

NO. 2013-TS-01490

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**IN THE SUPREME COURT OF MISSISSIPPI**

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**SASS MUNI-V, LLC,**

Appellant,

v.

**MIC-ROCKY, LLC, et al.,**

Appellees.

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**On Appeal From DeSoto County Chancery Court  
No. 11-CV-1730**

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**BRIEF OF APPELLANT**

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SASS MUNI-V, LLC

**ORAL ARGUMENT REQUESTED**

**NO. 2013-TS-01490**

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**SASS MUNI-V, LLC,**

**Appellant,**

**v.**

**MIC-ROCKY, LLC, et al.,**

**Appellees.**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sass Muni-V, LLC, Delaware limited liability company, Appellant;
2. Tax Collector of DeSoto County, Mississippi, Appellee;
3. Tax Assessor of DeSoto County, Mississippi, Appellee;
4. Chancery Clerk of Desoto County, Mississippi, Appellee;
5. Desoto County, Mississippi, Appellee;
6. City of Horn Lake, Mississippi, Appellee;
7. Marshall Investments Corporation a/k/a Marshall Investments Corporation of Minnesota,

Appellee;

8. E. Franklin Childress, Jr., R. Spencer Clift, III, and K. David Waddell, as Substitute Trustees , Appellees
9. Mic-Rocky, LLC, (Defaulted)
10. Mr. Billy C. Campbell, Jr.  
Hunt, Ross & Allen  
Counsel for the City of Horn Lake, Mississippi
11. Ms. Shannon L. Wiley  
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.  
Counsel for Appellees, Marshall Investments Corporation a/k/a Marshall Investments of Minnesota; E. Frank Childress, Jr., R. Spencer Clift, III, K. David Wadell, as substitute Trustees; and Mic Rocky, LLC
12. Mr. Joseph D. Neyman, Jr.  
Smith, Phillips, Mitchell, Scott & Nowak, LLP  
Counsel for Appellees, Joey Treadway, Tax Collector of DeSoto County; Parker Pickle, Tax Assessor of DeSoto County; W.E. Davis, Chancery Clerk of DeSoto County; and DeSoto County, Mississippi
13. Mr. Robert E. Quimby  
Smith, Phillips, Mitchell, Scott & Nowak, LLP  
Counsel for Appellees, Joey Treadway, Tax Collector of DeSoto County; Parker Pickle, Tax Assessor of DeSoto County; W.E. Davis, Chancery Clerk of DeSoto County; and DeSoto County, Mississippi
14. Honorable Mitchell M. Lundy, Jr., Chancellor  
Third Chancery Court District
15. State of Mississippi, nominal defendant
16. Mississippi State Tax Commission, nominal defendant

SO CERTIFIED, this the 18th day of April 2014.

By KALOM LAW FIRM, PLLC

By: /s/ Timothy Mitchell Kalom  
T, Mitchell Kalom, Esq. (MS Bar No. 102133)

## **STATEMENT REGARDING ORAL ARGUMENT**

**SASS MUNI-V, LLC**, Plaintiff - Appellant, respectfully requests oral argument on the issues presented by appeal on grounds that oral argument is appropriate and would be beneficial to the Court in light of the complicated and unique factual circumstances forming the basis of the claims made in its case, which Appellant believes to be one of first impression.

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## **STATEMENT OF ISSUES**

- I.** WHETHER A TAX SALE PURCHASER HAS STANDING TO INITIATE LITIGATION TO SET ASIDE A VOID TAX SALE AND SEEK A REFUND IN SITUATIONS WHERE THE VOID SALE RESULTS FROM THE CLERK'S FAILURE TO PROVIDE NOTICE IN CONFORMITY WITH STATUTORY REQUIREMENTS?
  
- II.** WHETHER ANY STATUTE OF LIMITATIONS BARS THE APPELLANT FROM RECEIVING A REFUND AFTER A VOID TAX SALE?
  
- III.** WHETHER CORPORATE DEFENDANTS WHO NEVER ANSWERED THE LAWSUIT, AND ENTERED ONLY A LIMITED APPEARANCE, MAY JOIN THE SUBSTANTIVE ARGUMENTS MADE BY THE COUNTY AND CITY DEFENDANTS, AND BENEFIT FROM THEIR DISMISSAL?

## STATEMENT OF THE CASE

Plaintiff Sass Muni-V, LLC (“Appellant” or “SASS”) duly filed its two-hundred-and-twelve page verified complaint on August 30, 2011 (the “Complaint”) (R. 19-231), naming as its principal defendants the Tax Collector of DeSoto County, Mississippi; Tax Assessor of DeSoto County, Mississippi; Chancery Clerk of DeSoto County, Mississippi; Desoto County, Mississippi; (collectively, “County Defendants”); City of Horn Lake, Mississippi; (“City Defendant”); Marshall Investments Corporation a/k/a Marshall Investments Corporation of Minnesota; E. Franklin Childress, Jr., R. Spencer Clift, III, and K. David Waddell, as Substitute Trustees; and Mic-Rocky, LLC; (collectively “Corporate Defendants”) and the State of Mississippi (the “State”) and the Mississippi Department of Revenue, as nominal defendants.<sup>1</sup> (R 19-20)<sup>2</sup>

In its Complaint SASS asserts, *inter alia*, that at the DeSoto County delinquent tax sale held on or about August 25, 2008 SASS purchased, for the sum of \$530,508.00. (*Id.*; R. 36), the delinquent 2007 ad valorem taxes (“Tax Sale”) on that certain parcel situated in Section 36, Township 1 South, Range 8 West, County of Desoto and City of Horn Lake, being generally identified for *ad valorem* tax purposes as Parcel No. 1087-3600.0-00005.00, PT NW 14. (the “Property”) being more particularly described in the Complaint (R. 26). SASS therein requested, *inter alia*, that the Court grant declaratory relief by finding and declaring that SASS’s Tax Sale was invalid and void due to the taxing authorities failure to follow the statutory noticing requirements and for entry of a judgment directing the refund to Plaintiff of ... delinquent County

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<sup>1</sup> In their respective answers, defendants Mississippi State Tax Commission and State of Mississippi (the “State”) essentially disclaimed any interest in the litigation albeit with some reservations by the State, all of which are irrelevant to the case in its current procedural posture.

<sup>2</sup> Docket Summary (R. 4-13 Attached as Exhibit)

and City levies against the Subject Property ... paid by Plaintiff on the subject tax sale ... to the Tax Collector of DeSoto County; and to expunge tax sale receipt and related documents, for further declaratory and other relief (R. 25)

The County and City Defendants filed motions arguing that tax sale purchasers, as a class, have no standing in Mississippi to demand a refund on a void tax sale. The Corporate Defendants, albeit wrongfully, joined in those motions. On July 31, 2013, The Desoto County Chancery Court ruled, in relevant part, that SASS, as a tax sale purchaser, lacked standing to pursue its claims (R. 687-688). SASS filed a timely notice of appeal on August 29, 2013 seeking to reverse the Chancery Court's decision (R. 1059-1061). SASS avers that strict application of Mississippi tax sale statutes and case law, along with principles of due process, require that both the letter and spirit of the statutory regime governing tax sale noticing establishes an objective standard against which every tax sale is measured and must overcome to be deemed valid otherwise the sale is void, as a matter of law, without the necessity of a third-party challenge. In turn, as redress, the statute allows those purchasers redress by way of a refund.

### **STATEMENT OF FACTS**

As set forth in the Complaint, this litigation stems from the SASS's Tax Sale purchase relating to that certain property located in the City of Horn Lake, DeSoto County, and is known as parcel 1-08-7-36-00-0-00005 (R. 26). Public records show, in relevant part, that Millennium of Mississippi, LLC (hereinafter, "Millennium") obtained the property by warranty deed in 2000. In 2003, Millennium conveyed the property to DeSoto County Development LLC ("DeSoto Development") by warranty deed. (*Id.*). Concurrently, DeSoto Development gave a deed of trust to Marshall Investments Corporation (hereinafter, "Marshall Investments") to secure a

mortgage loan for \$ 16,455,000. (*Id.*; R. 26).

Subsequently, the mortgage went into default, and Marshall Investments foreclosed on the property. Marshall Investments proceeded to issue a substitute trustee's deed in favor of MIC-Rocky, LLC (hereinafter, "MIC-Rocky") in December 2007 (R. 27). DeSoto County and the City of Horn Lake levied taxes against the property for the tax year ending December 31, 2007 in the amount of \$ 520,508.00 (R. 27). These taxes were not paid when due and, as a consequence, became delinquent on February 1, 2008. (*Id.*).

The property was offered for sale at public auction by the DeSoto County Tax Collector on August 25, 2008, for the purpose of collecting these taxes, together with statutory interest, costs and penalties (R. 28). SASS was the successful bidder at that sale, paying consideration in the sum of \$530,508.00. (*Id.*). The amounts paid by SASS were as follows: \$476,432.53 for city curb/gutter tax; \$2,970.45 for gross city taxes; \$6,592.27 for county gross taxes; \$98.02 for county drainage fee; \$34,051.73 for interest owed; \$3.00 for printer fee; \$10,000 for excess bid.

SASS later determined the sale was void, on the following facts, all of which were pled in the Complaint (R. 19-231).

1. Notice of the expiration of the two-year redemption period established by Miss. Code Ann. § 27-45-3 was not mailed to or served on MIC-Rocky, LLC, DeSoto Development, or Marshall Investments in the manner prescribed by Miss. Code Ann. § 27-43-1, § 27-43-3, and § 27-43-5 (R. 29).
2. The March 2007 Tax Search Report "Affidavit" did not follow the filing requirement of being: signed, sworn to, notarized or clearly written by a specific individual. (*Id.*). It recites, among other things, the following. (R. 29-30):
  - a. That "MIC-Rocky LLC" is the reputed owner of "parcel number 108736000 0000500" located in DeSoto County;
  - b. That the someone "Checked to See if Land Owner Owns More Property" in addition to searching for the owner(s) through use of the Telephone Book, Internet, Tax Assessor's Files, DeSoto County Car Tags; and

- c. That: “[I]n accordance with Section 27-43-3 of the Mississippi Code of 1972, I have issued and attempted to serve the notice required upon the above named reputed owner in the above described manner, in an effort to ascertain the reputed owner's street address and post office address, and after diligent search an inquiry, I have tried to locate the person named above, this date: 03/23/11 0.” (*Id.*).
3. The DeSoto County Chancery Clerk did not produce a notice of the expiration of the two-year redemption period that was sent to MIC-Rocky, LLC; DeSoto Development; or Marshall Investments (R. 30-31).
4. The Sheriff of Hinds County did not produce personal notice upon MIC-Rocky, LLC, and its resident agent, National Registered Agents, Inc., located at 840 Trustmark Building, 248 East Capitol Street, Jackson, Mississippi 39201 (R. 32).
5. The subject property was not described properly and the disclosure of the type of assessment due was not made under the advisement of the Tax Assessor, Tax Collector, Chancery Clerk, DeSoto County, and the City of Horn Lake (R. 32-33).
6. The Chancery Clerk did not duly note any of its actions on the tax sale book tax sale record pertaining to the subject Tax Sale and Property (R. 33).

Thereafter, SASS initiated litigation seeking to set aside the void tax sale and obtain relief therefrom. The Appellees filed motions seeking dismissal based on a purported lack of standing; this was based on their naked claim that no purchaser at a void tax sale could initiate an action to request a refund, and further by their interpretation of the doctrine of *caveat emptor* and position that SASS is an improper party of interest. On July 31, 2013, the DeSoto County Chancery Court granted the Miss. R. Civ. P. 12(b)(6) motions filed by the county and city defendants, and joined by the corporate defendants (R. 687-688).

In dictating the order from the bench, the judge ruled that SASS lacked standing to assert its claims (R. 750). However, the judge later signed a written order, which had been prepared and presented by the prevailing parties, and that order appeared broader than the ruling issued from the bench (R. 1026-1028 Attached as Exhibit).

Specifically, SASS asks this Court to rule that the purchaser at a void tax sale has the

right to receive a refund, just as any other interested party.

Although the Chancery Court's oral ruling focused on SASS's status as a purchaser (R. 968), the court later issued, over the objections of Plaintiff's counsel, a much broader written order, seemingly incorporating such issues as *caveat emptor*, and statutes of limitation. Finally, to the extent that the court's decision turned on any of these other grounds, SASS seeks reversal of those decisions as well. (R. 748-751 Attached as Exhibit)

This timely appeal follows.

## SUMMARY OF THE ARGUMENT

SASS, a tax sale purchaser, has standing to seek relief authorized by statute, such as a refund, following a void tax sale resulting from the clerk's failure to provide notice as required by statute. SASS has experienced and continues to experience an adverse effect on a property interest in which it has an interest; this adverse effect is distinct from any effect on the general public. The plain language of the statutory framework indicates that the clerk's failure to comply with the notice requirements voided the tax sale to SASS. Consequently, SASS is entitled to avail itself of the remedies, such as a refund, plainly provided for by statute. The doctrine of *caveat emptor* is not a bar because remedies are provided to SASS by statute; any other result would implicate due process. In sum, Mississippi statutory framework equitably balances the needs of all parties involved by providing remedies in cases in which void sales result from the clerk's failure to provide appropriate notice following the tax sale, as opposed to prior to the tax sale.

Nor should SASS's suit for declaratory relief be barred by any statute of limitations. First, no statute of limitations should apply to a void tax sale. Alternatively, the Court should hold that the general three-year statute limitations began to run, if at all, when the clerk failed to provide notice as required by statutes, and not on the earlier date of the tax sale.

Finally, as to the Corporate Defendants who never answered the complaint and attempted to enter, only on a limited basis later, filed joinders and participated in substantive arguments asserted by the county and city defendants – all over SASS's objections. The final order signed by the chancellor granted the county and city motions to dismiss. But the Chancery Court did not grant the corporate defendants' own motion to dismiss (R. 253-255). By stipulation, SASS and the Corporate Defendants had agreed to preserve the issue of joinder for further proceedings,

(R. 683-686). Accordingly, SASS's requests that the order of dismissal be held not to have properly reached to the corporate defendants.

## ARGUMENT

### I. STANDARD OF REVIEW

In *Franklin County Cooperative v. MFC Services* (A.A.L.), 441 So. 2d 1376, (Miss. 1983), the court set out the legal standard for deciding a motion to dismiss under Miss. R. Civ. P. 12(b)(6):

MRCP 12(b)(6), the successor to the common law demurrer, provides that the defense of failure to state a claim upon which relief can be granted may, as here, be asserted by motion. We note that the comment which follows this Rule provides in pertinent part that to grant this motion "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." We are mindful of the current judicial practice favoring disposition of cases on their merits. Accordingly, we are of the opinion that the above criteria express the proper principles to be employed in passing upon a motion to dismiss under MRCP 12(b)(6).

*Franklin* (Id. at 1377)

In the instant action, the motion to dismiss based on lack of standing determined as a matter of law and implicates fundamental principles of due process and property rights. In applying this standard, the facts alleged in the complaint would be taken as true.

"...a motion to dismiss under Mississippi Rule of Civil Procedure 12(b)(6) raises an issue of law, which requires a de novo review. *Burgess v. City of Gulfport*, 814 So. 2d 149, 151-52 (¶9) (Miss. 2002). When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim."

Id

A review of a court's decision to grant a motion to dismiss under Mississippi Rule of Civil Procedure 12(b)(6), raises an issue of law which requires a de novo review. *Burgess v. City of Gulfport*, 814 So. 2d 149, 151-52 (¶9) (Miss. 2002). When considering a motion to dismiss,

the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim. *Id.*; *Overstreet v. Merlos*, 570 So. 2d 1196, 1197 (Miss. 1990); *Favre Prop. Mgmt., LLC v. Cinque Bambini*, 863 So. 2d 1037, 1042 (Miss. Ct. App. 2004) (citations omitted), cited with approval in *Vinson v. Prather*, 879 So. 2d 1053, 1055 (Miss. Ct. App. 2004). *Brown v. Mississippi Dep't of Human Services*, 806 So. 2d 1004, 1005-06 (Miss. 2000); *Burgess v. City of Gulfport*, 814 So. 2d 149, 151 (Miss. 2002). The Mississippi Supreme Court emphasized this point in *Bilbo v. Thigpen*, 647 So. 2d 678 (Miss. 1994), stating,

Analysis of a complaint for legal sufficiency, and survival of a Rule 12(b)(6) motion to dismiss, is a question of law which the court decides, taking the allegations of the complaint as true. As this Court has previously stated, “[a] motion for dismissal under Miss. R. Civ. P. 12(b)(6) raises an issue of law.”

*Id.* at 687 (citations omitted).

As such, a *de novo* review is undertaken on appeal. *UHS-Qualicare, Inc. v. Gulf Coast Cmty. Hosp., Inc.*, 525 So. 2d 746, 754 (Miss. 1987). On appeal, this Court also employs this standard in determining whether the trial court improperly granted a motion to dismiss. *McFadden v. State*, 542 So. 2d 871, 874-75 (Miss. 1989).

## **II. TRIAL COURT ERRED IN DISMISSING SASS’S COMPLAINT FOR LACK OF STANDING.**

The general standing requirements that govern all litigation in Mississippi courts are satisfied by a tax sale purchaser involved in a void tax sale resulting from the clerk’s failure to provide proper notice of the impending expiration of the redemption period following the sale. The requirements for a party to have standing to sue have been addressed and clearly established by the Mississippi Supreme Court and may be summarized as follows:

It is well settled that ‘Mississippi’s standing requirements are quite liberal.’ This Court has explained that while federal courts adhere to a stringent definition of standing, limited by Art. 3, § 2 of the United States Constitution to a review of actual cases and controversies, the Mississippi Constitution contains no such restrictive language. Therefore, this Court has been ‘more permissive in granting standing to parties who seek review of governmental actions.’ In Mississippi, parties have standing to sue ‘when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.’

*State v. Quitman County*, 807 So. 2d 401, 405 (Miss. 2001) (citations omitted).<sup>3</sup>

The holding was restated in *Ball v. Mayor & Bd. of Aldermen*, 983 So. 2d 295, 301 (Miss. 2008). Thus, to have standing, “there must be a present, existent actionable title or interest which must be completed at the time the cause of action is filed.” *City of Madison v. Bryan*, 763 So. 2d 162, 165 (Miss. 2000). “[T]o have standing in this matter [a claimant] must demonstrate that the City’s action had an adverse effect on property in which he has an interest.” 763 So. 2d at 166.

In *Bryan*, the Supreme Court held that Bryan had no standing since he had did not have title to the property, a valid option to purchase the property, or a mortgage or other encumbrance on the land. 763 So. 2d at 166. Here, in marked contrast, there can be no question that the defendant’s actions “had an adverse effect on property in which [t]he[y] have an interest.”

An interest is “colorable” if it “appear[s] to be true, valid, or right.” *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 827 n. 13 (Miss. 2009). The party asserting standing must have “a present, existent actionable title or interest which must be completed at the time the cause of action is filed.” *City of Madison v. Bryan*, 763 So. 2d 162, 165 (Miss. 2000). Examples of title or interest include ownership of property, an option to purchase, mortgage, or other encumbrance. *Bryan*, 763 So. 2d at 166. To support standing, “the adverse effect experienced must be different from the adverse effect experienced by the general public. *Hall v. City of Ridgeland*, 37 So. 3d 25, 33-34 (Miss. 2010).

The clerk’s failure to provide required notice in the instant matter resulted in a void tax sale and tax deed. While SASS retains a lien as a tax sale purchaser, it did not

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<sup>3</sup> “Mississippi’s standing requirements are quite liberal.” *Burgess*, 814 So. 2d at 152 (¶13)

obtain marketable title, and the tax sale was ineffective to extinguish any existing mortgages. In this case, the clerk's failure to properly notice resulted in "an adverse effect on property in which [the Appellant] has an interest." The clerk's failure to notify the lienor holding a substantial mortgage on the tax sale property placed SASS in an untenable situation, with unmarketable title.<sup>4</sup> Both of these are adverse effects felt by the purchaser alone, as opposed to the general public. Under such circumstances, the tax sale purchaser should not be without recourse. Rather, the tax sale purchaser should be allowed to pursue remedial action.

1. **The plain language of Mississippi statutory framework governing tax sales provides that the clerk's failure to comply with any one of the notice requirements renders a tax sale void as a matter of law, and it recognizes the need to restore the tax sale purchaser to his or her position before the sale.**

In interpreting a statute, the polestar consideration is legislative intent. *Anderson v. Lambert*, 494 So.2d 370, 372 (Miss. 1986). The starting point is the text of the statute itself. Statutory language is not read in isolation, rather the design and language of the entire statute are considered. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). If the statute is unambiguous, the plain meaning should be accorded to the statute; in such cases, it is improper to utilize the rules of statutory construction to interpret the statute. *Forman v. Carter*, 269 So.2d 865, 868 (Miss. 1972); *Miss. Power Co. v. Jones*, 369 So.2d 1381, 1388 (Miss. 1979).

Statutory provisions address the consequences of the clerk's failure to properly notice all owners and lienors. In combination with Miss. Code Ann. § 27-43-1, Miss. Code Ann. § 27-43-

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<sup>4</sup> Nor would a suit to confirm title have solved the problem. First, counsel could not in good conscience represent to any court that the tax sale had been properly conducted – a requirement for confirmation. Further, given that the confirmation of a nullity accomplished nothing, confirmed title could be set-aside at any time if a subsequent party with standing filed suit and attached the sale pursuant to Miss. R. Civ. P. Rule 55(a) and 60(b).

3 delineates the clerk's responsibilities in notifying real property owners regarding the impending expiration of the redemption period following a tax sale; it provides, "Should the clerk inadvertently fail to send notice as prescribed in this section, then the *sale shall be void and the clerk shall not be liable to the purchaser or owner upon refund of all purchase money paid.*" § 27-43-3 (emphasis added). The word "shall" indicates something is mandatory, as opposed to discretionary. *Franklin v. Franklin, ex rel. Phillips, See* 858 So.2d 110, 115 (Miss. 2003) (citing *Planters Bank & Trust Co. v. Sklar*, 555 So.2d 1024, 1027 (Miss. 1990)). The word "upon" means "immediately or very soon thereafter" or "on the occasion of." dictionary.com, *available at* www.dictionary.com (last accessed April 3, 2014). Thus, it is clear that the clerk can only avoid liability by issuing a refund in circumstances when a void tax sale results from his or her failure to provide proper notice to the owner(s).<sup>5</sup>

Likewise, Miss. Code Ann. § 27-43-11 delineates the consequences of the clerk's failure to properly notify lienors as outlined in Miss. Code Ann. §§ 27-43-5 and 27-43-7. In pertinent part, § 27-43-11 provides:

*A failure to give the required notice to such lienors shall render the tax title void as to such lienors, and as to them only, and such purchaser shall be entitled to a refund of all such taxes paid the state, county or other taxing district after filing*

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<sup>5</sup> Stated as a basic, "Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the landowners." *Wachovia Bank, N.A. v. Rebuild Am., Inc.*, 56 So. 3d 586, 588 (Miss. Ct. App. 2011) (quoting *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss. 1991). "Any deviation from the statutorily mandated procedure renders the [tax] sale void." *Ibid.* (quoting *Roach v. Goebel*, 856 So. 2d 711, 716 (Miss. Ct. App. 2003) which cites *Hart v. Catoe*, 390 So. 2d 1001, 1003 (Miss. 1980)). In *Wachovia*, the Court noted that in *Green Tree Servicing, LLC v. Dukes*, 25 So. 3d 399, 403-04 (Miss. Ct. App. 2009), it set aside a tax sale because the notice to the lienholder failed to state the book, page, and date within the notice. It found the same defect in *Wachovia*, because "chancery clerk's notice clearly deviated from the statutorily mandated notice." 56 So.3d at 588. The tax deed is thus void, not merely voidable. See *Northlake Dev. L.L.C. v. BankPlus*, 60 So. 3d 792, 796 (Miss. 2011). Void is well understood to mean "Null; Ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. \* \* \* void means that an instrument or transaction is so nugatory and ineffectual that nothing can cure it." Black's Law Dictionary, Definition of "Void." It is void from the beginning. See *Hood ex rel. State Tobacco Litigation*, 958 So. 2d 790, 815 (Miss. 2007).

his claim therefor as provided by law.

§ 27-43-11 (emphasis added). The clear nature of the language of § 27-43-11 and its operation is further illustrated by *SKL Invs., Inc. v. Am. Gen. Fin., Inc.*, 22 So. 3d 1247, 1250-51 (Miss. Ct. App. 2009), in which the Court of Appeals summarized the options of tax sale purchasers following the clerk's failure to notify a lienor as follows:

In the event that a tax sale is rendered void for improper notice to one lienholder but not others, the purchaser is faced with two options. The purchaser may opt to retain the property subject to the lien of the improperly noticed lienholder. Alternatively, the purchaser may opt to file a claim for a refund, thereby relinquishing all rights to the property. Among other variables, the purchaser's decision will depend on the value of the property, the amount paid for the property, and the amount of the lien on the property.

*SKL*, 22 So. 3d at 1250-51.

The Court went on to observe:

Accordingly, on remand, Rebuild America may choose to either retain the property subject to the lien of Wachovia Bank and Mid-State or to relinquish its rights to the property and file a claim for a refund.

Rebuild America further argues that, should it choose to file a claim for a refund instead of retaining the property, it is entitled to statutory damages pursuant to Mississippi Code Annotated section 27-45-27(1) (Rev. 2010), which provides:

Additionally, Miss. Code Ann. § 27-45-27, which serves as an additional avenue for remedying a void tax sale, provides:

The amount paid by the purchaser of land at any tax sale thereof for taxes . . . and interest on the amount paid by the purchaser at the rate of one and one-half percent (1-1/2%) per month, or fractional part thereof, and all expenses of the sale and registration, thereof shall be a lien on the land in favor of the purchaser . . . if the taxes for which the land was sold were due, although the sale was illegal on some other ground. The purchaser . . . may enforce the lien by bill in chancery, and may obtain a decree for the sale of the land in default of payment of the amount within some short time to be fixed by the decree.

§ 27-45-27.

**A. TAX SALE STATUTES ARE INTENDED TO PROTECT AND PROMOTE DUE PROCESS NOT TO BNEFIT SOME AND DISFRANCHIES OTEHRS.**

Tax sale validity is not a subjective standard that turns on, necessitates or requires a ‘challenge’ to trigger scrutiny. Indeed, our statutory noticing requirement, enacted to recognize, foster and promote due process, set objective standards against which all tax sales are and must be measured. As the foregoing indicates, the Mississippi statutory framework set-forth an objective standard which every tax sale must overcome in order to be valid; failing that, the language clearly provides that failure to comply with notice requirements “will” results in a void tax sale; nor is there a curative statue to which one might avail themselves which could transform an otherwise void tax sale into a valid sale. Neither would an uncontested tax title confirmation suit and final decree serve to cure and revive a tax sale that is, as a matter of law, void; as that would be the equivalent of confirming a nullity. It appropriately balances the interests of all parties involved in tax sales and provides for equitable remedies following a void tax sale resulting from the clerk’s failure to give appropriate notice to property owner(s) and lienor(s) following the sale. In doing so, it recognizes that certain flaws in a tax sale could not be anticipated at the time of purchase, and it would be inequitable for the taxing authority to retain funds when its failure to provide notice results in a void sale. As such, it does not provide an avenue for every dissatisfied purchaser to obtain a refund, but it provides remedies for certain tax sale purchasers where equity requires it. SASS falls within that group of tax sale purchasers because the clerk’s failure to provide notice resulted in the tax sale being void. As will be demonstrated, it is immaterial whether the purchaser, owner, lienor, or taxing authority brings suit to set aside the void the tax sale; the availability of the remedy is not dependent on a third party initiating the process.

2. Notice is not a right of a person but a jurisdictional and statutory prerequisite, a standard affording substantive and procedural due process. The majority rule in the United States is that strict compliance with statutory notice provisions is required as a matter of due process in order for a tax sale to be valid.

As has been previously set out in the first section, Mississippi requires strict compliance with the statutory notice provisions. Where there is any deviation not provided for in the statute, the tax sale is absolutely void. Defendants have argued that Miss. Code Ann. 27-43-1 *et seq.* does not expressly provide a cause of action for a tax sale purchaser to set aside a void tax sale. This observation is as correct as it is irrelevant. Nor do the statutes expressly give anyone else a cause of action of any kind. Rather, the statutes govern and protect property rights through the mechanism of due process for which Mississippi law has long provided remedies.

There is also the incontrovertible conclusion, given the facts that must be considered as true under the present procedural posture of the Rule 12 motions, that the tax sale to SASS is void. See Section I. The Defendants' arguments that SASS has no "standing" to cope with the situation it finds itself in thanks to the Clerk's omissions to act, means that it cannot perfect a void title nor "unwind" the tax sale to end the inchoate state of title to the real property. The Defendants' arguments about "standing" mean that the title to the real property will be in limbo indefinitely inasmuch as SASS cannot hold title by operation of law; and as previously noted, SASS has no other avenue or basis for redress.

As for SASS's standing, the basics are again the place to start: Mississippi's "standing" requirements to bring a lawsuit are broader than federal "case or controversy" requirements of federal law where a plaintiff must allege a "personal injury" that is "traceable" to a defendant's unlawful conduct and which injury is likely to be redressed by the claimed relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

By contrast, in Mississippi a party may sue where a "colorable interest" in the subject

matter of the lawsuit is asserted or where the plaintiff has experienced an adverse effect from the conduct of the defendant. *Hall v. City of Ridgeland*, 37 So.3d 25, 33-34, ¶ 24 (Miss. 2010) (noting Mississippi's more liberal approach and the lack of the "case or controversy" requirement of Article III of the federal constitution). Obviously, SASS has a "colorable" interest in the notice statutes inasmuch as they define the difference between a valid tax sale that may mature into good title, and a void tax sale.

The Clerk's failure to provide notice, automatically rendering the tax sale void; in turn, the obvious adverse effect on SASS is that it is impossible for it to obtain title to the real property under a tax title which is void, as a matter of law. This situation is somewhat analogous to that in *City of Jackson v. Rebuild America, Inc.*, 77 So.3d 1105 (Miss.App. 2011), *cert. den.* January 19, 2012. There the Court of Appeals considered whether the City of Jackson's statutory right of reverter under a deed gave it the right to argue that want of notice to the owner rendered the tax sale void.

In order to foster development of affordable housing, Jackson had deeded real property to a non-profit entity named Greater Mount Calvary Community Development Corporation. Under applicable law, the City's deed out to GMCCDC required that the entity begin development within certain time periods with a failure to do so being governed by a right of reverter stated in the deed. *Id.* at 1107, ¶ 2. GMCCDC failed to perform its part of the bargain for the real property and the City's right of reverter matured. And in the meantime, GMCCDC also failed to pay the *ad valorem* taxes resulting in a tax sale. The redemption period eventually elapsed and the tax title wound up in the hands of Rebuild America. That entity filed suit to quiet title.

Jackson wrote letters to GMCCDC's representative, expressing the City's intention for the property to revert immediately. It also physically entered the property to begin development

and expended a fairly large sum in that effort. Based on these actions, the Court of Appeals held that Jackson had standing to assert the failure of proper notice to GMCCDC because it had a clear “colorable” interest in the real property – whether as a possibility of reverter or a right of entry upon condition broken – that could be adversely affected by Rebuild America’s quiet title suit. *Id.* at 1113, ¶ 22.

In cases of tax sales, the purchaser may not take possession of the property during the redemption period, but nevertheless has the expectation that the clerk will perform the ministerial tasks of notice that have their source in the 1892 Code. Historically, the relationships of the various parties – the owner, the purchaser, the county, and any lienors – has been characterized as a statutory contract. One of the reasons that no amended statute may be applied to a tax sale and the law in effect at the time must be applied, is that to do otherwise works an unconstitutional impairment of the “contract.” *Reid v. Federal Land Bank Of New Orleans*, 166 Miss. 392, 396-97, 148 So. 392 (1933)(three parties to a contract for sale of land by the state for the taxes and sometimes a fourth, a lienor; where rights of all parties to the contract of sale are fixed and governed by the statute under which the sale was made, they cannot thereafter be impaired under amended statute altering obligations). It is hard to understand how SASS can be a statutory party to the notice obligations of the contract with the Clerk and have no “standing” to depend on these reciprocal rights and duties of the statutory scheme.

During the February hearing, the Defendants argued that, far from advancing a claim of its own, SASS is attempting to “step over and make” the Corporate Defendants’ claims that the tax sale was void. In SASS’s view, this mischaracterizes the nature of the notice statutes. While research has revealed no Mississippi case on point, the majority rule in the United States is that any interested party to a tax sale may assert the failure or insufficiency of notice where the law of

the state requires strict compliance with the notice statutes to render the sale a valid one. Or, stated another way, the notice provisions must be strictly adhered to in order that tax sales comply with due process of law. Nora A. Uehlein, *Right of Interested Party Receiving Due Notice of Tax Sale or of Right to Redeem to Assert Failure or Insufficiency of Notice to Other Interested Party*, Annotation, 45 A.L.R. 4<sup>th</sup> 447 (1986 & Supp.).

For example, in *Homeowners Solutions, LLC v. Nguyen*, 148 Wn.App. 545, 200 P.3d 743 (Wash.App. Div. 1 2009), the Washington appellate court considered whether its notice statute required separate notices to cotenants. While Washington uses a judicial foreclosure process to effect tax sales, the process is much the same as Mississippi's administrative process: county officials must ascertain the owners of the property and use diligence in providing notice of the foreclosure on the tax liens to the owners. *Id.* at 745-46, ¶¶ 16-17.

In Washington, the requirements of the notice statute are “jurisdictional” in the sense that the foreclosure court has jurisdiction to conduct the foreclosure and effect a tax sale. *Id.* at 746, ¶ 17. Any failure to provide the statutory notice renders any foreclosure and tax deed void. Because of the “jurisdictional” nature of the notice statute, even someone with notice of the foreclosure proceeding may sue to invalidate the sale and deed because of the failure of jurisdictional notice. Where the county authorities failed to give notice to all parties required to receive notice under the statute, then the entire case fails.

“When the County discovered from the title report that additional record title holders existed, it was required to give them the same notice it extended to the person listed on the county tax rolls. This was not done pursuant to the statute, and jurisdiction for the purposes of the tax foreclosure proceeding was not obtained. The foreclosure sale and the issuance of the tax deed are void.” *Nguyen*, 200 P.3d at 746, ¶ 18, *citing Rosholt v. County of Snohomish*, 19

Wash.App. 300, 305, 575 P.2d 726 (Wash. App. 1978); see also, *Patterson v. Oakes*, 260 Pa.Super. 415, 394 A.2d 995 (Pa.Super. 1978)(for 200 years Pennsylvania courts have ruled that notice provisions of a tax sale statute must be strictly complied with in order to guard against a deprivation of property without due process of law); *Burks v. Hedinger*, 167 N.W.2d 650 (Iowa 1969)(Iowa cases clear that the a person entitle to notice of expiration of redemption period may take advantage of the failure to notify another entitled to notice), *result altered by amended statute*, *St. John's Full Gospel Baptist Church v. Tax 207*, 819 N.W.2d 426 (Iowa App. 2012).

Consistent with the foregoing analysis, several opinions issued by the Mississippi Attorney General support SASS's position that a tax sale purchaser has standing to initiate litigation to set aside a void tax sale, which results from improper notice, and obtain a refund. In one of these opinions, a tax sale purchaser had requested a refund following a void tax sale, and the issue was whether failure to properly notice a lienor enabled the City of McComb to void a tax sale and refund the purchaser. Miss. Att'y Gen. Op. No. 97-0101 (March 21, 1997). The answer, which was based on the language of § 27-43-5, was in the affirmative. *Id.* In so concluding, the opinion stated, “[T]he purchaser at a tax sale is entitled to have the sale declared void and taxes paid by him refunded.” *Id.* Similarly, in Opinion No. 2004-0530, the City of Bay St. Louis, through its counsel, inquired whether it could initiate litigation to void tax sales in which notice did not conform to the statutory requirements. Miss. Att'y Gen. Op. No. 2004-0530 (November 5, 2004). The opinion concluded that the City of Bay St. Louis could elect to “initiate or participate” in litigation for the purpose of voiding tax deeds, as an “interested party” with standing. *Id.* Consistent with Opinion No. 2004-0530, Opinion No. 2011-00400 stated that a municipality may “seek a judicial declaration that [a tax] sale is void.” Miss. Att'y Gen. Op. 2011-00400 (October 14, 2011). These opinions focused on the unequivocal nature of statutory

language providing that failure to comply with the notice requirements renders a tax sale void. If a municipality can issue a refund, *at the request of a tax sale purchaser*, following a sale in which a lienor was not properly noticed, a tax sale purchaser should also be able to initiate litigation to set aside a void tax sale under the same circumstances; both of these methods designed to fostering and promoting due process, also entitle a tax sale purchaser to a refund. By the same token, if where a taxing authority voids a tax sale simply by way of a board or council resolution, or no resolution at all, without any prior notice to tax purchaser, the purchaser still receives a refund of the amount paid at tax sale. Undoubtedly, County, City and Corporate defendants would be quick to argue that each of them have standing to challenge the validity of SASS's Tax Sale, while at the same time arguing that the statute's intent was to 'carve-out' tax purchasers class and deny that class any standing to petition for recovery on a voided tax sale and/or seek monetary relief in the way of a refund, and/or other equitable or declaratory relief.

SASS having purchased and paid good and valuable consideration for and is the owner and holder of the Tax Lien that state and federal statutes view, with few exceptions, as a 'superlien' on the Property. <sup>6</sup>Certainly, on that basis only, SASS should be deemed to have a colorable and

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"Generally, when the redemption period passes, a tax sale 'becomes valid, and the title relates back to the date of the sale and takes precedence over any mortgage . . . executed by the owner during such period of redemption.'" Hancock Bank v. Ladner, 727 So. 2d 743, 746 (Miss. Ct. App. 1998) (quoting Russell Inv. Corporation v. Russell, 182 Miss. 385, 178 So. 815, 816 (1938)). "[A] conveyance to a purchaser at tax sales by the chancery clerk, after the period of redemption under law, vests in the purchaser a perfect title with the immediate right of possession." Delta Hous. Dev. Corp. v. Johnson, 2008-CA-02127-COA, (Miss. Ct. App. 2010). 26 U.S. CODE § 6323(b)(6)(A) and Miss. Code § 27-35-1, the lien being asserted by the United States is not valid against and is subordinated and subject to SSC's Tax Lien and that SSC's tax lien primes and is superior to the lien(s) asserted by the United States. MS Code § 27-35-1 provides, in relevant part, that tax liens ". . .shall be entitled to preference over all judgments, executions, encumbrances or liens whensoever created . . .

protected property interest which, under Mississippi's liberal standing requirements, should give it Standing to pursue and have its action heard on the merits.

There is no principled basis for the Defendants 's conclusion that SASS lacks standing to pursue its claims. Furthermore, as SASS lacks any other reasonable avenue of redress, SASS argues, inter alia, that if the lower court's ruling is allowed to stand, it would be tantamount to a deprivation of its property without due process and constitute a clear violation of the Due Process Clause of the Fourteenth Amendment.<sup>78</sup>

Tax sales necessarily implicates state and federal constitutional concerns and protections for purchasers, owners, and lienors alike. The Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Similarly, the Mississippi Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." M.S. CONST. art. 3, § 14. The initial step in analyzing a procedural or substantive due process claim is determining whether there has been a deprivation of a liberty or property interest at the hands of the government. *Pruett v. Dumas*, 914 F. Supp. 133, 137 (N.D. Miss. 1996). Interest is not synonymous with title. To illustrate, "[a] mortgagor in possession, and a purchaser holding under a deed defectively executed, have, both of them, absolute, as well as insurable interests in the property, though neither of them has the legal title." *Hough v. City Fire Ins. Co.*, 29 Conn. 10

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<sup>7</sup> The Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law." The Due Process Clause of the fourteenth amendment requires the government to provide the owner "notice and opportunity to for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)

(1860). The fundamental requirement of due process is simply the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Tax sales implicate constitutional concerns for purchasers, owners, and lienors. As such, there must be a forum to address issues stemming from tax sales. One of those issues is the effect of the clerk’s failure to properly notice owner(s) and/or lienor(s) of the impending expiration of the redemption period. The tax sale purchaser must be able to initiate litigation to set aside a *void* tax sale resulting from the clerk’s failure to provide proper notice and seek a refund and any other relief authorized by statute. SASS obtained a tax deed in accordance with Miss. Code Ann. § 27-45-23 and retains a lien therein. Accordingly, it clearly has an interest in the property, although title issues remain, that it acquired at the tax sale, and it is entitled to initiate litigation regarding the same.

The Appellees’ reliance on language, such as that in *Brown v. Riley*, 580 So. 2d 1234, 1237 (Miss. 1991), stating that “[s]tatutes dealing with land forfeitures and delinquent taxes should be strictly construed in favor of landowners” is misplaced. This language typically appears in cases in which a landowner, who is also a taxpayer, seeks to set aside a tax sale based on improper notice, and it reflects a public policy aimed at establishing a minimum objective standard of due process to prevent forfeiture . *Carmadelle v. Custin*, 208 So. 2d 51, 55 (Miss. 1968). The quoted language is no different than the construction of other statutes governing taxation, except in the instant case, where the statutory noticing requirements set forth *objective* standards or benchmarks against which every tax sale is measured and must overcome to be valid; failing that, a tax sale is deemed void, as a matter of law. *Eidman v. Martinez*, 184 U.S. 578, 583 (1902).

Further, contrary to the Appellees’ contention, the legislature did not intend to reserve the ability to utilize the court system to set aside a void tax sale to property owners. In fact, the

statutory framework merely provides that failure to comply with notice requirements voids a tax sale, and it does not specifically identify potential parties who could initiate legal action to set aside a void tax sale. The statutory framework no more authorizes suits by landowners than it does suits brought by tax sale purchasers. It is unnecessary for it to do so, and the fact that one party has authority to initiate suits of a certain nature does not necessarily preclude another party from doing so where the requirements of standing are otherwise satisfied. *See City of Belmont v. Mississippi State Tax Com'n*, 860 So. 2d 289, 296-97 (Miss. 2003).

Based on the foregoing, it is clear that SASS, a tax sale purchaser, has standing to set aside a void tax sale where the clerk's failure to follow the statutorily mandated noticing requirement prior to the expiration of the two-year redemption period and maturity, *forfeiture*, of the property to a tax purchaser. Through its arguments, Defendants' attempt to conjure a subjective interpretation of the statute by arguing that tax purchasers do not have a cognizable financial, property and ownership interest at stake and, although expressly subject to the statute, they are not entitled to any due process nor do they have any standing to challenge the validity of their own tax sale or seek a refund thereon. It is immaterial whether the statute explicitly delineates who can bring suit as long as the requirements of standing are satisfied. Any other conclusion would contravene established principles of equity, be tantamount to denial of due process, both substantive and procedural, to SASS, and rise to the level of a taking. Aside from its suit to set aside a void tax sale, there is no other way for the SASS and other similarly situated tax sale purchasers to obtain the relief to which it is entitled. Public policy considerations lend further support. For this purpose, the competing interests of political subdivisions of the State of Mississippi, real property owners, and tax sale purchasers must be evaluated. *Ad valorem* taxes are often a significant source of revenue for cities, counties, and school districts. In the absence

of a meaningful opportunity to seek judicial intervention following a void tax sale resulting from the clerk's failure to provide required notice, the pool of potential buyers at tax sales may decrease, resulting in less revenue for governments and less incentive for landowners to pay their taxes on a timely basis. In some instances, tax sale purchasers may even elect to abandon property purchased at a tax sale. This holds the potential to result in significant revenue losses for political subdivisions. In addition, permitting tax sale purchasers to initiate litigation to set aside void tax sales would promote greater compliance with the requirements for lawful tax sales. As this is the case, other jurisdictions allow tax sale purchasers to do so. In sum, the Appellant's position is in accordance with the plain language of the statute, equitable considerations, and public policy.

**3. CAVEAT EMPTOR DOES NOT BAR A TAX SALE PURCHASER FROM SEEKING REFUND ON ITS VOID SALE**

In the lower court's proceedings several defendants posited that the doctrine of *caveat emptor* precluded SASS from demanding a refund, despite the void nature of its sale. However, in tax sale law, *caveat emptor* means only that a purchaser cannot pursue damages against taxing authorities that failed to follow the statutory noticing requirements; and in support offered *Davis v. Estate of Tiblier*, 107 So.3d 181 (Miss. Ct. App. 2013).

In *Davis* the chancellor, *after the parties has been afforded the opportunity to propound discovery, conduct depositions, brief and argue the case on its merits*, the court granted summary judgment voiding a tax sale due to the chancery clerk having failed to comply with the notice provisions of Miss. Code Ann. §27-43-3 (Rev. 2010). The decision was affirmed on appeal, with the court holding that “[a]ny deviation from the statutorily mandated procedure renders the sale void.” *Id.* at \*4-5 (quoting *Reed v. Florimonte*, 987 So. 2d 967, 973 (Miss. 2008)). On the other extreme and wholly distinguishable from *Davis*, stands SASS, its discovery stayed by the court

and denied the opportunity to proceed to have its case and claims heard and adjudicated on the merits and have its complaint dismissed on the premise that it laced standing to bring its action.

Totally disregarding the holding in *Davis*, defendants direct the court's attention to the *dicta* appearing at the end of the case.

The rule of caveat emptor applies with all its force to a purchaser at [a tax sale], who pays his money voluntarily, with the expectation of procuring the property at a grossly inadequate price, or of securing an exorbitant profit upon the investment in case the property is redeemed. Knowing that tax titles are to some extent uncertain, and that they usually depend upon numerous contingencies, he engages his means in speculation, and assumes the liability of having his title prove to be worthless[.]

*Davis v. Tiblier*, 2013 Miss. App. LEXIS 37, \*7-8 (quoting *Foster v. Malberg*, 119 Minn. 168 (Minn. 1912)).

What defendants failed to mention was that in *Davis*, the issue of caveat emptor only came into play because SASS argued that she was blameless for the taxing authorities failure to comply with the statutory notice provisions, and that she was entitled to recover damages, vis a vis, her attorney fees, from the taxing authority due to their errors and oversights. In turn, in specifically addressing and denying her claim for damages, damages, vis a vis, her attorney fees. In denying her claim, the court noted the above "caveat emptor" language to which defendants cling so desperately.<sup>1</sup>

Also quoted in *Davis* was *Foster v. Malberg*. *Foster* involved a flawed pre-tax sale notice that caused Foster's tax sale to be voided. Aggrieved, *Foster* filed a suit directly against the county auditor seeking *damages* against the auditors bond based on failure to give proper

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<sup>1</sup>The legal philosopher Gulian C. Verplanck stated that *caveat emptor* "is one of that tribe of anonymous Latin maxims that infest our law.... [T]hey fill the ear and sound like sense, and to the eye look like learning; while their main use is to supply the place of either or both." *An Essay on the Doctrine of Contracts* 218 (1825).

notices. In denying relief, the court referenced the timeworn adage that a tax sale purchaser has no remedy against the governmental entity, “independent of a statutory provision affording him relief.” *Foster*, 119 Minn. 168, 172.

Indeed, the *Foster* court’s reference to caveat emptor – quoted in part by the Mississippi court in *Davis*, and cited in the instant case by Defendants – only went as far as shielding the taxing official from direct action by the tax sale purchaser. In fact, the *Davis* court left out the final passage of the *Foster* quote, the complete version of which is:

The rule of caveat emptor applies with all its force to a purchaser at [a tax sale], who pays his money voluntarily, with the expectation of procuring the property at a grossly inadequate price, or of securing an exorbitant profit upon the investment in case the property is redeemed. Knowing that tax titles are to some extent uncertain, and that they usually depend upon numerous contingencies, he engages his means in speculation, and assumes the liability of having his title prove to be worthless; **and in that event he cannot, in the absence of a statute, recover the amount he has paid, in an action against the county.**

*Foster v. Malberg*, 119 Minn. 168, 172 (emphasis added) (internal citations omitted).

In both *Davis* and *Foster*, the purchaser was complaining (even suing) over perceived damages caused by an official’s transgression related to tax sale notices. But the only recovery available to such a purchaser – if any – would be provided by statute. See *State Bank of Mora v. Billstrom*, 210 Minn. 497 (Minn. 1941) (explains *Foster, supra*, as “prevent[ing] purchaser from recovering the value of the land he failed to get.”)

The essence of caveat emptor in all of these cases is that it represents the idea that a tax sale purchaser whose sale is void due to lack, without limitation, failure of notice or otherwise, cannot expect to recover *damages* for the loss of potential value in the land, or the costs of confirming or defending title. However, the doctrine does nothing to prevent or limit a purchaser from pursuing statutory remedies made available in his state. In Mississippi, there are such remedies. Thus, the distinction – even in the face of caveat emptor – that a statutory remedy is

available to a tax sale purchaser whose title is void due to failure of notice, makes all the difference in the instant case.

Miss. Code Ann. § 27-43-3 expressly states that “[s]hould the clerk inadvertently fail to send notice . . . then such sale shall be void and the clerk shall not be liable to the purchaser or owner upon refund of all purchase money paid.” Section 27-43-11 is to similar effect regarding refunds from taxing authorities where a tax sale is invalidated as to a lienor. Mississippi law provides additional remedies through Miss. Code Ann. § 27-45-27(1): “The amount paid by the purchaser of land at any tax sale thereof for taxes . . . and interest [thereon] . . . and all expenses of the sale and registration, thereof shall be a lien on the land in favor of the purchaser . . . if the taxes for which the land was sold were due, although the sale was illegal on some other ground. The purchaser . . . may enforce the lien by bill in chancery, and may obtain a decree for the sale of the land in default of payment of the amount within some short time to be fixed by the decree.” See, *Rebuild America, Inc. v. Norris*, 64 So.3d 480, 482 (Miss. 2011) (*en banc*) (briefly discussing requirement of separate claim by purchaser to effect remedy under Section 27-45-27(1)). SASS has elected its remedy to seek a refund under either or both Sections 27-43-3 and 27-43-11.

The cases where *caveat emptor* blocks a purchaser’s efforts usually involve an owner seeking to void a tax sale or deed. In this case there is no owner seeking application of the doctrine in order to remove the void tax sale cloud from the owner’s title. It is worth pausing for a moment to reflect on the relatively fair, if fine-tuned, provisions of Mississippi law regarding tax sales. The requirements for Chancery Clerks to give statutory notice, while apparently straightforward, are obviously much more difficult in practice than what appears in Section 27-43-3 facially suggests – otherwise there would not be hundreds of cases where the courts have

voided defective tax sales and restored title to the owner.<sup>9</sup>

The refund procedures under Sections 27-43-3 and 27-43-11 reflect an underlying policy that promotes the refund of purchase monies, and other itemized amounts, in appropriate cases. Together with Section 27-45-27(1), these sections treat the four “parties” to the tax sale statutory “contract” with considerable even-handedness. If the Clerk is negligent in its duties to supply proper notice, a tax sale deemed void; in which case, the Clerk is subject to refund claims pursuant to a court’s judgment. In turn, the disseized tax sale purchaser is given an election of remedies, he may claim a refund or alternatively, impose a lien against the land. There is no suggestion in the statutes or case law that the purchaser, through these remedies, will procure a windfall.

The position that defendants would have this court take during the course of this litigation would utterly undermine all of these basic statutory principles, leaving SASS without valid title, or refund; while on the other hand allowing taxing authorities, the very ones entrusted and charged with the keys of “due process” with no motivation to diligently exercise its duties. This is not the result contemplated by Mississippi’s statutory regime governing tax sales.

### **III. NO STATUTE OF LIMITATION HAS TOLLED AGAINST SASS’S CLAIMS**

Defendants have contended that the three-year “catch-all” limitations statute applies and that SASS filed its declaratory complaint five days late.<sup>10</sup> However, the City’s assertion was

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<sup>9</sup> The defendant’s relied upon the common law doctrine that a purchaser at the tax sale was governed by the rule of caveat emptor (“Let the buyer beware”), and was precluded from recovering the price from the tax officials and the true owner. See *Parsons v. Marshall*, 243 Miss. 719, 139 So.2d 833 (1962); *Davis v. Tiblier*, 107 So. 3d 181 (Miss. Ct. App. 2013). That rule, however, applies only in the absence of statute. In this State, Miss. Code Ann. § 27-43-11 and Miss. Code Ann. § 27-45-27 substantially modify the common law rule.

<sup>10</sup> This argument is based on the sale having been held on August 25, 2008, and the Complaint

unadorned by any authority and the County Defendant's did little better citing only *Alexander v. Taylor*, 928 So.2d 992 (Miss. App. 2006). In that case, Judge Southwick, writing for the Court, addressed a situation in which tax sale purchasers were reimbursed the delinquent taxes they had paid through the redemption process, but had paid another year's taxes and had not been reimbursed. In that case, the tax sale purchasers sued the clerk for failing to reimburse for the second year's taxes. Judge Southwick characterized the action as a "suit on the clerk's bond for failure to comply with a statutory duty . . . [and] concluded that there was no specific statute of limitations for a suit to enforce a public official's statutory duty and applied the catch-all, (*Alexander* at 998-99, ¶ 26).

This case involves a claim for declaratory judgments as to the validity of the tax sale and the true owner of the real property in order for the parties to be left as they were before the tax sale. It does not involve any claim for money judgments against any persons for their failures as public officials. Moreover, the case is not a simple claim for reimbursement because of an accidental overpayment or a recalcitrant clerk's failure to execute a statutory duty of reimbursement. Rather, the case turns on the Clerk's omissions to act and carry out duties to render notice of expiry of the redemption period to the "reputed owner" in 2010.

For purposes of this memorandum, SASS agrees that none of the various provisions of Chapter 1 of Title 15 relating to real property appear to expressly govern a suit for declaratory judgment to void a tax sale by a tax sale purchaser. Hence, the three-year default statute, Miss. Code Ann. § 15-1-49 appears to apply. The real question, then, is when did SASS's right to demand declaratory judgments and seek refund accrue?

The Defendants appear to argue that SASS's right to sue accrued, if at all, when it bought

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having been filed on August 30, 2011.

at the auction in 2008. Inasmuch as the tax sale did not become void, under the facts that must be deemed true in this case, then sometime in late 2010 when the Clerk failed to publish notice or supply any of the three types of notice at all to Marshall and DeSoto Development, then its right to seek a declaratory judgment that the sale was void could not have begun to accrue until then.

Generally, under Mississippi law a “cause of action” does not accrue under Section 15-1-49 until “it comes into existence as an enforceable claim, that is, when the right to sue becomes vested.” *Weathers v. Metropolitan Life Ins. Co.*, 14 So.3d 688, 692, ¶ 14 (Miss. 2009). Accrual in this case is somewhat unusual since it turns on omissions rather than actions, but the general time period during which these omissions occurred is all that need be established. As the well-pleaded facts of the Complaint make clear, the Clerk failed to carry out the Clerk’s duties under Section 27-43-3 to give notice of the redemption period’s expiration in 2010. This suit, filed in August of 2011, was timely under Section 15-1-49.

Alternatively, in *Fiddle v. Shannon*, 834 So.2d 39, 46-47, ¶¶ 28-29 (Miss. 2003), the Supreme Court held that for a claim for a refund of erroneously paid taxes, a tax sale purchaser’s claim did not accrue until the purchaser’s bank actually pays the draft and debits the purchaser’s account. While it is within the well-pleaded facts of the Complaint that SASS paid its bid by check dated August 25, 2008, when the check was actually paid by SASS’s bank is not within the scope of the pleadings.

While SASS has already averred by way of its February, 2013, memorandum (R. 507-527) that it knows the check was not honored until early September, 2008, that is a matter outside the pleadings that will have to await discovery should the Defendants fail to be granted a dismissal on the pending motions and seek another bite at the prescriptive period apple. However, the tax sale in that case was void and no title was conveyed to Byrd. Under these

circumstances Byrd could not avail herself of the statute of limitations because she had received no title the defects of which could be cured by the running of the limitations period.

Similarly, in *Pittman v. Currie*, 414 So.2d 423 (Miss. 1982), the Supreme Court was confronted with a claim by Currie that a tax sale was void over 31 years after the tax sale. The State contended that the claim should be barred pursuant to Miss. Code Ann. § 15-1-17, which provides, in pertinent part, that “[t]he owner, mortgagee or other person interested in any land which has been sold or forfeited to the state for delinquent taxes may bring a suit or action to cancel the title of the state, or its patentees, or to recover said land from the state, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes within two years after the period of redemption shall have expired . . .”

The *Currie* Court observed that it had “repeatedly held that this section is not applied when there is a void tax sale and the tax sale purchaser has not taken possession. *Russell Inv. Corp. v. Russell*, 182 Miss. 385, 416, 182 So. 102, 106 (1938), states that the two-year statute is: ‘purely a statute of limitation and does not take away any vested rights but fixes a reasonable period of time in which they may be asserted. It leaves the former owner the right to sue and have the sale declared void because of such defects, irregularities and illegalities.’” *Id.* at 428.

Given this treatment of other statutes of limitations applicable to tax sales, precedent supports SASS’s position that the Supreme Court of Court of Appeals of Mississippi would also find that Section 15-1-49 is not applicable to a void tax sale. And such a holding would be consistent with other states views of how limitations periods do not apply where the tax sale, and any subsequent conveyances, are void and convey nothing because nothing was owned to begin with. See, e.g., *St. John’s Full Gospel Baptist Church v. Tax* 207, 819 N.W.2d 426 (Iowa App. 2012) (Iowa law provides that three year limitations period does not apply to void sale where

there was failure to give required notice of redemption period).

Finally, the ready analogy to void tax sales, treated as a nullity never having happened, are void judgments. Under Rule 60(b), Miss.R.Civ.P., a person may directly attack a judgment that is void must be filed “within a reasonable time.”

#### **IV. CORPORATE DEFENDANTS NEVER ANSWERED COMPLAINT, AND ARE NOT PROPERLY JOINED IN THE COUNTY/CITY MOTIONS TO DISMISS**

Throughout the proceedings in Chancery Court, the Corporate Defendants participated in substantive proceedings, even though those parties made a limited appearance for the sole purpose of filing a Miss. R. Civ. P. 12(b)(6) motion to dismiss. It was not the corporate defendants’ 12(b)(6) motion ultimately granted by the chancellor.

Examples of these defendants’ actions included filing a Reply in Support of Motion to Dismiss (R. 625-628). In the Reply, the Corporate Defendants plowed directly into the heart of this case, arguing various aspects of tax sale notice, standing and statutes of limitation. All of these arguments are in the nature of affirmative defenses. The problem is that the Corporate Defendants never asserted any affirmative defenses, and have not answered the Complaint. Further, Corporate Defendants never answered discovery while they awaited the Chancery Court’s decision on the 12(b)(6) motion. Accordingly, no discovery was conducted.

Prior to the chancellor’s entry of the final order, (R. 687-688), the Corporate Defendants entered a stipulation, (R. 683-686), that preserved Appellant’s objections to the joinders. However, those objections were not addressed in a subsequent hearing, and Appellant requests that the Court find that the Corporate Defendants were not properly joined in the County/City motions, and that the dismissal did not reach the Corporate Defendants.

## CONCLUSION

For the reasons set forth herein, the Appellant respectfully requests that this Court reverse the decision of the DeSoto Chancery Court and remand this case for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Timothy Mitchell Kalom, counsel of record for SASS MUNI-V, LLC, do hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to the following persons:

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