

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
PROBATE DIVISION

ARTHUR P. DUECK, M.D., <i>et al.</i> ,)	CASE NO. 2018ADV234080
)	
Plaintiffs,)	JUDGE ANTHONY J. RUSSO
)	
v.)	
)	
JOSEPH KERRIGAN, TRUSTEE, CLIFTON)	<u>PLAINTIFFS' BRIEF IN OPPOSITION</u>
PARK TRUST, <i>et al.</i> ,)	<u>TO THE TRUSTEES' MOTION TO</u>
)	<u>DISMISS</u>
)	
Defendants.)	

I. INTRODUCTION

Plaintiffs Arthur P. Dueck’s, Paul A. Bjorn’s, Nancy Binder’s, and William Keller’s Second Amended Complaint (“SAC”) relies on the most basic of trust law propositions: the Defendant Clifton Park Trustees (“Trustees”)¹ can act only within the power vested in them by the terms of the Clifton Park Trust (“Trust”). This case is based on the Trust’s terms, the sole conveyor of rights to the beneficiaries of the Trust, and Plaintiffs seek to enforce its terms and enjoin the Trustees’ breaches of fiduciary duties.

The Trustees for their part seek to act outside their authority in the Trust and grant members of The Clifton Club Company (“Club”) who are not beneficiaries of the Trust rights to use Trust property that are equal to and commensurate with the rights of the Clifton Park lot owners – the sole beneficiaries of the Trust. The Eighth District Court of Appeals has now decided that the members of the Club who are not residents of Clifton Park (“Club Members”) are not beneficiaries of the Trust, have no legal rights under the Trust, do not have equal or commensurate rights as the beneficiary lot owners, and that the Trust document is the sole

¹ The Defendants are Joseph Kerrigan, Mary Ellen Fraser, Robert Frost, Warren Coleman, and Ryan Meany.

conveyor of rights to beneficiaries. *Dueck v. Clifton Club Co.*, 8th Dist. Nos. 103868 and 103888, 2017-Ohio-7161, ¶¶ 1, 41, 67, 125-126, 130-131. Despite these clear rulings, the Trustees have enacted rules for use of the Clifton Park Beach and related Beach Property (all Trust property to which only Clifton Park lot owners have a right of use) that give 224 Club Members equal rights of use and status equal to and commensurate with the actual Trust beneficiaries, thereby granting the Club—a single beneficiary—224 times the right of access that an individual resident lot owner beneficiary has. There is absolutely no authority in the Trust for the Trustees’ actions—and they have not been able to point to any language giving them that authority despite repeated requests to do so.

For the reasons set forth herein, the Court should deny the Trustees’ Motion to Dismiss Count I of the SAC because the issues here are not barred by collateral estoppel and the Plaintiffs have pled a claim for breach of the Trustees’ fiduciary duty to administer the Trust according to its terms and duty of loyalty to the lot owners – the sole Trust beneficiaries. Further, the Trustees’ motion pursuant to Rule 12(B)(7) should also be denied because (1) it is based on the false premise that the Plaintiffs’ SAC is brought under R.C. 2721.12 for a declaratory judgment—it is clearly a breach of fiduciary duty case—and (2) the Trustees cannot show the other lot owners are necessary and indispensable parties under Ohio Rules of Civil Procedure Rule 19(A)(2).

II. FACTUAL BACKGROUND

On March 25, 1912 the Clifton Park Land & Improvement Company (“CPLIC”) conveyed parcels of land including a beach located in the Clifton Park Allotment (“Clifton Park”) in Lakewood to five trustees to hold “for the common use of all the lot owners in [Clifton Park], and their successors in title, and members of their households”. [SAC Ex. A.] There are

204 lot owners in the Park, 203 of whom are resident beneficiaries² and one is the Club, a social club with over 250 members, most of whom do not own lots in Clifton Park. The Trust does not mention the Club Members.

A. The Trust Property

The terms of the Trust are memorialized in a certain Deed of Trust dated March 25, 1912. [SAC Ex. A.] The Trustees hold legal title to real property as set forth in the Trust together with certain fixtures, buildings, and other personal property (the “Trust Property”). [SAC ¶ 12.] The Trust Property includes a beach property in the northwest corner of Clifton Park at the entrance to the Rocky River from Lake Erie (hereinafter referred to as the “Beach”). [SAC ¶ 13.] The Trust Property at the Beach includes 50 picnic tables, a beach house building, a parking lot with approximately 75 parking spaces, and a sandy beach area about 700 feet long (“Beach Property”). [Id.]³ Only 15 picnic tables are actually placed along the sandy beach area. [Id.] The Beach and Beach Property are a limited resource and unique property that was intended to be an exclusive benefit for the 204 lot owners in Clifton Park. [Id. ¶ 14-15.]

B. The Trustees’ Powers and Duties Set Forth in the Trust Deed.

The Trust mandates that the Trustees hold Trust Property in trust for the sole use and benefit of the lot owners: “in trust, nevertheless, for the *sole use and benefit of all the owners* of sub lots or parts of lots, in the Clifton Park Allotment” [SAC Ex. A (emphasis added).]

The Trust gives the Trustees the power and duty to maintain the Trust Property, including the Beach and Beach Property, only for the common use of the Trust beneficiaries: “shall hold

² To be clear, a “resident beneficiary” is a Trust beneficiary who owns a Clifton Park lot and resides in a home there. Plaintiffs make this distinction because the Trustees have given the Club 224 times the rights that a resident of Clifton Park enjoys, even though all lot owners—Club and residents—are treated as equal beneficiaries under the Trust’s terms.

³ A true and accurate copy of an aerial photo of the Beach and Beach Property prepared by the Trustees and posted on the Trustees’ website is attached as Exhibit “B.” A true and accurate copy of Brochure describing the size of the Beach is attached as Exhibit “C.”

title to and preserve all the land deeded to them for the *common use* of all the lot owners in the Clifton Park allotment, and their successors in title, and members of their households.” [*Id.* (emphasis added).]

The Trustees’ duties and power also include making regulations for the use of the Trust Property: “shall establish regulations for the use of ... private roads, lanes, *parks and bathing pavilion*; and generally *maintain* all of *said property* in good order and condition *for the use of lot owners* in said allotment.” [*Id.* (emphasis added).]

Significantly, the Trustees cannot convey any interest in the Trust Property or dedicate any portion of the Trust Property to public use, *i.e.*, any person who is not a beneficiary, without the unanimous consent of all the lot owners in Clifton Park: “[n]o part of said land shall be sold, conveyed or dedicated to public use without the unanimous consent of all the lot owners in said allotment.” [*Id.*] Stated differently, the Trustees’ power to transfer any interest in or dedicate to public use any Trust Property is limited by the lot owners’ rights to object to that action.

C. The Beneficiaries of the Trust

The Trust Deed is the sole source of authority for the Trustees, and it is the sole conveyer of legal rights to the beneficiaries. The Plaintiffs and other subplot owners in Clifton Park are the sole legal beneficiaries in common under the Trust. *Dueck*, 2017-Ohio-7161, ¶ 125. The Club is a lot owner in Clifton Park pursuant to a deed dated July, 1, 1912 (the “Club Deed”). The Club Deed transferred title to the Club’s sublots, but it did not, and could not, convey any greater rights to the Trust Property than those that are set forth in the Trust Deed, because title to, and control of, the Trust Property was vested solely in the Trustees via the Trust Deed. [*Id.*]

D. The Eighth District Definitely States that Club Members Are Not Beneficiaries and Have No Legal Rights.

Club Members are not beneficiaries of the Trust. *Id.* ¶¶ 41, 126. The Club Members are

not named in the Trust and have no legal rights. [SAC Ex. A]; *Dueck*, 2017-Ohio-7161, ¶ 1. They have no rights under the Trust Deed, and they are not entitled to equal access and commensurate status as the lot owner Trust beneficiaries. *Id.* ¶¶ 41, 125-126. The Trust Deed does not give them any right to use Trust Property. *Id.* And the Trust Deed does not contain any terms allowing Club Members to use the Beach. *Id.* ¶¶ 41, 125-126; *id.* ¶¶ 130-131 (J. Gallagher Concurring); [SAC Ex. A]. Nor does the Trust Deed give the Trustees authority to allow, give, or grant Club Members rights to use Trust Property, including the Beach and Beach Property, unless the Clifton Park lot owners provide unanimous consent. [SAC Ex. A.]

On August 10, 2017, the Eighth District Court of Appeals stated that the “pending question” before the Eighth District “to be whether the nonresident Club Members are direct Beneficiaries under the Trust Deed, as stated in Count I of the first amended complaint, arguably entitling them to equal access and commensurate status as the owner Beneficiaries.” *Dueck*, 2017-Ohio-7161, ¶ 41. In response, the Eighth District confirmed all of the above conclusions:

- “After a thorough review of the record, we find that the nonresident members of the Clifton Club are not beneficiaries of the Trust and, as a result, have no legal rights.” *Dueck*, 2017-Ohio-7161, ¶ 1.
- “[I]n response to the declaration explicitly requested by appellants, we find that the Club Members have no legal right of access as Beneficiaries. Access by the Club Members is by permission and regulation of the Trustees.” *Id.* at ¶ 67.
- “Club Members are not equal or direct Beneficiaries of the Trust.” *Id.* at ¶ 126.
- “[T]he Club Members are not beneficiaries under the Trust Deed and, therefore, have no legal right to access the subject beach.” *Id.* at ¶ 130 (J. Gallagher Concurring).
- “The trust simply does not contain any language from which this court can reasonably conclude that the members of the Clifton Club share the same legal rights as the Clifton Club itself.” *Id.* ¶ 131 (J. Gallagher Concurring).
- “We determine that the *lot owners* are the *sole legal beneficiaries* of the Trust. The Clifton Club is a lot owner and thus a beneficiary. The *Trust Deed is the sole conveyer of legal rights to the beneficiaries*. The Club Deed transferred title to the Club Lots. The Club Deed did not, and could not, convey any greater rights to the Trust property

than those that are set forth in the Trust Deed, because title to, and control of, the Trust property was vested solely in the Trustees via the Trust Deed.” *Id.* ¶ 125.

E. The Trustees Treat the Club Members Like Beneficiaries and Make the Club a Super Beneficiary.

The Beach is a limited resource that can be used for only half the calendar year. [SAC ¶¶ 40-43.] It offers only 50 picnic tables and approximately 75 parking spots for the 204 Trust beneficiaries to use. [*Id.* ¶¶ 13-15.] The Beach Season is defined by the Trustees, and the Beach Season defines when beneficiaries can use the Beach and Beach Property. [*Id.* ¶¶ 40-41.] According to the Trustees’ rules and regulations (the “Rules”), the Beach Season is defined as May 1 to October 31 of the calendar year—184 days. [SAC ¶¶ 42-43.]

Through the Rules, the Trustees have given 224 Club Members, their families, and their guests permission to use the Beach and Beach Property for the 2018 Beach season. [*Id.* ¶ 44, 47.] The Rules inequitably favor the Club to the detriment of the other Beneficiaries. [*Id.* ¶ 45, 48-75.] The Trustees also treat each individual Club Member as an equal or direct beneficiary of the Trust because they gave an individual Club Member the same rights to use the Beach and Beach Property as any resident beneficiary. [*Id.* ¶ 46, 48-75.] These actions violate the Trust’s terms. [*Id.* ¶¶ 76-77.]

In fact, the Rules do not distinguish between a Club Member and resident beneficiary as they are all collectively referred to as “Beach Members” in the Rules. [*Id.* ¶ 48.] Trustees assert that in 2018, 224 Club Members have an equal right to use the Beach as the Rules state “All [Beach] members in good standing, along with their immediate family members living in the residence of the member, may use the Beach facilities [*i.e.*, Beach and Beach Property].” [*Id.*]

Under the Rules, a **resident beneficiary** has the following rights:

- One family living in the residence of the beneficiary may use the Beach. [*Id.* ¶ 50]
- A resident beneficiary receives only two windshield stickers for using the parking spaces

that are part of the Beach Property. Thus, a resident beneficiary can use only two parking spaces at a time. [*Id.* ¶ 51-52.]

- A resident beneficiary without a Beach picnic table reservation or Beach house reservation is limited to four guests per household and no more. [*Id.* ¶ 57.]
- A resident beneficiary can have only two open Beach picnic table reservations. [*Id.* ¶ 61.]
- A resident beneficiary can have only two open Beach house reservations. [*Id.* ¶ 68.]

Likewise, under the Rules, a **Club Member** has been given the same rights as a resident beneficiary by the Trustees:

- One family living in the residence of the Club Member may use the Beach. [*Id.* ¶ 49.]
- Each Club Member also receives from the Trustees two windshield stickers for using the parking spaces that are part of the Beach Property. Thus, each Club Member can use two parking spaces at a time. [*Id.* ¶¶ 53-56.]
- Each Club Member who does not have a Beach picnic table reservation or Beach house reservation is given a right to have four (4) guests per household. [*Id.* ¶¶ 58-60.]
- Each individual Club Member is given the right to have two open picnic table reservations at one time. [*Id.*, ¶ 62-67.]
- Each individual Club Member is given a right to have two open Beach house reservations at one time. [*Id.* ¶¶ 69-75.]

It is clear that the Rules apply equally to a resident beneficiary's use and a Club Member's use without distinction. [*Id.* ¶¶ 48-75.] Thus, there is no difference between a Club Member and a resident beneficiary in terms of rights to access and use the Beach and Beach Property.

As a result, under the Rules, the **Club** has been given the following super rights by the Trustees:

- The Trustees allow the Club to have 224 families living in the residence of each Club Member, none of whom have any legal rights under the Trust, to use the Beach Property. [*Id.* ¶¶ 47, 49.]
- The Club receives from the Trustees 448 (224 x 2 cars per Club Member) windshield stickers for using the parking spaces that are part of the Beach Property and, thus, can use

all of the approximately 75 available parking spaces at a given time. [*Id.* ¶ 56.]

- The Club has the right to have 448 open picnic table reservations at any given time (224 x 2 open picnic table reservations per Club Member). [*Id.* ¶ 63.]
- The Club is also guaranteed up to 40% of the available picnic table reservations daily, while a resident beneficiary has access to only one of the available picnic table reservations daily. [*Id.* ¶ 65-67.]
- The Trustees have given the Club the right to have 448 open Beach house reservations at any given time (224 x 2 open Beach house reservations per Club Member).⁴ [*Id.* ¶ 71.]
- The Club receives a right from the Trustees to have 896 guest passes (224 x 4 guest passes per Club Member household) for use on the Beach on a daily basis during the 2018 Beach season. [*Id.* ¶ 59.]

These Rules regulating the use of Trust Property—Beach and Beach Property— (a) grant each individual Club Member a right to use the Trust Property that is equal to the rights of an individual resident beneficiary to the use the Trust Property, and (b) grant the Club rights to use the Trust Property that are far greater than any individual resident beneficiary in Clifton Park—in fact 224 times greater. [*Id.* ¶ 76.] The Trustees assert that the basis for their authority to grant such rights to the Club Members and the Club is in the Trust—although they have never set forth what language gives such authority—and the Eighth District Court of Appeals’ Opinion.

F. Count I of The Second Amended Complaint

While the Trustees try to cherry-pick Count I of the SAC, their arguments ignore that it is a claim for breach of the Trustees’ fiduciary duties (1) to administer the Trust according to its terms and solely in the interests of the beneficiaries, the lot owners in Clifton Park and (2) of loyalty to the beneficiaries. [SAC ¶¶ 93-95.] And the breach of those duties includes (1) granting 224 Club Members a permissive right to use the Trust Property, including the Beach and Beach Property, that is equal to the rights of the Trust beneficiaries and (2) granting such a

⁴ Given that there are only approximately 175 available days for a Beach House reservation under the Rules, the Club has been granted the right to reserve the Beach House for the entire Beach season.

right of permissive use to the 224 Club Members without unanimous consent of the Clifton Park lot owners. [*Id.* ¶¶ 104-105.]

The Plaintiffs also, alternatively, contend that the Trustees have no authority under the Trust to make this grant of equal rights to any non-beneficiary without unanimous consent of the Clifton Park lot owners. [*Id.* ¶¶ 99-100.] Because the Trustees do make such a grant to non-beneficiaries, that too is a breach of fiduciary duty. Finally, the Plaintiffs also contend, alternatively, that the Trustees cannot grant any right to use Trust Property to any non-beneficiary without the unanimous consent of the Clifton Park lot owners. [*Id.* ¶¶ 97-98.]

In any event, the breach in Count I is premised on granting 224 Club Members a right to use the Trust Property that is equal to the rights of the Trust beneficiaries without the unanimous consent of the Clifton Park lot owners. [*Id.* ¶¶ 104-105.]

III. LAW AND ARGUMENT

A. Standard For Relief Under Civil Rule 12(B)(6).

In considering a Civ.R. 12(B)(6) motion to dismiss, the Court must (1) accept as true all material allegations in the SAC, (2) construe all reasonable inferences in Plaintiffs' favor, and (3) construe the SAC in the light most favorable to Plaintiffs. *Moore v. City of Middletown*, 2012-Ohio-3897, ¶ 4; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "Moreover, the motion to dismiss is viewed with disfavor and should rarely be granted." *Slife v. Kundtz Prop., Inc.*, 40 Ohio App.2d. 179, 182, 318 N.E.2d 557 (8th Dist. 1974). The Trustees' motion is sparse on supporting facts and legal authority. Under the deferential standard of review afforded to Plaintiffs, the motion to dismiss should be denied.

B. Count I Should Not Be Dismissed.

Count I asserts claims for breaches of the Trustees' fiduciary duties. To prove a breach of fiduciary duty, a plaintiff must show the "existence of a duty on the part of the alleged

wrongdoer not to subject such person to the injury complained of, a failure to observe such duty, and an injury proximately resulting therefrom.” *KeyBank Nat’l Ass’n v. Thalman*, 8th Dist. No. 102624, 2016-Ohio-2832, ¶ 20 (quoting *All Star Land Title Agency, Inc. v. Surewin Inv., Inc.*, 8th Dist. Cuyahoga No. 87569, 2006-Ohio-5729, ¶ 36). Plaintiffs have clearly pled that the Trustees have breached their fiduciary duties (1) to administer the trust in good faith and according to its terms and purposes and the interests of the beneficiaries (R.C. 5808.01); (2) of loyalty (R.C. 5808.02); and (3) of impartiality in managing the trust property (R.C. 5808.03). [See generally SAC.]

The Trustees’ Motion is based on two equally flawed premises. First, the Eighth District’s Opinion is not collateral estoppel barring Count I of the SAC. Second, the Trustees cannot show any Trust term that gives them authority to allow 224 non-beneficiaries to use the Beach Property, especially in a way that makes the non-beneficiaries *de facto* beneficiaries.

1. The Trustees Breached the Duty to Administer the Trust According to Its Terms and Duty of Loyalty

“[T]he powers and duties of a trustee are controlled by the terms of the trust instrument.” *Daloia v. Franciscan Health Sys.*, 1997-Ohio-402, 79 Ohio St. 3d 98, 102; *In re Trust of Brooke* (1998), 82 Ohio St.3d 553, 557, 1998 Ohio 185, 697 N.E.2d 191 (same); see also *Estate of Southard v. United States*, No. 2:05-cv-416, 2007 U.S. Dist. LEXIS 60957, at *15 (S.D. Ohio Aug. 20, 2007) (“As the Ohio Supreme Court held in *Daloia* ... the powers of a trustee are confined by the terms of the trust itself.”) While trustees have some discretion, they cannot act to frustrate the manifest intent of the settlor, which is ascertained from the unambiguous terms of the Trust. *Id.* (citing *Biles v. Webb*, 118 Ohio St. 346, 356, 161 N.E. 49 (1928); *Daloia*, 79 Ohio St. 3d at 103; *Domo v. McCarthy*, 66 Ohio St.3d 312, 314, 612 N.E.2d 706 (1993)). That is why “a trustee’s authority over the trust property is defined and limited by the instrument creating the

trust, and he should be strictly guided by its provisions, and should pursue his power strictly.” *Biles*, 118 Ohio St. at 356.

Likewise, the duty of loyalty requires the Trustees to administer the Trust solely in the interests of the beneficiaries. R.C. 5808.02; *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. 03AP-1114, 2004 Ohio 3484, at ¶ 28 (citing, Restatement of the Law 2d, Trusts (1959), Sections 169-177). This is the ““most fundamental [of the Trustees’] duty.” *Dejaiiffe v. KeyBank USA Nat’l Ass’n*, 2006-Ohio-2919, ¶ 28 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000)). Accordingly, the Trustee must display “complete loyalty to the interests of the beneficiary” when administering the Trust and “must exclude ... all consideration of the interests of third persons.” *Id.* (explaining Bogert, Law of Trusts and Trustees § 543 (2 Ed.Rev. 1980)).

Here, the terms of the Trust clearly confine the Trustees’ authority to holding and maintaining trust property for the sole benefit of the Clifton Park lot owners and their common use and prohibit the Trustees from selling, conveying, or dedicating the land to public use without the unanimous consent of all Clifton Park lot owners. [SAC Ex. A.] Nowhere are Club Members mentioned or given a right to use any Trust Property—which has already been decided by the Court of Appeals—and the Trustees have no authority under the Trust to grant them access. *Dueck*, 2017-Ohio-7161, ¶¶ 1, 67, 125-126, 130-131. Thus, the terms of the Trust alone prohibit the Rules implemented by the Trustees and their grant of Beach access to 224 Club Members.

Consistent with those terms, the duty of loyalty dictates that the Trustees administer and manage the use of the Trust Property, including the Beach and Beach Property, solely in the interest of the lot owners. Contrary to that duty, the Trustees have made clear that they made the Rules to protect the enjoyment of both beneficiaries and non-beneficiary Club Members. [SAC ¶¶ 44-75, 92-105.]

The Trust, however, has already been interpreted to mean that the Trust Property is held solely for the benefit of the Clifton Park lot owners – not the Club Members. The Court of Appeals “construe[d] the pending question to be whether the nonresident Club Members are direct Beneficiaries under the Trust Deed ... arguably entitling them to equal access and commensurate status as the owner Beneficiaries” *Dueck*, 2017-Ohio-7161, ¶ 41. The Court of Appeals’ answer was no. *Id.* at ¶¶ 1, 1, 67, 125-126, 130-131. The Court of Appeals expressly ruled that the Club Members were not “direct or equal beneficiaries” and had “no legal rights.” *Id.* at ¶¶ 1, 125-126. That was the only question presented to this Court in the prior case and to the Court of Appeals. Yet, the Trustees have created Rules and given the Club Members access for the 2018 Beach Season that grants the Club Members equal access and, in effect, commensurate status as the resident beneficiaries. [SAC ¶¶ 44-77, 92-105.] Under the Rules, there is absolutely no difference in being a Club Member and a resident beneficiary. [*Id.*] This confirms that the Trustees are maintaining and managing the Trust Property and setting rules by considering the interests of the third-party, non-beneficiary Club Members. That is a clear breach of their fiduciary duty of loyalty. Accordingly, Plaintiffs have stated a claim in Count I that the Trustees breached their fiduciary duties.

2. Plaintiffs’ Claims Are Not Barred by Collateral Estoppel

Because the Trust’s terms—the operative and controlling document—provide no authority for the Trustees to give 224 non-beneficiaries rights equal to and commensurate with being a Trust beneficiary, the Trustees go to great lengths to selectively cite and misrepresent the 2012 case and the Eighth District’s decision regarding the historical use of Trust Property by Club Members as an admission by Plaintiffs and finding that the Trustees have authority to give non-beneficiaries rights to use Trust Property as if they were equal beneficiaries. Their argument is wrong. The issues raised in this litigation were not litigated, determined or essential to the

judgment in the prior litigation,

“Due process requires a party asserting collateral estoppel to prove that the identical issue was (1) actually litigated, (2) directly determined, and (3) essential to the judgment handed down in the prior action.” *Buckeye Union Ins. Co. v. New Eng. Ins. Co.*, 87 Ohio St. 3d 280, 1999 Ohio 67, 720 N.E.2d 495, 501 (Ohio 1999); *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 201 443 N.E.2d 978 (1983) (same) *see also Thompson v. Wing*, 70 Ohio St. 3d 176, 637 N.E.2d 917, 923 (Ohio 1994). “It is not enough that a similar issue...was litigated and decided.... For collateral estoppel to bar the relitigation of an issue, precisely the *same issue* must have previously been litigated and decided.” *Thompson*, 70 Ohio St.3d at 185 (emphasis in original). Moreover, “[c]ollaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein.” *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 201 443 N.E.2d 978 (1983) (citations omitted).

Critical to any consideration of collateral estoppel in this case is the question of what was litigated in the prior case. The Eighth District was clear that the pending question for it to resolve was “whether the nonresident Club Members are direct Beneficiaries under the Trust Deed, as stated in Count I of the first amended complaint, arguably entitling them to equal access and commensurate status as the owner Beneficiaries.” *Dueck*, 2017-Ohio-7161, ¶ 41. The answer was that the Club Members are not beneficiaries, and are not entitled to equal access or commensurate status as the lot owner beneficiaries. Indisputably, the Plaintiffs posed three questions in the 2012 case: “(1) whether the Club Members are *Beneficiaries* under the Trust Deed; (2) that Club Members have no *legal right* to use the Beach; and (3) whether the Club

Deed provision extending use of the Beach to Club Members is valid since the settlors had no control over the Beach after the Trust creation.” *Id.* at ¶ 37. In fact, the Eighth District found that this Court “capsulized the issue to be whether the Club Members ‘have a right to use’ the Beach under the [Trust].” *Id.* at ¶ 39. Those were the only actually litigated issues.

The parties never litigated similar, let alone the identical, issues presented here: whether the Trustees have authority to grant 224 Club Members—who are not beneficiaries—the same rights to use Trust Property as the indisputable beneficiaries—the lot owners—thereby making the Club Members de facto beneficiaries. The answer to that question, as in any trust case, is found in the terms of the Trust only, which is why the Club and the Trustees previously argued in this Court, and in the Eighth District, that **the Trust** gave Club Members rights to use the Trust Property and avoided arguing that the Trustees had authority to permit Club Members to use Trust Property—the issue in the pending litigation. Because litigation of the identical issue is required under Ohio law and as matter of due process, Plaintiffs are not collaterally estopped from challenging the Trustees’ breaches of fiduciary duty and 2018 Rules.

The reason the issues were never litigated previously is because the prior trustees, including current trustee Warren Coleman, took the wrong position that the Club Members had access not due to permission, but due to legal rights under the Club Deed and Trust Deed: “The Clifton Club *and Trustees* posit that the Club Members have the same legal right to use the Beach as the Beneficiaries pursuant to the Trust Deed and Club Deed.” *Dueck*, 2017-Ohio-7161, ¶ 21. And that was the Trustees’ position for the whole case. *Id.* ¶¶23-24, ¶ 39 (“The trial court capsulized the issue to be whether the Club Members ‘have a right to use’ the Beach under the Trust Deed.”) The Eighth District rejected that claim and held that Club Members are not “direct Beneficiaries under the Trust” and are not entitled to “equal access and commensurate status as the owner Beneficiaries.” *Dueck*, 2017-Ohio-7161, ¶¶ 41, 125-126; *id.* ¶¶ 130-131 (J. Gallagher

concurring).

The Trustees prior position shows that the cited portions of the Eighth District’s opinion and Plaintiffs’ briefing are taken out of context and misrepresented.⁵ Indeed, Plaintiffs responded to the Trustees’ position that the Club Members had legal rights **under the Trust Deed and Club Deed** – positions the Eighth District rejected. Plaintiffs, in the prior case, simply recited the historical view that was taken by prior trustees and the Club. The question of whether that view was correct or done with authority was never raised or litigated. In fact, there has been no prior litigation on the authority of Trustees to grant access. The Eighth District responded to the Trustees’ diversionary arguments and correctly identified and decided the pending issue in paragraph 41 of the Opinion. Thus, the Eighth District made no findings regarding Trustee authority under the Trust to grant access to non-beneficiaries.

For their part, the Trustees in the prior lawsuit, including Warren Coleman, rejected the concept that they were granting permissive access and instead took the position that the access was as a legal right and due to membership in the Club—a lot owning beneficiary. *Dueck*, 2017-Ohio-7161, ¶¶ 50-51. As a result, the Trustees argued that the historical record was irrelevant. Thus, there was no incentive to litigate the issue of the Trustees’ authority to grant permissive access and Plaintiffs could not foresee the historical practices of the past trustees that were abandoned and rejected by the 2012 trustee defendants would be used to estop Plaintiffs from challenging the Trustees’ 2018 Rules – another due process requirement before applying collateral estoppel. *Goodson*, 2 Ohio St. 3d at 200-01 (“Collaterally estopping a party from

⁵ Trustees cite paragraph 21 as a holding. The paragraph reads in full: “The Clifton Club and Trustees posit that the Club Members have the same legal right to use the Beach as the Beneficiaries pursuant to the Trust Deed and Club Deed. Appellants agree that the Club Members have the right to use the Beach with the permission of the Trustees, but deny that they are direct Beneficiaries, and further state that neither the language, nor the history, supported the position of the Clifton Club and Trustees.” *Dueck*, 2017-Ohio-7161, ¶ 21. That is not a holding and the Plaintiffs never agreed to what rights Club Members had or what authority trustees had to grant any use rights to Club Members, only that their use had been permissive, not as a matter of a legal right.

relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein.”)

Finally, to the extent the Eighth District stated that it “appeared [Plaintiffs] agreed” the Club Members could use the Beach with Trustee permission, *Dueck*, 2017-Ohio-7161, ¶ 40, an appearance is not a finding and such finding was not essential to the Court determining the “pending question [of] whether the nonresident Club Members are direct Beneficiaries under the Trust Deed, as stated in Count I of the first amended complaint, arguably entitling them to equal access and commensurate status as the owner Beneficiaries.” *Id.* at ¶ 41. Thus, the Trustees’ reliance on paragraph 40 of the Eighth District’s decision as giving them any authority and estopping Plaintiffs is baseless.

For these reasons, Plaintiffs are not collaterally estopped from showing the Trustees’ breaches of fiduciary duties.

3. The Trustees Have Conveyed Part of the Trust Property to Non-Beneficiaries and Dedicated Part of the Trust Property to Public Use in Breach of the Trust.

Trustees’ argument that no part of the Trust Property was dedicated to public use because Club Members are not the same as the public due to their Club membership is wrong. First, the claim that membership in the Club gives its members special status under the Trust was soundly rejected already as the Eighth District specifically held that Club Members acquire no Trust rights due to membership. *Dueck*, 2017-Ohio-7161, ¶¶ 125-126. Thus, as it relates to Trust Property, Club Members are no different than the public. Despite this finding, the Trustees now have given them equal full use rights to the detriment of the resident beneficiaries. This is a textbook breach of fiduciary duty. Further, despite Trust’s directives that no part of the Trust

Property should be sold, conveyed, or dedicated to public use without the unanimous consent of the lot owners, the Trustees have made no attempt to obtain any lot owner consent before granting 224 non-beneficiaries Beach usage rights equal to a beneficiary. [SAC Ex. A.]

Ohio law is clear that property is comprised of a bundle of rights. *Dispatch Printing Co. v. Recovery Ltd. P'ship*, 2015-Ohio-381, ¶ 51, 28 N.E.3d 562, 577 (10th Dist.) (citing *United States v. Craft*, 535 U.S. 274, 278 (2002)). Part of that bundle is the right of use. *Paternoster v. United States*, 640 F. Supp. 2d 983, 990 (S.D. Ohio 2009) (Thus, Ohio law ... provides within its bundle of rights the rights to use, exclusion, and income.” (internal quotations omitted)) The right to use the Trust Property has been conveyed for the 2018 Beach season without unanimous lot owner consent. That is a breach of fiduciary duty.

4. The Trustees' Authority to Establish Regulations for Use of Trust Property Does Not Allow Them to Ignore the Trust.

The Trustees also claim that the “full authority to regulate Beach access” gives them the power to give non-beneficiaries the same rights as beneficiaries. That was not the Eighth District’s holding. Rather, the Eighth District in paragraph 66 of the opinion found that the historical understanding was that Club Members had no rights under the Trust and the Club’s use was restricted so the lot owners could enjoy the Beach:

Recitation of the foregoing events serves to confirm a historical understanding by the Trustees and Clifton Club that the Club Members’ right to access the Beach is permissive, and that the Trustees have full authority to regulate Beach access. The Club Lease, capping the membership number subject to the settlors’ consent, confirms that the Clifton Club’s use, even as a direct Beneficiary, is not unfettered, particularly since the purpose of the Trust is to allow the lot owners to enjoy the Beach.

Dueck, 2017-Ohio-7161, ¶ 66. The Eighth District did not say that the Trustees’ “authority to regulate” meant authority to give non-beneficiaries’ rights to use Trust Property as if they were beneficiaries. Nor could it have, as the Trust only says that the Trustees “shall establish

regulations for the use of, and provide for proper policing of [Trust Property].” [SAC Ex. A.]

A “regulation” is commonly understood as “**a** : an authoritative rule dealing with details or procedure ... safety *regulations*.” <https://www.merriam-webster.com/dictionary/regulation>. Thus, the Trustees authority to regulate is to create rules governing use of Trust Property, not to grant Beach use rights to 224 non-beneficiaries and create rules which treat Club Members as beneficiaries in breach of the terms of the Trust, the Trustees’ duty of loyalty, and Eighth District’s holding that the Club Members are not direct or equal beneficiaries.

For all these reasons, the Plaintiffs have stated a claim for relief in Count I, and Count I should not be dismissed.

C. The SAC Should Not Be Dismissed Under Rule 12(B)(7) Because All Necessary Parties Are Already Part of the Lawsuit.

The Trustees argue, in the alternative, that this action is barred because Plaintiffs have not joined all lot owners in Clifton Park. [Trustees’ Br. pp. 11-14.] Civil Rule 19 states, in relevant part, that:

A person who is subject to service of process shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest,

Here, the other Clifton Park lot owners are not necessary and indispensable parties.

First, the Trustees’ primary argument is based on this case being a claim for declaratory judgment under R.C. 2721.12. But as is plainly apparent from the SAC, the Plaintiffs bring claims to enjoin the Trustees breach of fiduciary duties under R.C. 5808.01, *et seq.* Accordingly, on this basis alone, the Trustees’ Rule 12(b)(7) motion should be denied.

Second, the Trustees have not shown under Civil Rule 19(A)(2) that all Clifton Park lot owners are necessary and indispensable parties. The Trustees’ argument that the “beneficiaries

have no ability to protect their deeded interests in this lawsuit” is a red-herring. Plaintiffs are not attacking the other beneficiaries’ deeded interests. Instead, they have asked the Court to treat all beneficiaries equally and ensure the Trustees manage the Trust with solely the lot owners’ interests in mind—not the interests of 224 non-beneficiaries. Based on this, Plaintiffs’ claims either (1) enhance the other lot owners’ position if Plaintiffs are successful or (2) leave them in their present position maintaining status quo.⁶ Accordingly, there is no danger that disposition of this action—without the other Clifton Park lot owners joined as parties—will “as a practical matter impair or impede [their] ability to protect” any interest granted to them under the Trust. Civ.R. 19(A)(2)(a).⁷

The Trustees’ claims are also wrong that they substantially risk incurring double, multiple, or otherwise inconsistent obligations. Enjoining the Trustees from breaching the fiduciary duties they owe to all lot owners will not incur double, multiple, or inconsistent obligations. Further, to the extent that the Trustees are claiming that the Club’s objection to paying the assessment or lost status as a super-beneficiary matters, that argument is baseless. Both the Club and Trustees entered the apparent 2018 agreement granting 224 non-beneficiaries rights to use Trust Property that are equal with and commensurate with being a Trust beneficiary. They knew that the Eighth District’s Opinion said this was wrong. Accordingly, their unclean hands cannot be used to create a defense under Civ.R. 19(A)(2)(b).

Finally, the Ohio Supreme Court in *Wallace v. Clifton Land Co.*, 92 Ohio St. 349, 357

⁶ The Trustees improper threat to increase lot owner assessments does not make the other lot owners necessary and indispensable parties.

⁷ The Trustees also wrongly claim that the requested injunction would deny the Club the right to have any of its members access the Beach. Not true. Plaintiffs’ prayer number three states the Club should get the same rights as every other lot owner. That is, it simply asks that the Trustees finally be required to treat all beneficiaries equitably in light of the purpose of the Trust that all lot owners be able to enjoy the Trust Property in common. *Dueck*, 2017-Ohio-7161, ¶ 66. That is the Trustees’ duty under R.C. 5808.03.

(1915) long ago held that a lot owner individually or united with other lot owners has the right “to enforce by injunction the restrictive covenants written into each deed” in Clifton Park. The Plaintiffs are likewise only seeking to enforce the same Trust language in the controlling Deed of Trust that governs the Trustees.

Accordingly, dismissal is not warranted under Civ.R. 12(B)(7), Civ.R. 19, or R.C. 2721.12.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Trustees’ Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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