IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

JAMES M. SWEENEY AND INTER-NATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, Plaintiffs, v. ALGONQUIN TOWNSHIP ROAD DISTRICT, Defendant.	
ANDREW GASSER, ALGONQUIN TOWNSHIP HIGHWAY COMMISSIONER, AND ALGONQUIN TOWNSHIP ROAD DISTRICT, Cross/Counter-Plaintiffs, v. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, Cross/Counter-Defendant.	CASE NO. 17 CH 482

MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COUNTER-CLAIM

Now Comes Andrew Gasser, Algonquin Township Highway Commissioner and Algonquin Township Road District (Collectively "Gasser") oppose Local 150's May 8, 2018, motion to dismiss their Second Amended Counterclaim and in opposition thereto states as follows: Much of Local 150's argument is the same as its July 10 and December 22, 2017, memoranda in support of its respective motions to dismiss Gasser's original and first amended counterclaims; Gasser realleges its entire October 10, 2017, and February 16, 2018, memoranda

in opposition to those motions, incorporated herein by reference as if set forth fully, and also sets forth the following additional arguments:

A. Construction of Pleading

The Illinois Code of Civil Procedure "shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." *See* 735 ILCS 5/1-106. "Pleadings shall be liberally construed with a view to doing substantial justice between the parties." *See* 735 ILCS 5/2-603(c). "Liberal construction of a pleading requires that no pleading is deemed to be bad which shall contain such information as shall reasonably inform the opposite party of the nature of the claim." *Zeitz v. Glenview*, 592 N.E.2d 384, 387 (Ill.App. 1992)(citations omitted). 735 ILCS 5/2-612 states in part: "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." The complaint must be considered as a whole and not in its disconnected parts. *Cain v. Amer. Bank*, 325 N.E.2d 799, 803 (Ill.App. 1975). It is error to dismiss on the pleadings unless it clearly appears that plaintiff cannot recover under any set of facts which can be proved true under the pleadings. *See Zeitz*, 592 N.E.2d at 387.

A pleader is not required to set forth his evidence. *Stinson v. Physicians* , 646 N.E.2d 930, 932 (Ill.App. 1995); *accord*, *Fiala v. Bickford*, 43 N.E.3d 1234, 1251 (Ill.App. 2015)(reversing dismissal). Dates and times are the sort of evidentiary facts which need not be pleaded. *Fiala*, 43 N.E.2d at 1252. A complaint also may withstand dismissal even where it "may not win any prizes for brevity." *See Zeitz*, 592 N.E.2d at 389.

B. Purchase of Services; Interference with Gasser's Powers; Direct Dealing

i. Disguised Employment Contract

Received 06-12-2018 11:42 PM / Circuit Clerk Accepted on 06-13-2018 09:38 AM / Transaction #17111167407 / Case #17CH000483

The repeated references on pp. 60-65 of the March 9, 2018, transcript (cited on Local 150's pp. 6--9) to "collective bargaining" erroneously resolve in Local 150's favor the factual issue raised by pp. 2-3 of Gasser's February 16 memorandum regarding whether the purported CBA is really an employment contract in disguise (*cf.* the *Heheman* and *Contl. Air* cases). Local 150's pp. 5-11 now build on that error by wrongly treating the purported CBA as merely a collective bargaining agreement.

ii. Board's Authority

Both pp. 60-61 of the transcript (605 ILCS 5/6-201.7 deals "directly with the Road District") and Local 150's argument erroneously disregard that §5/6-201.7 is subject to 60 ILCS 1/85-30 and also contains an independent bidding requirement. *See* Gasser's February 16 memorandum pp. 4, 7.

Nor can Local 150 continue to assert that the Township's "role is extremely limited in its interaction with the Road District" when its p.7 recognizes that the Board would be "performing its statutory functions" by refusing to pay bills or approve the budget and by evicting Gasser.

The unauthenticated, hearsay alleged Intergovernmental Agreement in no way proves that the Road District is distinct from the Township but rather, at most, raises a factual issue whether Miller was engaging in his practice of negotiating with unauthorized Township representatives as far back as 2008, since the document purports to be signed by only him and the Township Supervisor and does not indicate that the Board of Trustees knew of or approved it. Deciding to enter into this alleged agreement is not within the powers of the Supervisor set forth in 60 ILCS 1/70.

iii Gasser's Powers

In addition to the authority previously cited, *see Grassini v. DuPage*, 665 N.E.2d 860, 864-65 (Ill.App. 1996)(affirming dismissal of complaint for termination of four-year employment contract where trustees who authorized it were replaced a few months after contract was signed, even where electors voted to approve void contract).

iv Direct Dealing

Both a public employer and an exclusive representative have the duty to bargain in good faith. *See* 5 ILCS 315/7. Miller refused to bargain in good faith in violation of 5 ILCS 315/10(a)(1) and (4) by transferring to his daughter Rebecca and her husband Derek Lee the authority to determine the content of the purported CBA, *see* ¶¶9, 34, 55, 67, 75-85, so that the family would profit significantly from the agreement, *see* ¶¶25, 46(C) and (E), 47-52, 56(A) and (F), 58, 88-90, 92, and by executing the agreement, *see* ¶¶6, 8-22, 31, 34, 41, 43-52, 54-67, 69-72, 76, 78-79, 88-90, 91(B), 92. *See NLRB v. General Steel*, 933 F.2d 568, 571-72 (7th Cir. 1991)(since "[e]mployees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests," "*the mere appearance of divided loyalties must be avoided*" even where there is no evidence of actual interference and even where the effect would be to deprive union members of their right to select individuals (emphasis added and omitted; citation omitted)); *IBEW v. NLRB*, 557 F.2d 995, 999 (2d Cir. 1977)("the freedom to select representatives is not absolute" in "situations so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical"); *NLRB v. ILGWU*, 274 F.2d 376, 378 (3d Cir. 1960)("Each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent. However, this rule is not absolute or immutable");

Bausch, 108 N.L.R.B. 1555, 1559 (1954)("Collective bargaining … *does not exist* unless both parties enter the negotiations in a good-faith effort to reach a satisfactory agreement. What is envisioned by the Act is that in attempting to make such an agreement the parties will approach the bargaining table for the purpose of representing their respective interests and having approximately equal economic power. The employer must be present to protect his business interests and the union must be there with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and *there must be no ulterior purpose*" …. In our opinion, the Union's position as the bargaining table as a representative of the Respondent's employees while at the same time enjoying the status of a business competitor renders almost impossible the operation of the collective-bargaining process. For, the Union has acquired a special interest which may well be at odds with what should be its sole concern – that of representing the interests of the Respondent's employees")(emphasis added and omitted; citation omitted)); *Amal. Trans. v. ILRB*, 87 N.E.3d 315, 322 (Ill.App. 2017)(employer's refusal to bargain in good faith violates §§10(a)(1) and (4)).

Any purported "bargaining" between the Road District and Local 150 was merely a façade, *see* ¶84, a sham, *see* ¶¶6, 8-12, 15-21, 31, 59-64, 75-76, 78-85, 91(C), 93 (which makes Mr. Fahy's July 10, 2017, affidavit untrue).

Local 150 refused to bargain in good faith in violation of 5 ILCS 315/10(b)(1) and (4) by participating in this scheme, *see* ¶¶84-86, 90, 91(B), 92-93, and by attempting to enforce the agreement, *see* ¶¶26-27, 30, 90, 91(D), 93.

The authorities on p.12 of Local 150's December 22 memorandum fail to support any of its argument. Local 150 no longer expressly cites any of these authorities with respect to direct

dealing, and no authority supports Local 150's alleged exclusive authority to claim direct dealing. *See* Gasser's February 16 memorandum pp. 13-14.

B. Open Meetings Act

Pages 62-63 of the March 9 transcript (Township "isn't even a party to this action")(cited on Local 150's p.8) disregard 5 ILCS 120/3(c)(cited on p.14 of Gasser's October 10 memorandum) which allows the court to grant such relief as it deems appropriate, including "declaring null and void any final action taken at a closed meeting in violation of this [Open Meetings] Act ['OMA']." Section 120/3(c) does not require that the public body be the defendant in the action, but here the Road District, part of the Township, is a counterclaim plaintiff. It is not that Local 150 is alleged to be a public body, rather the Road District is a public body. Under the Open Meetings Act any action by the public body requires a meeting. This is true even though the public Body is mastered by a single person. And while it may appear strange that the a meeting would be held where only one person votes to make decisions, it is not that the public officer is protected by the Act, but rather the public as a whole.

Further, 735 ILCS 5/2-407 states in part that "[n]o action shall be dismissed for misjoinder of parties, or dismissed for nonjoinder of necessary parties without first affording reasonable opportunity to add them as parties"; *see also* 735 ILCS 5/2-615(a)("[t]he motion … shall ask for appropriate relief, such as: … that necessary parties be added"). If the Township is distinct from the Road District and a necessary party, which it is not, then the proper remedy is not to dismiss Gasser's counterclaim but to order the Township added, *see Orland Pk. v. First Fedl.*, 481 N.E.2d 946, 951 (Ill.App. 1985), and the court must do this *sua sponte*, *see Lerner v. Zipperman*, 387 N.E.2d 946, 951 (Ill.App. 1979).

A public body may not satisfy the OMA by simply not holding a meeting. The OMA requires a meeting. *See* 5 ILCS 120/2.01 ("[a] quorum of members of a public body must be physically present at the location of an open meeting")(cited in *Lawrence v. Williams*, 988 N.E.2d 1039, 1043 (Ill.App. 2013)(dismissing case where OMA violations prevented board decision from being final and courts therefore lacked jurisdiction). OMA protects the citizen's right to know. *Rice v. Bd.*, 762 N.E.2d 1205, 1206 (Ill.App. 2002).

A public body cannot take final action by merely circulating some document for signature and not voting on it publicly. *Baldermann v. Bd.*, 27 N.E.3d 170, 179 (Ill.App. 2015);

Howe v. Retirement Bd., 996 N.E.2d 664, 669 (Ill.App. 2013). Under *Baldermann*, there is no requirement that you have more than one person vote in order to be required to hold a meeting.

Further, OMA requires more than meetings. *See Gerwin v. Cty. Bd.*, 802 N.E.2d 410, 415-16 (Ill.App. 2003)((“The overall purpose of the Act is ‘to prohibit secret deliberation,’ and to implement that broad requirement of openness, the Act imposes a number of subsidiary requirements …. Thus, the complete openness, or lack of secrecy, of a meeting will not save it from violating the Act if the public body failed to keep minutes of the meeting. Convenience of place is another subsidiary requirement”)(citation omitted). OMA applies to unofficial and informal meetings, and to more than meetings of full bodies or duly constituted committees. *See Peo. v. Barr*, 414 N.E.2d 731, 734 (Ill. 1980). *Barr* cites with approval *Sacramento Newspaper v. Cty. Bd.*, 69 Cal.Rptr. 480, 487 (App. 1968), which applies a similar California statute to a meeting between public officials and labor officialssee also Allen v Clark county Park Dist. 67 N.E.3d 536 (Ill 4th Dist. 2016))

The Road District is a “public body” under the plain language of 5 ILCS 120/1.02. Further, courts adjudicating “public body” do not distinguish between OMA and the Freedom of Information Act (“FOIA”). *See Better Govt. v. Ill. HS Assn.*, 89 N.E.3d 376, 384 (Ill. 2017)(“[w]e find no reason to distinguish between the determination of a public body for purposes of the Open Meetings Act and the FOIA”); *Bd. v. Reynard*, 686 N.E.2d 1222, 1229 (Ill.App. 1997)(“The Council is part of the formal organizational structure of ISU and its duties and responsibilities are set forth in the supplement …. Under the [Open Meetings] Act and the FOIA, a subsidiary public body is itself a public body for purposes of complying with the requirements of both statutes. Thus, we conclude that the Council is a public body and must comply with the Act and the FOIA”). The Road District and the Highway Commissioner are not informal or *ad hoc* but rather are formal creations of statute and therefore “public bodies.” *See* 605 ILCS §§5/6-102; 5/6-112. Further, by suing the Road District under FOIA and asserting Highway Commissioner Miller’s authority to act on its behalf, Local 150 has conceded OMA’s applicability and is now estopped from arguing otherwise.

The communications between Miller and Local 150 regarding the purported CBA amount to a meeting. Whether one person is sufficient for a meeting depends on whether it constitutes a quorum. *See Lawrence*, 988 N.E.2d at 1043-44 (one member not sufficient where not quorum). But even less than a quorum might constitute a meeting. *See Barr*, 414 N.E.2d at 733, 735 (eight

Received 06-12-2018 11:42 PM / Circuit Clerk Accepted on 06-13-2018 09:38 AM / Transaction #17111167407 / Case #17CH000483

persons constituted quorum but trial court decided that OMA would apply to meetings of three or more persons). Since Miller was the only Highway Commissioner, his presence was sufficient. *Cf. Hotchkiss v. Norwood Pk.*, 82 N.E. 257, 259 (Ill. 1907). This is particularly true to the extent that Miller by himself had the authority which Local 150 asserts.

C. ***Statute of Limitations***

Page 63 of the March 9 transcript ("more than 60 days had lapsed")(cited on Local 150's p.13) is erroneous. Gasser did not (and also reasonably could not have) become aware of the purported CBA before he took office on May 15, 2017, and the counterclaims do not indicate otherwise. Therefore, Gasser's July 3, 2017, counterclaim and the subsequent amendments thereto are timely. If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2 years after the alleged violation, by a person utilizing reasonable diligence, the request for review may be made within 60 days of the discovery of the alleged violation. (The Discovery Rule.)

Paragraphs 23 and 24 of the first and second amended counterclaims, ¶59 of the first amended counterclaim and ¶¶38 and 62 of the Second Amended Counterclaim indicate that the purported CBA was not provided to Gasser before he took office and that it was represented that there was no such agreement. Before taking office and before the purported execution of the purported CBA, Gasser objected merely to "any" contract. *See* ¶¶28-29.

Any suggestion in this case that the statute of limitations should begin to run against the Road District while Local 150 was knowingly allowing Miller to control it for his own purposes, *see* ¶¶86, 90, 93, would be preposterous on its face, *see DeLuna v. Burciaga*, 857 N.E.2d 229, 241 (Ill. 2006)(principle that "no man may take advantage of his own wrong" "has frequently been employed to bar inequitable reliance on statutes of limitations" (citations omitted)).

But the fraudulent concealment in this case, discussed elsewhere herein, would support tolling of the limitations period if necessary. *Cf. DeLuna*, 857 N.E.2d at 248-49. So would equitable estoppel. *See DeLuna*, 857 N.E.2d at 249 (setting forth elements). The defendant need not intentionally mislead or deceive the plaintiff, or even intend by its conduct to induce delay; rather, the plaintiff need only reasonably rely on the defendant's conduct or representations in forbearing suit. *See ibid.* Gasser's Second Amended Counterclaim states such a claim. Paragraphs 6 and 8-10 indicate that no record relating to bargaining was left; nor was notice provided, *see* ¶¶16, 31, 59, 61. It was represented to Gasser that there was no agreement, *see*

Received 06-12-2018 11:42 PM / Circuit Clerk Accepted on 06-13-2018 09:38 AM / Transaction #17111167407 / Case #17CH000483

¶¶23, 38, and none was provided, *see* ¶¶24, 62. Miller and Local 150 obviously knew of the purported agreement when they signed it, Local 150 participated in Miller's scheme, *see* ¶¶86, 90, 91(B), 92-93, and there is no indication that Gasser knew that the representations were untrue. Miller and Local 150 reasonably would have expected Gasser to rely on the representations and Gasser reasonably would have done so and would be prejudiced if the court dismisses Gasser's OMA claim based on the statute of limitations. *See Zeitz*, 592 N.E.2d at 387 ("all reasonable inferences which can be fairly drawn from the facts alleged must be considered as true"). Unlawful contracts are as a principle of black letter law unenforceable. A violation of the Open Meetings act is a CLASS C Misdemeanour. Accordingly, any contract flowing form a criminal act is a void agreement)

Further, the statute of limitations would not bar Gasser's action since it was filed as a counter-claim. *See U.S. v. Western Pacific*, 352 U.S. 59, 72 (1956)("The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues"); *Stivers v. Bean*, 5 N.E.3d 196 (Ill.App. 2014)("statutes of limitations apply only to claims, not to defenses").

In addition, Gasser's counterclaim and the amendments thereto also are timely for the additional reasons set forth on pp. 14-15 of Gasser's February 16 memorandum, particularly the independent violations of 5 ILCS 120/2(e) and 60 ILCS 1/80-10(e).

D. Conspiracy

In *Majewski v. Gallina*, 160 N.E.2d 783, 788-89 (Ill. 1959), the court, finding conspiracy to defraud, states:

> It is seldom that any one act, taken by itself, will establish a conspiracy, but, when taken in connection with other acts it may appear clearly that the series of wrongful acts result from concerted and associated action. Considered separately the acts of the conspiracy are rarely of an unequivocally guilty character, and they can be properly estimated only when connected with all the surrounding circumstances

(citation omitted). Simultaneous acts by two defendants make reasonable the inference that they were acting in concert. *See Fritz v. Johnson*, 807 N.E.2d 461, 470-71 (Ill. 2004)(reversing dismissal).

Gasser's Second Amended Counterclaim alleges a combination of two or more persons, *see* ¶¶84-86, 90-91, 93; for the purpose of accomplishing by some concerted action unlawful purposes, *see* ¶¶22, 32-34, 56, 58, 68, 79, 88-93, and purposes by unlawful means, *see* ¶¶6, 8-22,

Received 06-12-2018 11:42 PM / Circuit Clerk Accepted on 06-13-2018 09:38 AM / Transaction #17111167407 / Case #17CH000483
Page 9 of 16

31, 34, 55, 59-64, 67, 75-85, 91, 93; and in the furtherance of which one of the conspirators committed an overt tortious or unlawful act, *see* ¶¶9, 26-27, 30, 75-86, 88-93. As mentioned above, a violation of the Open Meetings Act is a Class C Misdemeanor. See Open Meetings Act.)

The purported CBA has at least a twofold significance here. First, the execution of purported CBA is an overt act in furtherance of conspiracy. *See* ¶¶9, 75-86, 88-90, 91(A)-(C), 92-93. Second, the purported CBA itself is a conspiracy in furtherance of which other overt acts have occurred. *See* ¶¶26-27, 30, 90, 91(D), 93.

But an alleged overt or unlawful act need not be tortious or otherwise actionable in tort to support a cause of action for civil conspiracy. *Vance v. Chandler*, 597 N.E.2d 233, 236 (Ill.App. 1992).

Local 150's authorities are distinguishable. *See Fritz*, 807 N.E.2d at 471 (convincing employee who had threatened superior to transfer to different agency not inherently conspiratorial); *Buckner v. Atlantic* , 694 N.E.2d 565, 571 (Ill. 1998)(affirming dismissal of conspiracy claim against principal, since acts of agent are considered acts of **principal and there therefore** can be no conspiracy between principal and agent; affirming dismissal of other conspiracy claim where complaint failed to even identify alleged co-conspirators or their roles or to allege any concert of action); *Indeck v. Norweb*, 735 N.E.2d 649, 662 (Ill.App. 2000)(complaint failed to state independent cause of action underlying conspiracy allegations).

Local 150's p.11 ("[a]s Gasser would have it, any agreement reached between Local 150 or its agent, [sic] and the Road District would have been the product of an unlawful conspiracy") blatantly misstates Gasser's position. The purported CBA in this case is the product of an unlawful conspiracy – and also *is* an unlawful conspiracy – because of the constructive fraud, conversion and constitutional violations which have occurred.

E. *Constructive Fraud*

In *Ill. Rockford v. Kulp*, 242 N.E.2d 228, 234 (Ill. 1968), the court, citing *Majewski* and finding conspiracy to defraud, states that

> fraud may be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation, the intimacy and relation of the parties at the time of the commission of the acts, and generally all the circumstances preceding and attending the culmination of the claimed conspiracy.

Received 06-12-2018 11:42 PM / Circuit Clerk Accepted on 06-13-2018 09:38 AM / Transaction #17111167407 / Case #17CH000483

In Illinois there is no general rule for determining what facts will constitute fraud. *See Majewski*, 160 N.E.2d at 788; *Zokoych v. Spalding*, 344 N.E.2d 805, 813 (Ill.App. 1976).

"Constructive fraud is anything calculated to deceive, including acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence resulting in damage to another." *Kovac v. Barron*, 6 N.E.3d 819, 833 (Ill.App. 2014)(citation omitted).

Constructive fraud is

> any act, statement or omission which amounts to positive fraud or which is construed as a fraud by the courts because of its detrimental effect upon public interests and public or private confidence. It is a breach of legal or equitable duty which, irrespective of the moral guilt of the wrongdoer, the law declares fraudulent because of its tendency to deceive others.

In re Gerard, 548 N.E.2d 1051, 1059 (Ill. 1989)(citations omitted).

However, *Kovac* also states that the elements of constructive fraud are: (1) a fiduciary relationship; (2) a breach of the duties that are imposed as a matter of law because of that relationship; and (3) damages. 6 N.E.3d at 833.

A pleading need not use the words "constructive fraud." *See LaSalle Natl. v. Bd.*, 677 N.E.2d 1378, 1383 (Ill.App. 1997)(complaint adequate where it sets out various ways in which the fiduciary duty was knowingly and intentionally breached and establishes a picture of delay, lack of cooperation and obstruction).

A fiduciary relationship exists where one party reposes trust and confidence in another, who thereby gains a resulting influence and superiority over the subservient party. *Khan v. Deutsche Bank*, 978 N.E.2d 1020, 1040 (Ill. 2012); *Works v. McNeil*, 115 N.E.2d 320, 322 (Ill. 1953); *Miller v. Harris*, 985 N.E.2d 671, 679 (Ill.App. 2013). The fiduciary relationship exists in *all* such cases, *see Works*, 115 N.E.2d at 322, and is generally established by facts showing an antecedent relationship which gives rise to trust and confidence reposed in another, *see Khan*, 978 N.E.2d at 1040-41.

An official such as Miller has a fiduciary duty to the public. *See Peo. v. Warren*, 500 N.E.2d 22, 26 (Ill. 1986)("Lavin and Erskine, in their capacities relating to the assessment and levying of taxes, were acting as fiduciaries for the people of Cook County"); *Chicago Pk. v. Kenroy*, 402 N.E.2d 181, 185 (Ill. 1980)("[t]here can be no doubt that, as an alderman, Wigoda occupied a fiduciary relationship to the City"); *Wheeling v. Stavros*, 411 N.E.2d 1067, 1069 (Ill.App. 1980)("Illinois courts have repeatedly affirmed the principle that public officials are

trustees with a fiduciary duty to the people"). The fiduciary responsibility of a public official cannot be considered less than that of a private person. *Warren*, 500 N.E.2d at 26; *Chicago v. Keane*, 357 N.E.2d 452, 456 (Ill. 1976); *Wheeling*, 411 N.E.2d at 1069.

On a motion to dismiss the court does not determine whether a fiduciary relationship actually existed or was breached, but rather decides only whether the pleading adequately alleges this. *See Khan*, 978 N.E.2d at 1037-38.

A claim for breach of fiduciary duty has two elements: a fiduciary relationship, and a breach of the duties imposed as a matter of law as a result of that relationship. *See Khan*, 978 N.E.2d at 1037-38; *Miller*, 985 N.E.2d at 679.

Constructive fraud does not require a dishonest purpose or intent to deceive. *Gerard*, 548 N.E.2d at 1059; *accord*, *LaSalle Natl.*, 677 N.E.2d at 1383. Constructive fraud can be inferred from the parties' relationship and the circumstances. *Gerard*, 548 N.E.2d at 1059.

There need not be even a tendency to deceive; breach of fiduciary duty is enough. *See LaSalle Natl.*, 677 N.E.2d at 1384. Indeed, in a fiduciary relationship, where there is a breach of a legal or equitable duty, a presumption of fraud arises. *Id.* at 1383; *accord*, *Vermeil v. Jefferson*, 532 N.E.2d 288, 292 (Ill.App. 1988). Constructive fraud springs from the breach of a fiduciary duty. *LaSalle Natl.*, 677 N.E.2d at 1383; *see also Simon v. Wilson*, 684 N.E.2d 791, 799 (Ill.App. 1997)("Sam acted contrary to Ruth's interests, breached his fiduciary duty and his conduct may therefore be deemed fraudulent").

Further, "[c]ourts of equity will scrutinize with jealous vigilance transactions between parties occupying fiduciary relations toward each other." *McFail v. Braden*, 166 N.E.2d 46, 52 (Ill. 1960); *accord*, *Majewski*, 160 N.E.2d at 790 ("courts will scrutinize such transactions with greater severity, and the duty is upon the beneficiaries to vindicate the bargain from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect").

It is gain rather than loss from the abuse of the relationship which triggers the right to recover. *See Keane*, 357 N.E.2d at 456. Where a fiduciary relationship exists,

> the law presumes that any transaction between the parties by which the dominant party has profited is fraudulent, and while the presumption is not conclusive but may be rebutted by clear and convincing proof that the dominant party has exercised good faith and has not betrayed the confidence reposed in him, the burden rests upon the dominant party to produce such evidence and if the burden is not discharged, the transaction will be set aside in equity.

See Ambrosius v. Katz, 117 N.E.2d 69, 73 (Ill. 1954); *accord*, *Works*, 115 N.E.2d at 322; *Dombrow v. Dombrow*, 82 N.E.2d 47, 51 (Ill. 1948); *Ciolek v. Jaskiewicz*, 349 N.E.2d 914, 920 (Ill.App. 1976).

These decisions add that

> important factors in determining whether a particular transaction is fair include a showing by the fiduciary (1) that he has made a free and frank disclosure of all the relevant information which he had, (2) that the consideration was adequate, and (3) that the principal had competent and independent advice before completing the transaction.

See McFail, 166 N.E.2d at 52; *Works*, 115 N.E.2d at 322; *Dombrow*, 82 N.E.2d at 51; *Ciolek*, 349 N.E.2d at 920.

That it has been Miller who has had and breached the fiduciary duty does not exonerate Local 150. *See Warren*, 500 N.E.2d at 26 ("[t]hat the proceeding to have the trust imposed is against the third party that benefited from a public officer's breach of his fiduciary duty is not relevant"); *Majewski*, 160 N.E.2d at 790 ("it is of no consequence whether the conveyance was to the fiduciary or to another"); *Fiala*, 43 N.E.3d at 1252 ("Defendant claims that he cannot conspire to commit an illegal act if the law is not applicable to him. This is flatly incorrect. The purpose of a civil-conspiracy claim is to reach beyond the tortfeasor to others who helped to plan, implement, and encourage the unlawful act; there is no requirement that such a party actually committed the tort him- or herself, only that a tort was ultimately committed" (citations omitted)).

Gasser's Second Amended Counterclaim states a claim for constructive fraud. Paragraphs 5 and 44 allege that Miller was a public official, which thereby gave him a fiduciary duty to the public. Miller breached this duty by refusing to bargain in good faith and by executing the agreement as described in the discussion of direct dealing above.

Local 150 participated in this scheme and also has attempted to enforce the agreement as also described in the discussion of direct dealing above. Mr. Fahy's false affidavit is another overt act in furtherance of the conspiracy. *See* ¶¶91(D), 93..

There are significant damages, *see* ¶¶32-34, 46-52, 56, 68, 70, 72, and no indication of any of the factors which Local 150 must prove in order to show the fairness of the transaction – free or frank disclosure, *see* ¶¶6, 8-12, 15-21, 23-24, 31, 38, 59-64, 75-76, 78-84, 91(C);

adequate consideration, *see* ¶¶32-34, 56(D), 58, 68, 79, 88-90, 91(C), 92; or competent or independent advice, *see* ¶¶6, 8-12, 15-21, 31, 59-64, 75-76, 78-84, 91(C).

Few officials and unions have done what Miller and Local 150 did. This case is unusual as a matter of law. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944)("rare"). Local 150's authorities are distinguishable. *See SEIU*, 19 PERI ¶62 (IELRB ED 2003)(family relationship between union executive and employee alone not sufficient where union had no role in challenged decision); *IBEW*, 13 PERI ¶3008 (ILLRB 1997)(family relationship between union's steward and employer's general manager alone not sufficient without improper motive or irregular procedures; no indication of profit from fiduciary relationship)(sustaining dismissal of charge by employee with drug and attendance problems); *CTA*, 13 PERI 3007 (ILLRB 1997)(same).

F. Conversion

In *Bill Marek's v. Mickelson* , 806 N.E.2d 280, 285 (Ill.App. 2004), the court, affirming summary judgment for conversion, states:

> Conversion is any unauthorized act, which deprives a man of his property permanently or for an indefinite time. The substance of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held. Accordingly, to prove conversion, the plaintiff must prove the following elements by a preponderance of the evidence: (1) the defendant's unauthorized and wrongful assumption of control, dominion, or ownership over the plaintiff's personal property; (2) the plaintiff's right in the property; (3) the plaintiff's right to immediate possession of the property, absolutely and unconditionally; and (4) the plaintiff's demand for possession of the property

(citations omitted).

Gasser's Second Amended Counterclaim states a claim for conversion. Paragraphs 46-52, 56(A), (B) and (F), 58, 76, 78-79, 86, 88-90 and 92 make clear that the purported CBA gives the Miller family and Local 150 members control over millions of dollars of funds and equipment; this control is unauthorized and wrongful, *see* ¶¶6, 8-22, 31, 34, 41, 43-52, 54-67, 69-72, 76, 78-79, 88-90, 91(B), 92, yet Local 150 has tortiously and unlawfully attempted to enforce the agreement, *see* ¶¶26-27, 30, 90, 91(D), 93. The counterclaim plaintiffs have the right to this property and to its immediate possession, and have made demand by repudiating any agreement, *see* ¶¶28-29, and terminating employees, *see* ¶¶25, 40. *See Zeitz*, *supra*, 592 N.E.2d at 387.

G. Official Misconduct

It is official misconduct under the plain language of 720 ILCS 5/33-3 for a public officer in his official capacity to perform an act in excess of his lawful authority with intent to obtain personal advantage for himself or another, knowingly perform an act which he knows he is forbidden by law to perform or intentionally or recklessly fail to perform any mandatory duty as required by law. "Personal advantage" means an advantage to a particular person as opposed to the public the officer or employee serves. *See Peo. v. Kleffman*, 412 N.E.2d 1057, 1061 (Ill.App. 1980). Official acts in the performance of the duties of an office do not mean simply the lawful acts of the officer holding that office, but include all acts done in his official capacity, under color and by virtue of that office. *See Peo. v. Lanigan*, 818 N.E.2d 829, 836 (Ill.App. 2004). The Second Amended Counterclaim states a claim for official misconduct, *see* ¶¶6, 8-24, 31, 41, 43-52, 54-67, 69-72, 75-85, 88-90, 91(B), 92, in which Local 150 has participated, *see* ¶¶26-27, 30, 84-86, 90, 91(B) and (D), 92-93.

The purported CBA also violates Art. 8, §§1(a) and (b), of the Illinois Constitution as p.11 of Gasser's October 10 and p.15 of Gasser's February 16 memoranda have shown. This also can serve as a predicate unlawful act for official misconduct. *See Peo. v. Howard*, 888 N.E.2d 85, 90 (Ill. 2008). The argument on Local 150's p.10 that "[i]t cannot be seriously disputed that the CBA was entered into for a lawful public purpose" improperly asks the court to resolve an issue of fact in Local 150's favor the factual issues regarding fraud, conversion and the statutory and constitutional violations.

Local 150's authority is distinguishable. *See Atwood v. Contl. Cas.*, 246 N.E.2d 882, 891-92 (Ill.App. 1969)(not involving constructive fraud but reversing denial of leave to file fourth amended complaint).

H. ***Preemption***

There can be no pre-emption where there is no labor contract. *See Lowe Exc. v. IUOE Local 150*, 535 N.E.2d 1065, 1068-69 (Ill.App. 1989). Therefore, the court cannot apply the pre-emption doctrine unless it first decides that the purported CBA is valid, but that is the issue which Local 150 asserts is pre-empted.

Since Gasser's claims are that Local 150's acts are unlawful, not that they violate the purported CBA, the IPLRA does not pre-empt them. In *Gonzalez v. Prestress* , 503 N.E.2d 308, 312-13 (Ill. 1986), the court, affirming the striking of a pre-emption defense, explains:

Received 06-12-2018 11:42 PM / Circuit Clerk Accepted on 06-13-2018 09:38 AM / Transaction #17111167407 / Case #17CH000483

> Certainly a determination of whether an employee has been discharged in violation of clearly mandated public policy in no way turns upon whether the discharge was or was not "just" within the meaning of a labor contract. Were it otherwise, the public policy of this State would become a mere bargaining chip, capable of being waived or altered by the private parties to a collective bargain. Clearly, section 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law ….
>
> Because the claims asserted arise under the clear mandate of Illinois public policy, which exists independent of any privately negotiated contract rights or duties, we conclude that their adjudication in no way depends upon an interpretation of the "just cause" provision of the labor contract

(citation omitted); *accord*, *Lingle v. Norge*, 486 U.S. 399, 409-10 (1988)("§301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is independent of the agreement for §301 pre-emption purposes" (citations omitted)); *Ryherd v. Genl. Cable*, 530 N.E.2d 431, 436 (Ill. 1988)(reaffirming *Gonzalez*); *Krasinski v. UPS*, 530 N.E.2d 468, 470-72 (Ill. 1988); *Chicago Bridge v. Indl. Commn.*, 618 N.E.2d 1143, 1146-47 (Ill.App. 1993); *Lowe Exc.*, 535 N.E.2d at 1068-69. Therefore, p.65 of the March 9 transcript ("that would be something that would be more in the purview of the Labor Relations Board as opposed to this court")(cited on Local 150's p.14) is erroneous.

Local 150's authorities are distinguishable. *See Gendron v. Chicago Transp. Co.*, 564 N.E.2d 1207, 1218 (Ill. 1990)(affirming dismissal of action to protect benefits under collective bargaining agreement); *Bartley v. Univ. Asphalt*, 489 N.E.2d 1367, 1373-74 (Ill. 1986)(holding action for breach of collective bargaining agreement pre-empted by federal labor-contract law).

Conclusion

For these reasons, the court should deny Local 150's motion to dismiss Gasser's Second Amended Counterclaim.

Respectfully submitted,

/s/Robert T. Hanlon
Robert T. Hanlon