

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

ARTHUR P. DUECK, M.D., <u>et al.</u> ,)	CASE NO. 2018ADV234080
)	
Plaintiffs,)	JUDGE: ANTHONY J. RUSSO
)	
v.)	<u>BRIEF IN OPPOSITION TO</u>
)	<u>PLAINTIFFS' MOTION FOR</u>
JOSEPH KERRIGAN, TRUSTEE,)	<u>TEMPORARY RESTRAINING</u>
CLIFTON PARK TRUST, <u>et al.</u> ,)	<u>ORDER AND PRELIMINARY</u>
)	<u>INJUNCTION</u>
Defendants.)	

The issue at the heart of Plaintiffs' request for a temporary restraining order and preliminary injunction already has been conceded and litigated by Plaintiffs and decided by the Eighth District Court of Appeals and this Court. The Eighth District has held, as has this Court in its final Judgment Entry in Case No. 2012ADV179424, that the trustees of the Clifton Park Trust can grant permissive access to the Clifton Park Beach to non-lot-owning Clifton Club members. Plaintiffs' request for a temporary restraining order should be denied because: (1) Plaintiffs cannot demonstrate a likelihood of success on the merit of their claims; and (2) Plaintiffs have failed to demonstrate that this is an emergency situation where irreparable damage will occur before the Defendants can be heard. Plaintiffs' request for a preliminary injunction should be denied because Plaintiffs cannot demonstrate that (1) Plaintiffs will likely succeed on the merits of their claims; (2) irreparable harm is imminent; (3) third-parties will not be harmed; and (4) the public interest is served by an injunction.

I. INTRODUCTION

The issue at the heart of Plaintiffs' Second Amended Complaint (hereinafter "Amended Complaint") and TRO/PI Motion has been conceded and litigated by Plaintiffs and decided by

the Eighth District Court of Appeals and this Court in its March 19, 2018 Order (together, the “Prior Decisions”). The Clifton Park trustees, past and current, have the power and authority under the Trust to grant non-lot-owning Clifton Club Company (hereinafter “Club”) members permissive access to the Beach, in exchange for an annual payment and subject to the trustees’ regulations. Plaintiffs are attempting to re-litigate that very issue in this action.¹

The Current Trustees, defendants Joseph Kerrigan, Mary Ellen Fraser, Robert Frost, Warren Coleman, and Ryan Meany (hereinafter “Defendants” or “Current Trustees”), have promulgated rules to govern the 2018 Beach season in accordance with the authority they have under the Trust deed as confirmed in the Prior Decisions. In support of their request for a Temporary Restraining Order, Plaintiffs have articulated numerous complaints about the regulations established by the Trustees. But several things are beyond dispute: (1) similar regulations have been enacted by past Clifton Park Trust trustees over the course of several decades, (2) the regulations have been enacted in a good faith attempt to regulate Beach access for the use and enjoyment of all Trust Beneficiaries, and, (3) there is no justification for an immediate order amounting to a wholesale prohibition of a practice that is similar to a practice that has been in effect for decades.

II. FACTS²

The issues in this case have been litigated by Plaintiffs and decided by the Eighth District Court of Appeals and this Court. Arthur P. Dueck, Paul A. Bjorn, Nancy Binder, and William R. Keller (hereinafter “Plaintiffs”) are lot owners in the Clifton Park Allotment in Lakewood, Ohio (“Clifton Park”). *See* Plaintiffs’ Amended Complaint, ¶ 2. Clifton Park is a residential area

¹ Contemporaneously with this filing, Defendants have filed a Motion to Dismiss Plaintiffs’ Second Amended Complaint. Defendants incorporate herein all arguments and authorities set forth in their Motion to Dismiss.

² This Court is amply aware of the facts underlying this dispute. A comprehensive statement of facts applicable in full to this case can be found at *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, ¶¶ 2-33.

owned and developed in the 1800s by the Clifton Park Association (“Clifton Park Association”). *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, ¶ 2. Clifton Park Association is the predecessor in interest to the Clifton Park Land & Improvement Company (“Land Company”). *Id.* The Club was incorporated in 1902 to operate as a social club in Clifton Park. *Id.* On July 1, 1912, the Land Company conveyed four sublots in Clifton Park to the Club. *Id.* at ¶ 3. In 2016 the Club purchased a fifth lot in Clifton Park. Membership in the Club is not “confined to residents of Clifton Park.” *Wallace v. Clifton Park Land Co.* 92 Ohio St. 349, *10 (July 2, 1915). Rather, “a large number belonging thereto and patronizing the same are not residents.” *Id.*

In March 1912, the Land Company placed the Clifton Park private park and beach area (collectively the “Beach”) into a trust (“Trust”) for the use and enjoyment of all Clifton Park lot owners, vesting lot owners with the legal status of Trust beneficiaries (“Beneficiaries”). *Dueck, supra*, at ¶ 10. The Land Company also conveyed the private beach and park to five trustees, to hold for the use and benefit of Clifton Park lot owners.

[Land Company]...does by these presents absolutely give, grant...and forever quitclaim unto said grantees [trustees]...all such right and title as [Land Company] has...in the following described pieces and parcels of land..., which have been reserved for the use and benefit of the owners of land in said allotment...for the sole use and benefit of all owners of sub lots or parts of lots, in the [Beach]...subject to the terms, conditions, and regulations herein contained, that is to say:...

DUTIES OF TRUSTEES

(1) The Trustees shall hold 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. (2) No 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. (3) The trustees shall collect money from the persons interested as hereinafter provided, and from the sums so collected, and from any other moneys coming to their hands, shall pay taxes and assessments on said lands as they become payable; shall keep the weeds and grass cut, and trees, shrubbery and flower beds on said lands in good condition; shall provide for removal of snow and ice when necessary; shall keep the bathing pavilion, stairways, private roadways and sidewalks in repair; shall establish regulations for

the use of, and provide for proper policing of private roads, lanes, parks and bathing pavilions; and generally maintain all said property in good order and condition for the use of lot owners in said allotment, as the same is now maintained.

See Amended Complaint, Exhibit A.

Defendants, the Current Trustees of the Trust, are charged with the duty to “hold 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.* Defendants are granted the power to “establish regulations for the use of” the Beach. *Id.* Since at least 1942 the Club has made annual payments to the Trust and in exchange the trustees have granted use of the Beach to a finite number of non-lot-owning Club members. “Over the years, the meeting minutes of the Trustees as well as the Clifton Club’s board of directors document the understanding that use of the Beach by the Club Members was regulated by the Trustees.” *Dueck, supra*, at ¶61.

III. THE 2012 LITIGATION

In 2011 overcrowding of the Beach and related parking became an issue. *Id.*, ¶ 17. In meetings between the Club, the then trustees, and several Clifton Park lot owners, it became apparent that a disagreement had developed as to the various parties’ rights and responsibilities under the Trust, including the scope and extent of the non-lot-owning Club members’ right to access the Beach. *Id.*, ¶¶ 17-22.

On June 2, 2012, several Clifton Park lot owners³ (“2012 Plaintiffs”), three of whom are plaintiffs here, filed a declaratory judgment action to seek this Court’s guidance on the parties’ rights and responsibilities under the Trust. *Id.*, ¶ 22. Specifically, the 2012 Plaintiffs sought a declaration that non-lot-owning Club members are not Trust beneficiaries and, as a result, have

³ Arthur P. Dueck, Todd Gilmore, Nancy Binder, and William R. Keller.

no legal entitlement to use the Beach. *Id.* The 2012 Plaintiffs did not, however, request that non-lot-owning Club members be barred from using the Beach on a negotiated fee basis – a practice that has existed for decades. *Id.* In fact, the 2012 Plaintiffs agreed that non-lot-owning Club members have the right to use the Beach with the permission of the Trustees. *Id.*, ¶ 21.

Throughout their summary judgment briefing, the 2012 Plaintiffs consistently recognized and conceded that trustees of the Clifton Park Trust had the power and authority to grant non-lot owning Club members permissive Beach access in exchange for an annual payment and subject to the trustees’ regulations. The following excerpts from the 2012 Plaintiffs’ Brief in Opposition to the (then) Clifton Park Trustees’ Motion for Summary Judgment (attached hereto as Exhibit A) demonstrate this:

- **Page 3** – “Further supporting the Plaintiff Beneficiaries' requested relief is the indisputable fact that the Non-Resident Club Members' historical use of the Beach has been **through annually negotiated permission granted in exchange for the Club's agreement to pay money to the Trustees' operating budget. The Trustees' records prove this fact.**” (Emphasis added).
- **Page 4** – “The Trustees admitted as much on February 26, 2015 when they stated that ‘**historically the Club members have been allowed to access Clifton Beach by annual permission of the Trustees in exchange for a substantial contribution to the Trustees' operating budget.**’ (Ex. 51.) Accordingly, the only use that the Non-Resident Club Members enjoy is negotiated permissive use.” (Emphasis added).
- **Page 5** – “Further, the Trustees' power to regulate usage of the Beach is not called into question by the First Amended Complaint or any issue in this case.”
- **Page 9** – “The prior trustees did not interpret the Trust or Club's Deed as granting Non-Resident Club Members a right to use the Beach and treated their use as permissive **based on the Club's negotiation of a contribution with the trustees.**” (Emphasis added).
- **Page 11** – Referencing a 1942 letter from the Club’s negotiating committee, the 2012 Plaintiffs stated: “That letter was ‘acceptable’ to

the Club, and the President was authorized to collect one-quarter dues **to pay for the agreement from the trustees granting Non-Resident Club Members' Beach access.** (Emphasis added).

- **Page 12** – “Accordingly, during the time of these records it remained clear that the Non-Resident Club Members' use of the Beach **was permissive and based on the agreement between the trustees and the Club.**” (Emphasis added).
- **Page 13** – Quoting a 1964 letter from the then trustees: "As you know, the arrangement between the Trustees and the Club is simply that the **Trustees have afforded the Club and its member's permission on the year-to-year basis to use the beach** but do not have any ownership of the beach or the improvements." (Emphasis added).
- **Page 14** – Quoting a 2015 letter from then trustees: “The February 20 letter correctly reports that historically the **Club members have been allowed to access Clifton Beach by annual permission of the Trustees** in exchange for a substantial contribution to the Trustees' operating budget.... [W]e strongly affirm that we have continued this annual practice and intent [sic] to continue it in the future.”
- **Pages 28-29** – “Supporting Plaintiffs' requested relief is the indisputable fact that **the Non-Resident Club Members' use of the Beach has historically (since 1942, the beginning of the available records) been by virtue of annually negotiated permission of the Trustees in return for the Club's agreement to pay a large assessment to the operating budget.**”
- **Page 29** – “The Club's 1942 and 1947 approval of an agreement with the trustees to contribute to the Beach budget (and continued payment per those agreements) provided that the trustees had ‘legal authority’ and a ‘right to agree’ with the Club regarding its members' Beach use is * * * consistent with annual permissive use.”

Even in their Proposed Stipulations of Fact (attached hereto as Exhibit B), the 2012 Plaintiffs stated that:

14. Historically the Club's members who do not own a lot in the Clifton Park Allotment **have been allowed to access the Clifton Park Beach by annual permission of the trustees of the Trust in exchange for a substantial contribution to the Trustees' operating budget.** (Emphasis added).

15. The Trustees have historically established regulations that determine the number of Club members that are permitted to use the Clifton Park Beach.

Ultimately this Court granted summary judgment in favor of the Club holding that “due to the status of the Clifton Club as a Beneficiary, the Clifton Club, and through it, all of its members, has a legal right to use Trust property, including the Beach, subject to the regulations and restrictions as set forth in the Trust Deed and Club Deed.” *Id.*, ¶ 33. The 2012 Plaintiffs appealed.

On appeal, the 2012 Plaintiffs “consistently argued that the Club Members do not have a ‘legal right’ to use the Beach, **but that the right is by permission, and subject to regulations by the Trustees.**” *Id.*, ¶ 40 (emphasis added). The Eighth District itself noted that “the parties actually agree that Club Members may use the Beach **by permission, for an annual fee, with regulatory oversight by the Trustees.**” *Id.* (emphasis added). The Eighth District stated that the Trustees and the Club had a “historical understanding...that the [non-lot-owning] Club Members’ right to access the Beach is permissive, and that **Trustees have full authority to regulate Beach access.**” *Id.*, ¶ 66 (emphasis added). Moreover, the Eighth District concluded “that the trial court correctly determined that the [non-lot-owning] Club Members have a ‘right’ to use the Beach,” but, “that the [non-lot-owning] Club Members have no legal right of access as Beneficiaries. **Access by the [non-lot-owning] Club Members is by permission and regulation of the Trustees.**” *Id.*, ¶ 67, (emphasis added). Indeed, in its final conclusion the Eighth District stated: “[t]he [non-lot-owning] Club Members’ [sic] have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed.” *Id.*, ¶ 126. This Court’s final judgment entered after the case was remanded agreed: “**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that members of the Clifton Club, who are not

resident lot owners, are not equal or direct beneficiaries of the Trust and thus have no legal right to access the Beach under the Trust, although they do have a permissive right to access the Beach, as regulated by the Trustees pursuant to the Trust Deed.”⁴ Apparently Plaintiffs’ own counsel agreed with this as the press release issued by Hahn Loeser and Mr. Rose described the 8th District holding as follows:

[t]he Court of Appeals agreed with our arguments and reversed the trial court’s ruling. The Court held that the Club members were not legal beneficiaries and only had a permissive right to use the beach.

See Hahn Loeser Press Release, www.hahnlaw.com (August 16, 2017) (attached as Exhibit C).

IV. THIS CASE

Based upon a good faith reading of *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, the Current Trustees, named as Defendants, concluded they have the power and authority to grant non-lot-owning Club members permissive access to the Beach, in exchange for an annual fee and subject to the Trustees’ regulation of such access. In line with their good faith understanding of the law governing this dispute, the Current Trustees promulgated new regulations controlling the non-lot-owning Club members’ permissive access to the Beach during 2018. In promulgating these rules the Trustees evaluated, among other things: (1) the financial impact of continuing or discontinuing Beach access to non-lot owning Club members; (2) the relative annual usage of the Beach by lot owners and non-lot owning Club members; and (3) the utilization of the parking and picnic facilities by lot owners and non-lot owning Club members. The Current Trustees also announced: (1) plans for the creation of a committee comprised of lot-owner beneficiaries to study Beach use and assist the Trustees in the promulgation of future Beach rules; and (2) additional tracking to understand Beach use by Club members and lot owners including the

⁴ The Court initially entered this ruling on October 10, 2017, but stayed same pending the Ohio Supreme Court’s jurisdictional decision. The Court lifted the stay on March 19, 2018, and this ruling was reinstated.

implementation of different parking stickers for Club members and lot owners. All of this information will be utilized in the future to further evaluate and implement appropriate and fair rules for Beach use in the future. Thus, the Trustees attempted to fairly analyze and assess the *current* situation to implement fair and appropriate rules and to gather information that will help the Trustees fairly manage the Beach in the *future*.

On May 2, 2018, Plaintiffs filed their “Second Amended Complaint,”⁵ seeking, in part, to enjoin the Defendants from exercising the precise regulatory power granted to them by the Trust, as confirmed by the Eighth District and this Court:

97. The Trustees have no authority under the terms of the Trust to grant a right to use the Trust Property, including the Beach and Beach Property, to any person who is not a beneficiary of the Trust **without unanimous consent of the lot owners**. (Emphasis added).
98. The Clifton Park lot owners have not given unanimous consent to the Trustees to grant a right to use the Trust Property, including the Beach and Beach Property, to any person who is not a beneficiary of the Trust.
99. The Trustees have no authority under the terms of the Trust to grant a right or permission to use the Trust Property, including the Beach and Beach Property, to any person who is not a beneficiary of the Trust that is equal to the rights of the Trust beneficiaries **without the unanimous consent of the lot owners**. (Emphasis added).
100. The Clifton Park lot owners have not given unanimous consent to the Trustees to grant a right to use the Trust Property, including the Beach and Beach Property, to any person who is not a beneficiary of the Trust that is equal to the rights of the Trust beneficiaries.

The relief requested in Plaintiffs’ TRO/PI Motion mirror those found in Plaintiffs’ Second Amended Complaint.

Thus, despite the Prior Decisions, Plaintiffs now posit that the Current Trustees’ grant of permissive Beach access to any non-lot-owning Club members **without unanimous consent of all lot owners** is a breach of fiduciary duty which must be enjoined. This contradicts the 2012

⁵ Plaintiffs filed their original Complaint on May 1, 2018.

Plaintiffs’ position on this precise issue and, more importantly, the Eighth District’s holding that non-lot-owning Club members have the right to use the Beach **with the permission of the Trustees**. *Dueck, supra.*, ¶ 21 (emphasis added). Again, the Eighth District has made clear that: (1) “the [non-lot-owning] Club Members’ right to access the Beach is permissive, and that Trustees have full authority to regulate Beach access.” *Id.*, ¶ 66; and, (2) “**Access by the [non-lot-owning] Club Members is by permission and regulation of the Trustees.**” *Id.*, ¶ 67, (emphasis added). Plaintiffs’ counsel himself has taken this position. *See* Exhibit C. This Court should dismiss this issue and order the Plaintiffs to pay to the Trust the fees and expenses associated with litigating this already decided issue pursuant to R.C. 5810.04.

V. LAW AND ARGUMENT

A temporary restraining order contemplates the unusual emergency-type situation where immediate action is required to maintain the status quo until a hearing can be held. Civ. R. 65(A). The Rule makes it clear that a temporary restraining order is to be granted only in an emergency situation and only where irreparable damage would occur before the opposition could be heard. Staff Note to Civ. R. 65(A). Thus, a temporary restraining order is an order granted without written or oral notice to the adverse party. *Atwood v. Judge, Director*, 63 Ohio App. 2d 94 (7th Dist. Columbiana County 1977). It is a provisional remedy issued *ex parte* for the purpose of preventing the doing of some act until the propriety of granting a preliminary injunction can be determined. It is meant to preserve the status quo pending resolution of the underlying matter. *Grogan v. T.W. Grogan Co.*, 143 Ohio App. 3d 548 (8th Dist. Cuyahoga County 2001), as amended nunc pro tunc, (June 7, 2001).

The issue whether to grant or deny an injunction is a matter solely within the discretion of the trial court and a reviewing court will not disturb the judgment of the trial court in the absence

of a clear abuse of discretion. *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.* (1995), 73 Ohio St. 3d 590, syllabus three. In reviewing a preliminary injunction, the Eighth District, in *Cavanaugh Building Corp. v. Bd. of Cuyahoga Cty. Commissioners*, 2000 Ohio App. LEXIS 241 (Jan. 27, 2000) Cuyahoga App. No. 75607, unreported, found the standard of review to be one of abuse of discretion and noted that the term abuse of discretion connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. When applying the abuse of discretion standard, a reviewing court is not free merely to substitute its judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St. 3d 135, citing *Berk v. Matthews* (1990), 53 Ohio St. 3d 161.

The Eighth District recognizes that a preliminary injunction is an extraordinary remedy and, as such, the party seeking an injunction has a substantial burden to meet in order to be entitled to a preliminary injunction. *Ormond v. Solon*, 2001 Ohio App. LEXIS 4654 (Oct. 18, 2001) Cuyahoga App. No. 79223, unreported. The party seeking the preliminary injunction must establish a right to the preliminary injunction by showing clear and convincing evidence of each element of the claim. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App. 3d 786, citing to *Mead Corp., Diconix, Inc., Successor v. Lane* (1988), 54 Ohio App. 3d 59. Further, in ruling on a motion for a preliminary injunction, the trial court must consider whether: (1) the movant has shown a strong or substantial likelihood or probability of success on the merits; (2) the movant has shown irreparable injury; (3) the preliminary injunction could harm third parties; and (4) the public interest would be served by issuing the preliminary injunction. *Ormond, supra*, citing to *Gobel v. Laing* (1967), 12 Ohio

App. 2d 93; *Frisch's Restaurant, Inc. v. Shoney's, Inc.* (1985), 759 F.2d 1261, 1263; and *Goodall v. Crofton* (1877), 33 Ohio St. 271.

A. Plaintiffs Are Not Entitled To A Temporary Restraining Order Because There Is No Risk Of Immediate Or Irreparable Harm.

Plaintiffs' TRO/PI Motion is devoid of any argument that this is an "unusual emergency-type situation" that would require a temporary restraining order to maintain the status quo until a hearing can be held. In fact, the temporary restraining order requested by Plaintiffs would dramatically alter the status quo by denying all Club members access to the Beach in 2018. Defendants are on notice of Plaintiffs' request for a preliminary injunction, and respond on the merits below. Resolution of these issues should wait until this Court has evaluated the propriety of granting Plaintiffs' requested injunction. There is no cognizable need for an *ex parte* or other immediate order which would, in effect, radically alter the rights and responsibilities of people and an entity which have not yet even been made parties to this case.⁶

B. Plaintiffs Are Not Entitled To A Temporary Restraining Order Or A Preliminary Injunction Because Plaintiffs Have Not Presented Clear And Convincing Evidence Of A Strong Or Substantial Likelihood Or Probability Of Success On The Merits.

With respect to Count I of Plaintiffs' Amended Complaint, the Trustees' right to grant permissive access to non-lot owning members of the Clifton Club has been conceded and litigated by Plaintiffs and decided in *Dueck v. Clifton Club Co.*, 2017-Ohio-7161. Indeed, the 2012 Plaintiffs (three of whom are plaintiffs here) agreed with the premise that the Trustees may grant permissive access to non-lot owning Clifton Club members. *Id.*, ¶ 40. More importantly, the Eighth District held that: (1) non-lot-owning Club members have the right to use the Beach

⁶ Plaintiffs have not joined all lot owner Beneficiaries as parties, including the Club, whose members' Beach access the Plaintiffs are seeking to immediately deny. As set forth in Defendants Motion to Dismiss, all Beneficiaries of the Trust have legally protectable interests that would be affected by any grant of Plaintiffs TRO/PI Motion and, as such, they are necessary parties to this case.

with the permission of the Trustees. *Id.*, ¶ 21 (emphasis added); (2) “the [non-lot-owning] Club Members’ right to access the Beach is permissive, and that Trustees have full authority to regulate Beach access.” *Id.*, ¶ 66; and, (3) “**Access by the [non-lot-owning] Club Members is by permission and regulation of the Trustees.**” *Id.*, ¶ 67, (emphasis added).

Despite the foregoing, Plaintiffs’ Second Amended Complaint alleges that Defendants are precluded from granting “a right to use the Trust Property, including the Beach and Beach Property, to any person who is not a beneficiary of the Trust without unanimous consent of the lot owners.” Because this issue has been decided by the Eighth District, Plaintiffs may not litigate it again.

The doctrine of *res judicata* precludes both the relitigation of a cause of action, known as claim preclusion, and the relitigation of particular facts or issues between the same parties in another action on a different claim or cause of action, known as issue preclusion, and is often called collateral estoppel. *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St. 3d 526; *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St. 3d 386; *Fort Frye Teachers Ass’n, OEA/NEA v. State Employment Relations Bd.*, 81 Ohio St. 3d 392. Issue preclusion holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions was identical or different. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 97 Ohio St. 3d 269.

As noted above, all Clifton Park lot owners were parties to the 2012 litigation; indeed, three of the plaintiffs in that litigation are plaintiffs here. Mr. Bjorn, although not a plaintiff in the 2012 litigation, was a lot owner and a party to the litigation. The prior trustees were

defendants in the 2012 litigation. And, although four of the five Current Trustees are different people, they occupy the same office occupied by the prior trustees. All have been sued in their capacity as trustees of the Clifton Park Trust, and their rights and obligations under the Trust are identical. Therefore, this litigation is between the same parties and/or their privies.

The rights and responsibilities of the trustees under the Trust was a primary issue in the 2012 litigation. The Eighth District held that: (1) non-lot-owning Club members have the right to use the Beach **with the permission of the Trustees**. *Id.*, ¶ 21 (emphasis added); (2) “the [non-lot-owning] Club Members’ right to access the Beach is permissive, and that Trustees have full authority to regulate Beach access.” *Id.*, ¶ 66; and, (3) “**Access by the [non-lot-owning] Club Members is by permission and regulation of the Trustees.**” *Id.*, ¶ 67, (emphasis added). This Court’s final judgment entered after the case was remanded agreed: “**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that members of the Clifton Club, who are not resident lot owners, are not equal or direct beneficiaries of the Trust and thus have no legal right to access the Beach under the Trust, although they do have a permissive right to access the Beach, as regulated by the Trustees pursuant to the Trust Deed.” All parties have conceded that this Court and the Eighth District were the appropriate courts to decide this matter. Therefore, the doctrine of issue preclusion prevents Plaintiffs from continuing to litigate this issue and Count I of the Amended Complaint must be dismissed.

Count I must be dismissed for a second reason. The Trust deed, described by Plaintiffs as the “sole source of authority for the Trustees”⁷ and attached by Plaintiffs to their Second Amended Complaint as Exhibit A, states that no part of the Beach can be “sold, conveyed or dedicated to public use without the unanimous consent of all the lot owners in” Clifton Park. *See* Second Amended Complaint, Exhibit A. Plaintiffs appear to contend that Defendants’ grant of

⁷ See Plaintiffs’ Second Amended Complaint, paragraph 19.

permissive Beach access to non-lot-owning Club members is tantamount to selling, conveying or dedicating the Beach to public use. However, the Current Trustees' exercise of the power conveyed by the Trust (to hold and regulate access to the Beach for the use and benefit of all Clifton Park lot owners, including the Club) could not be a sale, conveyance or dedication to public use under any stretch of the imagination. The word "public" refers to people in general, rather than to people in a particular group, such as Club members. In regulating the use of the Beach by members of the Club, a lot-owner beneficiary of the Trust, the Trustees are not opening the Beach to use by the general public.

The bottom line is this: Plaintiffs' claim that Defendants are required to obtain the unanimous consent of all Clifton Park lot owners before they can grant permissive Beach access to Club members is wrong. So, too, is Plaintiffs' claim that granting permissive access is a breach of fiduciary duty. The Eighth District ruled that the Trust grants the Trustees "full authority to regulate Beach access." *Id.*, ¶ 66. Furthermore, the Eighth District has ruled that the Trustees may grant permissive access to non-lot owning Club members. Far from a substantial likelihood of success on this claim, Count I of Plaintiffs' Second Amended Complaint should be dismissed as it fails to even state a claim upon which relief may be granted.

Counts II and III of Plaintiffs' Amended Complaint are aimed at the specifics of the Trustees' 2018 Beach regulations. Plaintiffs admit that the Trust language grants the Trustees the power and authority to regulate Beach access, and that the Trustees have discretion in exercising their regulatory power and authority. *See* Plaintiffs' TRO/PI Motion, pgs. 6 and 13. Plaintiffs argue that the current regulations are so manifestly unfair that their promulgation amounts to a breach of the Defendants' fiduciary duties of loyalty and impartiality.

Plaintiffs' primary argument in this regard appears to be that there should be some mathematical distinction under the Beach regulations between the access granted to lot owners and non-lot-owning Club members. Because, from Plaintiffs' perspective, there is no such mathematical distinction, the Defendants are violating their fiduciary duties.⁸ As noted above, the Trustees have the power and authority to negotiate the grant of non-lot-owners' permissive Beach access, and to regulate that access.

Further, from a practical perspective, Plaintiffs cannot solve this issue by math alone. The Eighth District and this Court have already made that clear that the Trustees may grant permissive access to the non-lot owning Clifton club members. In so holding, the Eighth District and this Court were fully aware that the Clifton Club had in excess of 200 members – it is indeed a social club. Thus these Courts' holdings implicitly recognize that judging the appropriateness of access cannot be by math alone. Indeed, if that were the case, arguably the Trustees would have to apply a mathematical analysis across the board to all beneficiaries. That would seem to require a determination of how many resident family members reside in and are eligible to use the Beach as a whole and to make rules accordingly. Under that analysis, it would not be equal to allow a family of five residents more access than an empty nester family of two. The point is this: if math resolves this issue as Plaintiffs' claim, where does the mathematical application stop? There would be a significant administrative burden -- including costs in time and resources -- required to establish and enforce regulations solely based on mathematical formulas.

In short, Plaintiffs have made clear that they do not agree with the 2018 regulations. Plaintiffs have failed to present clear and convincing evidence that those regulations are so manifestly unfair that their mere promulgation and enactment amount to breaches of Defendants'

⁸ Contrary to Plaintiffs' claim, the non-lot owning Clifton Club members are not "super users", they are permissive users. Under the existing rules permissive users have limited access to the Beach. Beneficiaries have no such limitation on their Beach use.

fiduciary duties and that such promulgation and enactment must be preliminarily enjoined. The duty of loyalty requires the Trustees to administer the trust in the interests of its beneficiaries and the duty of impartiality requires the Trustees to give due regard to the beneficiaries' respective interests. The Club, as the owner of five lots, is a beneficiary of the Trust and pays a significant portion of the annual assessment required under the Trust Deed. Plaintiffs' proposed temporary restraining order/preliminary injunction would, in fact, deny the Club, a Trust beneficiary, the right to have any of its members access the Beach. How does such an order protect and preserve the Club's rights under the Trust deed as a beneficiary?

C. Plaintiffs Have Not Presented Clear And Convincing Evidence That Irreparable Injury Will Result Absent A Preliminary Injunction.

Plaintiffs argue that “[c]ourts have generally recognized that depriving one of their rights to use and access real property constitutes irreparable harm.” *See* Plaintiffs’ TRO/PI Motion, pg. 17. The Defendants are not depriving Plaintiffs, or any lot owners, of their rights to use and access the Beach. Rather, in carrying out their duties under the Trust, Defendants have enacted regulations governing Beach access. Non-lot-owning Club members have been granted permissive Beach access in exchange for an annual fee and subject to the trustees’ regulations for decades. Plaintiffs remain able to fully use the Beach, subject to the 2018 regulations. Therefore, Plaintiffs have failed to introduce clear and convincing evidence that they will suffer an “irreparable harm” absent the issuance of a preliminary injunction.

D Plaintiffs Have Not Presented Clear And Convincing Evidence That Third-Parties Will Not Be Harmed By The Issuance Of A Preliminary Injunction.

Plaintiffs’ requested injunction would immediately and severely harm the rights of the Club and all non-lot-owning Club members by destroying the permissive Beach access which they have negotiated and paid for. Since the Club pays its annual assessment on a monthly basis,

it is logical to assume that the Club might discontinue paying the monthly assessment if the TRO is granted. If this assumption is correct, the injunction also would harm the individual lot owner Beneficiaries by decreasing the funds available to the Trustees to pay the costs and expenses of the Trust and ultimately resulting in an increase in the assessment to each individual lot owner Beneficiary. On that basis alone the injunction should be denied. Furthermore, the Club must be made a party to this action and permitted an opportunity to address Plaintiffs' arguments and requests.

E. Plaintiffs Have Not Presented Clear And Convincing Evidence That The Public Good Would Be Served By The Issuance Of A Preliminary Injunction.

Plaintiffs' only contention in this respect is that the granting of a preliminary injunction would serve to further the societal interests of generally preventing the breach of agreements and duties. This is a private matter concerning access to a private Beach. The public good is simply irrelevant to any of the issues in this case.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs' request for a temporary restraining order and a preliminary injunction should be denied.

Respectfully submitted,

/s/ John R. Conley

William D. Kloss, Jr. (0040854)

Karen M. Moore (0021978)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

Columbus, OH 43215

(614) 464-6400

(614) 464-6350 *facsimile*

wdklossjr@vorys.com

kmmoore@vorys.com

John R. Conley (0084079)
VORYS, SATER, SEYMOUR AND PEASE LLP
106 S. Main Street, Suite 1100
Akron, OH 44308
(330) 208-1000
(330) 208-1001 *facsimile*
jrconley@vorys.com

CERTIFICATE OF SERVICE

I hereby certify pursuant to Civ.R. 5(B)(2)(f), that a true and accurate copy of the foregoing *Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction* was served this 15th day of May, 2018 via email upon counsel for Plaintiffs:

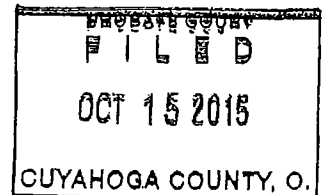
Dennis R. Rose
Casey J. McElfresh
Hahn Loeser + Parks LLP
200 Public Square, Suite 2800
Cleveland, OH 44114-2316
drrose@hahnlaw.com
cmcelfresh@hahnlaw.com
Attorneys for Plaintiffs

/s/ John R. Conley
William D. Kloss, Jr. (#0040854)
Karen M. Moore (#0021978)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, OH 43215
wdklossjr@vorys.com
kmmoore@vorys.com
(614) 464-6400 *telephone*
(614) 464-6350 *facsimile*
John R. Conley (#0084079)
VORYS, SATER, SEYMOUR AND PEASE LLP
106 S. Main Street, Suite 1100
Akron, OH 44308
(330) 208-1000
jrconley @vorys.com
(330) 208-1001 *facsimile*

Counsel for Defendants

EXHIBIT A

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



ARTHUR P. DUECK, *et al.*,

Plaintiffs,

vs.

THE CLIFTON CLUB COMPANY, *et al.*,

Defendants.

CASE NO. 2012 ADV 179424

JUDGE ANTHONY J. RUSSO

PLAINTIFFS ARTHUR P. DUECK'S,
TODD GILMORE'S, NANCY
BINDER'S, AND WILLIAM R.
KELLER'S, PUTATIVE PLAINTIFFS
RHONDA LOJE'S AND JEFFREY
MANSELL'S BRIEF IN OPPOSITION
TO THE CLIFTON PARK TRUSTEES'
MOTION FOR SUMMARY
JUDGMENT

Dennis R. Rose (0039416)
drose@hahnlaw.com
Arthur E. Gibbs III (0066819)
aegibbs@hahnlaw.com
Casey J. McElfresh (0088083)
cmcfresh@hahnlaw.com
HAHN LOESER & PARKS LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Telephone: (216) 621-0150
Facsimile: (216) 241-2824

Ross M. Babbitt (0072946)
rbabbitt@babbitt-lawfirm.com
ROSS M. BABBITT CO., LPA
Hoyt Block, Suite 200
700 West St. Clair Avenue
Cleveland, Ohio 44113
Telephone: (216) 623-6346
Facsimile: (216) 274-9683

Attorneys for Plaintiffs

2012ADV179424



1048106

PDF

AVB

EXHIBIT

A

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
INTRODUCTION AND SUMMARY OF ARGUMENT	1
1. The Trust Does Not Confer Any Right to Use Trust Property on the Non-Resident Club Members	1
2. The Club's Lease and the Club's Deed Do Not Grant Non-Resident Club Members a Right to Use Trust Property	2
3. The Club's Past Use of the Beach Has Only Been By Virtue of an Annually Negotiated Permissive Use In Exchange for an Agreed Contribution to the Trustees' Operating Budget.....	3
4. The Trustees' Records and Club's Records Confirm That Plaintiffs' Interpretation Is Correct	4
5. The Plaintiff Beneficiaries' Complaint Does Not Ask the Court to Rewrite the Trust or Override the Trustees' Powers to Regulate Beach Usage.....	5
6. The Trustees' Statute of Limitation Argument Fails as a Matter of Law	5
STATEMENT OF FACTS	6
I. THE FORMAL DEVELOPMENT OF THE PARK BEGINS WITH THE PROMISE TO GRANT LOT OWNERS A RIGHT TO COMMON USE OF LAND IN THE PARK DEVOTED TO PURPOSES OF AVENUES, ROADS, PARKS, BEACH OR PARK SPACES AND SHOWS THE ORIGINAL GRANTOR'S INTENT.....	6
II. THE TRUST CONFERS RIGHTS TO USE THE TRUST PROPERTY ON LOT OWNERS IN THE PARK.	7
III. NEITHER THE CLUB'S DEED NOR THE CLUB'S LEASE INCLUDES ANY GRANT OF A RIGHT TO USE TRUST PROPERTY TO THE NON-RESIDENT CLUB MEMBERS.....	8
IV. UNTIL 2011, THE TRUSTEES AND CLUB DID NOT RECOGNIZE THAT A RIGHT TO USE WAS GRANTED TO THE NON-RESIDENT CLUB MEMBERS.	9
A. The Prior Trustees Did Not Interpret the Trust or Club's Deed as Granting Non-Resident Club Members a Right to Use the Beach and Treated Their Use as Permissive Based on Negotiations With the Trustees.....	10
1. In 1942, the Club Negotiates Permissive Use of the Beach In Exchange for an Annual Fee.	10

2.	The Club and the Resident Lot Owners Approve a New Agreement with the Club Providing for Permissive Access to the Beach.....	11
3.	The Trustees Make Clear to the Club That Its Members' Use of the Beach Was Permissive Only and the Club Agrees.	12
B.	The Scope of the Non-Resident Club Members' Use Has Been Based on the Amount of the Club's Annual Contribution to the Trustees' Beach Budget.	15
C.	The Club Previously Took the Position That It Only Had to Pay for Beach Expenses Because Its Members Do Not Benefit From Other Trust Property.	16
D.	The Trustees Take the Position That Only Residential Lot Owners Are Granted a Right to Use Trust Property Under the Trust.	17
LAW AND ARGUMENT		18
I.	STANDARD OF REVIEW	18
II.	RULES OF TRUST CONSTRUCTION SHOW THAT NON-RESIDENT CLUB MEMBERS ARE NOT BENEFICIARIES AND DO NOT HAVE A RIGHT TO USE THE TRUST PROPERTY UNDER THE TERMS OF THE TRUST OR THE CLUB'S DEED.....	19
A.	The Trust's Terms Do Not Grant the Non-Resident Club Members a Legal Right to Use to the Trust Property and They Are Not Trust Beneficiaries.	20
1.	The Principle of <i>Expressio Unius Est Exclusio Alterius</i> Leads to the Conclusion That the Non-Resident Club Members Are Not Beneficiaries and Do Not Have a Right to Use the Beach.	21
2.	The Trustees' Interpretation Requires Adding Terms to the Trust, Which It Cannot Do.....	21
3.	There Is No Evidence That the Non-Resident Club Members Were Intended Beneficiaries of the Trust.	22
B.	The Club's Deed and Club's Lease Do Not Grant Non-Resident Club Members a Right to Use Trust Property.	23
1.	The CPLIC Did Not Hold Title to the Trust Property at the Time of the Club's Deed and Thus, Did Not Convey a Right of Use to the Non-Resident Club Members.....	23
2.	Non-Resident Club Members Are Not Third Party Beneficiaries of the Deed.....	24

3.	The Club’s Lease Does Not Confer Rights to Use Trust Property on Anyone.	25
4.	The Trustees’ Contorted View of Corporate Law Does Not Change the Conclusion That the Club’s Deed Did Not Grant Any Right to Use Trust Property to the Non-Resident Club Members.	26
III.	THE TRUSTEES’ RECORDS AND CLUB’S RECORDS CONFIRM THAT PLAINTIFFS’ INTERPRETATION OF THE TRUST IS CORRECT.	28
A.	The Non-Resident Club Members’ Past Use Has Only Been Permissive.	28
B.	The History of Trust Administration and the Calculation of the Club’s Contribution/Assessment to the Trustees’ Beach Budget for Use of the Beach Confirms That the Plaintiffs’ Interpretation Is Correct.	30
IV.	THE FIRST AMENDED COMPLAINT DOES NOT ASK THE COURT TO REWRITE THE TRUST OR THE CLUB’S DEED.	31
V.	THE TRUSTEES’ STATUTE OF LIMITATIONS ARGUMENT FAILS AS A MATTER OF LAW.	33
	CONCLUSION.	34

TABLE OF AUTHORITIES

Cases	Page(s)
<i>37 Robinwood Assoc. v. Health Indus., Inc.</i> , 47 Ohio App. 3d 156 (10th Dist. 1988)	25
<i>In re Arnott</i> , 190 Ohio App. 3d 493, 2010-Ohio-5392 (4th Dist.).....	19
<i>BancOhio Nat'l Bank v. Cardinal Constr. Co.</i> , 10th Dist. Nos. 89AP-1510, 90AP-90, 1991 Ohio App. LEXIS 574 (Feb. 7, 1991)	22, 24
<i>Barnhart v. Peabody Coal Co.</i> , 537 U.S. 149, 168 (2003).....	21
<i>Chaney v. Clark Cty. Agricultural Soc.</i> (1993), 90 Ohio App.3d 421	19
<i>Curtis v. Shillman</i> , 8th Dist. No. 40136, 1980 Ohio App. LEXIS 13755 (Jan. 25, 1980).....	28
<i>DeRosa v. Parker</i> , 197 Ohio App.3d 332, 2011-Ohio-6024 (7th Dist.).....	24
<i>Domo v. McCarthy</i> , 66 Ohio St.3d 312 (1993).....	19
<i>Downey v. 610 Morrison Rd., LLC</i> , 10th Dist. No. 2008-Ohio-3524	21
<i>Evans v. Evans</i> , 4th Dist. No. 12CA5, 12CA6, 2014-Ohio-4450	22
<i>Jonke v. Rubin</i> , 170 Ohio St. 41 (1959).....	24
<i>Jost v. Burr</i> , 69 Ohio App.3d 354 (9th Dist. 1990)	26
<i>Kamenar R. S., Inc. v. Ohio Edison Co.</i> , 79 Ohio App. 3d 685 (3d Dist. 1992)	23
<i>Kiddie Co. Enrichment Ctr. v. Cuyahoga Cnty. Bd. of Revision</i> , 8th Dist. No. 98515, 2012-Ohio-5717	27
<i>May v. Lubinski</i> , 9th Dist. No. 26528, 2013-Ohio-2173	21

<i>McDonald & Co. Secs. v. Alzheimer's Disease & Related Disorders Ass'n</i> , 140 Ohio App. 3d 358 (1st Dist. 2000).....	28
<i>Mitseff v. Wheeler</i> (1988), 38 Ohio St.3d 112, 526 N.E.2d 798	19
<i>Nat'l City Bank v. de Laville</i> , 170 Ohio App. 3d 317, 2006-Ohio-5909 (6th Dist.).....	28
<i>Nixon v. Wilmington Trust Co.</i> , No. 3:06 CV 3046, 2007 U.S. Dist. LEXIS 53931 (N.D. Ohio July 25, 2007).....	22
<i>State ex rel. Parsons v. Fleming</i> (1994), 68 Ohio St.3d 509.....	18
<i>PNC Bank, N.A. v. Camping & Educ. Found.</i> , 1st Dist. No. C-990690, 2000 Ohio App. LEXIS 1348 (Mar. 31, 2000).....	19
<i>Poston v. Schuster</i> , 6th Dist. No. H-07-037, 2008-Ohio-2085.....	19
<i>Parthe v. Parthe</i> , 6 Ohio App. 317 (5th Dist. 1917)	24
<i>Raulston v. Evans</i> , 561 S.W.2d 635 (Tex. 1978).....	27
<i>Sedlak v. Solon</i> , 104 Ohio App.3d 170 (8th Dist. 1995)	24
<i>Summerville v. City of Forest Park</i> , 128 Ohio St.3d 221, 2010-Ohio-6280.....	21
<i>In the Matter of the Trust U/W of Brooke</i> , 82 Ohio St.3d 553, 557 (1998).....	19
<i>Trustees of Dartmouth College v. Woodward</i> , 17 U.S. 518 (1819).....	26
<i>Vincent v. Zanesville Civ. Serv. Comm'n</i> , 54 Ohio St.3d 30 (1990).....	21
<i>Wallace v. Clifton Land Company</i> , 92 Ohio St. 349 (1915).....	26
<i>Zahn v. Nelson</i> , 170 Ohio App.3d 111, 2007-Ohio-667	19

STATUTES & OTHER AUTHORITIES

35 Ohio Jur.3d Deeds § 176.....	23
Civ. R. 56(C).....	18
The Law of Trusts and Trustees, Trusts and Estates § 16 (3d Ed. 2007)	26
MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 562 (10th Ed. 1993)	2
Ohio Rev. Code § 2305.14.....	5
Restatement (2d) Trusts § 126	22

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs Arthur P. Dueck's, Todd Gilmore's, Nancy Binder's, and William R. Keller's, Putative Plaintiffs Rhonda Loje's and Jeffrey Mansell's (the "Plaintiff Beneficiaries") First Amended Complaint asks this Court to resolve two questions:

- (1) whether the members of Defendant The Clifton Club Company (the "Club") who are not sub-lot owners ("Non-Resident Club Members")¹ in the Clifton Park Allotment (the "Park") are beneficiaries of the March 25, 1912 Deed of Trust (the "Trust"); and
- (2) whether the Non-Resident Club Members have a legal right to use the Trust property, including the Clifton Park Beach (the "Beach"), under the terms of the Trust, the Club's July 1, 1912 Deed ("Deed"), or the Club's 1902 Lease (the "Lease").

The plain language of the Trust, the historical interpretation of the Trust by the Trustees and the Club and the course of dealing of the Trustees and the Club all show that summary judgment is inappropriate. The answer to those two questions is no. Accordingly, for the following reasons, the Court should deny Defendant Charles Drumm's, John S. Pyke, Jr.'s, Peter A. Kuhn's, Philip W. Hall's and Warren Coleman's (the "Trustees") Motion for Summary Judgment.

1. The Trust Does Not Confer Any Right to Use Trust Property on the Non-Resident Club Members (pp. 19-23).

Determining who the beneficiaries of the Trust are starts and ends with the Trust's terms. The Court's interpretation of the Trust is guided by four principles: (1) the settlor's intention is determined by reading all the Trust's terms together, (2) undefined terms in a Trust must be given their plain and ordinary meaning, (3) the maxim of *expressio unius est exclusio alterius*, and (4) the prohibition against adding terms to a Trust.

The Trust's terms state that the only persons for whose use and benefit the Trustees hold the Trust property are the owners of sub-lots, their successors in title, and members of their household:

¹ Club members who are residents of the Park are Trust beneficiaries by virtue of being a resident lot owner.

To have and to hold the [Trust Property] . . . unto the said grantees [Trustees] and their successors in trust and assigns . . . in trust . . . for *the sole use and benefit of all owners of sub lots or parts of lots, in the Clifton Park Allotment . . . subject to the terms and conditions and regulations herein* contained, that is to say:

...

DUTIES OF TRUSTEES.

(1) The Trustees shall hold 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*. (2) No 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*.

(Ex. 6 (emphasis added).)² From these terms, it is apparent that the Non-Resident Club Members are not beneficiaries of the Trust. The Trustees admit this. (Exs. 54-58.) Moreover, by reading these terms together—most importantly the phrase “the lot owners in the [Park], and their successors in title, and members of their households”³—and giving them their plain and ordinary meaning it is apparent that the settlors did not intend to grant rights to use the Trust Property to Non-Resident Club Members. Accordingly, the Court should grant the Plaintiffs their requested relief and declare that those members are not beneficiaries of the Trust and do not have a legal right to use the Trust property, including the Beach.

2. The Club’s Lease and the Club’s Deed Do Not Grant Non-Resident Club Members a Right to Use Trust Property (pp. 23-27).

The Trustees’ reliance on the 1902 lease to the Club is misguided. The Lease became inoperative and provided no rights to the Club once it obtained the fee simple interest through the Deed. The Lease also supports the Plaintiffs’ requested relief as the terms of the Lease do not grant a right to use the common property—that later became the Trust property—and the fact that the Clifton Park Land and Improvement Company (the “CPLIC”) did not to fulfill the option

² Exhibits are presented to the Court in chronological order.

³ The dictionary definition of “household” is “those who dwell under the same roof and compose a family; *also*: a social unit comprised of those living together in the same dwelling.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 562 (10th Ed. 1993).

to lease a “certain strip of land upon the beach of Lake Erie for bathing purposes” to the Club shows an intent to not grant Non-Resident Club Members a right to use the Trust property.

Similarly, the Club’s Deed does not grant the Non-Resident Club Members a right to use the Beach. The Trustees concede that the Club’s Deed does not *expressly* grant the Non-Resident Club Members a right to use the Trust property, including the Beach. For that reason alone, the Court should not read such a grant into the terms of the Club’s Deed. Further, the faulty lynchpin of the Trustees’ argument is that the Club’s Deed grants a right of use to the Non-Resident Club Members because the “right to use in common with other owners of the land in [the Park], all portions of said allotment which shall by the grantor be devoted to the purposes of park or park spaces for the exclusive use and benefit of such lot owners” devolved by operation of law onto the Non-Resident Club Members. But Ohio law did not allow the CPLIC to grant a right of use to property it did not own, the case law upon which the Trustees rely does not stand for that proposition, and the Club’s Deed must be read in harmony with the Trust, which grants the right to use the Trust property, including the Beach, only to lot owners, their successors in title, and members of their household, not the Non-Resident Club Members.

3. The Club’s Past Use of the Beach Has Only Been By Virtue of an Annually Negotiated Permissive Use In Exchange for an Agreed Contribution to the Trustees’ Operating Budget (pp. 28-30).

Further supporting the Plaintiff Beneficiaries’ requested relief is the indisputable fact that the Non-Resident Club Members’ historical use of the Beach has been through annually negotiated permission granted in exchange for the Club’s agreement to pay money to the Trustees’ operating budget. The Trustees’ records prove this fact. (Exs. 8-15, 18, 20, 22, 24, 26,

51.) This course of dealing is demonstrated by the January 9, 1963 letter from then Trustee Clayton Quintrell to the then Clifton Park Trustees in which he stated that the Non-Resident Club Members’ use has always been permissive:

The resolution which was passed at the special meeting of the members and stockholders of the Club made it *perfectly clear that this use was permissive use*

afforded to the Club members, terminable at any time by Club members themselves upon short notice.

(Ex. 18) (emphasis added). Similarly, the Club's records cement this fact as the Club informed its members that the Club members' use was based on year-to-year arrangements:

As you may know, the approximately 200 families who live in Clifton Park are responsible for maintaining Clifton Beach. Members of the Club enjoy beach privileges (on the same basis as Clifton Park residents) through year-to-year arrangements and fees negotiated with the Clifton Beach Association.

(Ex. 40.) The Trustees admitted as much on February 26, 2015 when they stated that "historically the Club members have been allowed to access Clifton Beach by annual permission of the Trustees in exchange for a substantial contribution to the Trustees' operating budget."

(Ex. 51.) Accordingly, the only use that the Non-Resident Club Members enjoy is negotiated permissive use.

4. The Trustees' Records and Club's Records Confirm That Plaintiffs' Interpretation Is Correct (pp. 30-31).

The records of both the Trustees and the Club show that the Club's members do not have a right to use the Trust property under the terms of the Trust or Club Deed:

- As shown above, the records of the Club and the Trustees show that the Non-Resident Club Members' use has always been permissive, not as of right.
- The Trustees have publicly taken the position that owners of non-residential lots do not enjoy a right of access to the Beach under the Trust. (Exs. 15-16, 45-48.)
- The Club has previously taken the position that it is only required to contribute to expenses for maintaining the Beach and does not have to contribute to maintaining other Trust property because its members do not benefit from non-Beach property. (Exs. 21, 23, 31-33, 35, 42.)
- The Club has never been assessed on the basis of the assessment formula outlined in the Trust for each beneficiary's contribution to the maintenance of Trust property. Rather, it has always agreed to pay an amount tied to the usage of its members. (Exs. 29-30, 37, 39, 43-44, 54-58.)

These indisputable facts confirm that the Plaintiff Beneficiaries are correct that the Court should declare that the Non-Resident Club Members are (1) not beneficiaries of the Trust and (2) not entitled to use the Trust property under the terms of the Trust or Club Deed.

5. The Plaintiff Beneficiaries' Complaint Does Not Ask the Court to Rewrite the Trust or Override the Trustees' Powers to Regulate Beach Usage (pp. 31-32).

While the Trustees argue that the Court should grant their Motion because the Plaintiffs are attempting to rewrite the Trust and are trying to override the Trustees' power to regulate usage of Trust property, the Plaintiffs do no such thing. As shown throughout these proceedings, the Plaintiff Beneficiaries have only asked the Court to interpret the Trust and find that neither the Trust or Club's Deed confer any beneficial or legal rights on the Non-Resident Club Members as no such language exists in those documents. Because those documents do not grant such a right, the Plaintiffs' interpretation is correct. Further, the Trustees' power to regulate usage of the Beach is not called into question by the First Amended Complaint or any issue in this case. The Trustees' duty to regulate usage of Trust property does not grant a right of use to the Non-Resident Club Members. Rather, the Plaintiffs ask the Court to declare whether the Non-Resident Club Members have any legal right through the Trust Deed.

6. The Trustees' Statute of Limitation Argument Fails as a Matter of Law (p. 33).

The Trustees' final ground for summary judgment is the same argument advanced by the Club in their Motion for Judgment on the Pleadings. That claim is based on the false premises that (1) Plaintiffs seek to nullify the Club's deed and (2) that Plaintiffs have brought a breach of fiduciary duty claim against the Trustees for allowing the Non-Resident Club Members access to the Beach. But, the Plaintiffs' First Amended Complaint is not barred by the statute of limitations under Ohio Rev. Code § 2305.14 for those reasons because it only requests that the Court declare that the Non-Resident Club Members are not beneficiaries of the Trust (Prayer for Relief No. 1) and that the Non-Resident Club Members do not have a legal right to use the Trust property, including the Beach, and that the Club's and Trustees' interpretation of the Club's Deed is inconsistent with the Trust and must be rejected (Prayers for Relief Nos. 2 and 3). The Plaintiff Beneficiaries' claims did not accrue until the Club asserted that its members had a legal

right to access the Beach under the Trust and the Club's Deed, which was in 2011. Accordingly, the Plaintiff Beneficiaries' claims are not barred by the statute of limitations.

STATEMENT OF FACTS

This case involves the use of a private beach located in the Park in Lakewood by Non-Resident Club Members, who are indisputably not residents or lot owners in the Park. All properties in the Park are part of the Trust. The deeds for all lots in the Park obligate the lot owners to pay a portion of the maintenance costs of the Trust which holds common park property ("Trust Property"), including the Beach, for the use of the lot owners and members of their households. The resident lot owners must pay a mandatory assessment every year to meet this obligation or they will have a lien placed on their property. This lawsuit stems from two causes: (1) the Club recently has attempted to reinterpret the Trust's definition of Trust beneficiaries to include all of the Non-Resident Club Members; and (2) the Trustees supported the Club's attempt to conjure beneficial rights for the Non-Resident Club Members. Accordingly, certain lots owners within the Park—the Plaintiffs—initiated this lawsuit to obtain a declaratory judgment that only *persons owning property in the Park* possess a right to use Trust Property.

I. The Formal Development of the Park Begins With the Promise to Grant Lot Owners a Right to Common Use of Land in the Park Devoted to Purposes of Avenues, Roads, Parks, Beach or Park Spaces and Shows the Original Grantor's Intent.

The Park was the creation of the Clifton Park Association (the "CPA") under the guidance of William Starkweather in the late 1800's. Property development began in 1893. His plans for a suburb with common property including a beach were written in the covenants and restrictions in the deeds for the first two Park lots, his and Henry Coffinberry's, recorded in 1897. (*See* Ex. 1, Ex. 2.) Coffinberry's Deed clearly stated the following key elements:

1. The owner and future assigns will have "the right to use in common with other owners of the land in said allotment all portions thereof which shall by the grantor be devoted to the purposes of avenues, roads, *parks, beach or park spaces*"
2. The land may not be used for "any business purposes whatsoever, or for any purposes

other than a private residence....”

3. “.... the grantor covenants that all sales of lots ... shall be made subject to like conditions as to use ... except such portions thereof, ... for stables, canal slips, boat houses, casinos or club houses or bathing houses *for the use of the owners of lots in said allotment.*”

The obligation for all future owners or developers of the Park to honor and abide by those deed restrictions and covenants was placed into the deed of sale of the remaining property within the Park allotment to the CPLIC, which took place upon Starkweather’s death in 1899. That 1899 deed conveying the unsold land of the CPA to the CPLIC was done via an intermediary named McLaughlin and contains the requirement that the CPLIC honor the above covenants. It also restated that all sales of lots had to be for private residences “except such portions thereof as may be sold ... [for] ... club houses or bathing houses for the use of the owners of lots in said allotment” (*See Ex. 3.*)

II. The Trust Confers Rights to Use the Trust Property on Lot Owners in the Park.

On March 25, 1912, the CPLIC conveyed the Trust Property to the then Park trustees to hold the Trust Property only for the benefit of the lot owners:

[CPLIC] ... does by these presents absolutely give, grant ... and forever quitclaim unto said grantees [trustees] ... all such right and title as [CPLIC] has ... in the following described pieces and parcels of land ..., which have been reserved for the use and benefit of the owners of land in said allotment.”

(Ex. 6, at 1.) It is undisputed that the Trust Property includes the Beach. Further, it is undisputed that the resident lot owners in the Park are beneficiaries of the Trust and that the Trustees are required to hold the Trust Property for the “the sole use and benefit of all owners of sub lots or parts of lots, in the [Park] ... subject to the terms, conditions, and regulations contained” in the duties section of the Trust and that the Trustees’ duties included “hold[ing] title to and preserv[ing] all the land deeded to them [*i.e.* the Trust Property] for the common use of *all the lot owners* in the [Park], *and their successors in title, and members of their households.*” (*Id.* at 3-4 (emphasis added).) Further, the Trustees must “establish regulations for the use of” such property, and must assess each “sub lot, or part of sub lot” for the proportion of the annual

Trust Property maintenance expenses based on the tax value of the sub-lot. (*Id.* at 4.) That is, each resident lot owner only pays the assessment based on the tax value of his or her lot.

The Trustees agree that the Trust does not name the Non-Resident Club Members as beneficiaries. (*See* Exs. 54-58, at p.5.) In fact, the “members” of the lot owners’ “households” are the only non-lot owning persons who are mentioned in the Trust as having a right to use the Trust Property. (*See* Ex. 6.) And, the Trustees admit that they “do not owe fiduciary duties to individual Club members.” (Exs. 54-58, at p.5.)

III. Neither the Club’s Deed Nor the Club’s Lease Includes Any Grant of a Right to Use Trust Property to the Non-Resident Club Members.

It is undisputed that the Club came into existence as a for-profit corporation May 29, 1902. (Ex. 4.) Certain members of the Club owned stock in the Club. It is further undisputed that the Club’s connection to the Park began with the Club’s Lease, for a term of twenty years. (Ex. 5.) Pursuant the Club’s Lease:

- the CPLIC leased four sub-lots to the Club as “premises to be used solely for the purposes of being a social club.” (*Id.* at 1;)
- the Lease contained a covenant that before the end of its existence, the CPLIC would “convey the fee in the land reserved and dedicated for park purposes in” the Park to the Park Trustees. (*Id.*);
- the Lease provided the Club with an option to purchase the fee for the leased lots for \$14,000, which would include a lease of an unspecified “certain strip of land upon the beach of Lake Erie for bathing purposes,” another unspecified “strip of land upon the Easterly bank of Rocky River for a boat house,” and another unspecified “strip of land for the purposes of a stable, together with the right to use the approaches to the same.” (*Id.* at 2;)
- Most importantly, the Lease did not grant the Club or its members a right to use the land dedicated for park purposes.

After that Lease, and *before the Club was a lot owner*, the CPLIC transferred the Trust Property that included the Beach, to the Trustees. (Ex. 6.) Four months after that conveyance, on July 1, 2012, the CPLIC conveyed the leased lots to the Club by way of the Club’s Deed. (Ex. 7.) Notably, it is undisputed that the promise to lease a strip of beach to the Club, land along the Rocky River, or land for purposes of a stable was not fulfilled. (*See generally id.*) The

Club's Deed included the same covenant as the Lease, *i.e.* a covenant that the CPLIC would convey the Trust Property to the Trustees. Further, the Club's Deed included the language granting a right of use of the property devoted to park purposes, *i.e.* the Trust Property, that was in all the deeds for the Park sub-lots:

[T]he grantee [CPLIC] has bargained and sold and does hereby ... grant ... the following ... premises ... together with the right to use in common with other owners of the land in said allotment, all portions of said allotment which shall by the grantor be devoted to the purposes of parks or park spaces for the exclusive use and benefit of such lot owners but such use of the parks

(Ex. 7, at 1.) This language was consistent with the already created Trust, which stated that the Trustees held the Trust Property for the common use and benefit of the *Park lot owners, their successors in title, and members of their households*. Finally, the Club's Deed included the agreement that its property would be used for purposes of a private residence or social club.

Even though the Club's Deed allowed it to build a social club, the Deed did not include a grant of a right to the Non-Resident Club Members to use the property "devoted to the purposes of parks or park spaces" or a promise that the trustees would hold it for their benefit. (*Id.* at 2.) The Trustees admitted this when Trustee Pyke assembled an incomplete history of the "Clifton Club's Beach Privileges" and acknowledged that the "Club purchased the lots in July 1912; the deed did not specifically grant Club members Beach access." (Ex. 50 at 12082.) Accordingly, the Club Deed did not grant a right to use Trust Property to the Non-Resident Club Members.

IV. Until 2011, the Trustees and Club Did Not Recognize that a Right to Use Was Granted to the Non-Resident Club Members.

Both the Trustees' records and the Club' records regarding the use of the Beach by the Club's members only date back to the early 1940s. And those records show four key facts:

- The prior trustees did not interpret the Trust or Club's Deed as granting Non-Resident Club Members a right to use the Beach and treated their use as permissive based on the Club's negotiation of a contribution with the trustees.
- The scope and extent of the Non-Resident Club Members' use of the Beach was based on the amount of the Club's contribution to the Beach operating budget.
- The Club effectively disclaimed that its members were beneficiaries of all the Trust

Property, rather the Club claimed that its contribution to the Trustees' budget should be based only on expenses for maintaining the Beach, not all Trust Property.

- The prior trustees and Current Trustees took the position that only residential lot owners are granted a right to use Trust Property under the terms of the Trust.

A. The Prior Trustees Did Not Interpret the Trust or Club's Deed as Granting Non-Resident Club Members a Right to Use the Beach and Treated Their Use as Permissive Based on Negotiations With the Trustees.

1. In 1942, the Club Negotiates Permissive Use of the Beach In Exchange for an Annual Fee.

On June 23, 1942, the Club's shareholders approved a resolution that instructed "the Directors to issue a call for one-quarter of the annual dues against each member and pay the proceeds to the [trustees] as a contribution by the members ... for the maintenance and operation of the beach." (Ex. 8, at CliftonClub 1837.) Then, on June 29, 1942, the Club approved a new resolution which authorized the Club President to issue such a call for dues after he ensured that (1) the trustees "have the legal authority and right to agree with the [Club] concerning use of the beach by members" and (2) that the trustees "will execute an agreement assuring to the members ... the right to use all facilities of the beach in common with, and to the same extent as" Park lot owners. (*Id.*) Finally, a committee was formed to negotiate with the trustees with the authority to represent that the Club would pay that assessment if it got the above assurances. (*Id.* at 1838.)

On July 8, 1942, the Club amended the resolution by authorizing a committee to commit to paying "one-quarter of the annual dues" to the prior trustees "provided that the [trustees] will assure members the full use of all facilities of the beach in common with, and to the same extent" as Park lot owners. (Ex. 9, at CliftonClub 1840-41.) And upon that assurance, the Club voted that its Treasurer could make a call for the dues and pay the trustees. (*Id.* at 1841.) Then L.H. Hintzelmann reported on behalf of the Club's negotiating committee and read a letter signed by Chester G. Newcomb (a past Clifton Park Trustee) "which in substance acknowledged the representation that a call for one quarter of the annual dues would be issued, stated that the names of the members of [the Club] ... in good standing ... and their guests would be accorded

full use and privileges of the [Beach.]" (*Id.* at 1841-42.) The Club's Directors then quoted the letter from trustee Hintzelmann that stated "neither this letter nor any action taken, or to be taken, ... shall impair or affect" any party's rights "with respect to any such questions, nor shall it or any such action constitute a precedent for any future year." (*Id.* at 1842.) That letter was "acceptable" to the Club, and the President was *authorized to collect one-quarter dues to pay for the agreement from the trustees granting Non-Resident Club Members' Beach access.*

After that agreement, the Club continued to pay money to the trustees in exchange for the Non-Resident Club Members' a right of access to the Beach:

- On July 20, 1943, the Club reported that the "Club members had paid in a total of \$1,963.10 in assessments and gifts for use at Clifton Park Beach." (Ex. 10, at CliftonClub 1852.)
- On July 18, 1944, the Club reported in its minutes forwarding money to the "Trustees ... in Clifton Park for use at the Beach." (Ex. 11, at CliftonClub 1857.)
- On July 17, 1945, the Club described its \$1,500 contribution as payment to the trustees "to cover beach privileges for Clifton Club members." (Ex. 12, at CliftonClub 1861.)

2. The Club and the Resident Lot Owners Approve a New Agreement with the Club Providing for Permissive Access to the Beach.

Altering its agreement with the trustees, on August 7, 1947, the Club's stockholders passed a resolution stating that in "1948, and each subsequent year" the Club will "pay to trustees holding title to [the Beach] a certain share of expenses incurred in the particular year in the operation and maintenance of [the Beach]" (Ex. 13, at Clifton Club 1883.) That resolution set a new formula for determining the Club's share of expenses. (*Id.*) Also, the Club determined that the "arrangement shall continue unless the same shall be terminated or changed by the affirmative vote of a majority of" shareholders or members of the Club, *i.e.*, so long as the Club's members desired to participate in Beach activities. (*Id.*)

On April 16, 1959, subsequent minutes of the trustees confirm that this agreement was

⁴ Notably, the Club also appointed Clayton Quintrell as its counsel on July 17, 1945, who was also a trustee and made clear that the Club's use was permissive.

approved by “club membership and lot owners.” (Ex. 14, at CPT 12265.) Around that same time, the Club believed that the “amount paid” by the Club for “its [annual] share of beach expenses” was “much too high in light of the use of the beach by Club members.” (*Id.* at 12264-65.) The basis for this opinion was that the Club membership only had 35 members under age 50 and eight under age 35. (*Id.* at 12265.) The Club’s former counsel and former Park trustee Quintrell “reviewed the history of the agreement between the Park Trustees and the Club ... [and] emphasized that this agreement” was approved by “the club membership and lot owners” (*Id.*)⁵

Accordingly, during the time of these records it remained clear that the Non-Resident Club Members’ use of the Beach was permissive and based on the agreement between the trustees and the Club. None of those records show that the Non-Resident Club Members had a legal right to use the Beach based on the Trust or Club Deed, *despite the Club commissioning legal opinions on the right of the Club members’ continued use of the Beach.* (See Exs. 8, 10.)

And, on July 30, 1957, the trustees made it clear that the “Trustees unanimously determined that under a proper construction of the Trust Deed, a person, in order to be a beneficiary under the Trust and thus entitled to beach privileges, *must own property* ... of a sufficient size to constitute *residential use.*” (Ex. 15, at CPT 10917 (emphasis added).)

3. The Trustees Make Clear to the Club That Its Members’ Use of the Beach Was Permissive Only and the Club Agrees.

In 1963, the Club made a suggestion that the trustees directly collect the assessment from members in exchange for the Non-Resident Club Members’ use of the Beach. (Ex. 18, at 1.) The suggestion prompted both Trustee Quintrell and former trustee John Pyke, Sr. to consider both the “legal as well as practical aspects” of that suggestion. (*Id.*) On January 9, 1963, Quintrell told the trustees that the “lot owners of course pay no admissions tax because *they are using their own property,*” but that “Club members, as such, do not *have any property interest in the*

⁵ Quintrell was re-appointed as a Trustee on December 18, 1962. (Ex. 17, at CPT 10898.)

beach.” (*Id.* at 2 (emphasis added).) Quintrell further stated that the Club’s own resolution “made it perfectly clear” that the use of the Beach “was a *permissive use* afforded to the Club members” terminable at their will. (*Id.* at 3 (emphasis added).) In his transmittal to Trustee Charles Reed, Quintrell noted that Pyke, Sr. had approved the letter. (Ex. 19, at CPT 8102.) Trustee Reed transmitted that letter to Trustee W.D. Gorton (with a carbon copy to the other Trustees Robert Hartford, Harry Hoffman, and Quintrell), and stated that “we will all agree [Quintrell’s letter] is an excellent analysis of the situation.” (Ex. 20, at CPT 8100.)

Then, on November 10, 1964, some residents apparently suggested improvements to the Beach and suggested collecting assessments to pay for those improvements. (Ex. 22, at CPT 1248.) Certain individuals suggested that “the members of the Club” should be told that their contribution does not give them “any ownership in the improvement” (*Id.* at CPT 1249.) In response, the trustees made it clear that the use was permissive only: “As you know, the *arrangement between the Trustees and the Club* is simply that the Trustees have *afforded the Club and its members permission on the year-to-year basis* to use the beach but do not have any ownership of the beach or the improvements.” (*Id.* (emphasis added).)

On May 2, 1970, the use was again discussed by the Trustees and the Club’s representatives. In response to the Club’s position that it was not “obligated to pay the amount that we [the Club] do; but did so only because we [the Club] wanted to pay a fair share,” Trustee Robert Hartford “advised that [Club] members had *no rights to the Beach under the land deed* as these rights were *reserved for lot owners* and that [the Club was] *given these rights only because of [its] agreement* to carry a large portion of the assessment.” (Ex. 24, at CliftonClub 00080-81 (emphasis added).) Again, the Beach use was permissive only. The Club’s representative reported that he “was not certain of my ground” and that “matter should be investigated” before the 1971 meeting with the trustees (*Id.* at 00081.)

On June 30, 1971, the Beach access was again an issue. Trustee Hartford made it clear to

Club President Paul Sessions that its members had no rights under the Club's Deed or Trust, their access to the Beach was permissive, and their access was based on a "gentlemen's agreement" that the Club pay money in exchange for beach privileges for its members:

The Trust Deed specifically states that beach privileges shall be extended only to property owners in Clifton Park and members of their household.

Over the years, Clayton Quintrell, John Pyke, and other have interpreted this to mean ***owners of property wherever they may reside if they are individuals and not corporations***; and members of their household if there is a house in which people reside located on the property in question. This would mean for example that only Mrs. Westlake would be eligible for beach privileges at the Clifton Club.

If you were to retrace the minutes of the Clifton Park Trustees over the past 20 to 30 years you would find a number of entries and several documents dealing with the ***relationship between the Trustees and Clifton Club***.... [I]t is a ***gentlemen's agreement*** that in ***return for a reasonable payment of money members of the Clifton Club shall have beach privileges***. This is exactly the same philosophy we used in our dealing with the Lagoon Trustees. The understanding ... is that property owners of the 38 [Lagoon] properties ... [are] entitled to beach privileges upon payment of a sum ... equal to the [lot owners'] average assessment.

(Ex. 26, at CPT 1257-58.) And while the Trustees now maintain that the Non-Resident Club Members have a right of Beach access under the Trust and Club's Deed, they admitted on February 26, 2015 that historically the use was based on this annual permission:

The February 20 letter correctly reports that historically the Club members have been allowed to access Clifton Beach by annual permission of the Trustees in exchange for a substantial contribution to the Trustees' operating budget.... [W]e strongly affirm that we have continued this annual practice and intent [sic] to continue it in the future."

(Ex. 51, at 1.) The Trustees' protest that their words are not such an admission is unavailing.

Further, the Trustees are not the only party to the equation. The other party is the Club, and it admitted in the past that the use was permissive. Specifically, on April 27, 1995, the Club wrote a letter to its members regarding concerns about the Club's attempts to attract Park residents as members at a discounted rate. (Ex. 40, at CliftonClub00513.) In response, the Club stated that "the approximately 200 families who live in Clifton Park, are responsible for maintaining Clifton Beach. ***Members of the Club enjoy beach privileges*** (on the same basis as Clifton Park residents) ***through year-to-year arrangements and fees negotiated*** with the Clifton

Beach Association.” (*Id.* (emphasis added.)) The Club recognized that the use was permissive.

B. The Scope of the Non-Resident Club Members’ Use Has Been Based on the Amount of the Club’s Annual Contribution to the Trustees’ Beach Budget.

Because the established interpretation of the Trust was that the Non-Resident Club Members’ Beach use was permissive and not under rights granted by the Trust or the Club’s Deed, the Club continued in the 1980s to approve a monetary contribution to the Trustees’ budget for that use. (*See, e.g.*, Ex. 27, at CliftonClub 00339; Ex. 28, at CliftonClub 00358.) But, the scope or extent of the use was tied to the contribution amount that the Club agreed to make:

- On February 14, 1986, when The Club wanted to contribute less funds for the Beach, the Trustees presented two choices, one of which involved denying “Club members access to the Beach.” Trustee Douglas Cooper stated that the Club’s proffered \$20,000 contribution will only allow 88 Club families to use the Beach. (Ex. 29, at CPT 8776.)
- On May 22, 1986, Trustee Jack Rupert confirmed the annual agreement with Club. When the Club offered an additional \$5,000, the Trustees agreed to increase the number of Club members’ with access to Beach to 125 members. (Ex. 30, at CPT 4701.)
- On August 30, 1989, Club President Gary Amendola told Trustee Rupert that the Club will pay its share of the budget and in exchange its members will, as in the past, enjoy equal access to the Beach. (Ex. 37, at CliftonClub 00227.)
- But on October 5, 1989, in response to Amendola’s letter, Trustee Rupert reminds him that “[e]qual access [to the Beach] for your members with [residents] ... must depend on the level of financial support we are able to agree upon.” (Ex. 38, at CliftonClub 00225.)
- And on December 17, 1991, Trustee Rupert again reminded Amendola that “[t]here is no formal agreement of any kind between the two organizations. Each year that the Club *chooses* to participate in [Beach] activities, a new arrangement is worked out or not, depending on the circumstances.” (Ex. 39, at CPT 00348.)

And the position of the Trustees has been that the Club’s members are denied access to the Beach if the Club fails to pay its contribution:

- On April 21, 1987, Trustee Cooper attempted to outline an agreement with Club on its contribution and states that the “non-payment of the accrued monthly installments and the absence of a formula for future years on April 30, 1987, will result in a denial to Club Members of beach access and reservation rights.” (Ex. 34, at CPT 8937.)
- The Trustees’ February 28, 1988 letter to the Club’s President stated that its members’ “full and equal participation in the activities of the Beach” is tied to amount paid by the Club. (Ex. 36, at CPT 4189.)
- On March 12, 1997, the trustees told the Club that use of beach facilities on the same basis as in the past requires that the Club pay the assessment. (Ex. 41, at CPT 1014.)

And even the Trustees agreed with the belief that the scope of the Non-Resident Club Members' use was tied to the amount of the Club's contribution:

- On March 2, 2005, Trustee Drumm states that the trustees have the option to "reduce the number of Beach stickers available to the CC by 6%" if the Club insisted on reducing increases in the Trustees' monthly Beach expenses. (Ex. 43, at CPT 7633.)
- And Trustees Drumm, Hall, and Pyke, Jr. agreed one month later that until the Trustees and Club agree to resolution of the contribution, "Drumm will tell guards" not to grant the Club vehicle stickers for the Beach. (Ex. 44, at CPT 12185.)

C. The Club Previously Took the Position That It Only Had to Pay for Beach Expenses Because Its Members Do Not Benefit From Other Trust Property.

Not only has the Non-Resident Club Members' Beach use been a negotiated permissive use, the Club has not claimed that they enjoy all Trust Property when negotiating that permission. Instead, the Club has claimed that those members do not benefit from or have an interest in non-Beach related Trust Property and that the Club should only pay for the Beach.

- On May 11, 1964, the Club's assessment was described as only paying for a "portion of Beach expenses." (Ex. 21, at CPT 292.)
- On a May 22, 1965, the Trustees stated that the Club pays a portion of the Beach budget and "[t]he balance of the beach budget is paid by the lot owners together with the cost of operating the other property held by the Trustees in which Club members have no interest." (Ex. 23, at CliftonClub 00098.)
- The Trustees further noted that the Club members do not pay taxes on the Beach under the "existing arrangement" with the Club "[s]ince the Club members do not have any proprietary interest in the beach property." (*Id.*) ***In contrast***, the Beach property taxes were part of the lot owners' assessment for maintenance expenses of the Beach. (*Id.*)
- In 1987, the Club made clear to the Trustees in an adjustment to the Beach budget that its portion of the Trustees' costs of maintaining Trust Property does not include "[a]llocation of expenses related to the maintenance ... [of] areas not related to 'Beach Activities.'" (Ex. 31, at CPT 8906.) The Trustees apparently agreed with that position. (Ex. 32, at CPT 8755; *see also* Ex. 33, CPT 08749; *see also* Ex. 35, at CliftonClub 00031.)
- Apparently the issue arose again on April 30, 1997, when the Club stated its position that "[e]xpenses totally attributable to non-beach related Park properties and activities will be separated out of the total. The Clifton Club assessment will not include these expenses." (Ex. 42, at CliftonClub 00067.)

Accordingly, throughout the Club/Trustee relationship, the Club's and Trustees' position has been that the Club's members have no interest in Trust Property that is not the Beach.

D. The Trustees Take the Position That Only Residential Lot Owners Are Granted a Right to Use Trust Property Under the Trust.

While the Trustees protest in their Motion that the Plaintiffs are attempting to rewrite the Trust because Plaintiffs have pled that the Trust was intended to benefit residential sub-lot owners, the Trust's records show that has been their interpretation.

First, it is apparent that since at least 1957, the trustees have interpreted the Trust to mean that only residential lot owners are beneficiaries and have beach access:

"The Trustees unanimously determined that under a proper construction of the Trust Deed, a person, in order to be a beneficiary under the Trust and thus entitled to beach privileges, must own property within Clifton Park which either fronts upon or has direct access to a lot in the Park and that such property must be of sufficient size to constitute a residential site."

(Ex. 15, at CPT 10917 (quoting from letter from Quintrell).) On August 2, 1962, this interpretation was followed in an affidavit from Trustee Pyke, Sr. when the trustees determined that the State of Ohio, which owned a Park lot, was not a "lot owner as qualifies for the use and benefits of common property held by the Trustees or the Subdivision." (Ex. 16, at CPT 4244.) Trustee Robert M. Lawther reached a similar conclusion on May 4, 1971 in a letter to a Park lot owner stating that "parcels providing for Beach privileges were defined as 'buildable lots.'" (Ex. 25, at CPT 2663.) Accordingly, it is apparent from the earliest Trust records available that the beneficiaries and those persons with a right to use Trust Property were resident lot owners.

And the current Trustees have adopted this interpretation of the Trust even though it is undisputed that the lot owners of non-buildable or non-residential lots, like the Club, have the same grant of a right to use common property (*i.e.*, Trust Property) in their original deeds. Specifically, on July 6, 2009, Trustee Pyke, Jr. informed a Clifton Park lot owner that he would not get a Beach sticker because he did not own a residential lot:

[t]he Trustees historically have granted vehicle stickers to residents in Clifton Park, that is, individuals owning property in Clifton Park and residing on that property. It is our understanding that the property you own in Clifton Park is undeveloped and that you do not reside on the property. Therefore, we will not issue a vehicle sticker to you.

(Ex. 45, at CPT 2566.) In response, the lot owner argued what the Trustees have argued here, that it is the “ownership, and not the act of residing on the property, that constitutes a right of access to the beach.” (Ex. 46, at CPT 2560.) On July 31, 2009, Trustee Pyke responded that ownership of his parcel “in Clifton Park does not entitle the owner to Beach privileges.” (Ex. 47, at CPT 2555.) Six months later, on February 12, 2010, the Trustees reported in their minutes that Trustee Pyke, Jr. researched a similar issue and reached the same conclusion:

Pyke research into the legalities of the assessment and beach sticker for the Kniley property. . . . It was determined that an assessment and beach privileges will not be sent to Kniley [because] only residents with an actual home on the property get assessed.

(Ex. 48, at CPT 12171.) The Trustees’ clear interpretation of the Trust is that it only confers beneficial rights and a right to use Trust Property on residential lot owners.

LAW AND ARGUMENT

The Trustees’ Motion is premised on two incorrect arguments. First, the Trustees incorrectly claim that it is “manifest” and unambiguous in the language of the Trust and the Club’s Deed that the settlors intended for the Non-Resident Club Members to have a right to use the Beach, even though no such language exists and the evidence of the Trust’s administration and history disproves that interpretation. Second, the Trustees incorrectly claim (without evidence) that the First Amended Complaint is barred under the 10-year statute of limitations for equitable actions based on the false premises that the Plaintiffs seek to reform the Club’s Deed. That is not what the Complaint requests. Accordingly, the Trustees’ Motion should be denied.

I. Standard of Review

Summary judgment is proper only when (1) no genuine issue as to any material fact remains; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing such evidence most strongly in favor of the non-movant. Civ. R. 56(C); *see also State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511. The movant must show that no genuine issue of

material fact exists for trial. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. The nonmovant may then set forth specific facts showing there is a genuine issue for trial, which precludes summary judgment. *Chaney v. Clark Cty. Agricultural Soc.* (1993), 90 Ohio App.3d 421, 424. Here, genuine issues of material fact preclude judgment in favor of the Trustees.

II. Rules of Trust Construction Show that Non-Resident Club Members Are Not Beneficiaries and Do Not Have a Right to Use the Trust Property Under the Terms of the Trust or the Club's Deed.

Determining who the beneficiaries are and who has rights to the Trust Property starts and ends with determining the meaning of the terms of the Trust. "When construing provisions of a trust, a court must ascertain, within the bounds of the law, the intent of the donor." *PNC Bank, N.A. v. Camping & Educ. Found.*, 1st Dist. No. C-990690, 2000 Ohio App. LEXIS 1348, at *4-5 (Mar. 31, 2000) (citing *Domo v. McCarthy*, 66 Ohio St.3d 312, 314, (1993)). The intent can be ascertained from the express terms "[w]hen the language of the trust instrument is not ambiguous." *Id.* (citing *In the Matter of the Trust U/W of Brooke*, 82 Ohio St.3d 553, 557 (1998). Further, "[t]he settlor's intention is determined by considering the language used in the trust; reading all the provisions of the trust together." *Poston v. Schuster*, 6th Dist. No. H-07-037, 2008-Ohio-2085, at ¶ 8 (citing *Zahn v. Nelson*, 170 Ohio App.3d 111, 118-119, 2007-Ohio-667, at ¶ 26); *In re Arnott*, 190 Ohio App. 3d 493, 508, 2010-Ohio-5392, at ¶ 49 (4th Dist.) ("But interpretation of testamentary or trust documents, like the interpretation of legislation, is a holistic endeavor.") Finally, a court presumes that the settlor used the words in the trust "according to their common, ordinary meaning." *Poston*, at ¶ 8.

Here, contrary to the positions of the Trustees and the Club, the language of the Trust does not confer any rights on the Non-Resident Club Members to use Trust Property. Simply, they are not beneficiaries of the Trust. Similarly, the Club's Deed does not confer any rights on the Non-Resident Club Members to use Trust Property. Rather, the correct interpretation of the Trust is that its language defines the beneficiaries as lot owners and that it grants the right to use

Trust Property only on resident lot owners and members of their households. Further, while the Club's Deed includes the same language in every Park deed, *i.e.* a right to use Trust Property in common with other lot owners, that Deed cannot be interpreted to extend rights to the Non-Resident Club Members. Moreover, such language cannot be added to either the Trust or the Club's Deed because if that was the settlor's intent, it would have added that language. To the extent that the Court believes that the language of the Trust and Club's Deed could be construed to provide a beneficial or legal right to use the property, that finding can only occur if there is ambiguity in the language. And any ambiguity is resolved in favor of the Plaintiffs because the relevant evidence shows that neither the Trust nor the Club's Deed granted the Non-Resident Club Members a right to use Trust Property.

A. The Trust's Terms Do Not Grant the Non-Resident Club Members a Legal Right to Use to the Trust Property and They Are Not Trust Beneficiaries.

Contrary to the Trustees' argument that the beneficial rights in the Trust were intended to extend to the Non-Resident Club Members, the Trust's language actually excludes them as beneficiaries. Under the terms of the Trust, the Trust Property was conveyed to the Trustees to hold that property for the "use and benefit of the owners of land in said allotment." (Ex. 6, at 1, 3.) And the language further provides that the individuals with a right to "common use" of Trust Property are the "lot owners in the Clifton Park allotment, and their successors in title, and members of their households." (*Id.* at 3-4.) Nowhere in the Trust are the Non-Resident Club Members named as beneficiaries or as persons with a right to use Trust Property. The Trustees admit as much. (Exs. 54-58, at p.5.) Because it is undisputed that those members are not named as beneficiaries of the Trust and are not named as persons who have a right to use Trust Property in common with the other beneficiaries, the Court must deny the Trustees' Motion and grant Plaintiffs their request for a declaration that Non-Resident Club Members are not beneficiaries and do not have a legal right to use the Trust Property, including the Beach.

Several principles of Trust interpretation support that conclusion.

1. **The Principle of *Expressio Unius Est Exclusio Alterius* Leads to the Conclusion That the Non-Resident Club Members Are Not Beneficiaries and Do Not Have a Right to Use the Beach.**

Ohio courts have long recognized the maxim of *expressio unius est exclusio alterius* as an interpretative aid “meaning that if certain things are specified in a law, contract, or will, other things are impliedly excluded.” *Downey v. 610 Morrison Rd., LLC*, 10th Dist. No. 2008-Ohio-3524, ¶ 47 (quoting *Vincent v. Zanesville Civ. Serv. Comm’n*, 54 Ohio St.3d 30, 33 n.2 (1990)). That maxim applies “when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 229, 2010-Ohio-6280, ¶ 35 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)) When the settlors expressly stated that the persons entitled to use Trust property were “**lot owners** in the [Park], their successors in title, and the **members of their household**”⁶ they listed a group of like individuals as beneficiaries who at the time were only resident lot owners and their household members. This language shows an unambiguous intent that the Non-Resident Club Members were not intended as beneficiaries of the Trust or to have a legal right to use the Trust Property under its terms. Moreover, the Club does not have any household members. (Exs. 54-58, at 10.)

2. **The Trustees’ Interpretation Requires Adding Terms to the Trust, Which It Cannot Do.**

Ohio courts have found that a court does not have the power to add terms to the Trust that do not exist: “We have already noted that the rules of construction for interpreting wills are equally applicable for interpreting trusts. Where the language of a will is clear, words cannot be

⁶ To the extent that either the Trustees or the Club argue that the phrase “members of their household” was intended to be expansive rather than restrictive, such an interpretation is a contrary to the plain and ordinary meaning of the phrase, which is the proper interpretation under Ohio law. *See May v. Lubinski*, 9th Dist. No. 26528, 2013-Ohio-2173, at ¶ 13 (“A court must give undefined words their plain and ordinary meaning.”)

added or changed, even if the consequences seem harsh to some.” *Evans v. Evans*, 4th Dist. No. 12CA5, 12CA6, 2014-Ohio-4450, at ¶ 94. To read the Trust or Club Deed as granting a “clear and unambiguous” right to the Non-Resident Club Members to use the Beach or other Trust Property would require adding words not found in either of those documents, which the Court cannot do. Had the settlor’s intended that conclusion, they could have added Club members to the list of beneficiaries and persons with a right to use Trust Property. They did not. Accordingly, the Non-Resident Club Members are not implied beneficiaries of the Trust and do not have a right to use the Beach under the Trust.

3. There Is No Evidence That the Non-Resident Club Members Were Intended Beneficiaries of the Trust.

Finally, under uniform law, a “person is not a beneficiary of a trust if the settlor does not manifest an intention to give him a beneficial interest, although he may incidentally benefit from the performance of the trust.” Restatement (2d) Trusts, § 126. Following this principle, Ohio law provides that a party only has rights under a trust if it is an intended beneficiary of the trust. *BancOhio Nat’l Bank v. Cardinal Constr. Co.*, 10th Dist. Nos. 89AP-1510, 90AP-90, 1991 Ohio App. LEXIS 574, at*18-19 (Feb. 7, 1991) (noting that if the party “is merely an incidental beneficiary of the agreement, then it has no enforceable rights.”) “Under this analysis, the intent of the contracting parties determines whether the third-party is an intended or an incidental beneficiary. A similar result occurs under the law of trusts.” *Id.* at *19. Applying these principles in *BancOhio*, the court found that the defendant was not an intended beneficiary of the subject trust because its language provided that “its covenants, conditions, and provisions are intended to be for the sole and exclusive benefit of the parties thereto.” *Id.* “Given such a clear statement of the parties’ intent,” the court concluded the defendant who was not named as a beneficiary “was not an intended beneficiary of the trust indenture.” *Id.*; see also *Nixon v. Wilmington Trust Co.*, No. 3:06 CV 3046, 2007 U.S. Dist. LEXIS 53931, at *9-10 (N.D. Ohio July 25, 2007) (same). Here, the relevant Trust language clearly states that the Trust Property is

held for the common use of **lot owners**, their successors in title, and the **members of their household**. (Ex. 6.) Accordingly, that language is a clear statement of the parties' intent that the Non-Resident Members are not beneficiaries and were not intended to have a beneficial or legal right to use the Trust Property.

While the Trustees urge that because the Club is a lot owner, it has beneficial rights that devolve upon its members (*see* Trustees' Mot. at 8-10), the Trust language makes it clear that such rights were not intended to be extended to the Non-Resident Club Members.

B. The Club's Deed and Club's Lease Do Not Grant Non-Resident Club Members a Right to Use Trust Property.

The Trustees urge that the Club's Deed specifically grants the Club a right to use the Beach (*See* Mot. at 7) and that by operation of law, that right devolves upon the Club members (*id.* at 8-10). But a grant of a right to the Non-Resident Club Members does not exist in the Club's Deed and thus, reading such a right into the Club's Deed requires the Court to adopt the Trustees' incorrect interpretation of the Club's Deed and Club's Lease (*id.* at 7) and contorted reading of corporate law that the Court must reject.

1. The CPLIC Did Not Hold Title to the Trust Property at the Time of the Club's Deed and Thus, Did Not Convey a Right of Use to the Non-Resident Club Members.

The CPLIC could not have transferred a right to use the Trust Property to the Non-Resident Club Members at the time of the Club's Deed because it is undisputed that the CPLIC did not hold title to the Trust Property on July 1, 1912 as it already transferred title to that property on March 25, 1912, recorded on March 27, 1912. (Trustees' Mot. at 5.) Under Ohio law, a deed can only convey the extent of the grantor's title and interest in real property to the grantee. 35 Ohio Jur.3d Deeds § 176, at 412; *Kamenar R. S., Inc. v. Ohio Edison Co.*, 79 Ohio App. 3d 685, 689 (3d Dist. 1992) ("Further, a quit-claim deed transfers only those rights which a grantor has at the time of the conveyance." These rights include both adverse and beneficial

equities existing at the time of conveyance.” (quoting *Jonke v. Rubin*, 170 Ohio St. 41, at paragraph one of the syllabus (1959)). This has long been the law of Ohio. See *Parthe v. Parthe*, 6 Ohio App. 317, 325 (5th Dist. 1917) (“An owner of real estate can only convey to the grantee to the extent of his own title and interest therein.” (quotations omitted)).

Because the CPLIC did not own the fee title interest in the Trust Property at the time of the Club’s Deed, it could not grant Non-Resident Club Members a right to use the property. While the Trustees argue that the Plaintiffs are “attempting to re-write” and reform the Club’s Deed, that argument misses the point. The law regarding transfers of real property was clear at the time of the Club’s Deed, the CPLIC had no right, title, or interest (*i.e.* it owned no sticks) in the Trust Property at the time of the Club Deed, and thus, there is nothing to reform because the Deed could not, as a matter of law, convey a right of use to the Non-Resident Club Members.

2. Non-Resident Club Members Are Not Third Party Beneficiaries of the Deed.

The Trustees have admitted that there is no express grant of a right to use the Trust Property, including the Beach, in the terms of the Deed. (See Ex. 50, at CPT 12082.) Given that admission, the Trustees must present evidence showing that the Non-Resident Club Members were intended to be a third-party beneficiaries. See *Sedlak v. Solon*, 104 Ohio App.3d 170, 176 (8th Dist. 1995) (“Courts presume that the parties’ intentions at the time of the execution of a deed reside in the language they chose to employ in the deed.”); *cf. DeRosa v. Parker*, 197 Ohio App.3d 332, 339, 2011-Ohio-6024 at ¶ 8 (7th Dist.) (“The ordinary rules of construction applicable to the interpretation of contracts are to be applied when interpreting deed restrictions.”) And as shown in *BancOhio*, for a party to be a third-party beneficiary of a contract, the language of the agreement must show that intent. *BancOhio*, 1991 Ohio App. LEXIS 574, at*18-20. Any rights that the Club received are explicitly limited to lot owners.

Moreover, the inclusion of the right of use language in the Club’s Deed, as in all other

Park deeds, does not show that the Non-Resident Club Members were intended as beneficiaries when viewing the whole picture. The historical documents concerning the Trust and the Club lead to the conclusion that the Club was formed to attract residents to the Park and was for the benefit of lot owners. The 1899 deed memorializing the transfer of property in the Park to the CPLIC incorporated the covenant that all lots had to be sold for residences only, except for the possibility of “*stables, canal slips, boat houses, casinos or club houses, ice houses or bathing houses for the use of the owners of lots in said allotment*” (the “CPLIC Deed Restrictions”). (See Ex. 3 (emphasis added).) The Club Deed granted to the Club four sub-lots to be used as either a social club or a private residence. (Ex. 7, at 2.) Further, the Club’s Deed contained the unnecessary covenant that it would transfer the Trust property to the Trustees for the benefit of Park lot owners, which had already occurred. (*Id.*) The most plausible explanation for those inclusions, viewed in context with the express words of the Trust and the CPLIC Deed Restrictions is simply the acknowledgement that the Club’s four sub-lots could someday be used as residential sub-lots. Thus, the covenants were necessary to carry out the intent of the Trust and the requirements of the original deed to the CPLIC that a successor of the Club who became a resident lot owner and members of her household would have a right to use the Trust Property.

3. The Club’s Lease Does Not Confer Rights to Use Trust Property on Anyone.

The Trustees rely upon a partial copy of the Club’s Lease, which does not support for the Trustees’ claims. (Ex. 5). First, the Lease is not material to defining the Club’s rights under the Trust because it is not an operative document and was extinguished by the Club’s Deed. 37 *Robinwood Assoc. v. Health Indus., Inc.*, 47 Ohio App. 3d 156, 157-158 (10th Dist. 1988) (“The doctrine of ‘merger by deed’ holds that whenever a deed is delivered and accepted ‘without qualification’ pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants of the deed only.”) Rather, the Club’s Deed is the document that defines the

Club's title, and the Trust defines the rights to use Trust Property. Second, the Club Lease purportedly contained an option to lease an unspecified strip of beach, which was not performed. (Ex. 5.) Most importantly, the Lease did not include a right to use the property already devoted to park purposes in 1902, which indisputably became the Trust Property. Accordingly, the Lease does not show that the Non-Resident Club Members have a right to use the Beach.⁷

4. The Trustees' Contorted View of Corporate Law Does Not Change the Conclusion That the Club's Deed Did Not Grant Any Right to Use Trust Property to the Non-Resident Club Members.

The Trustees' reading of an a non-existent right relies on a version of corporate law that Ohio does not follow. While the Trustees accurately note that the Supreme Court stated in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) that a "corporation is an "artificial being" that "exists in contemplation of law," they incorrectly assert that the "law generally holds that the rights to enjoy and use property of a corporation ... necessarily devolve upon its individual members." To support this point, the Trustees incompletely cite Bogert, *The Law of Trusts and Trustees, Trusts and Estates*, § 16, at p.221 (3d Ed. 2007). In the very next paragraph, Bogert notes that the "[t]he contrary view also receives frequent expression" and that view is that the "entire interest in the corporate property is vested in the legal entity known as the corporation.... No equitable title or interest is vested in shareholders A stockholder cannot reduce any property of the corporation to possession" *Id.* at § 16, at pp. 221-22 (quotations omitted). **Ohio follows that view.** See *Jost v. Burr*, 69 Ohio App.3d 354, 358 (9th Dist. 1990) ("It is a fundamental principle of corporate structure that shareholders have no ownership interest

⁷ In claiming that the Lease demonstrates an intent to convey rights to the Club's members, the Trustees rely on *Wallace v. Clifton Land Company*, 92 Ohio St. 349 (1915). It does not support the Trustees' or the Club's position. First, the Ohio Supreme Court held that "[t]he only question presented in this record is the question of the right of the Clifton Land Company to devote these lots, covered by these restrictions, to street purposes, and that question must be answered in the negative." See *Wallace*, 92 Ohio St. at 361. Second, the Ohio Supreme Court did not find the Club's members have rights to use Trust Property. See generally *id.* Finally, the quote in the Trustees' Motion is from a Court of Appeals decision that the Ohio Supreme Court reversed and was not the Court's reported opinion.

in corporate-owned property. Likewise, a change of shareholders will not affect the title or the ownership of the corporation's property.”); *Kiddie Co. Enrichment Ctr. v. Cuyahoga Cnty. Bd. of Revision*, 8th Dist. No. 98515, 2012-Ohio-5717, at ¶ 13 (“The idea that a corporation is a legal entity separate and distinct from its members is an accepted principle of law.”) It is undisputed that the Club was a for-profit stock corporation when it was formed and when the CPLIC conveyed the Club its Deed. (Ex. 4.) It only recently became a non-profit corporation. (See Ex. 49 (Club’s November 14, 2011 Amendment to its Articles of Incorporation changing the Club to a corporation not for profit)). Accordingly, the settlors or the Deed’s grantor could not have contemplated the Non-Resident Club Members’ use as equivalent to use by the Club.

For the same reasons, the Trustees’ other out-of-state cases are inapposite. First, in *Raulston v. Evans*, 561 S.W.2d 635 (Tex. 1978), the court found that the members of a **non-stock** membership corporation which is similar to an unincorporated association under Texas law, acquire “not a severable right to any of [that corporation’s] property or funds, but merely a right to the joint use and enjoyment thereof so long as he continues to be a member.” *Id.* at 637-38. In making this holding, the Court distinguished a non-stock membership corporation from “stock corporations.” While it is unclear if such a distinction exists under Ohio law, that distinction is irrelevant because it is undisputed that the Club was a for-profit stock corporation. Accordingly, it is not like an unincorporated association and the holding in *Raulston* does not cause the Club’s rights under its Deed to devolve on the Non-Resident Club Members.

Similarly, the Trustees’ other out-of-state cases do not transform the Club’s rights under its Deed to rights of the Club’s shareholder or members. In those cases, a club had its members or agents use a certain piece of land and found that such use by that club’s members satisfied the open and notorious use requirement necessary to obtain a prescriptive easement over the subject real estate. None of those cases found that the club’s members gained a prescriptive easement or a right of use. Accordingly, the fault in the Trustees’ logic is apparent.

III. The Trustees' Records and Club's Records Confirm That Plaintiffs' Interpretation of the Trust Is Correct.

To the extent that a right to use the Trust Property could be derived from the language of the Trust or the Club's Deed that the Trustees rely on to support their argument, such language is at best ambiguous because there is no "clear and unambiguous" grant of rights to the Non-Resident Club Members as the Trustees urge. Under Ohio law, where such an ambiguity exists, the court can look to extrinsic evidence. *McDonald & Co. Secs. v. Alzheimer's Disease & J*

Related Disorders Ass'n, 140 Ohio App. 3d 358, 363 (1st Dist. 2000) (collecting authorities) ("[W]here ambiguity exists or the settlor's intent is unclear, a court may look to extrinsic evidence to determine the settlor's intent."); *see also Nat'l City Bank v. de Laville*, 170 Ohio App. 3d 317, 326, 2006-Ohio-5909, at ¶ 39 (6th Dist.) (finding that "any extrinsic evidence is appropriately considered to ascertain" intent where court was "forced to conclude that the language of the trust document is ambiguous."). Such appropriate extrinsic evidence includes the conduct of the trustee. *See Curtis v. Shillman*, 8th Dist. No. 40136, 1980 Ohio App. LEXIS 13755, at *11-12 (Jan. 25, 1980) ("[W]here an ambiguity exists as to how a provision in a written trust document was intended to be interpreted and applied with regard to a certain trustee, the interpretation can be determined from the intent and conduct of the testator and trustee." (quotations omitted)).

Here, to the extent that the Court finds that the language of the Trust and the Club's Deed might be susceptible to the Trustees' interpretation, the course of dealing and conduct of the prior trustees and Club in treating the Non-Resident Club Members' use as permissive use in exchange for the Club's contribution to the Beach budget along with the history of Trust administration and calculation of the Club's contributions show that the Plaintiffs' interpretation is correct.

A. The Non-Resident Club Members' Past Use Has Only Been Permissive.

Supporting Plaintiffs' requested relief is the indisputable fact that the Non-Resident Club

Members' use of the Beach has historically (since 1942, the beginning of the available records) been by virtue of annually negotiated permission of the Trustees in return for the Club's agreement to pay a large assessment to the operating budget. (See Statement of Facts, § IV.A.)

The Club's 1942 and 1947 approval of an *agreement* with the trustees to contribute to the Beach budget (and continued payment per those agreements) provided that the trustees had "legal authority" and a "right to agree" with the Club regarding its members' Beach use is not consistent with an intent or interpretation that the Club's rights under the Trust and Deed flowed to Non-Resident Club Members. (See Ex. 8, at CliftonClub 1837-38; Ex. 9, at 1840-42; Ex. 10, at 1852; Ex. 11, at 1857; Ex. 12, at 1861; Ex. 13, at 1883.) Rather, such an agreement is consistent with annual permissive use.

Further, in the 1960s and 1970s the Trustees repeatedly reminded the Club and other individuals that:

- (1) the Club members' use of the Beach was "a permissive use afforded to the Club members" (Ex. 18, at 1);
- (2) The "arrangement between the Trustees and the Club is simply that the Trustees afforded the Club and its members permission on the year-to-year basis to use the beach," (Ex. 22, at CPT 1249);
- (3) "Clifton Club members had no rights to the Beach under the land deed as these rights were reserved to lot owners" (Ex. 24, at CliftonClub00080); and
- (4) It was a "gentlemen's agreement that in return for a reasonable payment of money members of the Clifton Club shall have beach privileges" (Ex. 26, at CPT1257-58.)

The Club acquiesced and agreed that such use was permissive as evidenced by its continued payment of the assessment. Further, it reported to its members that the Non-Resident Club Members "enjoy beach privileges (on the same basis as Clifton Park residents) through year-to-year arrangements and fees negotiated" with the Trustees. (Ex. 40, at CliftonClub00513.) The Trustees confirmed these historical facts. (Ex. 51, at 1.)

If, in fact, the Non-Resident Club Members had a right to use the Beach under the terms of the Deed and the Trust, such an arrangement for permission to use or access the Beach would

have historically been unnecessary. But since the beginning of the records regarding the course of dealing and the use of the Beach, this annual agreement has been deemed necessary because neither the Deed or the Trust make the Non-Resident Club Members beneficiaries of the Trust nor do those documents grant them a right to use the Beach. Rather, the use is permissive.

B. The History of Trust Administration and the Calculation of the Club's Contribution/Assessment to the Trustees' Beach Budget for Use of the Beach Confirms That the Plaintiffs' Interpretation Is Correct.

As shown above, throughout the history of the Trust's administration, the trustees, including the current Trustees, and the Club have also taken other positions that are inconsistent with the Non-Resident Club Members having rights to use Trust Property by virtue of their Club membership.

First, the trustees made it clear that the number of members permitted to access the Beach was dependent on the size of the Club's contribution to Beach budget (*See* Statement of Fact, § IV.B. *infra*.) When the Club wanted to decrease its contribution, the trustees stated that the number of members allowed access to the Beach would decrease and vice versa. (Ex. 29, at CPT 8776; Ex. 30, at CPT 4701; Ex. 37, at CliftonClub 227; Ex. 38, at CliftonClub 225; Ex. 39, at CPT 348.) And the prior trustees' position was that a failure to pay a contribution would result in denial of access. (Ex. 34, at CPT 8937; Ex. 36, at CPT 4189; Ex. 41, at CPT 1014.) It is undisputed that unlike the Non-Resident Club Members, the resident lot owners and members of their household all have access to the Beach regardless of the size of the household or their assessment. Their assessment for Trust Property maintenance is based on the formula set forth in the Trust and does not account for household size. (Ex. 6, at 3.) There is no evidence that the Club has ever paid based simply on this formula. Rather, the Club paid a negotiated contribution in exchange for permission for its non-resident members to use the Beach (Exs. 54-58, at pp. 13-14.) This treatment of the Non-Resident Club Members' use further demonstrates that they were not intended to have a legal right to use the Beach or any Trust Property.

Second, when negotiating its contribution, the Club has previously taken the position that it is not responsible for expenses related to non-Beach property and the calculation of its contribution cannot include those expenses because its members do not benefit from that property. (*See* Statement of Facts, § IV.C, *infra*.) It is undisputed that the Trust Property includes all the park spaces and common areas in the Park, not just the Beach. By claiming that the Non-Resident Club Members do not benefit from those spaces, the Club has tacitly admitted that those members are not beneficiaries and do not have a legal right to use Trust Property.

Finally, the Trustees' own interpretation of the Trust when dealing with other non-resident Park lot owners further shows that the intended beneficiaries of the Trust were resident lot owners and that residents along with their household members were the persons with a right to use the Beach under the Trust. (*See* Statement of Facts, § IV.D, *infra*.) Specifically, as shown above, the interpretation that the Trust requires an individual to own a residential lot in the Park began in 1957. (Ex. 15.) And, in 2009 and 2010, the Trustees made it clear that under the terms of the Trust only those individuals with buildable lots and residing on those lots have a right to use the Beach under the Trust. (Exs. 45-48.) The non-residential lot owners are not granted access to the Beach. Accordingly, the Trustees' own interpretation proves that the Non-Resident Club Members are not beneficiaries and have no legal right to use the Beach.

IV. The First Amended Complaint Does Not Ask the Court to Rewrite the Trust or the Club's Deed.

The Trustees argument that Plaintiff Beneficiaries ask the Court to rewrite the Trust and the Club's Deed is wrong. Contrary to that claim, the Plaintiffs ask the Court to interpret the Trust's provisions that require the Trustees to hold Trust Property for the benefit of all lot owners and asks the Court to declare that (1) the Trust does not confer any beneficial rights to the Non-Resident Club Members and (2) that the Club's Deed does not confer any legal right to use Trust Property on those individuals. (*See* First Am. Compl.) Plaintiffs do acknowledge that the Club is a lot owner. (*See* Am. Compl. at ¶ 8.) But the language of the Trust and Club's Deed and the

history of its interpretation and administration of the use of the Beach shows that the persons for whose benefit and use the Trustees hold the Trust Property are the lot owners and members of their household. Because it is undisputed that the Trustees hold Trust Property for those persons, that the Non-Resident Club Members are not lot owners, the Club has no household members, and neither Deed nor the Trust confer express rights on the Non-Resident Club Members, the Plaintiff Beneficiaries are not rewriting those documents.

Further, the Trustees' claim that neither document has an express residency requirement asks the Court to ignore the Trust's terms and the above described history and read into those documents a right not granted to Non-Resident Club Members, which it cannot do. The Court must give effect to all terms in the Trust, not just the phrase "lot owners."

Finally, the Trustees' arguments regarding the Trustees' duty to regulate the Trust and the purported ratification of the Trustees' regulations are unavailing. The Plaintiffs have not filed a challenge to the Trustees' duty to regulate use of the Trust Property. That duty to regulate does not give the Trustees' discretion to determine who the beneficiaries are and determine who has a legal right to use Trust Property. Instead, the threshold inquiry before considering any regulation is who are the beneficiaries of the Trust and who has a legal right to use the Trust Property under the operative documents. The ratification argument turns the history of the administration of the Trust on its head. The past trustees have consistently applied the interpretation that Non-Resident Club Members have no legal right to use the Beach and that any such Beach use was permissive. If those members were granted a right of use under the Trust or Club's Deed, the Trustees would not have negotiated the number of members that can use the Beach.⁸

⁸ The Trustees also make the specious argument that the result of the Court declaring that the Trust says exactly what it says, *i.e.* that only lot owners and members of their household have a right to use the Beach and other Trust Property means that the beneficiaries of Trusts and members of LLCs that own residences in the Park would not be able to access the Beach. That argument is false as the Trust specifically allows household members to use the Beach and the

V. The Trustees' Statute of Limitations Argument Fails as a Matter of Law.

The Trustees' statute of limitations argument ignores the fact that the CPLIC never granted Non-Resident Club Members access to the Beach and that Plaintiff Beneficiaries have shown that there is a dispute over the intent and meaning of the Trust's and Club Deed's language concerning who has a right to use Trust Property. For the Trustees' argument to prevail, the Court would be required to wrongly construe the material facts in favor of the Trustees' conclusion that the Club's Deed granted its members the right to access the Trust Property contrary to the terms of the Trust. Here, the evidence shows that the Club's Deed did not include such a grant of a right of access and the history of Trust administration supports that conclusion as no one made the claim that the Club's members have a right of access until 2011.

Also, the cause of action would not accrue until someone claimed that the Non-Resident Club Members have a right to use Trust Property. Thus, the Complaint is timely.

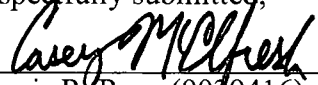
Finally, the Trustees' attempts to turn this into a breach of trust case is wrong. No one has attacked the Trustees for breach of trust except to the extent that they are breaching the duty of impartiality by advancing the arguments the Club was equally capable of making as a competing beneficiary.

Trustees have consistently interpreted this to mean the residents of the various Park lots have a right of Beach access. Accordingly, those LLC members or Trust beneficiaries would have access as the Trust intended.

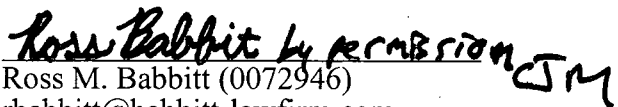
CONCLUSION

For the forgoing reasons, the Court should deny the Trustees' Motion.

Respectfully submitted,



Dennis R. Rose (0079416)
drose@hahnlaw.com
Arthur E. Gibbs III (0066819)
aegibbs@hahnlaw.com
Casey J. McElfresh (0088083)
cmcfresh@hahnlaw.com
HAHN LOESER & PARKS LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Telephone: (216) 621-0150
Facsimile: (216) 241-2824



Ross M. Babbitt (0072946)
rbabbitt@babbitt-lawfirm.com
ROSS M. BABBITT CO., LPA
Hoyt Block, Suite 200
700 West St. Clair Avenue
Cleveland, Ohio 44113
Telephone: (216) 623-6346
Facsimile: (216) 274-9683

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff Arthur P. Dueck's, Todd Gilmore's, Nancy Binder's, and William R. Keller's, Putative Plaintiffs Rhonda Loje's and Jeffrey Mansell's Brief In Opposition to The Clifton Park Trustee's Motion for Summary Judgment has been served by U.S. mail on October 15, 2015 upon the following:

Adam M. Fried, Esq.
afried@reminger.com
David Ross, Esq.
dross@reminger.com
Julian Emerson, Esq.
jemerson@reminger.com
Reminger Co., LPA
101 W. Prospect Avenue, Suite 1400
Cleveland, OH 44115-1093

Attorney for Defendant
The Clifton Club Company

Leo M. Spellacy, Esq.
lspellacy@porterwright.com
Porter Wright Morris & Arthur LLP
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115-1483

Attorney for Interested-Party Defendant
BAI, LLC

Kip Reader, Esq.
kreader@ulmer.com
Mary Forbes Lovett, Esq.
mlovett@ulmer.com
Ulmer & Berne LLP
Skylight Office Tower
1660 W. Second Street, Suite 1100
Cleveland, OH 44113

Attorneys for Defendants
Charles Drumm; John S. Pyke, Jr.; Peter A. Kuhn; Philip W. Hall; and Warren Coleman
(Trustees of the Clifton Park Trust)

Walter F. Ehrnfelt, Esq.
walter@healthlaw.com
Thomas M. Ehrnfelt, Esq.
tehrnfelt@healthlaw.com
Waldheger Coyne
Gemini Tower I, Suite 550
1991 Crocker Road
Cleveland, OH 44145

Attorneys for Interested Party-Defendants
Edmond and Mary Blades, Trustees;
Louis and Cynthia Keppler; and Robert Stall

Michael C. Cohan, Esq.
mcohan@cavitch.com
Cavitch, Familo & Durkin Co., LPA
1300 E. Ninth Street, 20th Floor
Cleveland, OH 44114

Attorney for Interested-Party Defendants

Sarah Cohan; Leigh E. Fox, Trustee; Joanne H. Calkins, Trustee; Matthew and Susan Beverstock; Jeffrey S. and Stefanie Christian; Janna Dresing; Cynthia Dunn and Dale Cuthbertson; Mark and Nancy S. Graves; Scott and Amy C. Kimes; Andrew Logan; Peter and Linda Joy Nintcheff, Trustees; Ron and Beverly Rudin; Carolyn Seelbach; and Byron T. and Mary Anne Crampton, Trustees

F. Thomas Vickers, Esq.
tvickers@vickerslawgroup.com
Vickers Law Group Co., LPA
1119 Bassett Road
Westlake, OH 44145

Attorney for Interested-Party Defendants
Joseph and Alicia A. Kerrigan

Kevin M. Spellacy, Esq.
kspell@mgslaw.com
McGinty, Hilow & Spellacy Co., LPA
The Rockefeller Building, Suite 1300
614 West Superior Avenue
Cleveland, OH 44113

Attorney for Interested-Party Defendants
Thomas and Kelly O'Malley; Michael and Patricia Smith; and Kevin and Molly M. Spellacy

Gary A. Vick, Jr., Esq.
gavickjr@connickvicklaw.com
Connick & Associates Co., L.P.A.
NorthPoint Tower, Suite 1720
1001 Lakeside Avenue
Cleveland, OH 44114

Attorney for Interested-Party Defendants

Charles and Patricia Geiger; Gordon D. and Susan S. Geiger; Christine R. Kraay, Trustee; and 17822 Lake Avenue LLC

John F. McCaffrey, Esq.
john.mccaffrey@tuckerellis.com
Tucker Ellis LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414

Attorney for Interested-Party Defendants
John F. and Margaret McCaffrey

Michael J. Connick, Esq.
mconnick@connickvicklaw.com
Connick & Associates Co., L.P.A.
NorthPoint Tower, Suite 1720
1001 Lakeside Avenue
Cleveland, OH 44114

Attorney for Interested-Party Defendants
James and Nancy S. Seibert

Gregory D. Seeley, Esq.
GDSeeley@sseg-law.com
Seeley, Savidge, Ebert & Gourash Co., L.P.A.
26600 Detroit Road
Cleveland, OH 44145-2397

Attorney for Interested-Party Defendant
Melissa K. Meany

Brian J. Darling, Esq.
BDarling@DarlingDuffy.com
John Duffy & Associates
Brendan Place
23823 Lorain Road, Suite 270
North Olmsted, OH 44070

Attorney for Interested-Party Defendant
Harold W. Goforth

Ross M. Babbitt, Esq.
rbabbitt@babbitt-lawfirm.com
Ross M. Babbitt Co., LPA
Hoyt Block, Suite 200
700 West St. Clair Avenue
Cleveland, OH 44113

Co-Counsel for Plaintiffs and
Attorney for Interested-Party Defendants
Rhonda Loje and Jeffrey Mansell

Solvita McMillan, Esq.
17904 Lake Road
Lakewood, OH 44107

Attorney for Interested-Party Defendants
John G. and Solvita A. McMillan

Michael E. Smith, Esq.
msmith@frantzward.com
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114-1230

Attorney for Interested-Party Defendants
Michael Smith and Michelle Myers

James D. Romer, Esq.
jromer@pprblaw.com
Polito, Paulozzi, Rodstrom & Burke
21300 Lorain Road
Fairview Park, OH 44126

Attorney for Interested-Party Defendants
James and Katherine Romer

Christian M. Bates, Esq.
cbates@corsarolaw.com
Corsaro & Associates Co., LPA
28039 Clemens Road
Westlake, OH 44145

Attorney for Interested-Party Defendant
Saji T. Daniel, Trustee

James P. Oliver, Esq.
james.oliver@squirepb.com
Squire Patton Boggs LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114

Attorney for Interested-Party Defendants
James and Mary Patricia Oliver

Dennis R. Lansdowne, Esq.
dlansdowne@spanglaw.com
Spangenberg Shibley & Liber LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114

Attorney for Interested-Party Defendant
Kim Lansdowne, Trustee


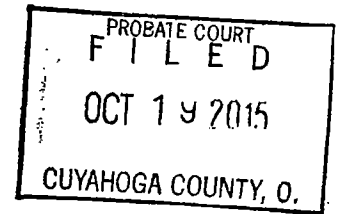

One of the Attorneys for Plaintiffs

EXHIBIT B

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



ARTHUR P. DUECK, *et al.*,

Plaintiffs,

vs.

THE CLIFTON CLUB COMPANY, *et al.*,

Defendants.

) CASE NO. 2012 ADV 179424
)
)
)

) JUDGE ANTHONY J. RUSSO
)
)
)

) PLAINTIFFS ARTHUR P. DUECK'S,
) TODD GILMORE'S, NANCY
) BINDER'S, AND WILLIAM R.
) KELLER'S, PUTATIVE PLAINTIFFS
) RHONDA LOJE'S AND JEFFREY
) MANSELL'S TRIAL BRIEF, WITNESS
) LIST, AND PROPOSED
) STIPULATIONS

Dennis R. Rose (0039416)
drrose@hahnlaw.com
Arthur E. Gibbs III (0066819)
aegibbs@hahnlaw.com
Casey J. McElfresh (0088083)
cmcelfresh@hahnlaw.com
HAHN LOESER & PARKS LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Telephone: (216) 621-0150
Facsimile: (216) 241-2824

Ross M. Babbitt (0072946)
rbabbitt@babbitt-lawfirm.com
ROSS M. BABBITT CO., LPA
Hoyt Block, Suite 200
700 West St. Clair Avenue
Cleveland, Ohio 44113
Telephone: (216) 623-6346
Facsimile: (216) 274-9683

Attorneys for Plaintiffs

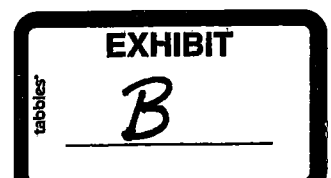
2012ADV179424



1050417

PDF

AVB



I. PLAINTIFFS' TRIAL BRIEF

INTRODUCTION

Plaintiffs Arthur P. Dueck's, Todd Gilmore's, Nancy Binder's, and William R. Keller's, Putative Plaintiffs Rhonda Loje's and Jeffrey Mansell's (the "Plaintiff Beneficiaries") First Amended Complaint asks this Court to resolve two questions:

- (1) whether the members of Defendant The Clifton Club Company (the "Club") who are not sub-lot owners ("Non-Resident Club Members")¹ in the Clifton Park Allotment (the "Park") are beneficiaries of the March 25, 1912 Deed of Trust (the "Trust"); and
- (2) whether the Non-Resident Club Members have a legal right to use the Trust property, including the Clifton Park Beach (the "Beach"), under the terms of the Trust, the Club's July 1, 1912 Deed ("Deed"), or the Club's 1902 Lease (the "Lease").

The answer to those two questions is no based on the evidence to be presented to the Court, including the plain language of the Trust, the historical interpretation of the Trust by the trustees and the Club and the course of dealing of the trustees and the Club all show that summary judgment is inappropriate. Accordingly, the Court should grant the Plaintiffs Beneficiaries' request for a declaration that (1) the Non-Resident Club Members are not beneficiaries of the Trust and (2) that the Non-Resident Club Members do not have a legal right to use the Trust's property, including the Beach, under the terms of the Trust, the Club's Deed or the Club's Lease.

SUMMARY OF THE EVIDENCE

The Plaintiff Beneficiaries filed their First Amended Complaint requesting that the Court enter the above declarations, which are the correct interpretation of the Trust—the operative and controlling document—and correct definition of the parties' respective rights. On the other hand, both the Club and the Defendants Charles Drumm, John S. Pyke, Jr., Peter A. Kuhn, Philip W. Hall and Warren Coleman (the "Trustees") ask the Court to wrongly interpret the Trust, the

¹ Club members who are residents of the Park are Trust beneficiaries by virtue of being a resident lot owner.

Club's Deed, and the Club's Lease to provide the Non-Resident Club Members with a right to use the Trust property, including the Beach. This new position of the Club and the Trustees, which they set forth in 2011, necessitated filing this action to protect the Trust property held for the benefit of all the beneficiaries of the Trust, not the Non-Resident Club Members. Below is a summary of the evidence that will show the Plaintiff Beneficiaries requested relief is proper.

1. The Evidence Will Show That the Trust Does Not Confer Any Right to Use Trust Property on the Non-Resident Club Members.

Determining who the beneficiaries of the Trust are starts and ends with the Trust's terms. The Court's interpretation of the Trust is guided by four principles: (1) the settlor's intention is determined by reading all the Trust's terms together, (2) undefined terms in a Trust must be given their plain and ordinary meaning, (3) the maxim of *expressio unius est exclusio alterius*, and (4) the prohibition against adding terms to a Trust.

The Trust's terms show that the only persons for whose use and benefit the Trustees hold the Trust property are the owners of sub-lots, their successors in title, and members of their household:

To have and to hold the [Trust Property] . . . unto the said grantees [Trustees] and their successors in trust and assigns . . . in trust . . . for ***the sole use and benefit of all owners of sub lots or parts of lots, in the Clifton Park Allotment . . . subject to the terms and conditions and regulations herein*** contained, that is to say:

...

DUTIES OF TRUSTEES.

(1) The Trustees shall hold 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.*** (2) No 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.***

(See Trust (emphasis added).) From these terms, it is apparent that the Non-Resident Club Members are not beneficiaries of the Trust. The Trustees admit this. Moreover, by reading these terms together—most importantly the phrase “the lot owners in the [Park], and their successors

in title, and members of their households”²—and giving them their plain and ordinary meaning it is apparent that the settlors did not intend to grant rights to use the Trust Property to Non-Resident Club Members. Had the settlors of the Trust intended to grant the Non-Resident Club Members a right to use the Beach and other Trust property, they could have done so through similar language or including them in the group of persons with such a right. The settlors chose not to do so. Rather, the “members” of the lot owners’ “households” are the only non-lot owning persons who are mentioned in the Trust as having a right to use the Trust Property.

Further, the evidence will show that the Trustees must “establish regulations for the use of” such property, and must assess each “sub lot, or part of sub lot” for the proportion of the annual Trust Property maintenance expenses based on the tax value of the sub-lot. That is, each resident lot owner only pays the assessment based on the tax value of his or her lot and they have a right to access the Beach as a beneficiary. In contrast, the evidence will show that unlike resident lot owners who are undisputed Trust beneficiaries, the Club members have historically been allowed to access the Beach by annual permission of the Trustees in exchange for a substantial contribution to the Trustees’ operating budget. Finally, the Trustees admit that they do not owe fiduciary duties to individual Club members.

Accordingly, the Court should grant the Plaintiffs their requested relief and declare that Non-Resident Club Members are not beneficiaries of the Trust and do not have a legal right to use the Trust property, including the Beach.

2. The Evidence will show that the Club’s Lease and the Club’s Deed Do Not Grant Non-Resident Club Members a Right to Use Trust Property.

The terms of the Lease do not show that the settlors intended for the Non-Resident Club Members to have a beneficial right to use the Beach. The evidence will show that the Club came

² The dictionary definition of “household” is “those who dwell under the same roof and compose a family; *also*: a social unit comprised of those living together in the same dwelling.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 562 (10th Ed. 1993).

into existence as a for-profit corporation on May 29, 1902 and that certain members of the Club owned stock in the Club. It is further undisputed that the Club's connection to the Park began with the Club's Lease, for a term of twenty years. As a matter of law, however, the Lease became inoperative and provided no rights to the Club once it obtained the fee simple interest through its Deed. The Lease also shows that the Plaintiffs' requested relief is proper as the terms of the Lease do not grant a right to use the common property that later became the Trust property. Moreover, the evidence will show that the Clifton Park Land and Improvement Company (the "CPLIC") did not fulfill the option to lease a "certain strip of land upon the beach of Lake Erie for bathing purposes" to the Club, which shows an intent to not grant Non-Resident Club Members a right to use the Trust property.

Similarly, the evidence will show that the Club's Deed does not grant the Non-Resident Club Members a right to use the Beach. The Trustees have conceded that the Club's Deed does not *expressly* grant the Non-Resident Club Members a right to use the Trust property, including the Beach. For that reason alone, the Court should not read such a grant into the terms of the Club's Deed. Further, the faulty lynchpin of the Trustees' argument is that the Club's Deed grants a right of use to the Non-Resident Club Members because the language "right to use in common with other owners of the land in [the Park], all portions of said allotment which shall by the grantor be devoted to the purposes of park or park spaces for the exclusive use and benefit of such lot owners" is included in the Deed and devolved by operation of law onto the Non-Resident Club Members. But Ohio law did not allow the CPLIC to grant a right of use to property it did not own, which the evidence shows that at the time of the Deed the CPLIC had already transferred to common property, *i.e.* Trust property, to the Trust. Further, there is no evidence to show that the Non-Resident Club Members were intended as beneficiaries of the Deed and the evidence will show through the history of the common development plan of the Park that including such language was not intended to benefit the Non-Resident Club Members.

Further, the case law upon which the Trustees rely does not stand for the proposition that the Club's rights devolve on its members, and the Club's Deed must be read in harmony with the Trust, which grants the right to use the Trust property, including the Beach, only to lot owners, their successors in title, and members of their household, not the Non-Resident Club Members. Accordingly, while the Club's Deed allowed the Club to operate a social club, its Deed did not grant any rights to the Non-Resident Club Members to use the Trust property, including the Beach.

3. The Evidence That the Club's Past Use of the Beach Has Only Been By Virtue of an Annually Negotiated Permissive Use In Exchange for an Agreed Contribution to the Trustees' Operating Budget Demonstrates that the Settlers Did Not Intend to Grant a Right of Beach Access to the Non-Resident Club Members.

The evidence will show that the Non-Resident Club Members' historical use of the Beach has been through annually negotiated permission granted in exchange for the Club's agreement to pay money to the Trustees' operating budget. The Trustees' records prove this fact. The prior trustees and current Trustees took the position that only residential lot owners are granted a right to use Trust property under the terms of the Trust. This course of dealing is demonstrated in the earliest records of the history of Trust administration and Beach use. And those records show two key facts:

- The prior trustees did not interpret the Trust or Club's Deed as granting Non-Resident Club Members a right to use the Beach and treated their use as permissive based on the Club's negotiation of a contribution with the trustees.
- The scope and extent of the Non-Resident Club Members' use of the Beach was based on the amount of the Club's contribution to the Beach operating budget.

A. The Prior Trustees Did Not Interpret the Trust or Club's Deed as Granting Non-Resident Club Members a Right to Use the Beach and Treated Their Use as Permissive Based on Negotiations With the Trustees.

Since the beginning of available records, the Club negotiated permission for its members' use of the Beach in exchange for paying an annual fee or contribution to the Trustees. Specifically, the records show that in 1942, the Club's shareholders approved a call for one-

quarter of the annual dues against each Club member and payment of the proceeds to the trustees as a contribution by the members for the maintenance and operation of the Beach. That contribution was made based on obtaining the prior trustees' agreement and assurances that (1) they had the legal authority and right to agree with the Club concerning use of the Beach by its members and (2) the Non-Resident Club Members would have the right to use the Beach in common with the Park lot owners. Further, the Club formed a committee to negotiate this agreement. And the Club's shareholders did not approve the call until Trustee Chester G. Newcomb made the representation that Club members in good standing and their guests would be accorded full use and privileges of the Beach. The evidence will show that Trustee Newcomb made it clear that the agreement would not impair or affect any party's rights with respect to the Non-Resident Club Members' Beach usage or constitute a precedent for future years. That is, the permission for use would continue to be negotiated.

And the evidence will show that after that agreement, the Club continued to pay money to the trustees in exchange for the Non-Resident Club Members' right to access to the Beach.

The evidence will show that in 1947, the Club and the resident lot owners approved a new agreement with the Club providing for permissive access to the Beach. Specifically, the Club's corporate records show that the new agreement only altered how the Club's contribution for the permissive use would be calculated. Also, the Club determined that the "arrangement" would continue so long as the Club's members desired to participate in Beach activities. Subsequent meeting minutes of the Trustees from 1959 will confirm that this agreement was approved by Club membership and Park lot owners. Further, those minutes show that around that same time, the Club believed that the amount paid by the Club for its annual share of Beach expenses was too high because too few Non-Resident Club Members used the Beach as all but 43 of its members were over age 50. The evidence will show that the Club's former counsel

(around the time the agreements were made) and former Trustee Clayton Quintrell reviewed the history of the agreement and told the Trustees that the agreement was approved by the Club membership and lot owners. Accordingly, the records continued to show that the Non-Resident Club Members' use of the Beach was permissive and based on the agreement between the trustees and the Club. None of those records show that the Non-Resident Club Members had a legal right to use the Beach based on the Trust or Club Deed, *despite the Club commissioning legal opinions on the right of the Club members' continued use of the Beach.*

Then, the records from the 1960s through the 1990s will show that the trustees made it clear to the Club that the Non-Resident Club Members' use of the Beach was permissive only and that the Club agreed. Specifically, in 1963, when the Club made a suggestion that the trustees directly collect the assessment from members in exchange for the Non-Resident Club Members' use of the Beach, both Trustee Quintrell and former Trustee John Pyke, Sr. considered both the legal as well as practical aspects of that suggestion. (*Id.*) That review showed that the Club own members' use of the Beach was a "***permissive use*** afforded to the Club members." Similarly, the evidence will show that in 1964, the trustees again made it clear that "***the arrangement between the Trustees and the Club*** is simply that the Trustees have ***afforded the Club and its members permission on the year-to-year basis*** to use the beach but do not have any ownership of the beach or the improvements." (emphasis added.) And, in 1970, the Club's records show that when the Club and trustees discussed the Club's contribution, the trustees reminded the Club that its "***members had no rights to the Beach under the land deed*** as these rights were ***reserved for lot owners*** and that [the Club was] ***given these rights only because of [its] agreement*** to carry a large portion of the assessment." (emphasis added). Finally, when the issue was again discussed in a letter between Trustee Robert Hartford and the Club's President Paul Sessions, Hartford informed Sessions that the Non-Resident Club Members' access to the

Beach was permissive and that their access was based on a “gentlemen’s agreement” that the Club pay money in exchange for beach privileges for its members. Accordingly, the evidence will show that the historical interpretation of the Trust and Club’s Deed was that the Non-Resident Club Members did not have a right to access the Beach under those documents. Rather, the Trustees had to grant them permission in exchange for a fee.

In 1995, the Club acknowledged that the Non-Resident Club Members’ use was permissive only when it informed its members that they “*enjoy beach privileges* (on the same basis as Clifton Park residents) *through year-to-year arrangements and fees negotiated* with the Clifton Beach Association.” (emphasis added.) Further, the evidence will show that contrary to the Trustees’ litigation position, they acknowledged earlier this year on February 26, 2015 that “historically the Club members have been allowed to access Clifton Beach by annual permission of the Trustees in exchange for a substantial contribution to the Trustees’ operating budget.” While the Trustees will protest that their words are not an admission, the evidence is clear that the Non-Resident Club Members only have access to the Beach by way of annual permission, not through any rights under the Trust, the Club’s Deed, or the Club’s Lease.

B. The Scope of the Non-Resident Club Members’ Use Has Been Based on the Amount of the Club’s Annual Contribution to the Trustees’ Beach Budget.

The evidence will further show that because the established interpretation of the Trust was that the Non-Resident Club Members’ Beach use was permissive and not under rights granted by the Trust or the Club’s Deed, the Club continued in the 1980s to approve a monetary contribution to the Trustees’ budget for that use and the scope or extent of their use was tied to the contribution amount that the Club agreed to make. Specifically, the Plaintiffs will present evidence showing that both the amount of the Club’s contribution and the number of members allowed access to the Beach were negotiated numbers. Further, the prior trustees also made it clear that if the Club failed to pay its contribution, the Non-Resident Club Members would be

denied access to the Beach. Finally, the evidence will show that even the current Trustees agreed with the belief that the scope of the Non-Resident Club Members' use was tied to the amount of the Club's contribution and that they could deny access for a failure to pay.

Simply, these facts and the above history are not consistent with an interpretation that Non-Resident Club Members are Trust beneficiaries or that they have deeded rights to use the Beach. Accordingly, these facts show that Plaintiffs' requested declaration should be granted.

4. The Trustees' Records and Club's Records Will Further Confirm That Plaintiffs' Interpretation Is Correct.

The records of both the Trustees and the Club show that the Club's members do not have a right to use the Trust property under the terms of the Trust or Club Deed.

First, as shown above, the records of the Club and the Trustees show that the Non-Resident Club Members' use has always been permissive, not based on a right.

Second, the evidence will further show that the Trustees have publicly taken the position that owners of non-residential lots do not enjoy a right of access to the Beach under the Trust. The Trustees' records show that the trustees have consistently applied the interpretation that non-residential Park lot owners, *i.e.* persons who do not reside on their lot or have a home on their lot, do not have a right to use the Trust property, including the Beach, under the terms of the Trust. The current Trustees have continued to apply this interpretation, and the evidence will show that the Trustees have denied Beach access to non-resident lot owners in 2009 and 2010 because in Trustee Pyke, Jr.'s words "[t]he Trustees historically have granted vehicle stickers to residents in Clifton Park, that is, individuals owning property in Clifton Park and residing on that property." Accordingly, the evidence will show that the Trustees have consistently administered the Trust to only confer beneficial rights and a right to use Trust Property on residential lot owners.

Third, the Club has previously taken the position that it is only required to contribute to expenses for maintaining the Beach and does not have to contribute to maintaining other Trust

property because its members do not benefit from non-Beach property. Specifically, the evidence will show that when the Club has negotiated its contribution in exchange for the Non-Resident Club Members' use of the Beach, it has claimed that those members do not benefit from or have an interest in non-Beach related Trust property and that the Club should only pay for the Beach maintenance expenses. Accordingly, throughout the Club/Trustee relationship, the Club's and Trustees' position has been that the Club's members have no interest in non-Beach Trust property, which is inconsistent with an interpretation that the Trust and Club's Deed were intended to make the Non-Resident Club Members beneficiaries and to give them a legal right to use the Trust property, including the Beach.

Finally, the evidence will show that the Club has not been assessed on the basis of the assessment formula outlined in the Trust for each beneficiary's contribution to the maintenance of Trust property. Rather, it has always agreed to pay an amount tied to the usage of its members. This different treatment of the Club's assessment/contribution further shows that the Non-Resident Club Members are not beneficiaries and do not have a legal or beneficial right to use the Beach under the Trust or the Club's Deed.

5. The Plaintiff Beneficiaries' Complaint Does Not Ask the Court to Rewrite the Trust or Override the Trustees' Powers to Regulate Beach Usage.

While the Trustees and the Club have argued that the Plaintiff Beneficiaries cannot prevail because they are attempting to rewrite the Trust and are trying to override the Trustees' power to regulate usage of Trust property, the Plaintiffs do no such thing. The evidence will show that the Plaintiff Beneficiaries have only asked the Court to interpret the Trust and find that neither the Trust or Club's Deed confer any beneficial or legal rights on the Non-Resident Club Members as no such language exists in those documents. Because those documents do not grant such a right, the Plaintiffs' interpretation is correct. Further, the Trustees' power to regulate usage of the Beach is not called into question by the Plaintiffs Beneficiaries' First Amended Complaint or any issue in this case. The Trustees' duty to regulate usage of Trust property does

not grant a right of use to the Non-Resident Club Members. Rather, the Plaintiffs ask the Court to declare that the Non-Resident Club Members have no legal right of use through the Trust Deed or Club Deed, which is the proper interpretation based on the evidence.

6. The First Amended Complaint Is Not Barred By Any Statutes of Limitations.

Both the Trustees and the Club have raised statute of limitations defenses. Those claims are based on the false premises that (1) Plaintiffs seek to nullify the Club's Deed and (2) that Plaintiffs have brought a breach of fiduciary duty claim against the Trustees for allowing the Non-Resident Club Members access to the Beach. But, the evidence will show that Plaintiffs' requested relief is not barred by any statute of limitations because it only requests that the Court declare that the Non-Resident Club Members are not beneficiaries of the Trust (Prayer for Relief No. 1) and that the Non-Resident Club Members do not have a legal right to use the Trust property, including the Beach, and that the Club's and Trustees' interpretation of the Club's Deed is inconsistent with the Trust and must be rejected (Prayers for Relief Nos. 2 and 3). Accordingly, the Plaintiff Beneficiaries' claims did not accrue until the Club asserted that its members had a legal right to access the Beach under the Trust and the Club's Deed, which the evidence will show occurred in 2011. Accordingly, the Plaintiff Beneficiaries' claims are not barred by the statute of limitations.

CONCLUSION

Based on the foregoing, the Court should grant the Plaintiffs Beneficiaries' request for a declaration that (1) the Non-Resident Club Members are not beneficiaries of the Trust and (2) that the Non-Resident Club Members do not have a legal right to use the Trust's property, including the Beach, under the terms of the Trust, the Club's Deed or the Club's Lease.

II. PLAINTIFFS' WITNESS LIST

Plaintiffs hereby submit its witness list for the trial in the above captioned matter:

1. **Dr. Arthur P. Dueck** – Dr. Dueck will testify regarding the history of the Park development and the history of the dispute between the Plaintiffs, the Club, and the Trustees giving rise to this litigation.

2. **John S. Pyke, Jr.** – Mr. Pyke will testify regarding the history of Trust administration, the history of the relationship between the Club and Clifton Park Trustees, history of the Non-Resident Club Members' use of the Beach, and the history of the dispute between the Plaintiffs, the Club, and the Trustees giving rise to this litigation.

3. **Charles Drumm** – Mr. Drumm will testify regarding the history of Trust administration, the history of the relationship between the Club and Clifton Park Trustees, history of the Non-Resident Club Members' use of the Beach, and the history of the dispute between the Plaintiffs, the Club, and the Trustees giving rise to this litigation.

4. **Mary Ann Crampton** – Ms. Crampton will testify regarding the history of Trust administration, the history of the relationship between the Club and Clifton Park Trustees, history of the Non-Resident Club Members' use of the Beach, and the history of the dispute between the Plaintiffs, the Club, and the Trustees giving rise to this litigation.

5. **Philip W. Hall** – Mr. Hall will testify regarding the history of Trust administration, the history of the relationship between the Club and Clifton Park Trustees, history of the Non-Resident Club Members' use of the Beach, and the history of the dispute between the Plaintiffs, the Club, and the Trustees giving rise to this litigation.

6. **Jeffrey Weber** – Mr. Weber will testify regarding the history of the relationship between the Club and Clifton Park Trustees, history of the Non-Resident Club Members' use of

the Beach, and the history of the dispute between the Plaintiffs, the Club, and the Trustees giving rise to this litigation.

7. **John (“Jack”) E. Rupert** – Mr. Rupert will testify regarding the history of Trust administration, the history of the Club’s contributions to the Trustees’ budget, the history of the relationship between the Club and the Clifton Park Trustees, and history of the Non-Resident Club Members’ use of the Beach.

8. **Donald Strang** – Mr. Strang will testify regarding the history of Trust administration, the history of the Club’s contributions to the Trustees’ budget, the history of the relationship between the Club and the Clifton Park Trustees, and history of the Non-Resident Club Members’ use of the Beach.

9. **Douglas O. Cooper** – Mr. Cooper will testify regarding the history of Trust administration, the history of the Club’s contributions to the Trustees’ budget, the history of the relationship between the Club and the Clifton Park Trustees, and history of the Non-Resident Club Members’ use of the Beach.

Plaintiffs also reserve the right to supplement this Witness List with the name of any witness identified on the witness list of any Defendants and any witness for impeachment or on rebuttal.

[THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK]

III. PLAINTIFFS' PROPOSED STIPULATIONS

The Plaintiff Beneficiaries hereby submit its proposed stipulations for the trial in the above captioned matter:

1. A true, accurate and authentic copy of the Deed from the Clifton Park Association to William Starkweather is attached as Exhibit 1.

2. A true, accurate and authentic copy of the Deed from the Clifton Park Association to Henry Coffinberry is attached as Exhibit 2.

3. A true, accurate and authentic copy of the Deed from John J. & Mary E. McGlaughlin to the Clifton Park Land Improvement Company is attached as Exhibit 3.

4. On May 29, 1902, The Clifton Club Company was formed as a for-profit stock corporation.

5. A true and accurate copy of the May 29, 1902 Articles of Incorporation of The Clifton Club Company is attached as Exhibit 4.

6. On June 9, 1902, The Clifton Park Land and Improvement Company leased four sublots in the Clifton Park Allotment to The Clifton Club Company.

7. A true, accurate and authentic copy of the June 9, 1902 Lease from the Clifton Park Land Improvement Company to The Clifton Park Company is attached as Exhibit 5.

8. In a Deed of Trust dated March 25, 1912, recorded of record on March 27, 1912 in the Cuyahoga County Recorder's office at Volume 1382, Pages 277-280 (the "Trust"), the Clifton Park Land Improvement Company conveyed certain property in the Clifton Park Allotment dedicated for purposes of the parks, park spaces, roads, and other common property, including the Clifton Park Beach, for the use and benefit of the owners of lots within the Clifton Park Allotment.

9. A true, accurate and authentic copy of the Trust is attached as Exhibit 6.

10. The Trust requires the trustees of the Trust to hold title to and preserve all 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.

11. The members of The Clifton Club Company who do not own lots or sublots within the Clifton Park Allotment are not expressly named as beneficiaries in the Trust.

12. The members of The Clifton Club Company who do not own lots or sublots within the Clifton Park Allotment are not beneficiaries of the Trust.

13. The trustees of the Trust do not owe fiduciary duties to members of The Clifton Club Company who do not own lots or sublots within the Clifton Park Allotment.

14. Historically the Club's members who do not own a lot in the Clifton Park Allotment have been allowed to access the Clifton Park Beach by annual permission of the trustees of the Trust in exchange for a substantial contribution to the Trustees' operating budget.

15. The Trustees have historically established regulations that determine the number of Club members that are permitted to use the Clifton Park Beach.

16. The Clifton Club Company has no household members.

17. No one resides at The Clifton Club Company's clubhouse.

18. The Trust provides a formula by which lot owners are charged a portion of the cost of all ordinary care of the lands and buildings in the hands of the trustees of the Trust and their necessary expenses in carrying out their duties.

19. There is no time period for which records still exist in which the trustees of the Trust have charged an annual assessment to the Club according to the formula described in the Trust.

20. In a deed dated July 1, 1912, recorded of record on July 9, 1912 in the Cuyahoga County Recorder's office at Volume 1399, Pages 374-376, the Clifton Park Land and

Improvement Company conveyed four sublots in the Clifton Park Allotment to The Clifton Club Company.

21. A true, accurate and authentic copy of the of the Club's July 1, 1912 Deed is attached as Exhibit 7.

22. A true, accurate and authentic copy of the November 9, 2011 Amendment to the Articles of Incorporation for The Clifton Club Company is attached as Exhibit 8.

23. The document bates range CliftonClub 1836-1839 is a true, accurate and authentic copy of the copy of the June 29, 1942 Minutes of Meeting of Board of Directors of The Clifton Club Company, Lakewood, Ohio, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

24. The document bates range CliftonClub 1840-1842 is a true, accurate and authentic copy of the July 8, 1942 Minutes of Meeting of Board of Directors of the Clifton Club Company, Lakewood, Ohio and is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

25. The document bates range CliftonClub 1852 is a true, accurate and authentic copy of the July 20, 1943 Minutes of the Meeting of the Stockholders of the Clifton Club Company, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information

transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

26. The document bates range CliftonClub 1857 is a true, accurate and authentic copy of the July 18, 1944 Minutes of the Meeting of the Stockholders of the Clifton Club Company, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

27. The document bates range CliftonClub 1861 is a true, accurate and authentic copy of the July 17, 1945 Minutes of Meeting of Board of Directors of the Clifton Club Company, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

28. The documents bates range CliftonClub 1883-1884 is a true, accurate and authentic copy of the August 7, 1947 Minutes of the Annual Meeting of Stockholders of the Clifton Club Company, Lakewood, Ohio, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

29. The document bates range CPT 12262-12267 is a true, accurate and authentic copy of the April 16, 1959 Minutes of Meeting of the Board of Trustees of Clifton Park, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

30. The document bates range CPT 10917 – 10918 is a true, accurate and authentic copy of the March 30, 1962 Minutes of Meeting of Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

31. The document bates range CPT 04242-4245 is a true, accurate and authentic copy of the August 2, 1962 Affidavit of John S. Pyke, Sr., and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

32. The document bates range CPT 10898 is a true, accurate and authentic copy of the December 18, 1962 Minutes of a Special Meeting of the Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

33. The document bates range CPT 14126-14128 is a true, accurate and authentic copy of the January 9, 1963 Letter to Board of Trustees Clifton Park from Clayton Quintrell, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

34. The document bates range CPT 08102 is a true, accurate and authentic copy of the January 9, 1963 Letter to Charles Reed from Clayton Quintrell, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

35. The document bates range CPT 08100 – 08101 is a true, accurate and authentic copy of the January 10, 1963 Letter to W. D. Gorton from Charles Reed, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

36. The document bates range CPT 00292 is a true, accurate and authentic copy of the May 11, 1964 Letter to John H. Weeks from Robert C. Sessions, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

37. The document bates range CPT 01248-1250 is a true, accurate and authentic copy of the November 10, 1964 Letter to Mr. and Mrs. Carl Behl from Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

38. The document bates range CliftonClub 00098-00099 is a true, accurate and authentic copy of the May 22, 1965 Letter to Clifton Park Lot Owners and Clifton Club Members from Clifton Park Trustees, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

39. The document bates range CliftonClub 00080-00081 is a true, accurate and authentic copy of the May 2, 1970 Report of Meeting May 2, 1970 with Clifton Park Trustees and Subsequent Events Pertaining to Meeting, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

40. The documents bate range CPT 02663 is a true, accurate and authentic copy of the May 4, 1971 Letter to Carl Larsen from Clifton Park Trustee Robert Lawther, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in

the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

41. The document bates range CPT 01257 – 01259 is a true, accurate and authentic copy of the June 30, 1971 Letter to Paul S. Sessions from Robert L. Hartford, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

42. The documents bates range CliftonClub 00338-339 is a true, accurate and authentic copy of the May 18, 1982 The Clifton Club Minutes of Regular Meeting of the Board of Directors, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

43. The document bates range CliftonClub 00358-359 is a true, accurate and authentic copy of the March 15, 1983 The Clifton Club Minutes of the Regular Meeting of the Board of Trustees, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

44. The document bates range CPT 08776 – 08779 is a true, accurate and authentic copy of the February 14, 1986 Letter to Edward Saxton, President Clifton Club Trustees from

Douglas O. Cooper for Clifton Park Trustees regarding Budget and Finances; Clifton Club, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

45. The document bates range CPT 04701 is a true, accurate and authentic copy of the May 22, 1986 Letter to Edward Saxton II, President of the Clifton Club from John E. Rupert, President, Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

46. The document bates range CPT 08905 – 08908 is a true, accurate and authentic copy of the March 2, 1987 Letter to The Clifton Park Trustees from Walter J. Manns, Treasurer, The Clifton Club Company, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

47. The document bates range CPT 8755 – 8756 is a true, accurate and authentic copy of the March 5, 1987 Unsent Letter to The Clifton Club Company, c/o Charles Gallagher, President from Douglas O. Cooper and William R. Gorton for the Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge,

was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

48. The document bates range CPT 8747 – 8750 is a true, accurate and authentic copy of the March 24, 1987 Letter to the Clifton Club Company, c/o Charles Gallagher, President from Douglas O. Cooper for the Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

49. The document bates range CPT 08937 is a true, accurate and authentic copy of the April 21, 1987 Letter to Wally Mann, Treasurer, the Clifton Club Company from Douglas O. Cooper, Clifton Park Trustee, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

50. The document bates range CliftonClub 00030-00034 is a true, accurate and authentic copy of the 1988 Memorandum of Understanding, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

51. The document bates range CPT 04189 – 04190 is a true and accurate copy of the February 28, 1988 Letter to Ed Denk, President of Clifton Club Board of Trustees from Jack

Rupert for the Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

52. The document bates range CliftonClub 00227-00229 is a true, accurate and authentic copy of the August 30, 1989 Letter to John E. Rupert, Clifton Park Trustee from Gary Amendola, President Clifton Club, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

53. The document bates range CliftonClub 00224 – 00226 is a true, accurate and authentic copy of the October 5, 1989 Letter to Gary Amendola, President The Clifton Club from John (“Jack”) E. Rupert, for Clifton Park Trustees, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

54. The document bates range CPT 00348 – 00349 is a true, accurate and authentic copy of the December 17, 1991 Letter to Albert Fowerbaugh, President, The Clifton Club from John (“Jack”) E. Rupert, President, The Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the

ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

55. The document bates range CliftonClub 00511 – 00513 is a true, accurate and authentic copy of the April 27, 1995 Letter to Clifton Club Members from The Clifton Club Board of Directors, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

56. The document bates range CPT 01014 is a true, accurate and authentic copy of the March 12, 1997 Memorandum to the Clifton Club Directors, Dianna Foley, President from the Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

57. The document bates range CliftonClub 00067 is a true, accurate and authentic copy of the April 30, 1997 Memorandum from the Clifton Club Board of Directors to the Clifton Park Trustees re: Draft of Five Year Beach Assessment Agreement, and it is a record stored in and retrieved from the corporate records of The Clifton Club Company, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of The Clifton Club Company, and was a regular practice of The Clifton Club Company to make such a record.

58. The document bates range CPT 07632-7633 is a true, accurate and authentic copy of the March 3, 2005 Email Chain Regarding the Clifton Club Letter – Response Suggestion, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

59. The document bates range CPT 12185 is a true, accurate and authentic copy of the April 12, 2005 Minutes of the Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

60. The document bates range CPT 02566 is a true, accurate and authentic copy of the July 6, 2009 Letter from John S. Pyke, Jr., President, Clifton Park Trustees to Mr. and Mrs. Michael Daso, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

61. The document bates range CPT 02560 is a true, accurate and authentic copy of the July 8, 2009 Letter from Michael Daso to Nancy Graves, Secretary-Treasurer, Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of

Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

62. The document bates range CPT 02555 – 02556 is a true, accurate and authentic copy of the July 31, 2009 Letter from John S. Pyke, Jr., President, Clifton Park Trustees to Mr. and Mrs. Michael Daso, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

63. The document bates range CPT 12171 – 12172 is a true, accurate and authentic copy of the February 12, 2010 Minutes of Clifton Park Trustees, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

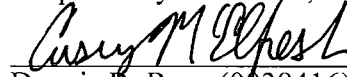
64. The document bates range CPT 12082 – 12083 is a true, accurate and authentic copy of the February 15, 2012 History of The Clifton Club's Beach Privileges, signed John S. Pyke, Jr., and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

65. The document bates range CPT 01554 is a true and accurate copy of the Clifton Park Trustees – Chronology of Trustees, and it is a record stored in and retrieved from the

records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

66. The document bates range CPT 01553 is a true and accurate copy of the Clifton Park Trustees – Years of Service, and it is a record stored in and retrieved from the records of Clifton Park Trustees, was made at or near the time of the event, was made by or from information transmitted by a person with knowledge, was kept in the ordinary course of a regularly conducted business activity of Clifton Park Trustees, and was a regular practice of the Clifton Park Trustees to make such a record.

Respectfully submitted,



Dennis R. Rose (0039416)

drrose@hahnlaw.com

Arthur E. Gibbs III (0066819)

aegibbs@hahnlaw.com

Casey J. McElfresh (0088083)

cmcfresh@hahnlaw.com

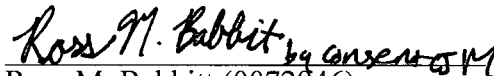
HAHN LOESER & PARKS LLP

200 Public Square, Suite 2800

Cleveland, Ohio 44114

Telephone: (216) 621-0150

Facsimile: (216) 241-2824



Ross M. Babbitt (0072946)

rbabbitt@babbitt-lawfirm.com

ROSS M. BABBITT CO., LPA

Hoyt Block, Suite 200

700 West St. Clair Avenue

Cleveland, Ohio 44113

Telephone: (216) 623-6346

Facsimile: (216) 274-9683

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiffs Arthur P. Dueck's, Todd Gilmore's, Nancy Binder's, And William R. Keller's, Putative Plaintiffs Rhonda Loje's And Jeffrey Mansell's Trial Brief, Witness List, And Proposed Stipulations* has been served by U.S. mail on October 19, 2015 upon the following:

Adam M. Fried, Esq.
afried@reminger.com
David Ross, Esq.
dross@reminger.com
Julian Emerson, Esq.
jemerson@reminger.com
Reminger Co., LPA
101 W. Prospect Avenue, Suite 1400
Cleveland, OH 44115-1093

Attorney for Defendant
The Clifton Club Company

Leo M. Spellacy, Esq.
lspellacy@porterwright.com
Porter Wright Morris & Arthur LLP
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115-1483

Attorney for Interested-Party Defendant
BAI, LLC

Kip Reader, Esq.
kreader@ulmer.com
Mary Forbes Lovett, Esq.
mlovett@ulmer.com
Ulmer & Berne LLP
Skylight Office Tower
1660 W. Second Street, Suite 1100
Cleveland, OH 44113

Attorneys for Defendants
Charles Drumm; John S. Pyke, Jr.; Peter A. Kuhn; Philip W. Hall; and Warren Coleman
(Trustees of the Clifton Park Trust)

Walter F. Ehrnfelt, Esq.
walter@healthlaw.com
Thomas M. Ehrnfelt, Esq.
tehrnfelt@healthlaw.com
Waldheger Coyne
Gemini Tower I, Suite 550
1991 Crocker Road
Cleveland, OH 44145

Attorneys for Interested Party-Defendants
Edmond and Mary Blades, Trustees;
Louis and Cynthia Keppler; and Robert Stall

Michael C. Cohan, Esq.
mcohan@cavitch.com
Cavitch, Familo & Durkin Co., LPA
1300 E. Ninth Street, 20th Floor
Cleveland, OH 44114

Attorney for Interested-Party Defendants
Sarah Cohan; Leigh E. Fox, Trustee; Joanne H. Calkins, Trustee; Matthew and Susan Beverstock; Jeffrey S. and Stefanie Christian; Janna Dresing; Cynthia Dunn and Dale Cuthbertson; Mark and Nancy S. Graves; Scott and Amy C. Kimes; Andrew Logan; Peter and Linda Joy Nintcheff, Trustees; Ron and Beverly Rudin; Carolyn Seelbach; and Byron T. and Mary Anne Crampton, Trustees

F. Thomas Vickers, Esq.
tvickers@vickerslawgroup.com
Vickers Law Group Co., LPA
1119 Bassett Road
Westlake, OH 44145

Attorney for Interested-Party Defendants
Joseph and Alicia A. Kerrigan

Kevin M. Spellacy, Esq.
kspell@mghslaw.com
McGinty, Hilow & Spellacy Co., LPA
The Rockefeller Building, Suite 1300
614 West Superior Avenue
Cleveland, OH 44113

Attorney for Interested-Party Defendants
Thomas and Kelly O'Malley; Michael and Patricia Smith; and Kevin and Molly M. Spellacy

Gregory D. Seeley, Esq.
GDSeeley@sseg-law.com
Seeley, Savidge, Ebert & Gourash Co., L.P.A.
26600 Detroit Road
Cleveland, OH 44145-2397

Attorney for Interested-Party Defendant
Melissa K. Meany

Gary A. Vick, Jr., Esq.
gavickjr@connickvicklaw.com
Connick & Associates Co., L.P.A.
NorthPoint Tower, Suite 1720
1001 Lakeside Avenue
Cleveland, OH 44114

Attorney for Interested-Party Defendants
Charles and Patricia Geiger; Gordon D. and Susan S. Geiger; Christine R. Kraay, Trustee; and 17822 Lake Avenue LLC

John F. McCaffrey, Esq.
john.mccaffrey@tuckerellis.com
Tucker Ellis LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414

Attorney for Interested-Party Defendants
John F. and Margaret McCaffrey

Michael J. Connick, Esq.
mconnick@connickvicklaw.com
Connick & Associates Co., L.P.A.
NorthPoint Tower, Suite 1720
1001 Lakeside Avenue
Cleveland, OH 44114

Attorney for Interested-Party Defendants
James and Nancy S. Seibert

Michael E. Smith, Esq.
msmith@frantzward.com
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114-1230

Attorney for Interested-Party Defendants
Michael Smith and Michelle Myers

Brian J. Darling, Esq.
BDarling@DarlingDuffy.com
John Duffy & Associates
Brendan Place
23823 Lorain Road, Suite 270
North Olmsted, OH 44070

Attorney for Interested-Party Defendant
Harold W. Goforth

Ross M. Babbitt, Esq.
rbabbitt@babbitt-lawfirm.com
Ross M. Babbitt Co., LPA
Hoyt Block, Suite 200
700 West St. Clair Avenue
Cleveland, OH 44113

Co-Counsel for Plaintiffs and
Attorney for Interested-Party Defendants
Rhonda Loje and Jeffrey Mansell

Solvita McMillan, Esq.
17904 Lake Road
Lakewood, OH 44107

Attorney for Interested-Party Defendants
John G. and Solvita A. McMillan

Dennis R. Lansdowne, Esq.
dlansdowne@spanglaw.com
Spangenberg Shibley & Liber LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114

Attorney for Interested-Party Defendant
Kim Lansdowne, Trustee

James D. Romer, Esq.
jromer@pprblaw.com
Polito, Paulozzi, Rodstrom & Burke
21300 Lorain Road
Fairview Park, OH 44126

Attorney for Interested-Party Defendants
James and Katherine Romer

Christian M. Bates, Esq.
cbates@corsarolaw.com
Corsaro & Associates Co., LPA
28039 Clemens Road
Westlake, OH 44145

Attorney for Interested-Party Defendant
Saji T. Daniel, Trustee

James P. Oliver, Esq.
james.oliver@squirepb.com
Squire Patton Boggs LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114

Attorney for Interested-Party Defendants
James and Mary Patricia Oliver



One of the Attorneys for Plaintiffs

EXHIBIT C



Hahn Loeser & Parks Achieves Successful Appeals Court Victory for the Residents of Clifton Park

DENNIS R. ROSE

August 16, 2017

Hahn Loeser & Parks' fiduciary litigation team led by Dennis R. Rose recently achieved a significant victory for the residents of Clifton Park, when the 8th District Court of Appeals held that members of the Clifton Club who do not reside in the Park are not legal beneficiaries of a trust that held the interest in a private beach located in the Park.

The case began in 2012, when Hahn Loeser was retained by residents of Clifton Park to bring an action to resolve a dispute with the Clifton Club over use of a private beach located in the Park. The beach had been deeded to a group of trustees over a century ago for the benefit of Clifton Park lot owners. The trust requires each lot owner to pay a portion of the cost of beach maintenance based on the tax value of the lot. Over the years, the trustees regulated the use of the beach to protect the interest of the resident lot owners while allowing Clifton Club members to use the Beach for an additional fee in a manner that did not impede on the rights of the residents.

In 2011, the historical balancing of the rights of lot owners and interests of members of the Club were turned upside down when the successor trustees took the position that members of the Clifton Club were beneficiaries of the trust and had equal rights with the lot owners. This asymmetric position would have potentially allowed all Club members to use the beach without the Club needing to pay more than its single family lot assessment.

Hahn Loeser brought a lawsuit in the spring of 2012 in Cuyahoga County Probate Court to answer the simple question of whether the Club members who did not reside in the Park were trust beneficiaries with the legal right to use the beach. The response of the trustees and the Club was aggressive and unified. The Club asked the Court to dismiss the lawsuit for failing to name all of the 209 lot owners of the Park and the trustees. The trustees took up the Club's position and argued that the Club members had equal rights to use the trust property as any other lot owner even though most Club members were not lot owners. The Court denied the request but ordered the Plaintiffs to sue all of the lot owners and the trustees.

In 2014, the Plaintiffs asked the Court to remove the trustees for breach of their duties of impartiality and to disclose trust documents and information on request of the lot owner beneficiaries. Two-thirds (138) of the lot owners in the Park supported



the Plaintiffs' position. Plaintiffs also moved for attorney fees against the trustees for their breaches of fiduciary duty.

In 2015, the trustees asked the Court to enter judgment in their favor, claiming that a plain reading of the trust supports the view that the Club members were all legal beneficiaries. In doing so, the trustees relied on the Club lease and other deeds and extrinsic evidence to support their argument. The Plaintiffs opposed the request and argued that the Court must look at all the extrinsic evidence (including the historical interpretation) in deciding the issue. This evidence included a detailed history of the development of Clifton Park with deeds and documents dating as far back as 1896. The Court entered judgment in favor of the trustees in November of 2015, relying on the language of the trust deed and only the extrinsic evidence cited by the trustees. The Court also denied the motion to find the trustees breached their fiduciary duties and for attorney fees.

Hahn Loeser filed an appeal on behalf of the lot owners and argued that the trust deed did not make the members of the Club legal beneficiaries and therefore the Court erred in granting summary judgment. The Court of Appeals agreed with our arguments and reversed the trial court's ruling. The Court held that the Club members were not legal beneficiaries and only had a permissive right to use the beach. The Court also held that the trustees breached their fiduciary duty and remanded the case for a hearing on the recovery of the costs incurred by the Plaintiffs.

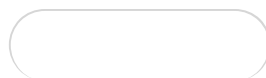
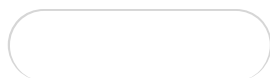
Mr. Rose made the following statement. "The Plaintiffs who tirelessly pursued this case for over five years are delighted that the rights of the residents of Clifton Park have been protected. This decision gives the residents of Clifton Park, the trustees of the Trust and the Clifton Club clear direction as to the respective interests of the Clifton Park residents and the non-resident Club members as they relate to the beach. As this chapter of the long and storied history of Clifton Park closes, I am hopeful that the direction this decision provides will lead to the enjoyment of the beach for the next 100 years. I am honored to represent the Plaintiff lot owners who volunteered countless hours of time reviewing the historical record and who persevered through many setbacks to achieve this result."

LAUNCH 



Dennis R. Rose, *Partner*

RELATED PRACTICES & INDUSTRIES



LITIGATION

FIDUCIARY
LITIGATION