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July 3, 2019

Mr. James Brill
White Pines Community Alliance

Re: July 2, 2019 FOIA Request

Dear Mr. Brill:

I am pleased to help you with your July 2, 2019 Freedom of Information Act ("FOIA"). The Village of Bensenville received your request on July 2, 2019. You requested copies of the items indicated below:

> *"Any document submitted, written or received related to the case of Gina Mellenthin vs Frank DeSimone, #2018CH001065, between June 1, 2019 and this present date that have not already been sent to the White Pines Community Alliance in response to previous FOIA requests."*

After a search of Village files, the following information was found responsive to your request:

1) Plaintiffs' Response to Defendant' Motion to Dismiss Regarding 18CH001065 Dated July 2, 2019. (9 pgs.)
2) Notice of Filing Regarding 18CH001065 Dated July 2, 2019. (2 pgs.)

These are all the records found responsive to your request.

Do not hesitate to contact me if you have any questions or concerns in connection with this response.

Very truly yours,

Corey Williamsen
Freedom of Information Officer
Village of Bensenville

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT
DUPAGE COUNTY, WHEATON, ILLINOIS

GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, PHIL ADCOCK, AND GARRY GARDNER Plaintiffs, v.	No.: 18 CH 001065
FRANK DESIMONE, ROSA CAMONA, ANN FRANZ, ANGIESZKA JAWORSKA, MCLANE LORAX, NICHOLAS PANICOLA, JR., AND ARMANDO PEREZ Defendants.	Judge Bonnie Wheaton

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

NOW COME, the Plaintiffs, GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, PHIL ADCOCK, and GARRY GARDNER, by and through their attorneys, Matton and Werwas, P.C., and present their Response to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, and in support thereof state as follows:

INTRODUCTION

This matter stems from a Breach of Fiduciary Duty claim plead by GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, PHIL ADCOCK, and GARRY GARDNER (collectively "Plaintiffs"), who are unincorporated property owners and taxpayers within the unincorporated Village of Bensenville. Plaintiffs allege that Defendants, which includes the President of the Village and its Trustees, each breached his or her fiduciary duties of loyalty, good faith, and independence, since approximately $300,000.00 contributed to the Unincorporated Utility Fund (hereinafter the "Fund") between 2013 and 2017 is

missing. This is evidenced by the receivables showing zero dollars during 2013 to 2017. On February 21, 2019, Plaintiffs filed their Amended Complaint. On April 11, 2019, Defendants filed their Section 2-615 and 2-619 Motion to Dismiss Plaintiff's Amended Complaint. The Plaintiffs now respond to Defendants' Motion.

LEGAL STANDARDS

A motion to dismiss filed under section 2-619 admits the legal sufficiency of the claim, but asserts affirmative matters outside of the pleading that defeats the claim. *Wallace v. Smith*, 203, Ill. 2d 441, 447 (2001). Subsection (a)(9) permits the dismissal of an action where "the claim asserted against the defendant is barred another affirmative matter avoiding the legal effect or of defeating the claim." 735 ILCS 5/2-619(a)(9). An "[a]ffirmative matter" is some kind of defense "*other than a negation of the essential allegations of the plaintiff's cause of action.*" *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d 112, 115 (1993). (emphasis added). Where the non-moving party's well-pleaded facts and inferences drawn therefrom raise the possibility that the party raising the issue will prevail, the motion to strike should not be granted. Long v. Kemper Life Insurance Co., 553 N.E.2d 439 (1990).

A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615) attacks the legal sufficiency of a pleading by alleging defects on the face of the complaint. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). When ruling on a section 2-615 motion, the relevant question is whether the allegations in the complaint, construed in a light most favorable to the nonmoving party, are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). In ruling on a section 2-615

motion to dismiss, the court must accept all well-pleaded facts, as well as any reasonable inferences drawn therefrom, as true. *Buzzard v. Bolger*, 117 Ill. App. 3d 887, 889-90 (1983). "Where the well-pleaded facts of a complaint raise the possibility that the party asserting them will prevail, the defense should not be stricken." *International Insurance Co. v. Sargent & Lundy*, 242 Ill. App. 3d 614, 631 (1993). As a general rule, a trial court should exercise its discretion liberally in favor of allowing amendments if doing so will further the ends of justice, and it should resolve any doubts in favor of allowing amendments. *Alpha Sch. Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 748 (1st Dist. 2009). The most important question is whether amendment will be in furtherance of justice and amendment of defective pleadings should be permitted unless it is clear that the defect cannot be cured thereby. *Thomas v. Davenport*, 196 Ill. App. 3d 1042, 1046 (1st Dist. 1990).

ARGUMENT

A. Plaintiffs have standing to bring this action.

A party with an injury in fact to a "legally cognizable interest" has standing to bring a claim for that injury. *Village of Chatham v. County of Sangamon*, 216 Ill.2d 402, 419, 297 Ill.Dec. 249, 837 N.E.2d 29 (2005). The injury, threatened or actual, must be "(1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Wexler v. Wirtz Corp.*, 211 Ill.2d 18, 23, 284 Ill.Dec. 294, 809 N.E.2d 1240 (2004). Under Illinois law, a plaintiff need not allege facts establishing standing. *Wexler v. Wirtz Corp.*, 211 Ill.2d 18, 22, 284 Ill.Dec. 294, 809 N.E.2d 1240 (2004); *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago,*

189 Ill.2d 200, 206, 244 Ill.Dec. 26, 724 N.E.2d 914 (2000). Rather, it is the defendant's burden to plead and prove lack of standing. *Chicago Teachers Union,*189 Ill.2d at 206, 244 Ill.Dec. 26, 724 N.E.2d 914; *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 494, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988). Where standing is challenged by way of a motion to dismiss, a court must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in the plaintiff's favor. *Schlenker,* 209 Ill.2d at 461, 283 Ill.Dec. 707, 808 N.E.2d 995.

It has long been the rule in Illinois that citizens and taxpayers have a right to enjoin the misuse of public funds, and that this right is based upon the taxpayers' ownership of such funds and their liability to replenish the public treasury for the deficiency caused by such misappropriation. *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160, 139 N.E.2d 227, 229 (1956). The misuse of these funds for illegal or unconstitutional purposes is a damage which entitles them to sue. *Krebs v. Thompson*, 387 Ill. 471, 56 N.E.2d 761; *Fergus v. Russel*, 270 Ill. 304, 110 N.E. 130. The taxpayer must allege that the acts complained of would result in financial loss or other injury to himself or the taxpayers as a whole, through increased taxation, or in some financial injury or other harm to the governmental body involved. *Lynch v. Devine*, 45 Ill. App. 3d 743, 749, 359 N.E.2d 1137, 1141 (1977).

The mere fact that the same kind of damage is alleged for multiple property owners does not preclude the damage from being separate and distinct for each owner. *Davis v. Dyson*, 387

Ill. App. 3d 676, 690, 900 N.E.2d 698, 711 (2008). Ownership of individual property is separate, and each individual property owner is therefore entitled to relief. *Id.*

Defendants argue in their Motion that the Plaintiffs do not have any representational relationship with any named Defendant, nor was this action brought as a class action pursuant to Section 2-801 of the Illinois Code of Civil Procedure. Defendants further allege that one of the Plaintiffs, Garry Gardner, has not paid the Village for any water and sewer services at any time, including the relevant period between 2013 and 2017. However, the Defendants fundamentally lack understanding of what is required for a resident payers to bring an action against a municipality in which he resides. It is irrelevant whether any Plaintiff has contributed any amount of money to a Village utility or service. The monies which were owed to the Fund's receivables were provided with revenue raised by the various funds paid by residents of the Village. Under the rulings of *Wright* and *Thompson*, the Plaintiffs are entitled to sue for the misuse of public funds, and therefore have standing in this action.

Furthermore, the law only requires that each Plaintiff's injury be separate and distinct, not unique. *Davis v. Dyson*, 387 Ill. App. 3d 676, 690, 900 N.E.2d 698, 711 (2008). That is the case here. Each Plaintiff is similarly situated as they are all resident-payers into the Fund, who have the longstanding right under Illinois law to bring suit to enjoin the misallocation of funds. *See Wright*, 10 Ill. 2d 157 at 160. Thus, Defendants' claim that Plaintiffs do not have standing is without merit and should be disregarded.

B. Plaintiffs' Amended Complaint properly names Defendants in their official capacity.

Defendants argue that when a suit is brought to enjoin a public official from taking some action, that official must be sued in his official capacity, not in his individual capacity. As a result, Defendants contend in their Motion that Plaintiffs have sued each named Defendant in his or her individual capacity and not in his or her official capacity, President and Trustee, respectively. However, even before any of the allegations in the Amended Complaint are set forward, the Plaintiffs name each Defendant in his or her official capacity. *See* Amended Complaint ¶¶ 1-7. Each Defendant who is a named party in this action is described in his or her official capacity. Therefore, Defendants' argument fails as Defendants are named in the Amended Complaint in their official capacities.

C. The Amended Complaint sufficiently pleads the elements necessary for issuance of an injunction.

1. Plaintiffs have plead a clear, protectable interest and an irreparable injury.

Evidence need not be laid out in the complaint, only the ultimate fact(s). *People ex rel. Fahner v. Carriage Way W., Inc.*, 88 Ill. 2d 300, 310, 430 N.E.2d 1005, 1009 (1981). The trial, not the pleadings, is the proper place to look for evidence of how and when the illegal conduct took place. *Id.* Also, Plaintiffs also need not set out every evidentiary fact in their Complaint, only the ultimate facts. The pleading must contain enough facts that lead to an inference of a plausible claim for relief, which is the case in the Plaintiff's Amended Complaint as discussed *supra*. *See Fahner v. Carriage Way W., Inc.*, 88 Ill. 2d 300 at 310.

The Defendants move to dismiss the Amended Complaint pursuant to 2-615 because they deem the Plaintiffs' pleaded injury as "conclusory." However, the Amended Complaint alleges that there is at least $300,000.00 missing from a public utility fund. The injury sustained by Plaintiffs is not merely the lost monies, but the entire economic loss of the Village's water infrastructure's now inability to be improved. Plaintiff's are not praying that the money be returned to them in their capacity as residents, but they seek to enjoin the public officials of the Village to replenish the Fund.

Moreover, in direct contravention to the Defendant's argument, the injury is in fact irreparable without the Court's issuance of an injunction. Again, the injury is separate and distinct, albeit not unique: the resident payers detrimentally relied on the Village's President and Trustees to use these contributed monies to improve an aspect of the Village's infrastructure, and thus improve the livelihood, health, and safety of the residents of unincorporated Bensenville. No remedy at law would rectify this injury as it is irreparable, and thus the only remedy appropriate would be an injunction.

2. Plaintiffs adequately plead a breach of fiduciary duty claim.

To state a claim for breach of fiduciary duty, it must be alleged and ultimately proved: (1) that a fiduciary duty exists; (2) that the fiduciary duty was breached; and (3) that such breach proximately caused the injury of which the party complains. *Lawlor v. N. Am. Corp. of Illinois*, N.E.2d 414, 433 (2012). Illinois courts have repeatedly affirmed the principle that public officials are trustees with a fiduciary duty to the people. *Chicago Park District v. Kenroy,*

Inc., 78 Ill.2d 555 (1980); *Brown v. Kirk*, 64 Ill.2d 144 (1976); *City of Chicago ex rel. Cohen v. Keane*, 64 Ill.2d 559 (1976). A public official owes to his principal duties of absolute loyalty and fidelity, and occupies a position of the highest public trust. *See People v. Bordeaux*, 242 Ill. 327 (1909); *County of Cook v. Barrett*, 36 Ill.App.3d 623 (1975).

As applied to the Plaintiff's Amended Complaint, all of these elements are properly plead. Each Defendant was named in his or her official capacity. Under the ruling in *Chicago Park District*, public officials are trustees that owe a fiduciary duty to the people, therefore the fiduciary duty exists. *Chicago Park District.*, 78 Ill.2d at 555. Second, that duty was breached since approximately $300,000.00 owed to the Fund is missing, and Defendants are solely in control of this account, which leaves them wholly responsible for the Fund's monies and contributions. Third, this breach proximately caused the injuries of the Plaintiffs, since increased taxation is a proximate injury of the Defendant's breach that caused missing tax revenues owed to a public fund for capital improvements to the Plaintiffs' water infrastructure, as well as the decrease in livelihood, health, and safety of the residents of Bensenville that would result from not improving the water infrastructure.

WHEREFORE, Plaintiffs, GINA MELLENTHIN, KURT IGLEMAN, CELESTE SHAW, PHIL ADCOCK, and GARRY GARDNER, pray that this Court enter an Order denying Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, and for any and all other relief this Court deems just and proper.

Respectfully submitted,

/s/ Keith H. Werwas

Keith H. Werwas

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT
DUPAGE COUNTY, WHEATON, ILLINOIS

GINA MELLENTHIN Plaintiff, v. FRANK DESIMONE, ROSA CAMONA, ANN FRANZ, ANGIESZKA JAWORSKA, MCLANE LORAX, NICHOLAS PANICOLA, JR., AND ARMANDO PEREZ Defendants.	No.: 18 CH 001065 Judge Marian Emily Perkins Cal. 62

NOTICE OF FILING

To: Richard F. Bruen, Jr.
Montana & Welch, LLC.
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Please take notice that on July 2, 2019 there will be filed with the Clerk of the Circuit Court of DuPage County, County Department, Chancery Division, the Plaintiff, Gina Mellenthin's, Response to Plaintiff's Motion to Dismiss.

MATTON and WERWAS, P.C.

/s/ Keith H. Werwas

By: _____
Keith H. Werwas

CERTIFICATION OF SERVICE AND MAILING

I, Michael A. Ciulla, a non-attorney, under penalties as provided in 735 ILCS 5/1-109, certify that I caused to be served a copy of the above Notice, together with the referenced Motion and its attachments to be served upon those persons delineated above by email using the i2file e-file system on July 2, 2019.

Respectfully submitted,

/s/ Michael A. Ciulla

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