No. 16-2022

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE:
CHICAGO PARK DISTRICT, et al.,

Petitioners

Petition for Writ of Mandamus

Northern District of Illinois, Eastern Division
Case No. 14-cv-9096
The Honorable John W. Darrah

RESPONSE OF REAL PARTIES IN INTEREST, FRIENDS OF THE PARKS, SYLVIA MANN, AND JOHN BUENZ

DESPRES, SCHWARTZ & GEOGHEGAN, LTD.
Thomas H. Geoghegan (*counsel of record*)
Michael P. Persoon
77 West Washington Street, Suite 711
Chicago, Illinois 60602
(312) 372-2511

Table of Contents

Table of Authorities

Cases

Statutes

Secondary Materials

SUMMARY OF ARGUMENT

This petition falls far short of meeting any of the standards for a writ of mandamus. First, Defendants failed to present the relevant issue – Article III standing – to the District Court in the first instance. Second, there is no "clear and indisputable" right to dismissal for lack of standing. Plaintiffs allege injury to their right to use and enjoy public trust property, both as a clear and open space and as a natural physical environment. These injuries more than suffice for standing to challenge the construction of this elephantine project and the conveyance of trust land to a private party for 297 years. *See Friends of the Earth v. Laidlaw Env. Services,* 528 U.S. 167 (2000); *Sierra Club v. Morton,* 405 U.S. 727 (1972). Furthermore, Defendants do not explain why this Court should peremptorily order dismissal of the supplemental state law claims without even allowing the district court to exercise its discretion under §28 U.S.C. 1367(c). In the case of dismissal of the state claims, the parties would have to start over in state court. Because Defendants have twice sought and received from the district court rulings on the state law claims, this would amount to significant waste of judicial resources. Moreover, the continuation of this case in state court means that a writ of mandamus will not "end the

litigation," as desired by Defendants. Put simply, a writ of mandamus cannot be used here, as Defendants hope, as a substitute for interlocutory appeal.

ARGUMENT

I. The writ of mandamus is a drastic remedy not available here.

"It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). The writ is for rare cases in which a district court abuses its power – amounting to "judicial usurpation," *id.* at 35 – or the flipside, where it *refuses* to exercise its power. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 31 (1943).

The Supreme Court has cautioned that the writ may not be used "as a substitute for the appeal procedure," *id. at* 26 (1943) or to address "inconvenience to the litigants" resulting from decision of Congress that review of district court orders should happen "only on review of final judgment." *Id.* at 31. Nor is the writ appropriate to challenge denials of a motion to dismiss such as the district court's opinions below. *See Lindner v. Union Pacific R.R.*, 762 F.3d 568, 573 (7th Cir. 2014).[1]

[1] That the writ is reserved for truly extraordinary circumstances is illustrated by the cases cited by Defendants in the Petition. In *Abelesz v. OTP Bank*, 692 F.3d 638 (7th Cir. 2012), where Holocaust survivors sought damages against Hungarian banks in an amount equal to 40% of Hungary's annual GDP, and where this Court had "crystal clarity" that there was personal jurisdiction over the banks, "serious foreign-policy implications" led to the writ. *Lindner v. Union Pacific R.R.*, 762 F.3d 568, 573 (7th Cir. 2014). In *In re Lloyd's Register North America, Inc.*, 780 F.3d 283 (5th Cir. 2015), the writ

Cheney v. United States District Court, 542 U.S. 367, 380-81 (2004), sets forth a standard for evaluating a petition for a writ for mandamus. First, the party seeking the writ must have no other adequate means to attain the relief it desires. Second, that party must show that the right to issuance of the writ is "clear and indisputable." Third, even if the first two conditions are met, this Court must also be satisfied that the writ is appropriate under the circumstances.

II. As to the first *Cheney* factor, Defendants have failed to show that they have no other means to obtain the relief desired.

There is no merit to Defendants' arguments that they have an "indisputable" right to relief, or that Plaintiffs lack standing on their federal claims. But those arguments are not properly before this Court. Defendants have failed to show that they cannot obtain the relief they desire by proceeding in the district court, which has set the deadline for dispositive motions for August of this year. In that respect, they fail to meet the first factor in *Cheney v. United States District Court,* 542 U.S. at 380-81, that they have "no other adequate means" to a remedy except this writ of mandamus.

In addition, Defendants present in their Petition a newly-framed claim on Article III standing that they never presented in a motion to dismiss in the

---

issued where the district court denied a motion to dismiss "without explanation and without any visible weighing of the factors … giving the parties and reviewing courts no way of understanding how the court reached its conclusion and providing no assurance that it was the result of conscientious legal analysis." *Id.* at 291.

district court. Instead, they come directly to this Court on their new argument, seeking a remedy that the Supreme Court has termed "drastic and extraordinary." *Allied Chem. Corp.*, 449 U.S. at 34.

What's more, even if a writ of mandamus issued, it would not "end the litigation." Even if the Court dismissed the federal and state claims, Plaintiffs could - and would - proceed to bring the state claims in state court. To start over in state court would of course significantly delay resolution. In other words, it would not remedy the claimed harm—a "harm" that is nothing but the subjective distress of a non-litigant with the pace of litigation. Furthermore, as the District Court has stated in detail in open court on March 2, 2016, the Defendants have delayed the case and lost a trial date. Exhibit A (3/2/16 Tr.) at 4-15. For these and other reasons, the Court should deny this ill-conceived petition, which fails to meet any of the conditions set out in *Cheney*, and would frustrate the timely resolution that Defendants claim to seek.

Defendants' plan to build a museum on the Lakefront does not constitute a public emergency. There is no reason the museum could not be constructed at the conclusion of this litigation, assuming Defendants prevail, and certainly no reason why Defendants could not at least await a ruling from the district court on their newly-framed Article III standing question. In characterizing their situation as a looming catastrophe, Defendants point only to the vague

preferences of the Lucas Museum of Narrative Art (LMNA) to go forward. But virtually every real estate developer would prefer to build now, rather than later. The annoyance of a non-litigant is no basis for the extraordinary remedy of a writ of mandamus. Furthermore, the LMNA's declared intent is unclear and vague. The affidavit of Mr. Garcia states that the LMNA refuses to wait an "indefinite" period of time, and requires a "prompt" resolution. Tab G, Defendants' Petition for Writ of Mandamus ("Def. Pet."). But he does not explain what he means by "indefinite" or "prompt." Nor does the LMNA give any specifics about what other city proposals it is "actively considering," or even what it means by "actively considering." The affidavit is silent as to whether these alternative sites are feasible, and it is silent as to whether pursuit of these claimed alternatives would lead to construction before this case is resolved by dispositive motions. Through no doing of Plaintiffs, it has taken the LMNA and the Park District from 2012 to August 2015 to reach agreement on the Ground Lease - and even then the LMNA has not been ready to start. To begin again in another city - if that really is the LMNA's intent - and start over with a multi-year process would be senseless, when in this case the parties are scheduled to file dispositive motions by August 24, 2016, which the district court is scheduled to resolve this year. [Dkt. 91]. One can only guess what this fact-free affidavit means by "indefinite" or "prompt," or how this Court is supposed to make a finding as to what the LMNA will do.

As already noted, even if the federal claim were dismissed on the merits, Plaintiffs would file their state law claims in state court. Indeed, the Petition does not explain why the district court should not retain jurisdiction of the state law claims under supplemental jurisdiction, or at least decide whether it should retain jurisdiction. That the district court should exercise this discretion is especially true when dispositive motions are shortly due. A remand to state court would certainly delay the resolution of at least some legal issues, and for the very futility of the relief sought, the Petition should be denied.

III. Defendants' request for the extraordinary writ is plainly inappropriate when their actions have delayed resolution of this case.

Defendants are responsible for delay of this case. As explained by the District Court on March 2, 2016, it has been Plaintiffs who have pushed for a prompt resolution of their legal challenge, while Defendants have held the case up with motion practice and resistance to discovery. *See, e.g.*, Exhibit A (3/2/16 Tr.) at 9 ("…but for the city and the park district's motions to stay discovery, the trial date that I originally signed would be next week … the delays that were occasioned in the prosecution of this case, by and large, came from the defendants"). *See also id.* at 15.

Plaintiffs filed this action on November 13, 2014, to challenge a decision, described in a Memorandum of Understanding (MOU), to turn over trust property on the lakefront to the LMNA. Tab B, Def. Pet. Upon filing, Plaintiffs

sought a motion for preliminary injunction, which would have resulted in a ruling on Plaintiffs' likelihood of success on the merits. *See* Exhibit A (3/2/16 Tr.) at 4-8. However, Defendants opposed resolving things in this manner. Incidentally, the so-called "preliminary injunction" that Defendants now decry was and is not a preliminary injunction at all - it is an agreed order, offered by the court at the suggestion of Defendants, to avoid Plaintiffs' motion to obtain a preliminary injunction. The order is merely Defendants' agreement to notify Plaintiffs if and when there would be physical alterations to the property. *See* Exhibit A (3/2/16 Tr.) at 7-8. The purpose of the order is just to ensure that Plaintiffs can then bring a motion for preliminary injunction in an orderly way, without the need to seek a TRO.

On December 12, 2014, having put off the motion for a preliminary injunction, Defendants filed motions to dismiss under Rule 12(b)(6). [Dkts. 20, 23]. The motions sought not just to decide the two federal claims in the first complaint, but the two supplemental state law claims as well. *Id.* Specifically, Defendants sought a ruling that the conveyance did not violate the substantive state law of public trust. *Id.* While one Defendant, the City, did raise standing in the first motion, it was not the particular Article III standing argument Defendants raise here. Rather, at that time Defendant City argued that Plaintiffs' claims were not ripe, because there was no certainty that the project would go

forward until it had the approval of City Council and the Park District board. [Dkt. 20, at 6]. No Article III standing argument of the kind Defendants now bring before this Court was raised by them. *See* Exhibit A (3/2/16 Tr.) at 21-22.

On March 12, 2015, the district court issued an order and opinion partly granting and partly denying the motion. [Dkt. 36.] The court ordered Rule 26(a)(1) disclosures to be exchanged by April 14, 2015, and a status hearing was set for two weeks later. [Dkt. 35]. Plaintiffs filed their first request for production of documents on *April 27, 2015*. For nearly a *year* after, Defendants failed to engage in meaningful production, except to turn over what are mostly copies of early drafts of Memorandum of Understanding and the Ground Lease. Defendants opposed *any* document discovery *or* depositions on the issues that should decide whether this conveyance violates the purpose of the public trust – issues such as the alleged purpose of the museum, Defendants' consideration of alternative sites, the environmental impact of the project on this fragile trust property, the private gain to the LMNA from receiving exclusive control over the land and full control of the museum, the viability of or need for such a privately operated museum over a period of 297 years, and the fairness of the $10 price for Lakefront real estate and other non-transparent costs that taxpayers will assume but are not yet disclosed. Such discovery is essential to the kind of fact-based determinations used by courts to decide when conveyances of trust property to

private parties violate the law. The legal issues in this case could never be resolved without such discovery. *See, e.g., Scott ex rel. People of Illinois v. Chicago Park District,* 66 Ill.2d 65 (1976)*; Lake Michigan Federation v. U.S. Army Corps of Engineers.* 742 F.Supp. 441 (N.D. Ill. 1990). If the LMNA wished to avoid the delay posed by this litigation, it had the option of selecting sites not on trust property and not hedged with special legal protections.

In April 2015, the district court ordered discovery closed by September 2015, and set a bench trial for March of 2016. [Dkt. 44]. But only two months after this order, Defendants were back in court with a motion to stay discovery, which was granted over Plaintiffs' objections. [Dkts. 45, 47, 49, 53]. As the district court stated, "The plaintiffs were again prevented from obtaining the material they said was necessary to prosecute this case." *See* Exhibit A (3/2/16 Tr.) at 12. In last year's motion for a stay, Defendants insisted that the whole case had to stop until the Ground Lease was executed, because the terms might be different from those in the MOU, which had led to the filing of the complaint

The Ground Lease turned out to be, in essence, the transaction described in the MOU. Nevertheless, once the Ground Lease was executed, Defendants sought again to delay the case again by insisting Plaintiffs file a new complaint addressing the Ground Lease instead of the MOU. At the direction of the district court, Plaintiffs filed an amended complaint. [Dkt. 62.] Defendants then seized

on the new filing to bring yet another Rule 12(b)(6) motion, raising many of the same arguments as before. [Dkt. 66]. As Plaintiffs wished, the parties could have just finished discovery and proceeded to resolution of the claims - including the state law claims - by dispositive motions on the merits. On February 4, 2016, the district court reached a decision for reasons either similar to or exactly the same as its reasons contained in its order and opinion of March 4, 2015. [Dkt. 74]. Defendants had now wasted a good part of a year with this strategy of delay.

Even now, Defendants objected to much of the discovery Plaintiffs had been seeking since April 2015. When the district court made clear that discovery should be as broad as Rule 26 permits, Defendants turned to a new motion. Specifically, on February 16, 2016, Defendants brought the court a Motion to Dissolve the Preliminary Injunction. [Dkts. 76, 86.] Briefing on this motion was gratuitous, as there was no "preliminary injunction" to dissolve. In this motion, Defendants raised – for the first time – an argument they had never made in their two motions to dismiss: that Plaintiffs lacked Article III standing altogether. *See* Exhibit A (3/2/16 Tr.) at 21-22 ("I don't think – we [the City] haven't raised the Article iii standing point in our motion to dismiss"). But Defendants did not raise this argument directly in a Rule 12(b)(6) motion for the district court to decide.

At the March 2, 2016 hearing on Defendants' Motion to Dissolve, the district court stated flatly that "defendants have not provided [Plaintiffs] with the

discovery necessary to defend this motion." Exhibit A (3/2/16 Tr.) at 13. The court also stated: "In reviewing the file in its totality, it's clear that much of the delay, if that's the proper word, much of the time-consuming nature of this litigation, has been occasioned by the defendants." *Id.* at 15.

A week later, the district court again expressed dismay at Defendants' attempts to avoid any meaningful discovery. "I don't understand – frankly, I don't understand the reluctance to produce this information. It would seem it's all a matter of public record." Exhibit B (3/9/16 Tr.) at 8. Counsel for the City reiterated that Defendants did not believe the Plaintiffs needed the discovery, to which the district court disagreed. *Id.* at 14. In April 2016, months after Plaintiffs requested it, Defendants produced discovery. However, just five days after producing documents, Defendants filed the Petition.

There is surely no basis for mandamus relief under the first factor in *Cheney*. It is not just that Defendants failed to raise the issue of Article III jurisdiction in the district court before proceeding here. Also, Defendants are claiming an emergency that, if it exists, was caused by their own unnecessary strategy of delay. Furthermore, Defendants are claiming the need to bypass the District Court just when the parties will begin preparing the dispositive motions. This is a plain misuse of mandamus and is especially unjustified when - as explained - it will not in fact resolve the case.

IV. Under the second *Cheney* factor, Defendants raise no "clear and indisputable right" to dismiss for lack of jurisdiction.

Under the second *Cheney* factor, Defendants have to show "a clear and indisputable" "right to issuance of the writ" to dismiss the claims. *Cheney, supra,* at 381. Defendants primarily contend that Plaintiffs lack Article III standing and that while they failed to file a proper motion to dismiss, this Court should decide that Article III standing issue in the first instance by this writ. Yet even a cursory review of the case law would show that Plaintiffs have Article III standing: they will suffer a concrete and particularized injury from the construction of a bloated new building on land that should be held in trust as clear and open space. The Illinois Supreme Court has made clear that the purpose of the trust is not just to preserve this land as open space but to keep it as a natural physical environment, for recreation and aesthetic enjoyment. *People ex rel. Scott v. Chicago Park District,* 66 Ill.2d 65, 78 (1976) (quoting Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. Law Rev. 471, 490 (1970)) ("The public trust doctrine... should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit..."). That right to use and enjoy the trust land is exactly what is in jeopardy.

If Defendants convey this land to the LMNA in three successive leases for a period of 297 years, Plaintiffs will suffer a concrete and particular injury to their

right to the property for the purpose the trust was created. This conveyance to a private party will long outlast the lease of Soldier Field to the Chicago Bears, or the existence of the Bears parking lot, or the dilapidated east building of McCormick Place. Such private ownership - as it effectively will be - will foreclose for centuries the possibility of restoring the original Daniel Burnham vision: the entire Lakefront maintained as a green and open space. A large private building will blot a Lakefront that is one of the glories of American cities.

As Lakefront users, the Plaintiff Friends of the Parks and the individual Plaintiffs surely have standing to complain of this injury to their use and enjoyment of the property for the intended trust purpose. In *Friends of the Earth Inc. v. Laidlaw Environmental Services,* 528 U.S. 167 (2000), and *Sierra Club v. Morton,* 405 U.S. 727 (1972), the United States Supreme Court made clear that there is "injury-in-fact" standing in such cases. As the Court stated in *Laidlaw:* "[P]laintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the areas will be lessened' by the challenged activity." 528 U.S. at 183. *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562-563 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.") In *Laidlaw* the Court distinguished *Lujan v. National Wildlife Federation,* 504 U.S. 555 (1990), where the Court found

that the Federation members had only speculative "'some day' intentions" to visit endangered species in Egypt and other foreign countries "halfway around the world." 528 U.S. at 184. Likewise, in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Court did not find "injury-in-fact" standing when only one solitary Federation member claimed ever to show up anywhere on a vast tract of frigid Alaskan public lands up in the Arctic Circle. Chicago can be cold but it is not the remote Arctic, and any morning one can see cyclists, joggers, walkers, and gawkers – including some of the 2,000 Chicagoans who belong to Friends of the Park - enjoying one of the greatest green and open urban spaces in the United States. Indeed, it is precisely because it is so desirable an area that LMNA seeks to acquire effective ownership and control of it through three successive 99-year leases. In *Laidlaw* the Supreme Court upheld standing even on *conditional* statements of possible use - allegations that the plaintiffs in that case *would* visit the area but for Laidlaw's on-going environmental violations. Here, on the other hand, the members of Friends of the Parks and the individual Plaintiffs *do* allege that they use and enjoy the property for its intended purpose. Under *Laidlaw* and *Morton,* not to mention dozens of appellate court decisions, Plaintiffs have adequately alleged standing. As set out in paragraph 38 of the original complaint:

> By the actions [to sell off public trust land to a private party or entity], Defendants will interfere with and impair [the] right of Plaintiffs and other

> Illinois citizens to *use and enjoy* property held in trust by the State of Illinois as a natural resource and pristine physical environment *and* as a free and open space for access to and *use* and *enjoyment* of navigation, fishing, boating, and commerce on Lake Michigan.

Tab C, Def. Pet. (emphasis supplied). Instead of addressing the specific injury alleged in the complaint, Defendants belabor an inapt analogy to *Hollingsworth* - a case involving some citizen bystanders who tried to substitute for the State of California to defend its ban on gay marriage. See *Hollingsworth v. Perry,* 530 U.S. _ (2013). The Supreme Court correctly held that the these citizens - who merely took a "nosey neighbor" offense at gay marriage and had no direct stake in the issue - were not injured in any particular way by the existence of gay marriage and had no standing to step into the state's role of defending the law. In contrast, Plaintiffs here are not seeking to substitute for the State of Illinois or the City of Chicago. To the contrary, they are suing the City and the Park District for interfering with their own particular use and enjoyment of the Lakefront.

It is true that in *Paepcke v. Public Building Commission,* 46 Ill.2d 330 (1970), the Illinois Supreme Court did not base standing on the "use" and "enjoyment" of the land for the intended trust purpose, as Plaintiffs allege in paragraph 38. Indeed, this Illinois case preceded the decisions in *Sierra Club* and *Laidlaw* that later would allow standing just on that basis. Rather, at this earlier date, the Illinois Supreme Court chose to base standing on the possible economic injury or loss to plaintiffs as the beneficial or true owners of the trust property. Yet in this respect,

and unlike *Hollingsworth,* the plaintiffs in *Paepcke* were enforcing not a sovereign interest, or an abstract interest, but their own economic interest as "beneficiaries of the trust," or beneficial owners of the trust. *See Paepcke, supra* 46 Ill.2d at 341-42. As one court recently put it, the plaintiffs as "beneficial owners" of the trust property might even be deemed the real party in interest. *See Fiala v. Wasco v. Sanitary Water District,* 2014 Ill. App. 2d 130253-U (May 7, 2014) *(*cited here not for precedential value but the clarity of the appellate court's analysis).

Unlike public property, where the State owns both the legal and beneficial interest, the State - and the Park District as its delegate - only holds legal title to land recovered from the waters of Lake Michigan. *See Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892). The people of the state are the beneficial owners, and that beneficial ownership is a restriction on the ability of the General Assembly to sell or convey the land to a private developer or investor like the LMNA. In other words, as recognized by the district court in this case, the Plaintiffs and other citizens of the State of Illinois - not just Chicago - have a fractional economic interest in the land. For that reason, as the district court also recognized, Plaintiffs are not asserting a taxpayer standing claim, as they are not seeking a recovery on behalf of the State of Illinois or the City of Chicago or any other unit of government. Rather, as they have a necessary right to enforce a trust, they are suing as beneficiaries for themselves. This is a world away from

Hollingsworth, or even from a taxpayer standing case. Such standing to enforce a trust is a necessary implication of the Supreme Court decision in *Illinois Central Railroad Company,* 146 U.S. 387 (1892), the case called the "lodestar" of public trust law, *Scott,* 66 Ill.2d at 75, where the Court stated at page 453:

> The trust devolving upon the State for the public, and which can only by discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

Furthermore, often with little or no discussion, the highest courts in states other than Illinois allow citizens to sue to enforce such public trusts. *See, e.g., Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 2011 WI 54 (Wis. 2011); *Glass v. Goeckel,* 473 Mich. 667 (2005); *Robbins v. Department of Public Works,* 355 Mass. 328 (1968); *Gould v. Greylock Reservation Commission,* 350 Mass. 410 (1966). Far from there being a "clear and indisputable right" to dismiss for lack of Article III standing, Plaintiffs have alleged a "clear and indisputable" injury in fact both to their use and enjoyment of the trust land and their own economic interest as the beneficial owners.

Plaintiffs note that there are two other requirements for standing - the traceability of the injury to the action of the defendant and whether the injury can be redressed by a favorable court decision. *See, e.g. Laidlaw, supra,* at 180-81. In these respects, Defendants do not appear to question Plaintiffs' standing here - and properly so, since the actions of the City and Park District will interfere for

the next three *centuries* with use and enjoyment of open space, and that is precisely what enforcement by order of the district court can redress or block.

V. Nor is there a "clear and indisputable right" to dismiss state law claims.

On Article III jurisdictional standing grounds, Defendants seek dismissal not only of the federal but also the state law claims. As set out above, the Article III jurisdictional argument is meritless. But even if it were otherwise, there is no discussion as to why the district court could not exercise its discretion under 28 U.S.C. §1367(c) to retain jurisdiction of the state law claims. It is true that if the federal claim is dismissed before trial, the normal practice is to dismiss without prejudice the supplemental claims for possible filing in state court. But as this Circuit has repeatedly made clear, the district court has discretion to retain jurisdiction over the state law claims even after dismissal of the federal claim before a trial. *See Miller v. Herman,* 600 F.3d 726, 738 (7th Cir. 2010); *Hansen v. Hamilton Southeastern School Corp.,* 551 F.3d 599, 607-09 (7th Cir. 2008). One accepted reason to keep jurisdiction is "where substantial federal judicial resources have already been expended on the resolution of the supplemental claims." *Williams Elecs. Games, Inc. v. Garrity,* 479 F.3d 904, 907 (7th Cir. 2007). In this case the district court - at the urging of Defendants - has issued *two* legal opinions to resolve the merits of the state law claims. Both opinions involved a survey of the extensive body of public trust law. At any rate, the power to retain

jurisdiction under 28 U.S.C. §1367(c) – or to make a decision as to whether to do so - is one that clearly belongs to the district court. In *Whitely v. Moravec,* 635 F.3d 308, 311 (7th Cir. 2011), discussing 28 U.S.C. §1367(c), this Court put the matter in a way that applies here as well:

> The statute says that a district judge has *discretion* to relinquish supplemental jurisdiction and remand once the federal claim has dropped out. Discretion to remand implies a power to retain jurisdiction for good reasons.... Once a court has invested the time and energy needed to resolve a legal claim, it would be foolish to set the decision aside and remand so that a different court could cover the same ground. Once is enough. Someone who wants a district judge to send state-law issues back to state court should ask far enough in advance that the judge and litigants can save the time needed to gather evidence, file briefs, and write opinions. Remands after decision would produce nothing but wasteful duplication.

In both of their Rule 12(b)(6) motions filed below, Defendants had the option to seek transfer of the state law claims. Instead, they chose to ask the district court to decide the merits. While not finally deciding the state law claims, the district court developed the framework for final decisions. Now, on second thought, Defendants seek to use a petition for mandamus that will, in effect, require the district court to send the parties over to state court to start from scratch. To propose such a wasteful delay to resolution of the state claims, which until recently Defendants were happy to let the district court decide, suggests that Defendants' real purpose here is not a "prompt" resolution of the case but plain and simple forum shopping.

At the very least, the decision to retain jurisdiction under 28 U.S.C. §1367(c) requires an exercise of the district court's discretion. Just as Defendants have yet to file a Rule 12(b)(1) motion challenging subject matter jurisdiction, they have not raised any question about the district court's supplemental jurisdiction. To the contrary, they have – at least until now – embraced it. With respect to the first *Cheney* factor, Defendants had ample opportunity to chart a different course when they filed their Rule 12(b)(6) motions to dismiss Plaintiffs' state claims on the merits. As this Court said in *Miller v. Herman, supra,* 600 F.3d at 737:

> ... [A] district court is never required to relinquish jurisdiction over state law claims merely because the federal claims were dismissed before trial... Whether it chooses to exercise its supplemental jurisdiction is a question the district court must take up in the first instance.

At no time have Defendants asked the district court to dismiss the state supplemental claims as an inappropriate exercise of jurisdiction under 28 U.S.C. §1367(c).

IV With respect to the third *Cheney* factor, mandamus is also inappropriate for other reasons.

A. "Failure to state a claim" is not a basis for mandamus petitions.

As set forth in *Cheney,* a petition for mandamus should be denied if it is inappropriate for other reasons. The purpose of the All Writs Act, 28 U.S.C. §1651, is to deal with issues of *jurisdiction,* and as set out above, there is no basis

here for deciding - without even a ruling by the district court - whether the lower court has Article III or supplemental jurisdiction. At any rate, the Article III standing is clear. Defendants also contend that Plaintiffs have failed to state a claim under Rule 12(b)(6). Petitions for mandamus are not intended to review denials of Defendants' Rule 12(b)(6) motions for failure to state a claim because those Defendants would like to get the case over in a hurry. *Lindner v. Union Pacific R. Co.*, 762 F.3d 568, 573 (7th Cir. 2014) (the defendants were "in the same position as any other defendant who loses a motion to dismiss, and mandamus relief is not appropriate merely because defendants don't want the burden of having to litigate the case further."). Nor, of course, is a writ justified because a non-litigant is restless; if writs were issued in such circumstances, this Court would face a flood of petitions.

The district court has only held that, for now, Plaintiffs have at least stated a federal claim for relief. To be sure, public trust law is a doctrine of state law. In violation of that trust, Defendants have conveyed an ownership interest to a private owner, the LMNA, in three successive 99-year leases. On the substantive merits, the claim arises under state law. But like other property or economic interests created by state law, such interests are protected from loss or impairment by the Due Process Clause of the Fourteenth Amendment. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The economic interests of Plaintiffs

under state law as beneficial owners of this property held in trust were recognized in *Paepcke v. Public Building Commission, supra,* 46 Ill.2d at 341-42. Indeed, such an interest was implicitly recognized in *Illinois Central* - which recognized a State obligation to hold the land in trust:

> The State can no more abdicate its trust over property in which the whole people have are interested, like navigable waters and the soil under them, so as to leave them entirely under the use and control of private parties... than it can abdicate its police powers in the administration of government and the preservation of the peace.

146 U.S. 453. Logically, to enforce this kind of restraint on the legislature, *each* citizen individually must have some fractional beneficial ownership of this real property. *See, e.g.,* Epstein, The Public Trust Doctrine, 7 Cato Law Journals, 411, 418-21 (1987).

The due process violation Plaintiffs allege in the first amended complaint is that the State has abdicated this trust obligation by delegating its power to the local park districts to make decisions affecting all the people of the state. *See* Park District and Aquarium Act, 70 ILCS 1290/1. In *Illinois Central, supra,* the U.S. Supreme Court found that the State's duty as trustee "may for a *limited period* be delegated to a municipality or other body." 146 U.S at 453-4. But the newly amended Park District and Aquarium Act simply delegates the power on a *permanent basis* to any and all local park districts, with no requirement to comply with public trust law or the obligations under it. Such decision making is one "in

which the whole people [of the State] are interested." *See Illinois Central, supra,* 146 U.S. at 456. Due process requires that the alienation of property in which all the people of the state have a beneficial interest should be made at the state level. Indeed, *Matthews v. Eldridge,* 424 U.S. 319 (1973) recognizes that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 335 (internal quotes omitted). The Park District and Aquarium Act denies, for future decisions about land held in public trust, this kind of fundamental fairness. There is no disinterested state wide body to make these decisions. Local park districts - even the Chicago Park District - might sell off land to meet next year's budget deficit or pursue some purely local interest. To be sure, the General Assembly need not make each specific decision, but there should be some state agency or state role of some kind in the decision making process, as there was at the state level in the Soldier Field case by an agency known as the Illinois Sports Facilities Authority. *See Friends of the Parks v. Chicago Park District,* 203 Ill. 2d 312 (2003).

Under *Illinois Central* and recent Illinois Supreme Court decisions, Plaintiffs have a "legitimate expectation" to have the State, as trustee and holder of legal title, protect their rights as the true beneficial owners of the land in question. As articulated by a district court judge, this is regardless of the identity of the private party:

> The public trust doctrine is the law of the State of Illinois. It has been so since 1892. A federal court may not decide as a matter of policy that state law should be reversed. Nor should the federal court carve out an exception to the law because the affected private party is a respectable non-profit entity … the law of the land must be applied with equanimity to us all -- including the influential and well regarded.

Lake Michigan Federation v. U.S. Army Corps of Engineers. 742 F.Supp. 441, 449 (N.D. Ill. 1990) (internal citations omitted).

At any rate, a Rule 12(b)(6) motion on this kind of claim is not the kind of issue intended for emergency mandamus review. There is no "indisputable" right to relief for Defendants, and even if there were, the issuing of a writ will not speed up a judicial resolution, which could have come by now but for the delay caused by the actions of Defendants themselves.

B. There should be a serious consideration of Defendants' obligations to hold the land in public trust.

Furthermore, it is appropriate to note that throughout this case Defendants seems to scoff at the very idea that land recovered from Lake Michigan is held in trust. For example, Defendants begin the Petition by characterizing this case as one of routine land use. Far from routine, Defendants have a serious trust obligation with respect to the Lakefront land. The obligation includes (1) preserving the trust property as a free and open space, for access to activities on the Lake, and (2) preserving it as a natural environment, and for recreational and aesthetic use. *See People ex rel. Scott v. Park District, supra*, 66 Ill.2d at 79. Not once

during this case has the City or the Park District acknowledged that they hold the land in trust for these purposes, nor do they ever explain how their decision to give the land away to the LMNA can be justified under any of these trust purposes.

The LMNA may be annoyed by the filing of this suit - and may have had nothing to do with Defendants' efforts to delay the case. But this case centers on a proposed leasehold of Lakefront land for three centuries. Some of the concrete now paving over the Lakefront can be removed in the near future. The asphalt parking lot can be removed in a fortnight, at little cost. The East Building of McCormick Place is falling apart, and sooner or later will come down. But the LMNA - a very large, if not unsightly, building - would be a fixture of the Lakefront for centuries. Plaintiffs have sought discovery to determine why the Mayor's Site Commission refused to consider any other site but public trust land to convey to the LMNA. They have also sought to determine the private gain to the LMNA and its owner from this conveyance of public property to them for 297 years. It is unclear the degree to which the LMNA exists to market the Star Wars franchise, but some marketing is likely to occur. And it is clear that the Ground Lease allows the LMNA to charge the public whatever it likes, pocket the public money, and use it to buy art works or other things that the LMNA, and not the public, will own. Defendants may believe that this kind of inquiry

will annoy the LMNA and its owner and drive them away. But the gain to a private party from exclusive use of public trust land are legitimate – indeed, crucial – areas of inquiry under the public trust doctrine. *See, e.g., Scott,* 66 Ill.2d at 78-81; *Lake Michigan Federation,* 742 F.Supp. at 444-46. The district court's opinion of March 2015 quoted *Lake Michigan Federation*, 742 F. Supp. at 446:

> The purpose 'of the public trust doctrine is to police the legislature's disposition of public lands.... If courts were to rubber stamp legislative decisions, ... , the doctrine would have no teeth. The legislature would have unfettered discretion to breach the public trust as long as it was able to articulate some gain to the public.'

As summarized in the same case, and quoted by the district court:

> Three basic principles can be distilled from this body of public trust case law. First, courts should be critical of attempts by the state to surrender valuable public resources to a private entity... Second, the public trust is violated when the primary purpose of a legislative grant is to benefit a private interest... Finally, any attempt by the state to relinquish its power over a public resource should be invalidated under the doctrine.

Id. at 445; Tab D, Def. Pet., at 8.

The conveyance to the LMNA violates every one of the above-quoted principles. Plaintiffs are entitled to their day in court - a final decision on the merits - and but for the delaying tactics of Defendants, they would have had it by now. There is no emergency basis for a mandamus to deny them from having their own prompt day in court.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the Petition for Mandamus.

Dated: May 11, 2016

s/ Thomas H .Geoghegan
Attorney for Plaintiff-Appellant

Thomas H. Geoghegan (*counsel of record)*
Michael P. Persoon
DESPRES, SCHWARTZ & GEOGHEGAN, LTD.
77 West Washington Street, Suite 711
Chicago, Illinois 60602
(312)372-2511

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I electronically filed the Response of the real parties in interest with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants other than the Honorable John W. Darrah in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I certify that I caused the foregoing to be served by hand delivery on:

Honorable John W. Darrah
United States District Judge
219 S. Dearborn
Rm 1288
Chicago, Illinois 60604

Dated: May 11, 2016

s/ Thomas H .Geoghegan
Attorney for Plaintiff-Appellant

Thomas H. Geoghegan (*counsel of record)*
Michael P. Persoon
DESPRES, SCHWARTZ & GEOGHEGAN, LTD.
77 West Washington Street, Suite 711
Chicago, Illinois 60602
(312)372-2511

Exhibit A

Case: 16-2022 Document: 7 Filed: 05/11/2016 Pages: 74

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRIENDS OF THE PARKS, SYLVIA MANN and JOHN BUENZ, Plaintiffs, -vs- CHICAGO PARK DISTRICT and CITY OF CHICAGO, Defendants.	Case No. 14 C 9096 Chicago, Illinois March 2, 2016 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN R. DARRAH

APPEARANCES:

For the Plaintiffs: DESPRES SCHWARTZ & GEOGHEGAN, LTD.
BY: MR. SEAN MORALES-DOYLE
77 West Washington Street, Suite 711
Chicago, Illinois 60602

For the Defendants: BURKE WARREN MacKAY & SERRITELLA, PC
BY: MR. JOSEPH P. RODDY
330 North Wabash Avenue, Suite 2100
Chicago, Illinois 60611

KIRKLAND & ELLIS LLP
BY: MR. BRIAN DOUGLAS SIEVE
MS. SYDNEY LEAF SCHNEIDER
300 North LaSalle Street
Chicago, Illinois 60654

CITY OF CHICAGO, DEPARTMENT OF LAW
BY: MR. WILLIAM MACY AGUIAR
30 North LaSalle Street, Suite 1230
Chicago, Illinois 60602

APPEARANCES: (Continued)

Court Reporter: MS. MARY M. HACKER, CSR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 1212
Chicago, Illinois 60604
(312) 435-5564
Mary_Hacker@ilnd.uscourts.gov

(Proceedings had in open court:)

THE CLERK: 14 C 9096, Friends of the Parks versus Chicago Park District.

MR. SIEVE: Good morning, your Honor. Brian Sieve and Sydney Schneider from Kirkland & Ellis on behalf of the city.

THE COURT: Good morning, Mr. Sieve. Good morning, Ms. Schneider.

MR. AGUIAR: Good morning, your Honor. William Aguiar on behalf of the City of Chicago.

THE COURT: Good morning, Mr. Aguiar.

MR. RODDY: Good morning, Judge. Joe Roddy on behalf of the Park District.

THE COURT: Good morning, Mr. Roddy.

MS. SCHNEIDER: Good morning. Sydney Schneider on behalf of the City of Chicago.

THE COURT: Good morning, Ms. Schneider.

MR. MORALES-DOYLE: Good morning, your Honor. Sean Morales-Doyle on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Doyle.

I spent some time reviewing this. This comes up for status this morning, and it appears again there's a discovery dispute.

MR. SIEVE: I'm not sure there is, your Honor.

THE COURT: Well, let me speak.

MR. SIEVE: Okay.

THE COURT: And I read the correction to defendants' motion to dissolve the preliminary injunction and memorandum in support of that. I also read the corrected motion to dissolve the preliminary injunction and, frankly, I don't think that accurately states the complete history of this case.

There's been an implicit statement that the Court has put a -- effectively put a preliminary injunction in place and thereby denied the defendant the opportunity to dissolve the injunction and to move forward. When you look at the transcripts and when you look at the history of the case, that's not accurate.

The first time this issue arose was back on November 25th of 2014. And when you look -- and there's an implication in there that the -- in the papers that the plaintiff really has never attempted to put an injunction in place -- a preliminary injunction in place, and that also is inaccurate.

When you look at those transcripts, from the very beginning the plaintiffs indicate on the first time this case was in court that they intended to file a motion for preliminary injunction. And I'm looking at Page 4 of the proceedings -- let's go back to Page 3.

The Court says good morning to all the parties.

(Reading:)

This matter comes on this morning on my motion to determine the status of this case. Have the defendants -- you haven't filed any responsive pleadings yet, I take it?

Mr. Aguiar: No, not yet, your Honor.

Mr. Burke: We were just served last week, your Honor.

And then I say:

All right. Do you want to set a time for that?

Mr. Geoghegan immediately, before anything goes any further, says:

Your Honor, plaintiffs would like to file a motion for preliminary injunction, and we're hoping that the Court would give plaintiffs leave to file that within 45 days of today and allow the very limited expedited discovery on that motion during the 45-day period.

I stopped the plaintiffs and say:

We're kind of ahead of ourselves again.

And then there's another discussion, and Mr. Geoghegan again brings up the preliminary injunction. Mr. Aguiar says:

The city's responsive pleadings is due December 9th. We would like just three additional days, to the 12th, to file something.

Mr. Burke: That's acceptable with the park district, your Honor.

And I say: All right.

And I turn to the plaintiffs and say:

You have no objection to that?

Mr. Geoghegan says:

None, but we do want to proceed with our motion for a preliminary injunction.

So to suggest that there wasn't some impetus from the plaintiffs to get to the issue of preliminary restraint on construction on that property is just not an accurate statement.

And then finally, when we get to that issue, after I set a schedule -- we put a briefing schedule in place on a motion to dismiss, Mr. Geoghegan again brings this up:

Your Honor, our one concern, Friends of the Parks' greatest concern, is that during the pendency of this case the city will break ground and start construction on the Lucas Museum, which we allege is a violation of the public trust doctrine.

And I say:

Any thought -- and I said this tongue and cheek but it doesn't reflect that in the transcript. Any thought of something occurring similar to the destruction of the runways at Meigs?

Mr. Aguiar says:

Your Honor, may I address that point?

And then Mr. Aguiar goes on to discuss all the things that would have to occur before construction could begin. He says:

This is a proposal for a museum at this location. That proposal to come to fruition would require the approval of the Chicago Planning Commission, the Chicago City Council, Chicago Park District Board of Directors. Those proceedings would be -- there would be an application filed, there would be public notice given, there would be a public hearing given, and then there would be a determination made by those three separate boards at three separate times. Therefore, the concern of the Friends of the Park that there's going to be some midnight groundbreaking is simply not valid.

So the impetus for putting the standstill order in place came from the defendants, very clearly came from the defendants.

And then I say:

Can you represent to the Court that -- what was the next status date? And I turned to Mel and she says: February 26th. Then I say:

There will be no physical activity in that area before the next status date.

Mr. Aguiar says:

I can represent that, your Honor, that unless there are approvals given those boards, nothing will happen.

And then I say:

Let me ask you to do this: Let's put an order in place that before any physical change in the property is effected, you'll do so only after application to the Court and approval by order of the Court.

And then the defendants, through Mr. Burke and Mr. Aguiar, say:

That's acceptable. Mr. Aguiar says: That's fine.

Mr. Geoghegan says:

Thank you, Judge.

And I say:

Good enough?

Mr. Geoghegan, who was obviously very nervous about the standstill order, says:

Yes, good enough.

So when you read the docket sheet -- when you read the transcript, it's clear from this colloquy that what occurred was a common sense suggestion by the defendants to have an agreed order in place that nothing would happen until further order of the Court based on the common sense reason that no parties want to be assessed the cost of restoring the property back to its original condition if whatever construction activity they took on the premises turned out to be not valid under the public trust doctrine.

And that rationale has, by and large, been present

throughout this case. And, frankly, it's -- that still seems to be a good common sense approach to this.

When I reviewed the docket sheet -- and we'll go into this in a moment -- but for the city and the park district's motions to stay discovery, the trial date that I originally assigned would be next week; that the delays that were occasioned in the prosecution of this case, by and large, came from the defendants.

And to suggest that the defendants were handicapped or somehow hamstrung because there was an order in place precluding them from doing anything, is not accurate. I expressly said that on application to the Court and due notice to the parties, that the standstill order could be dissolved.

And when you look at the docket sheet, the docket entry on November 25th says:

> It is hereby ordered that prior to the status hearing ruling on defendants' motion to dismiss on February 26th, 2015, defendants shall not make any physical alteration of the property identified in Paragraph 20 of plaintiffs' complaint for the purposes of construction of the Lucas Museum of Narrative Art except upon application by the defendants for leave of Court to do so. And that order was in place until it was later modified again in August.

It's clear that at any time, going back to November

of 2014, at any time either party, but expressly the defendants, had leave to file a motion to dissolve that order. And then there never was any attempt to do so until last month, when out of the blue the Court was presented with a motion to dissolve the order, which you characterize as the preliminary injunction. And you cited the reason for it, the necessity for expediency, that Mr. Lucas was concerned about the delay that had been occasioned by this.

The next time this arose was in August of 2015. And again, although you quote this in your papers, the real flavor of this is not reflected in the defendants' papers.

I do say:

Well, I'm going to sua sponte reinstate that order, referring to the order of November 25th of 2014. There would be no material changes to the site until further order of Court, end quote, again reflecting the common sense approach -- and I've been at this quite awhile, and I would say in almost every matter involving injunctive relief, the parties generally agree to try to get some resolution on the merits before they go about destroying the subject matter of the lawsuit and run the risk of having to spend a lot of money to put the -- to restore the status quo if they don't prevail on the merits.

So I say:

There will be no material changes to the site until

further order of Court. Any objection to that?

Mr. Roddy says: No, Judge. Mr. Aguiar says: No, your Honor. Mr. Morales-Doyle says: No, your Honor.

Mr. Roddy says:

Prior to that, the only thing we had agreed to is there was a possibility of some soil-testing. There was no objection from the plaintiffs.

You go on to say, Mr. Roddy:

That has taken place and it continues to take place.

And then we go on to talk about, I need something concrete as to the schedule of these proceedings. Have you something final that you can represent to me?

And Mr. Roddy says:

Those negotiations are ongoing and active.

So whatever order was in place regarding maintaining the status quo of that property, was clearly in place by agreement of all the parties, and I might say makes great sense, and could have been modified at any time, certainly long before February of this year, by simply filing a motion, as I had indicated when I first put the order in place back in November of 2014.

Now, when you look at the docket sheet, back in April of last year I put a trial date in place. It was set for bench trial on March 14th of this year. That would be, what -- 12 days from now we would be going to trial on the

merits of this case, which we still haven't reached.

Discovery was ordered closed by September 30th of last year. I read plaintiffs' response. Plaintiff is still saying that they have not really received the material they want in discovery that they've sought for almost two years now.

And so a trial date was set that would have sent this case to trial next week -- or two weeks from now. Discovery was ordered closed in September of last year. And that order was put in effect in April of 2015, on April 28th.

On June 19th of 2015, two months later, the defendants were back in this courtroom with a motion to stay discovery. And on defendants' motion discovery was again stayed. The plaintiffs were again prevented from obtaining the material they said was necessary to prosecute this case. And after briefing on the issue, a final order was entered in July of last year.

Back in September of last year the defendants were to issue a scheduling order, an amended complaint was to be filed by October 2nd, responsive pleadings time was set, and the discovery deadline date of September 30th was vacated again and another status hearing was held.

Now, I read the proposed scheduling order submitted by the plaintiffs, and the defendants have responded that they still don't have discovery in any meaningful sense.

In your papers to dissolve the preliminary injunction, the order that you characterize as a preliminary injunction, you point out the elements to maintain a preliminary injunction, and one of them, of course, is the likelihood of success on the merits. And you also point out the rich fact question that is associated with the likelihood of success on the merits, and that is the public interest in this case.

It would be manifestly unfair to hold the defendants to this briefing schedule in the absence of any discovery, meaningful discovery, so they can defend the motion to dissolve the preliminary injunction.

When I last saw you all, I was left with the clear implication that you were going to resolve this discovery issue and that there wasn't going to be any difficulties. And I think you, Mr. -- one of you I think -- I think it was you, said to me, there will be no problem with that, we'll work that out. Well, here we are now two weeks later and there still is no resolution of this discovery issue.

The plaintiff makes the point that they're spending most of their time trying to meet this expedited briefing schedule which I put in place at the defendants' urging, and that works a manifest unfairness on the plaintiffs.

The defendants have not provided them with the discovery necessary to defend this motion. I outlined what I

thought was the appropriate way to approach discovery unless there was some assertion of privilege or work product or something of that nature, and that was to turn everything over. And I thought there was general agreement that that would be a good way to proceed.

I'm going to vacate the briefing schedule I put in place on the motion to dissolve the preliminary injunction.

I'm going to direct the parties to meet and come up with a meaningful discovery schedule which will provide the plaintiffs with the necessary information to defend the motion for preliminary injunction.

In your papers you indicate that you believe you could forgo the need for expert disclosure at this time.

MR. MORALES-DOYLE: Yeah. For the time being we don't know that we need to disclose an expert. It's something that we haven't made a final decision about.

THE COURT: But this is manifestly unfair.

MR. SIEVE: Your Honor, I don't think we have a dispute. That's what I started to say at the beginning.

THE COURT: Well, I believe there is. And I believe there is a potential for unfairness to the plaintiff now.

You convinced me earlier that there was a need to proceed expeditiously because we didn't want to lose this opportunity if, in fact, the public trust doctrine would not

prevent this construction. And in that spirit I put this expedited schedule in place.

But in reviewing the file in its totality, it's clear that much of the delay, if that's the proper word, much of the time-consuming nature of this litigation, has been occasioned by the defendants. And to hold the plaintiffs to an expedited procedure which effectively denies them the factual wherewithal to defend this motion, would be manifestly unfair.

So in light of the defendants' conduct -- and I'm not saying necessarily that the defendants' conduct was bad. These are complex issues, and I can understand the desire of some folks to want to move expeditiously. But the consequences of doing this wrong are severe.

In your papers, Mr. --

MR. SIEVE: Sieve, your Honor.

THE COURT: -- Sieve --

MR. SIEVE: That's okay.

THE COURT: We're off the record.

(Discussion had off the record.)

THE COURT: But in your papers you make the point that if the plaintiff is right, that all we have to do is restore the parking lot. Do you recall saying that?

MR. SIEVE: Yes.

THE COURT: It would seem to me that if you start

construction and you invest a lot of money in building a building -- and plaintiff is right, it will be a lot more expensive than simply restoring a parking lot.

MR. SIEVE: Well, your Honor, if I may -- could I make a few points just to respond?

THE COURT: Sure.

MR. SIEVE: So a couple of things. First --

THE COURT: I'm going to order that the briefing schedule is vacated, just to recap, and I'm going to give you seven days to come up with a meaningful discovery schedule.

MR. SIEVE: Well, I think we have a schedule, which is what I was trying to explain, if I may.

THE COURT: Okay. Go ahead.

MR. SIEVE: Okay. The plaintiffs proposed 120 days for fact discovery. We had suggested trying to shorten that by 30 days. Mr. Geoghegan indicated he thought that was aggressive, and so we said, fine, we're amenable to 120 days.

So the schedule the plaintiffs propose in their filing to you is acceptable to us. The only thing we were going to ask is that the Court set a trial date so that we had something on the calendar. So we're not --

THE COURT: I think that would be a great idea.

MR. SIEVE: So we're not disputing, your Honor -- we're accepting the proposal the plaintiffs made for their discovery. That's No. 1.

No. 2 is, you had indicated last time -- you gave us your guidance on the scope of relevancy, and we indicated to Mr. Geoghegan that we wanted to see his supplemental document requests. They were served Monday night, so I just had a chance to look at them. I don't think we're going to have any objections to those. We've indicated to him that we don't anticipate filing any kind of motions on that, that we would rather just get to the merits on this.

So we have already started putting together search terms and custodians that we intend to share with Mr. Geoghegan to make sure that we have an agreement on the scope of the ESI searches. So I don't think we have a dispute on that.

My goal here, your Honor -- and I do want to come back to the briefing schedule in just a second. My goal here is to get through the discovery -- as you know, I came in in the fall. My goal here is to get through discovery and get this case ready for a trial on the merits so you can decide it.

So --

THE COURT: But for this motion practice, that trial would be 12 days from now.

MR. SIEVE: I understand. And I wasn't involved in the case, as you know, your Honor.

THE COURT: I understand that. But you might

explain to your client that I set probably the most aggressive trial schedule imaginable at that time. And so any delay has certainly not been occasioned by the Court here and certainly by the plaintiffs. From the onset they've been saying they want a preliminary injunction, they want discovery and they want a trial date.

It seems to me that if you can agree on discovery, I can give you a quick trial date. I can probably give you a trial date by the fall.

MR. SIEVE: We'll take it. We've agreed to their schedule, your Honor. So the way --

THE COURT: Here's what we're going to do: I'm going to ask you to present to me a formal schedule -- do you all have travel problems or anything that could -- is next week available?

MR. SIEVE: Your Honor, I start a trial in New York in the GM Ignition Switch Bellwether, so I'm leaving Monday for New York.

THE COURT: A patent case?

MR. SIEVE: No. It's a product liability case, your Honor.

THE COURT: I see.

How long will that take?

MR. SIEVE: The whole month.

THE COURT: Will you have time to meet and confer

regarding a concrete discovery schedule?

MR. SIEVE: Yes.

THE COURT: And maybe one of you folks can carry the ball for next week.

MR. RODDY: Next week is fine for us.

THE COURT: Okay. And what I would like to know from you -- of course, you haven't seen anything yet, so you're at a complete disadvantage here.

What I would like to know from you is, if we're going to go forward on this motion for preliminary injunction -- dissolve the preliminary injunction or the standstill order, if you're going to go ahead on that, how much time you would need to conduct limited discovery on that issue regarding likelihood of success and the classic elements to keep a preliminary injunction in place.

MR. MORALES-DOYLE: It's a good question, your Honor --

THE COURT: You don't have to do that now.

MR. MORALES-DOYLE: Okay.

THE COURT: I want you to meet and confer, see what documents you're going to get, and then tell me that next week.

MR. MORALES-DOYLE: Okay.

THE COURT: And we're going to develop a briefing schedule that protects the plaintiffs' rights also to have

the wherewithal to defend this motion. That's basic fairness.

Here's something else that occurred to me, in deference to the collective wisdom of all of you folks -- and I'm just thinking out loud. I did some very basic research on this. But if we were to dissolve the preliminary injunction and the city and the park district and the museum folks decided to go ahead at their own peril, understanding that if it is ultimately determined that this construction would violate the public trust doctrine, wouldn't damages at law be adequate, because all I would do would be to order them all to take down whatever they've built?

MR. SIEVE: Well, your Honor, that's one of the things I wanted to make sure the Court understood, is that under the ground lease the Lucas Museum is required to have in the endowment sufficient funds to demolish the building and to restore the property if, in fact, there is a default or, in your example, the Court orders that it be done and that's affirmed on appeal. So the lease already has a mechanism for that.

THE COURT: Would they be prepared -- would the city and the Lucas people and the park district be prepared to execute a bond in that regard?

MR. SIEVE: Well, that's what I'm saying, your Honor. I don't think there is a bond because it's already

required by the lease. The lease requires a sufficient endowment --

THE COURT: I would like something filed with this Court. Consider that. That's all I'm asking you to do, is consider that.

MR. SIEVE: Can I make one other point, your Honor, just so the record is clear?

THE COURT: Sure. I've talked enough.

MR. SIEVE: No, that's fine. I appreciate it, your Honor.

One of the things that I think it's important to remind the Court is that one of the critical arguments that we made on the likelihood of success on the merits is a standing argument that -- as we point out, that we don't believe as a matter of constitutional law --

THE COURT: I read that.

MR. SIEVE: -- there is Article iii standing here. And Article iii standing, of course, different from standing to assert a state law --

THE COURT: I read that. You raised that twice now. You raised that in both motions to dismiss and I ruled on that.

MR. SIEVE: Well, I'm not sure that we raised the Article iii standing point, your Honor. That's what I was trying to -- I don't think that that is -- I just want to

make sure the record is clear and your Honor understands where we're coming from.

We don't think there's any discovery on that. That's a factual -- I mean a legal issue, excuse me, that the Court can resolve as a matter of Article iii standing.

I don't think -- we haven't raised the Article iii standing point in our motion to dismiss. We raised a -- in my recollection, we did not raise the Article iii standing point.

THE COURT: Well, it is what it is. We can all go back and look at it.

You also raised something in passing, that there was some additional costs that you had learned of that really weren't set out in the lease or otherwise discussed. Can you refresh my recollection in that regard?

MR. MORALES-DOYLE: If I'm correct as to what your Honor is referring to, this is -- in addition to the plans to build the museum on the east side of Lake Shore Drive, there is -- there are plans to build a parking structure and a pedestrian bridge on the west side of Lake Shore Drive. And there is a reference in the lease to Mr. Lucas providing, I believe, $40 million for that project.

It is not clear that $40 million is enough money to pay for both the parking garage and the pedestrian walkway. And based on how much these things have cost elsewhere along

Lake Shore Drive, we don't know that that would be enough.

So we do have a concern that there might be a requirement that the city or the park district spend money on infrastructure and improvements in order to make this project possible.

THE COURT: Okay.

Let me ask you to meet and confer, come back with a concrete discovery schedule. And I'm particularly interested in how much time it would take the plaintiff to develop factually the wherewithal to defend the motion to dissolve the preliminary injunction.

If you can strike some agreement on the preliminary injunction, I'll certainly listen to that, too.

What would be a good date? Tuesday, Wednesday or Thursday, you folks choose.

MR. RODDY: Judge, my only conflict is Thursday next week.

THE COURT: So Tuesday or Wednesday?

MR. MORALES-DOYLE: I think that's fine, your Honor.

MR. SIEVE: Your Honor, I'm gone.

THE COURT: You'll be gone.

MR. SIEVE: Right.

THE COURT: Okay.

MR. AGUIAR: That's fine, your Honor.

THE COURT: Either one?

MS. SCHNEIDER: Either one is fine with me.

THE COURT: Okay.

THE CLERK: March 9th at 9:30.

THE COURT: We're off the record.

(Discussion had off the record.)

THE COURT: Okay. See you all then.

MR. SIEVE: All right. Thank you, your Honor.

MR. MORALES-DOYLE: Thank you, your Honor.

THE COURT: You're welcome.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ ***Mary M. Hacker*** ***March 2, 2016***

Mary M. Hacker
Official Court Reporter

Date

Exhibit B

Case: 16-2022 Document: 7 Filed: 05/11/2016 Pages: 74

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRIENDS OF THE PARKS, SYLVIA MANN and JOHN BUENZ, Plaintiffs, -vs- CHICAGO PARK DISTRICT and CITY OF CHICAGO, Defendants.	Case No. 14 C 9096 Chicago, Illinois March 9, 2016 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN R. DARRAH

APPEARANCES:

For the Plaintiffs: DESPRES SCHWARTZ & GEOGHEGAN, LTD.
BY: MR. SEAN MORALES-DOYLE
77 West Washington Street, Suite 711
Chicago, Illinois 60602

For the Defendants: BURKE WARREN MacKAY & SERRITELLA, PC
BY: MR. JOSEPH P. RODDY
330 North Wabash Avenue, Suite 2100
Chicago, Illinois 60611

KIRKLAND & ELLIS LLP
BY: MS. SYDNEY LEAF SCHNEIDER
300 North LaSalle Street
Chicago, Illinois 60654

CITY OF CHICAGO, DEPARTMENT OF LAW
BY: MR. WILLIAM MACY AGUIAR
30 North LaSalle Street, Suite 1230
Chicago, Illinois 60602

APPEARANCES: (Continued)

Court Reporter: MS. MARY M. HACKER, CSR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 1212
Chicago, Illinois 60604
(312) 435-5564
Mary_Hacker@ilnd.uscourts.gov

(Proceedings had in open court:)

THE CLERK: 14 C 9096, Friends of the Parks versus Chicago Park District.

MR. MORALES-DOYLE: Good morning, your Honor. Sean Morales-Doyle on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Morales-Doyle.

MS. SCHNEIDER: Good morning, your Honor. Sydney Schneider on behalf of the defendant City of Chicago.

THE COURT: Good morning, Ms. Schneider.

MR. AGUIAR: Good morning. William Aguiar on behalf of the City of Chicago.

THE COURT: Good morning, Mr. Aguiar.

MR. RODDY: Good morning, Judge. Joe Roddy on behalf of the Chicago Park District.

THE COURT: Mr. Roddy.

The parties have presented a proposed order -- an agreed motion and a proposed order setting out some scheduling dates.

You've agreed that all fact discovery will be completed on or before June 24th, is that correct?

MR. MORALES-DOYLE: Correct.

THE COURT: And then you've put in a date if you choose to use experts. And if you do choose to use experts, all expert disclosure will be completed on or before July 24th of this year.

MR. MORALES-DOYLE: That's correct, your Honor.

THE COURT: Dispositive motions will be filed on August 24th if no experts are designated and -- pardon me.

Dispositive motions will be August 24th if experts are used. If no experts are designated, dispositive motions should be filed on July 24th.

Why don't we put a briefing schedule in place now for them and we can save you a trip back here?

If dispositive motions are filed on July 24th, we'll ask the parties -- I assume they will be joint motions.

MR. MORALES-DOYLE: You mean cross-motions?

THE COURT: Pardon me. Joint motion would be easy, wouldn't it?

(Laughter.)

THE COURT: We might be on to something here.

Cross-motions for summary judgment, cross-responses 21 days?

THE CLERK: August 16th.

THE COURT: And cross-replies 14 days.

THE CLERK: August 30th.

THE COURT: And a ruling date.

THE CLERK: October 26th at 9:30.

THE COURT: If experts are used, we'll need 21 days after August 24th for cross-responses.

THE CLERK: September 15th.

THE COURT: 14 days after that for cross-replies.

THE CLERK: September 29th.

THE COURT: And a ruling date.

THE CLERK: November 30th at 9:30.

THE COURT: You've presented a joint scheduling order. Shall I enter that or do you want to put all this in one order and you can submit it electronically to Ms. Foster, including the dates we just --

MR. MORALES-DOYLE: We can have the briefing schedule and submit a new --

THE COURT: Why don't we do that so they'll all be in one place.

MR. MORALES-DOYLE: We did have the other issue of the motion to dissolve the --

THE COURT: Where are we on that?

MR. MORALES-DOYLE: Well, Judge, we spoke with counsel for the City last night regarding the discovery. And as you'll recall, last time we were here your Honor suggested that we be given an opportunity to do some discovery before we file our response to that motion.

The problem is two-fold. One is, the defendants aren't willing to agree to a response date, any response date, because they feel that we're not entitled to discovery before we file our response. The second is, we don't have a date certain for any production from the defendants. They've

told us that at the end of the 30-day period from our requests they will give us a proposed electronic discovery protocol, and from there we'll still need to be waiting for document production. So I'm unable to commit to a date for a response.

What I can say, your Honor, is we -- the plaintiffs agree with your Honor, that we don't believe this order is a preliminary injunction. We understood it to be an agreed order that essentially provided plaintiffs an opportunity for notice so that we could make our decision as to whether we would file a motion for preliminary injunction. And the trouble we're having about making any decision on that is that we don't know how imminent anything is.

THE COURT: You don't know what?

MR. MORALES-DOYLE: How imminent anything is.

The defendants -- as we understand it, the lease sets forth a variety of conditions precedent that must take place before commencement of the construction. We don't know how many or if any of those conditions have been met. We do know that not all of them have been met, and we know that there's not a commencement date yet set by the defendants and the Lucas Museum.

But other than that, we know very little. And so it's difficult for us to take a position with regard to whether we should or may file a motion for a preliminary

injunction.

We understood this order, that was agreed to by the defendants, to be an opportunity for us to be given notice so that we could proceed with the motion, and essentially that they would make an application with this sort of crucial information if we hadn't already received it in discovery. And as of today we have not received that discovery.

THE COURT: Let me make a comment, and I'm going to ask one of you to respond.

Procedural niceties aside, if the parties want to reach the issue of whether or not there should be no activity on the property until the ultimate merits are reached, we can do that regardless of how we couch this, whether it's a motion to dissolve or whether we ask the Friends of the Park, the plaintiffs, to bring a motion for a preliminary injunction. So the mechanics are, in my judgment, of very little concern to us.

What is of concern to me, though, is despite repeated assurances that discovery is going to be produced, it appears that none has.

MR. MORALES-DOYLE: Well, Judge, I'll also say that while we understood the defendants to be taking the position that they wouldn't object to any of the remaining discovery, my understanding now is the defendants are reserving the right to object to some of this discovery --

THE COURT: In my judgment, that's contrary to the spirit of the representations that were made the last time we were together and discussed the issue of disclosure.

If the plaintiffs say that this is a fact question -- presents a fact question, at least in part, and that they need discovery to reach that, to defend that, or to prosecute it, depending on how procedurally we couch this, I think it would be unfair not to take them at their word.

Have you given any thought as to specifically what you would need?

MR. MORALES-DOYLE: Sure, Judge. We've tried to tailor our more recent discovery requests to the particular questions at issue here, some of which are when and how these conditions for commencement will take place, whether the Lucas Museum is actually intending to begin discovery during the pendency of the litigation, because everything we've heard in discovery and in the motion is that the uncertainty of litigation is what's holding things up. So --

THE COURT: I don't understand -- frankly, I don't understand the reluctance to produce this information. It would seem it's all a matter of public record.

MR. MORALES-DOYLE: And the second category, I suppose, Judge, would be information about the fact question that was referenced in the opinion on the motion to dismiss, which is the -- the question of whether a public benefit is

being served or whether or not a private --

THE COURT: Absolutely, absolutely.

I'm not going to put a date in place until we get some agreement on discovery.

MS. SCHNEIDER: Your Honor, may I respond?

THE COURT: Sure.

MS. SCHNEIDER: So just to give a little history here, plaintiffs served us with renewed discovery requests that covers the information Mr. Morales-Doyle just described to you. They served these requests on February 29th. Under the rules we have 30 days to respond.

Now, we are doing the best we can to respond --

THE COURT: I'm sorry --

MS. SCHNEIDER: -- as quickly as we can and to go through the voluminous amount of documents and --

THE COURT: Why don't you just turn it all over? What's the secret?

MS. SCHNEIDER: Well, your Honor, first of all, we need to figure out who has this information. We need to --

THE COURT: Well, there's only three parties: There's the Park District, the City and the Lucas people. One of the three must have it; probably all three do.

MS. SCHNEIDER: Well, many employees --

MR. RODDY: There are privileges that attach to --

THE COURT: Well, that's different. If you're

going to assert privilege and want to file a privilege log, absolutely. And I'm certainly very sensitive to those claims.

MR. RODDY: Certainly will, because we have to review all these documents to assess --

THE COURT: But the issue of the public good, which is just -- it seems to me just permeates the entire case -- public interest -- public benefit, it would seem to me that that is all a matter -- should be a matter of public record.

MS. SCHNEIDER: Well, your Honor, plaintiffs ask for all documents that discuss or relate to the public benefit. We are --

THE COURT: It would seem to me -- not to interrupt you, but I did.

(Laughter.)

THE COURT: It would seem to me, absent some assertion of privilege or work product, they're entitled to that.

MS. SCHNEIDER: And, your Honor, we're working to give them that information. Based on your definitions of relevancy that you put forth at the last hearings, you know, while we may object to the scope, we understand your position and we've been working hard --

THE COURT: Okay.

MS. SCHNEIDER: -- to figure out custodians, search

terms and to present plaintiffs with an ESI protocol that we can all agree on.

I mean, we want to avoid any discovery disputes in the future, so we want to take the time now to make sure we're doing this right. So we're taking our time and we're going to produce documents that adequately respond to their requests.

THE COURT: Well, that taking your time business is inconsistent with some of the representations that have been made in here by the defendants.

MS. SCHNEIDER: Well, I have a short caveat to that. We're taking our time insofar as we're making sure our search terms are right, our custodians are right. But we're doing that as quickly as we can.

THE COURT: Okay.

MS. SCHNEIDER: I mean, just to give your Honor some perspective, we collected over 18,000 documents just to respond to their first requests regarding discussions and negotiations of the ground lease.

Now they have seven or eight other additional very broad requests that require us to go through a lot of documents and figure out who has the stuff, and we're doing it as fast as we can.

THE COURT: Okay. I understood counsel to say that there was a dispute as to whether or not they were going to

be produced, that it wasn't a question of timeliness.

MR. MORALES-DOYLE: No. My understanding is that there will be -- just to be clear, we don't have 18,000 documents. I don't want -- there hasn't been a production of 18,000 documents.

Our understanding is that there will be production but we're not being given the date certain for when that production will take place. The date certain we're being given is when we will get a proposed ESI protocol that we can then discuss and conference over before we will get production.

And my understanding is also that the defendants are still reserving the right to object. Now, if that objection is just on the grounds of privilege --

THE COURT: Or work product.

MR. MORALES-DOYLE: -- or work product, then I understand they may have that objection. Of course, they're within their rights to make that objection. We do have some concerns about a privilege, including the Lucas Museum, but we can deal with that issue when it comes.

But we do understand the plaintiff -- the defendants to be saying they will make production. We just don't know when it's coming.

THE COURT: Any idea when you can produce this material?

MS. SCHNEIDER: As we represented to the plaintiffs, we are working through the search terms and custodians, and then also our objections and/or responses, if we have some, on privilege or possibly scope, and we will serve those within 30 days. So I believe that date is March 30th. And then from there we -- we'll endeavor to go as quickly as we can to produce documents.

THE COURT: Well, it's in your clients' interests according to the representations you've made in this courtroom on several occasions.

MS. SCHNEIDER: Yes. And we want to produce these documents, your Honor. We just want to do it the right way. And we want to make sure we have an ESI agreement in place that plaintiffs can review and that we can work together to agree on search terms and custodians so then going forward we don't run into different disputes in the future.

THE COURT: Well, let me recap this.

It's my job to ensure that both sides have the necessary factual wherewithal to prosecute and defend this motion and that's going to happen. Okay?

MR. MORALES-DOYLE: Thank you, your Honor.

THE COURT: What do you suggest? Do you want to come back -- it seems to me that you're going to have to really move just to meet the discovery schedule that you put in place regarding the motion for summary judgment. Unless

you move quickly on this, we could get to that before the issue regarding the dissolution of either the preliminary -- de facto preliminary injunction or the agreed standstill order, however we ultimately wind up characterizing it.

MR. MORALES-DOYLE: We agree, your Honor.

MS. SCHNEIDER: We understand the fact discovery schedule and we're endeavoring to go as quickly as we can.

THE COURT: Let me ask you to do this: Let me ask you to meet and confer. Let me ask you to prioritize those things that you need in order regarding the motion to dissolve, or however we want to characterize it.

MR. MORALES-DOYLE: Absolutely.

THE COURT: And also, if you could informally exchange tentative dates that the defendants are considering regarding construction. That might give you a little bit more --

MR. MORALES-DOYLE: Yes. We would appreciate that information.

MS. SCHNEIDER: And, your Honor, I just want to represent on the record that defendants still maintain that no additional discovery is needed to hear the motion to dissolve. So I wanted to just reiterate that for the record.

THE COURT: Well, let me say for the record I disagree.

And whatever necessary information is needed to

defend or prosecute this suit is going to be provided to both sides absent, of course, any showing of privilege or work product. Okay?

MR. MORALES-DOYLE: Thank you, your Honor.

MR. RODDY: Thank you, Judge.

MS. SCHNEIDER: Thank you.

THE COURT: See you then.

MR. MORALES-DOYLE: Should we set a date or --

THE COURT: A two-week date? Is that enough time?

MR. MORALES-DOYLE: Well, I guess if we're -- I think we're three weeks out from the proposed ESI discovery and the answers. So maybe shortly after that date.

THE COURT: Four weeks.

THE CLERK: April 12th at 9:30.

THE COURT: And if you don't come up with an agreement, I might set a time myself and you don't want that.

MR. MORALES-DOYLE: Thank you, your Honor.

MR. RODDY: Thank you, Judge.

MR. AGUIAR: Thank you, your Honor.

THE COURT: Thank you all.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ ***Mary M. Hacker*** ***March 9, 2016***

Mary M. Hacker
Official Court Reporter

Date