. The Plaintiffs appeared by Robert A. Hill, attorney at law. Defendants appeared by Jay R. Stassen, Assistant Dakota County Attorney. The Court, having considered the file and pleadings herein, the comments of counsel and otherwise being advised in the premises, makes the following

SCHEDULING ORDER

1. By agreement of the parties, this matter shall be tried on stipulated facts and arguments of counsel, which may include amicus curiae briefs.

2. Plaintiff shall submit a proposed set of stipulated facts to defendant by September 25, 1998.

3. Defendant shall make reply to plaintiff's facts, with any additions, deletions or corrections, by October 9, 1998.

4. In the event that the parties are not able to agree on a set of stipulated facts, they shall schedule a telephone conference with the undersigned judge to discuss resolution of outstanding issues.

5. Plaintiff, and amici for plaintiff's cause, shall submit briefs by October 16, 1998.

6. Defendant, and amici for defendant, shall submit briefs by November 17, 1998.

7. The parties shall participate with the Court in a telephone conference call on Monday, November 30, 1998, at 8:30 a.m., to determine whether further briefing and/or oral arguments are necessary. The Court may request additional briefs, may schedule the matter for oral argument or may take the matter under advisement at the telephone conference.

8. Plaintiff shall arrange for such telephone conference and shall reach the Court at (507) 237-4051.

9. The memorandum attached hereto is incorporated herein by reference.

Dated: September 15, 1998.

Hon. Thomas G. McCarthy
Judge of District Court

MEMORANDUM

It occurred to the Court that a telephone conference on November 23 might be unproductive, as the Court will return from a two-week vacation that day. If either counsel is unavailable on November 30, please contact the Court and we will work out another date and time.

tgm 9-15-98

C

MINNESOTA TAX COURT
25 CONSTITUTION AVENUE
SAINT PAUL, MINNESOTA 55155

CHAMBERS OF
DIANE L. KROUPA
JUDGE

October 9, 1998

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Re: Minnesota Tax Court Jury Trial Issue

Dear Attorneys:

I am writing to state the Tax Court's position regarding jury trials.

The Tax Court hears cases without a jury as provided under Minn. Stat. § 271.06, subd. 6 (the "Hearing Provision"). The Tax Court acknowledges it has the ability to empanel an advisory jury under the Hearing Provision. The Tax Court has never ruled upon empaneling an advisory jury and will not do so unless and until a motion from a party is presented to the Court requesting a jury. The Tax Court has not received a motion requesting an advisory jury in the Burkholder matters.

Our position on jury trials is consistent with the information Ms. Sue Wozniak, Tax Court Administrator, provided to Mr. Bob Hill on July 30, 1998.

Sincerely yours,

Diane Kroupa

Diane L. Kroupa

dlk/jury.ltr

D

STATE OF MINNESOTA

IN COURT OF APPEALS

Taco Bell of California, et al.,

Petitioners,

vs.

Donald F. Dahlke, et al.,

Respondents.

ORDER

#C1-98-1886

Considered and decided by Toussaint, Chief Judge, Peterson, Judge, and Harten, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

Petitioners seek a writ of mandamus, to compel the district court to retain a matter transferred to the state tax court.

Petitioners have not established that mandamus is the appropriate remedy. To obtain a writ of mandamus, petitioners must establish that the district court is clearly required by law to perform an act and mandamus cannot control judicial discretion. Minn. Stat. § 586.01 (1996). The district court is authorized to transfer matters arising under the tax laws of this state to the tax court. Minn. Stat. § 271.01, subd. 5 (Supp. 1997). Because the statute authorizes transfers to the tax court, this petition appears to be directed at the district court's exercise of discretion in determining whether to transfer this matter. Petitioners have cited no

authority holding that mandamus is an appropriate remedy to restrain a transfer to the tax court and our research has revealed no such authority.

The supreme court has held that the tax court has authority to determine constitutional questions in matters transferred from the district court. ***In Re Petition of McCannel***, 301 N.W.2d 910, 919 (Minn. 1980). To the extent that petitioners dispute that holding or the scope of the tax court's jurisdiction, mandamus from this court, directed at the district court's decision to transfer this case, is inappropriate.

IT IS HEREBY ORDERED the petition for mandamus is denied.

Dated: October 27, 1998

BY THE COURT

Edward Toussaint
Chief Judge

CLL:mbs

AFFIDAVIT OF SERVICE BY UNITED STATES MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

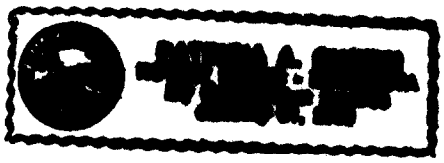
Susan Abeln, of the City of Cannon Falls, County of Goodhue, in the State of Minnesota, being duly sworn, says that on the 13th day of November, 1998, she served the following document(s) entitled: Response to Hennepin County's "Motion" to Transfer Property Tax Overpayment Cases to Tax Court and Petition for an Extraordinary Writ Pursuant to Minn. R. App. Pro. 120 by mailing a copy thereof via United States mail upon: on all counsel of record, on attached Service List enclosed in an envelope, postage prepaid, and by depositing same in the post office at Bloomington, Minnesota addressed to the last known address of said attorneys.

Susan Abeln

Subscribed and sworn to before me this
13th day of November, 1998.

Notary

0250072.01



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