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Hearing Date: No hearing scheduled  
Courtroom Number: No hearing scheduled  
Location: No hearing scheduled

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7/27/2018 1:36 PM  
DOROTHY BROWN  
CIRCUIT CLERK  
COOK COUNTY, IL  
2013CH17450

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

**Michael W. Underwood, et al.,**  
**Plaintiffs,**  
**v.**  
**CITY OF CHICAGO, a Municipal Corporation,**  
**Defendant,**  
**And**  
**Trustees of the Policemen's Annuity and Benefit Fund**  
**of Chicago;**  
**Trustees of the Firemen's Annuity and Benefit Fund**  
**of Chicago;**  
**Trustees of the Municipal Employees' Annuity and**  
**Benefit Fund of Chicago; and**  
**Trustees of the Laborers' & Retirement Board**  
**Employees' Annuity & Benefit Fund of Chicago, et al.**  
**Defendants.**

**2013 CH 17450**

**Hon. Neil H. Cohen**

**LABORERS' & RETIREMENT BOARD EMPLOYEES'  
ANNUITY & BENEFIT FUND OF CHICAGO'S SECTION 2-619.1 MOTION TO  
STRIKE AND DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT**

The Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago (the "LABF"), by its undersigned attorneys, moves pursuant to Section 2-619.1, Section 2-615 and Sections 2-619(a)(4) and (9) to strike and dismiss Plaintiffs' Fourth Amended Complaint. In support of its motion, the LABF states:

**SECTION 2-619(a)(4)**

**A. The *Underwood* Appellate Court Decision**

In *Underwood v. City of Chicago*, 2017 IL App (1st) 162356, *appeal denied*, 93 N.E.3d 1056 (2017) (the "Appeal"), the Appellate Court affirmed this Court's dismissal with prejudice of Counts II-VII of Plaintiffs' Third Amended Complaint. The Appellate Court also held that Plaintiffs who began participating in the City's retirement system before the 2003 Korshak

settlement became effective stated a claim only under Count I and limited to the 1983 and 1985 amendments to the Pension Code. *Id.* ¶ 62. The Appellate Court noted that on remand, this Court will have to find a workable solution to address how the subsidies established in those amendments will be funded. *Id.* ¶ 64. Any other issues Plaintiffs may have raised in Count I of the Third Amended Complaint thus were dismissed.

**B. The LABF Has Addressed the Remaining Issues under Count I in Previously Filed Briefs**

At this point in this case, the LABF has already briefed the remaining post-appeal issues. Plaintiffs filed a procedurally flawed and unsupported “Motion to Compel” concerning both payment of the subsidies and Plaintiffs’ misplaced view that the LABF must “provide” its members with a health care plan.<sup>1</sup> On July 13, 2018, the LABF addressed these remaining issues in its Response of the Laborers’ and Retirement Board Employees’ Annuity and Benefit Fund of Chicago to Plaintiffs’ Motion to Compel Defendants to Bring Subsidies Current and Provide a Healthcare Plan. In that Response, the LABF demonstrated that the 1985 amendment to Article 11 of the Pension Code (Section 11-160.1) does not require the LABF to “provide” a health insurance plan for its retiree members. In that Response, the LABF also pointed out that the City has the obligation to fund the health care subsidy, and identified serious operational issues that must be resolved before the subsidies are to be paid.

The LABF also has shown out that the City has the obligation to fund the health care subsidy. *See Laborers’ & Retirement Board Employees’ Annuity & Benefit Fund of Chicago Reply to the City Of Chicago’s Memorandum of Law Concerning the Pension Fund’s Obligations to Pay Subsidies under the 1983 And 1985 Amendments to the Pension Code*, filed

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<sup>1</sup> In so doing, Plaintiffs overlook the Appellate Court’s unambiguous statement that Plaintiffs have no constitutional right to continued health care coverage. *Underwood*, 2017 IL App (1st) 162356, ¶ 40.

July 20, 2018. The LABF will not repeat herein its arguments made in those recent filings. Accordingly, the LABF has already responded to the only issues remaining on remand from the Appellate Court, those in Count I of the Fourth Amended Complaint related to the subsidies under the 1985 amendment.

**C. Counts II-VII of the Fourth Amended Complaint Are Barred by Law of the Case**

In their Fourth Amended Complaint, Plaintiffs have repleaded the same Counts II-VII in the Third Amended Complaint that this Court dismissed with prejudice and whose dismissal has been affirmed by a final judgment in *Underwood*. Those Counts are barred by law of the case and should once again be dismissed. Counts II-VII are not justified by law or fact. Plaintiffs should be sanctioned for repleading Counts II-VII under these circumstances.<sup>2</sup>

The law here is clear. The law-of-the-case doctrine bars relitigation of a previously decided issue in the same case. *Village of Ringwood v. Foster*, 2013 IL App (2d) 111221, ¶ 33. The law-of-the-case doctrine prevents a party, here the Plaintiffs, from taking two bites out of the same apple. *People v. Tenner*, 206 Ill.2d 381, 395 (2002). The doctrine encompasses not only the reviewing court's explicit decisions, but those issues decided by necessary implication. *Reich v. Gendreau*, 308 Ill. App. 3d 825, 829 (2d Dist. 1999).

In this case, Plaintiffs alleged Counts II-VII in the Third Amended Complaint. In *Underwood*, the Appellate Court affirmed this Court's order dismissing Counts-II-VII of the Third Amended Complaint, holding that the Plaintiffs could not state a claim on these Counts. *Underwood*, 2017 IL App (1st) 162356, ¶¶ 47-57. Plaintiffs filed a petition for leave to appeal the Appellate Court ruling to the Illinois Supreme Court, and that petition was denied. 93 N.E.3d

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<sup>2</sup> The LABF also adopts the argument of the Municipal and Firemen's Funds that these counts are barred by *res judicata*.

1056 (2017). Thus, whether Counts II-VII state a claim has been finally decided by a court of last resort.

Nonetheless, in the Fourth Amended Complaint, Plaintiffs recklessly repleaded Counts II-VII in virtually identical fashion to the way those counts were alleged in the Third Amended Complaint, in clear violation of the law of the case doctrine. Accordingly Counts II-VII have no basis in law or fact and should be dismissed.

#### SECTION 2-619(a)(9)

Under Section 2-619(a)(9) of the Code of Civil Procedure, a case may dismissed if “the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.” *Better Government Association v. Illinois High School Association*, 2017 IL 121124 ¶21 (quoting 735 ILCS 5/2-619(a)(9) (West 2014). A motion to dismiss under 2-619 admits well-pleaded facts, but does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts. *Id.*

Here, Plaintiffs’ Fourth Amended Complaint, replete with irrelevant allegations and counts, should be dismissed based on this Court’s clear direction that any Fourth Amended Complaint the Plaintiffs may file should be limited solely to the issues remaining after the June 29, 2017 Appellate Court decision:

THE COURT: I understand. That's one  
 17 of my questions to Mr. Krislov, which I hesitated to  
 18 ask, but I will ask it eventually when I give him the  
 19 floor, about amending the complaint to reflect the  
 20 new reality based upon the appellate court and based  
 21 upon what happened, all my rulings, and the refusal

22 by the Supreme Court of his PLAs.  
 23 So just as a matter of consolidation  
 24 and being concise and specific and shooting with, as  
 1 my tort professor used to say, with a rifle rather  
 2 than a shotgun, so -- as I say now. So I understand.

Tr. of Proceedings, 47:17-48:2, Apr. 30, 2018. A copy of relevant pages of the April 30, 2018 transcript of proceedings is attached as Exhibit 1. Plaintiffs, without explanation, chose to ignore this Court's direction, and essentially re-filed the Third Amended Complaint. This tactic is wasteful, unnecessary and effectively puts the burden on the defendants to sort out what is relevant and what is not relevant. This tactic unfairly prejudices the defendants, and is an independent reason why the Fourth Amended Complaint should be dismissed.

#### **SECTION 2-615**

The remainder of the Fourth Amended Complaint should be stricken or dismissed pursuant to Section 2-615 of the Code of Civil Procedure. A motion to strike under Section 2-615 is proper if an allegation in a complaint is both irrelevant and prejudicial to the moving party. *Reynolds v. Jimmy John's Enters., LLC*, 2013 IL App (4th) 120139, ¶ 41. Other than the allegations in Count I, the remaining allegations of the Fourth Amended Complaint are irrelevant because they purport to be the factual underpinnings for Plaintiffs' now dismissed breach of contract and estoppel counts.

Further, these allegations are prejudicial to the defendants. They confuse the remaining issue, which relates solely to the funding of the health insurance subsidies set forth in the 1983 and 1985 amendments to the Pension Code. *See Underwood*, 2017 IL App (1st) 162356, ¶ 64 ("On remand, the court will have to find a workable solution to address how the subsidy will be



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# EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT - CHANCERY DIVISION

CITY OF CHICAGO, a municipal )  
corporation, )  
 )  
Plaintiff-Counterdefendant, )  
 )  
v. ) No. 01 CH 4962  
 )  
MARSHALL KORSHAK, et al., )  
 )  
Defendants-Counterplaintiffs, )  
 )  
and )  
 )  
MARTIN RYAN, et al., )  
 )  
Intervening Plaintiffs.)

Record of proceedings had at the  
hearing for the above-entitled cause, before the  
Honorable NEIL H. COHEN, one of the Judges of said  
Court, on April 30, 2018, in Room 2308, Richard J.  
Daley Center, Chicago, Illinois, 60602, at 10:09 a.m.



1 position that how he is defining classes has already  
2 been resolved in some way by the appellate court or  
3 it was inaccurate because of resolutions by you and  
4 the appellate court, then that's one way we would  
5 respond. Otherwise, we'll respond in the normal  
6 fashion.

7 THE COURT: So assuming I agree with  
8 you, do you think that that should be filed as a  
9 matter of efficiency before the requirement of you  
10 answering anything?

11 MR. PRENDERGAST: Oh, no, Your Honor.  
12 I think that -- well, I'll start there.

13 If it were me -- and these are  
14 judgment calls. If it were me, I'd file a complaint  
15 that states the classes as he wants them.

16 THE COURT: I understand. That's one  
17 of my questions to Mr. Krislov, which I hesitated to  
18 ask, but I will ask it eventually when I give him the  
19 floor, about amending the complaint to reflect the  
20 new reality based upon the appellate court and based  
21 upon what happened, all my rulings, and the refusal  
22 by the Supreme Court of his PLAs.

23 So just as a matter of consolidation  
24 and being concise and specific and shooting with, as

1 my tort professor used to say, with a rifle rather  
2 than a shotgun, so -- as I say now. So I understand.

3 And, now, what's your understanding  
4 with regard to the intervenor? Could that change  
5 things?

6 MR. PRENDERGAST: Your Honor, I saw  
7 the --

8 THE COURT: I haven't seen it.

9 MR. PRENDERGAST: -- petition to  
10 intervene this morning.

11 THE COURT: Oh, I'm not asking --  
12 okay. So I'm not -- do you wish to review it, think  
13 about it and have a response to it?

14 MR. PRENDERGAST: Yes, I think  
15 probably all parties would want that. I'm assuming  
16 -- because I read it to be that the intervenor wants  
17 to represent a class, that Mr. Krislov would have a  
18 lot to say about that subject.

19 THE COURT: All right. Very good.  
20 I'll listen to what he has to say. Soon, Clint.  
21 Soon.

22 So what else do you see teed up from  
23 the City's point of view, not from the Funds' point  
24 of view? I know what the Funds wonder about.

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COUNTY DEPARTMENT, CHANCERY DIVISION**

Michael W. Underwood, et al.,  
Plaintiffs,  
v.  
CITY OF CHICAGO, a Municipal Corporation,  
Defendant,  
And  
Trustees of the Policemen's Annuity and Benefit Fund of  
Chicago;  
Trustees of the Firemen's Annuity and Benefit Fund of  
Chicago;  
Trustees of the Municipal Employees' Annuity and  
Benefit Fund of Chicago; and  
Trustees of the Laborers' & Retirement Board  
Employees' Annuity & Benefit Fund of Chicago, et al.  
Defendants.

2013 CH 17450

Judge Neil H. Cohen

**NOTICE OF FILING**

To: Attached Certificate of Service

PLEASE TAKE NOTICE THAT on Friday, July 27, 2018, we filed with the Clerk of the Circuit Court, County Department, Chancery Division, Cook County, Chicago, Illinois, ***Laborers and Retirement Board Employees' Annuity & Benefit Fund of Chicago's Section 2-619 Motion to Strike and Dismiss Plaintiffs' Fourth Amended Complaint***, a copy of which is served upon you by the Court's eFileIL electronic filing system

Dated: July 27, 2018

Respectfully Submitted,  
LABORERS & RETIREMENT BOARD EMPLOYEES'  
ANNUITY & BENEFIT FUND OF CHICAGO,

/s/ Cary E. Donham

By: One of Its Attorneys

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312.527.4000 / Firm I.D. No. 29143

23263025.1

**CERTIFICATE OF SERVICE**

The undersigned, pursuant to the provisions of Section 1-109 of the Code of Civil Procedure, certifies that a true and accurate copy of this *Notice of Filing and Laborers and Retirement Board Employees' Annuity & Benefit Fund of Chicago's Section 2-619 Motion to Strike and Dismiss Plaintiffs' Fourth Amended Complaint* were served upon:

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Via email from the law offices of Taft Stettinius & Hollister LLP, 111 E. Wacker Drive, Suite 2800, Chicago, Illinois, before the hour of 5:00 p.m. on the 27<sup>th</sup> day of July, 2018.

/s/ Cary E. Donham  
Cary E. Donham