

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

ARTHUR P. DUECK, M.D., ET AL.	)	
	)	
Plaintiffs,	)	<b>CASE NO: 2018ADV234080</b>
	)	
v.	)	<b>JUDGE: ANTHONY J. RUSSO</b>
	)	
JOSEPH KERRIGAN, TRUSTEE, CLIFTON	)	
PARK TRUST, ET AL.	)	<b><u>PLAINTIFFS' MOTION TO FILE</u></b>
	)	<b><u>ATTACHED SURREPLY INSTANTER</u></b>
Defendants.	)	

Pursuant to Local R. 40.1(D), Plaintiffs respectfully move this Court for an Order granting it leave to file *instanter* the attached Plaintiffs' Surreply Reply to the Trustees' Reply Brief ("Surreply"). The grounds for this Motion are that the Defendants have set forth new arguments regarding their powers under the Trust that were not previously argued in their moving brief and that contain misstatements of fact and law. This Motion is being filed within seven days of Defendants' reply brief. Accordingly, good cause exists for this Surreply, and Plaintiffs respectfully request that the Court grant it leave to file the attached Surreply *instanter* to correct the record and respond to Defendants' new and improper arguments.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Plaintiffs' Motion to File Attached Surreply Instanter*, was sent via email on June 5, 2018 upon the following counsel of record:

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ARTHUR P. DUECK, M.D., *et al.*, ) CASE NO. 2018ADV234080  
)  
Plaintiffs, ) JUDGE ANTHONY J. RUSSO  
)  
v. )  
) **PLAINTIFFS' SURREPLY TO THE**  
JOSEPH KERRIGAN, TRUSTEE, CLIFTON ) **TRUSTEES' REPLY BRIEF**  
PARK TRUST, *et al.*, )  
)  
Defendants. )

**I. INTRODUCTION**

Plaintiffs Arthur P. Dueck's, Paul A. Bjorn's, Nancy Binder's, and William Keller's Second Amended Complaint ("SAC") is about the Trust and requiring the Trustees to adhere to their fiduciary duties and act within the confines of the power granted to them by the terms of the Clifton Park Trust ("Trust").

The Trustees do everything they can to avoid the Trust. But no amount of misdirection and contortion can recast the SAC. This case is based on the Trust's terms, the sole conveyor of rights to the beneficiaries of the Trust. Plaintiffs seek to enforce its terms and enjoin the Trustees' breaches of fiduciary duties. Those breaches are the result of the Trustees granting 224 non-beneficiaries a right to use Trust property that is equal to the rights of the only Trust beneficiaries – the lot owners of Clifton Park – without any authority to do so in the Trust and in direct contravention of the Trust and *Dueck v. Clifton Club Co.*, 8th Dist. Nos. 103868 and 103888, 2017-Ohio-7161, ¶¶ 1, 41, 67, 125-126, 130-131. Further, as a result, the Trustees have given the Club super-beneficiary status and given the Club 224 times the rights to use Trust property than any other lot owner in Clifton Park.

The Eighth District Court of Appeals' Opinion ("Opinion") is not the Trustees' saving

grace, it's a nail in the coffin for their fallacious arguments that the Eighth District granted the Trustees some authority to effectively make Club Members beneficiaries – or give them the same rights as lot owner beneficiaries – through the Trustees' power to “establish regulations” for use of the Trust property by beneficiaries. The Eighth District could not have been clearer: the “pending question” 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. In short, no. *Id.* at ¶¶ 1, 67, 126, 130-131 (J. Gallagher Concurring). No amount of parsing words, cherry-picking sentences, and re-arranging paragraphs can change that conclusion or excuse the Trustees' breaches. A cipher is not needed to read the Opinion or the Trust. The Opinion was clear, and the Trustees grant of rights in 2018 that turned 224 non-beneficiaries into beneficiaries and the Club into a super-beneficiary is a breach of fiduciary duty.

Desperate to run out the clock on the 2018 Beach season, the Trustees also resort to old tactics and claim all lot owners must be named as defendants because this is a “declaratory judgement” action. The plain English of the SAC makes clear that this is a breach of fiduciary duty case and thus, the Trustees cannot stall the case to run out the clock on the 2018 Beach season that can never be regained by the Beneficiaries. For these reasons, the Court should deny the Trustees' Motion to Dismiss.

## **II. ARGUMENT**

### **A. The Trustees' Newly Revised Motion Goes Far Beyond the Four Corners of the SAC.**

The Trustees reply appears to be an attempt at a redo of their motion to dismiss. [*See, e.g.,* Mot. pp. 7-12.] That of course is improper for a reply brief and those arguments should be stricken from the record. *City of Dublin v. Friedman*, 10th Dist. No. 16AP-516, 2017-Ohio-

9127, ¶ 63 (“A party may not advance new arguments in its reply brief.” (quoting *Clifton Care Ctr. v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 12AP-709, 2013-Ohio-2742, ¶ 13)). In any event, the reply goes well beyond the four corners of the SAC. In considering a Civ.R. 12(B)(6) motion to dismiss, the Court is limited to the four corners of the complaint. *Nat’l Union Fire Ins. Co. v. Hartford Ins. Co.*, 5th Dist. No. 06CA32, 2007-Ohio-2615, ¶ 22-23. Because the Trustees have gone beyond the SAC, the motion to dismiss should be denied.

**B. The 2012 Case Was Not About Beach Access and Did Not Give the Trustees Any Authority; It Was About Who the Beneficiaries Are and Who Had Rights Under the Trust.**

The Trustees want this court to ignore any meaningful language in the Opinion. The Eighth District “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. Its answer was no. *Id.* at ¶¶ 1, 67, 125-126, 130-131 (J. Gallagher, concurring). The Eighth District expressly ruled that the Club Members were not “direct or equal beneficiaries” and had “no legal rights.” *Id.* at ¶¶ 1, 125-126 (“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.*” (emphasis added)) 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.

Desperate to justify their actions, the Trustees wrongfully claim that the Eighth District “analyzed all of the evidence” and determined that Club Members have a right to use the Beach because the Club is a beneficiary. [Mot. pp. 2-5.] To do this, they must cut and paste the Eighth District’s words out of context and ignore the clear language identified above.

First, “all the evidence” was not before the Court. Second, paragraphs 54 to 57 of the opinion made clear that contrary to what the Trustees argue here, the Club’s rights as a beneficiary do not transfer or devolve on Club Members, the Club Members do not have the rights of the Club, and they obtained no rights via the Club Deed. *Dueck*, 2017-Ohio-7161, ¶¶ 54-57. Third, the Eighth District never held that the Trustees have “full authority to grant non-lot-owning Club Members access to the Beach[;]” rather, the court said the Trustees have “full authority to regulate Beach access.” [*Compare* Mot. p.4 with Opinion ¶ 66.] That is the fundamental problem; the Trustees believe that the power to regulate means the power to treat 224 non-beneficiaries as having equal rights to the actual 204 lot owner beneficiaries. That is wrong, contrary to Trust and the Eighth District’s opinion in *Dueck*, 2017-Ohio-7161, and a breach of fiduciary duty. Thus, there was no litigation of the Trustees’ authority to grant access. The Eighth District’s opinion did not grant authority to the Trustees in perpetuity, make their decision incontestable and certainly did not grant some “irrevocable” right to the Club Members, especially where the Court said they are not beneficiaries and have no legal rights under the Trust. *See Dueck*, 2017-Ohio-7161, ¶¶ 1, 67, 125-126, 130-131 (J. Gallgher, concurring).<sup>1</sup>

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<sup>1</sup> Contrary to their claim, Plaintiffs never “agree[d] in the 2012 litigation that the Trustees can permissively admit non-lot owning Club Members”. [Mot. p.7.] Instead, the Plaintiffs in the

**C. The Other Beneficiaries Are Not Necessary Parties Because This Is Not a Declaratory Judgment Action.**

It is plainly apparent from the SAC that the Plaintiffs bring claims to enjoin the Trustees breach of fiduciary duties under R.C. 5808.01, *et seq.* Accordingly, there is no basis to dismiss the SAC under Rule 12(b)(7). The Trustees rely on R.C. 2712.12 to argue that all beneficiaries must be joined in this suit. R.C. 2712.12 provide that “when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding.” Nowhere have Plaintiffs requested a declaration of rights. Rather, Plaintiffs have asked the Court to “direct the ... trustees ... to ... abstain from doing any particular act in their fiduciary capacity” and seek relief under R.C. 5710.01. The Trustees owe the Plaintiffs the duties to: (1) administer the Trust according to its terms – not falsely claim authority under language that is not in the Trust, (2) administer the Trust for the sole benefit of the beneficiaries – not to make accommodations for 224 non-beneficiaries, and (3) treat all beneficiaries impartially – not to determine that one beneficiary has more rights than the other beneficiaries. The Trustees have breached their duties, are bound by the Trust, and they cannot rewrite Plaintiffs’ SAC to absolve their breaches and make their actions incontestable.

The Court must reject the argument that the “Trust contains language granting the Trustees power to grant non-lot-owning Club Members permissive access.” [Mot. p. 9.] The fatal defect in this argument is that they don’t identify a single word in the Trust that supports that proposition. Instead, they rely on their contorted reading of *Dueck*, 2017-Ohio-7161. Indeed, a Trustee cannot claim to be administering the Trust according to its terms without

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2012 case showed that the Trustees claim that the Club Members had been using the Beach for 100-plus years due to having rights under the Club Deed and Trust was false and that the trustees and Club had agreed in the past that the Club Members’ use was by permission on an annual basis.

actually identifying the term that justifies his or her action. Thus, the Trustees actions are not immune from challenge.

Finally, because this is not a declaratory judgment action, the argument for dismissal under Rule 12(b)(7) is meritless.

### **CONCLUSION**

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

Respectfully submitted,

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