NO. 12-2878

IN THE SUPREME COURT OF ILLINOIS

THE CITY OF CHICAGO and THE VILLAGE OF SKOKIE,	)	**Appeal from the Appellate Court of Illinois, First Judicial District**
Plaintiffs-Appellees,	)	**No. 15-3531**
v.	)	**There Heard on Appeal from the Circuit Court of Cook County Illinois, Chancery Division**
THE CITY OF KANKAKEE, THE VILLAGE OF CHANNAHON, MTS CONSULTING, LLC, INSPIRED DEVELOPMENT COMPANY, LLC, MINORITY DEVELOPMENT COMPANY, LLC, CORPORATE FUNDING SOLUTIONS, and CAPITAL FUNDING SOLUTIONS,	)	**11 CH 29745**
	)	**Consolidated with: 11 CH 29744, 11 CH 34266**
Defendants-Appellants.	)	**The Honorable Peter A. Flynn, Judge Presiding**

AMICUS BRIEF OF INTERNET RETAILERS IN SUPPORT OF THE APPELLANTS

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INTRODUCTION

The *amicus* Internet Retailers, identified below, respectfully urge this Court to reverse the Appellate Court judgment below.

In their Motion for Leave to File a Fourth Amended Complaint ("Leave Motion"), Plaintiffs sought to join as additional defendants Dell Marketing L.P. ("Dell"), Cabela's Catalog, Inc., Cabelas.com, Inc., Cabela's Marketing and Brand Management, Inc. (collectively, "Cabela's"), NCR Corporation ("NCR"), Williams-Sonoma, Inc., Williams-Sonoma Stores, Inc. (collectively, "Williams-Sonoma"), and HSN, Inc. ("HSN") (collectively, "Internet Retailers"). In its order denying leave, the trial court correctly held that the Plaintiffs could not state any claims against the Internet Retailers.[1] The Appellate Court found otherwise, reversed the trial court, and held that Plaintiffs should be granted leave to move forward with their claims against the Internet Retailers.

As explained herein, the Appellate Court's decision should be reversed. It is undisputed that the Internet Retailers paid the appropriate amount of state tax, and Plaintiffs do not allege that the Internet Retailers owe more tax then they paid. Instead, the Plaintiffs' proposed claims allege that the Internet Retailers misclassified what types of taxes they were paying, resulting in the Plaintiffs receiving less money from the Illinois Department of Revenue ("IDOR"). These allegations do not support a claim against the Internet

[1] The Internet Retailers already were before the Circuit Court as respondents in discovery pursuant to 735 ILCS 5/2-402. The issue before the Circuit Court, therefore, was whether to allow Plaintiffs leave to join certain of the respondents in discovery (i.e., the Internet Retailers) as defendants in a proposed Fourth Amended Complaint. Given their prior involvement in the case and that their interests were at issue, the Circuit Court allowed the proposed Defendant Internet Retailers to file a memorandum opposing Plaintiffs' Leave Motion (Ex. 1) and to argue their position during the hearing on that motion. On October 8, 2015, the Circuit Court denied Plaintiffs' Leave Motion and, later, denied their Motion for Reconsideration.

Retailers, and the Appellate Court was incorrect in finding otherwise. First, the Appellate Court incorrectly held that the Plaintiffs alleged wrongful conduct sufficient to maintain an unjust enrichment claim against the Internet Retailers. Second, the Appellate Court failed to address the lack of a direct connection, or, for that matter, any connection, between the Plaintiffs and the Internet Retailers as required to sustain Plaintiffs' unjust enrichment claims. Finally, the Appellate Court incorrectly allowed claims for constructive trust and restitution to go forward against the Internet Retailers.

The Appellate Court's failure to address issues unique to the Internet Retailers highlights the importance of an *amicus* brief specifically tailored to the concerns of the Internet Retailers and the taxpayers of Illinois. Thus, the Internet Retailers have sought leave, through their concurrently filed Motion, to submit this *amicus* brief addressing the Appellate Court's decision as it relates to the Internet Retailers and the similarly situated taxpayers of Illinois. Accordingly, the Internet Retailers should not be joined as defendants and the decision of the Appellate Court should be reversed.[2]

FACTS PERTINENT TO THE INTERNET RETAILERS

The Internet Retailers are domiciled outside the State of Illinois but either they or their affiliates sell products to customers in the State of Illinois via the internet. The IDOR promulgated a regulation published at Title 86, Part 130, section 130.610 ("Sales of Property Originating in Other States") (as amended and effective August 2, 1971), that treated sales to Illinois consumers as subject to Illinois Retailers' Occupation Tax ("ROT") when the retailer accepted the purchase order in Illinois, stating in pertinent part:

> 3) If the following situations where the sale is made by or through an out-of-State place of business of the

[2] The Internet Retailers also join and support the Defendants' argument that IDOR has exclusive jurisdiction over this case.

> seller, Retailers' Occupation Tax liability will, nevertheless, be incurred:
>
> A) Where the seller or his authorized representative accepts an order in Illinois so as to create a contract, or
>
> B) where the order is received in Illinois on behalf of the seller and someone in Illinois has authority to accept such order so as to create a contract (whether such authority is exercised in the particular case or not).

Ill. Admin. Code tit. 86, § 130.610.

Pursuant to this regulation, the Internet Retailers or their affiliates contracted with procurement companies to perform sales-acceptance activities on their behalf in the City of Kankakee ("Kankakee") and the Village of Channahon ("Channahon"). The Internet Retailers or their affiliates paid ROT on all sales orders accepted in these municipalities, in accordance with the regulation, until 2014. Kankakee and Channahon offered economic incentives to retailers—via brokers—as an inducement to encourage them to set up operations in their jurisdictions. As authorized by 65 ILCS 5/8-11-20, Kankakee and Channahon remitted to each Internet Retailer, through its procurement companies, a portion of that Internet Retailer's share of the ROT distributed to the municipality by the State in respect to that Internet Retailer's sales within the municipality.

In 2014, following the Illinois Supreme Court decision in *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, the IDOR repealed Ill. Admin. Code Title 86, Part 130, section 130.610 and submitted new regulations whereby the location of purchase order acceptance was no longer the *sine qua non* in determining how sales were sourced for purposes of paying Illinois sales and use taxes. Consistent with these new regulations, the Internet Retailers or their affiliates began sourcing sales outside of Illinois, thereby rendering such

sales subject to the Illinois Use Tax. The Illinois Use Tax rate of 6.25% is the same as the State ROT of 6.25%. Accordingly, the Internet Retailers paid the same percentages of taxes relating to sales to Illinois consumers after repeal of Ill. Admin. Code Title 86, Part 130, Section 130.610(d). As explained below, however, the only difference created by paying use tax as opposed to ROT is the distribution scheme used by the IDOR to distribute Use Tax Revenues among various municipalities is different from that used to distribute the ROT collected by IDOR.

Plaintiffs initially sued Kankakee, Channahon, and several brokers that accepted orders in Kankakee and Channahon on behalf of the Internet Retailers. Several years later, Plaintiffs attempted to join the Internet Retailers via a Fourth Amended Complaint, alleging that, prior to the enactment of the new regulations by IDOR, the Internet Retailers should have been paying use tax rather than ROT. Plaintiffs do not allege that the Internet Retailers either underpaid their taxes or failed to pay the correct amount of tax owed. Instead, Plaintiffs' theory is that the Internet Retailers engaged in what they called a "sales tax-use tax swap." Plaintiffs contend that the Internet Retailers improperly reported that their sales occurred in Kankakee or Channahon and were thus subject to ROT pursuant to Ill. Admin. Code tit. 86, section 130.610. According to Plaintiffs, the Internet Retailers should have reported their sales as subject to the Illinois Use Tax instead. Had they reported their sales as subject to the Illinois Use Tax, the Internet Retailers would have paid the same amount of state tax, but IDOR would have distributed the taxes to the various Illinois municipalities pursuant to a different statutory scheme (involving application of a complex algorithm whereby approximately 20% is allocated to Chicago, 10% is allocated to the Regional Transportation Authority ("RTA"), and the remaining portion is allocated

to more than 200 other state, local, and governmental authorities). *See* 30 ILCS 105/6z-18; 30 ILCS 105/6z-20; 35 ILCS 120/3.

The Circuit Court held that, even if it had jurisdiction, the Plaintiffs' proposed Fourth Amended Complaint failed to state claims against the Internet Retailers for unjust enrichment, constructive trust, and restitution.[3] As the Circuit Court held, these so-called "claims" are, in fact, remedies and not freestanding causes of action, and even if Plaintiffs could state a claim for unjust enrichment, they could not do so against the Internet Retailers because "there is *no* connection, let alone a direct one, between the Chicago Plaintiffs and the *rebates*." (Order at 11) (emphasis in original). On September 29, 2017, the Illinois Appellate Court, First Division reversed and remanded the decision of the Circuit Court, finding in part that Plaintiffs' proposed Fourth Amended Complaint stated claims of unjust enrichment against the Internet Retailers. *City of Chicago v. City of Kankakee*, 2017 IL App (1st) 153531, ¶¶ 44-45.

As discussed below, the Appellate Court incorrectly found that Plaintiffs' proposed Fourth Amended Complaint alleged facts that, if proven at trial, would entitle Plaintiffs to relief on any cause of action against the Internet Retailers. Further, the Appellate Court's decision undermines the statutory authority bestowed upon the IDOR by giving Illinois municipalities the unfettered power to use the judiciary to audit Illinois taxpayers that the municipalities believe have mis-classified their taxes.

ARGUMENT

[3] The Circuit Court also held that Plaintiffs' claim for declaratory relief failed because the accused conduct had ceased. Plaintiffs did not appeal this holding.

I. Plaintiffs fail to allege any facts specific to any of the Internet Retailers necessary to sustain a cause of action.

Illinois appellate courts apply an abuse of discretion standard when reviewing an order denying a motion seeking leave to amend a complaint. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455 ¶ 41 (citing *Mandel v. Hernandez*, 404 Ill. App. 3d 701, 707-08 (2010)). "[B]efore a trial court can be found to have abused its discretion in denying leave to amend, it must be clear from the record that reasons of fact were presented to the court as a basis for requesting leave to amend." *Hayes Mech., Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 13 (2004). "Illinois is a fact pleading jurisdiction, and plaintiffs cannot rely on mere conclusions of law or fact unsupported by specific factual allegations but must allege facts sufficient to bring their claims within the scope of the cause of action asserted." *Id.* at 7. (citing *Hirsch v. Feuer*, 299 Ill. App. 3d 1076, 1081, 234 Ill. Dec. 99, 702 N.E.2d 265, 269 (1998)). Illinois requires that complaints set forth facts that, if accepted as true, would be sufficient to support liability as to each of plaintiff's causes of action. *See* 735 ILCS 5/2-601; 735 ILCS 5/2-603. "Where it is apparent even after amendment that no cause of action can be stated, leave to amend should be denied." *Hayes Mech.*, 351 Ill. App. 3d at 7.

Here, Plaintiffs' proposed claims against the Internet Retailers fall far short of Illinois' fact-pleading requirement. Plaintiffs' proposed Fourth Amended Complaint lumps together entities the Plaintiffs propose adding as Internet Retailer defendants and makes only general allegations against them, with no allegation specifically directed at any particular entity. As the Circuit Court noted, the Fourth Amended Complaint "is far too general and conclusory in its factual allegations, and fails to plead factually adequate causes of action against [Internet Retailer] defendants." (Order at 7.) Plaintiffs followed

the same course in their appellate briefing, concluding only that the Internet Retailers are somehow guilty of wrongdoing or of misrepresentation without alleging any specific facts that, if proven at trial, would support those claims. The Appellate Court's holding that these conclusory claims state a cognizable cause of action gives Plaintiffs authority not only to add the Internet Retailers currently named in their Fourth Amended Complaint, but to continue adding *any* entities that meet Plaintiffs' general allegations of "wrongdoing." Not only would this result wholly ignore Illinois' fact-pleading requirements, it could result in mass litigation that would unnecessarily burden the judicial system. (*See id.*)

II. Plaintiffs' claim against the Internet Retailers for unjust enrichment fails as a matter of law.

To state a claim for unjust enrichment under Illinois law, "a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 516 (7th Cir. 2011). *See also HPI Health Care Services, Inc. v. Mt. Vernon Hosp. Inc.*, 131 Ill. 2d 145, 160, (1989). Unjust enrichment does not constitute an independent cause of action. *Chicago Title Ins. Co. v. Teachers' Ret. Sys. of State of Ill.,* 2014 Ill. App. (1st) 131452, ¶¶ 17-18 (1st Dist. 2009). Rather, "it is a condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress or undue influence" (internal quotation marks omitted) (*Alliance Acceptance Co. v. Yale Ins. Agency, Inc.*, 271 Ill. App. 3d 483, 492 (1995)), or, alternatively, it may be based on contracts that are implied in law. *Perez v. Citicorp Mortg., Inc.*, 301 Ill. App. 3d 413, 425 (1998).

A. Plaintiffs fail to allege an actionable wrong by the Internet Retailers necessary to support a claim for unjust enrichment.

Here, as stated by the Circuit Court, Plaintiffs "propose a remedy based on the assumption that an actual wrong has been committed; but they do not articulate what that actionable wrong is." (Order at 10.) In their proposed Fourth Amended Complaint, Plaintiffs failed to allege any fraud, duress, or undue influence by the Internet Retailers that would give rise to a claim for unjust enrichment. Instead, Plaintiffs alleged only that the Internet Retailers' ROT payments "had the effect of wrongfully taking what should have been Plaintiffs' Local Share of the state use tax and diverting it to the use of the Internet Retailer Defendants in the form of rebates of the Local Share of the state sales tax," (Compl. ¶ 74), and the Internet Retailers' receipt of rebates "has wrongfully deprived Plaintiffs of the Local Share of the state use tax and constitutes unjust enrichment of the Internet Retailer Defendants." *Id.* In upholding Plaintiffs' unjust enrichment claims against the Internet Retailers, the Appellate Court merely echoed Plaintiffs' deficient claims, reasoning that "the retailers misreported sales as having taken place in the defendant municipalities and, like the broker defendants, the retailers retained a portion of the sales tax revenue in the form of a rebate that rightfully should have been plaintiffs' share of the use tax." *City of Chicago v. City of Kankakee*, 2017 IL App (1st) 153531, ¶ 38.

Yet as the Circuit Court recognized, there is nothing illegal or improper about a municipality, like Kankakee or Channahon, rebating a portion of its share of state taxes. (*See* Order at 10. ("Such sales tax rebate agreements are not improper *per se*.") To the contrary, Illinois law expressly authorized municipalities to enter ROT-sharing agreements with retailers to encourage economic development within the municipality. 65 ILCS 5/8-11-20. In addition, IDOR regulations in effect during the relevant time period specifically provided that, for purposes of determining where a sale occurred (and thus, whether Illinois

ROT or use tax should be paid), the sole question was where a purchase order had been accepted. *See* Section 130.610(d)(3), repealed at 38 Ill. Reg. 19998, effective October 1, 2014; *see also Hartney*, 2013 WL 115130 ¶ 56 ("We conclude that the regulation, in subsection (c)(1), does define situs for retail occupation tax where purchase order acceptance occurs at the seller's place of business within the county, with sale at retail and the purchaser taking delivery within the state."). Plaintiffs' allegations simply do not allege wrongful conduct on the part of anyone, and in particular, the Internet Retailers.

Furthermore, although a misrepresentation made by a defendant to a plaintiff might, in some circumstances, give rise to an equitable remedy, the Internet Retailers made no representations whatsoever to Plaintiffs. Any representations by the Internet Retailers as to appropriate taxing jurisdiction were made only to IDOR. IDOR is empowered by statute to audit any taxpayer representations. Nothing in the ROT or use tax statutes empowers a municipality to seek remedies based on representations made to IDOR. To hold otherwise, as the Appellate Court did, effectively allows municipalities to perform judicial audits of any representations made by Illinois taxpayers to the IDOR that the municipality believes to be incorrect.

B. Plaintiffs do not and cannot allege any direct connection between themselves and the Internet Retailers necessary to support a claim for unjust enrichment.

Similarly, Illinois common law does not permit a plaintiff to pursue the remedy of unjust enrichment when the plaintiff lacks a direct connection with the defendant's retention of the benefit. *Saletech, LLC v. E. Bait, Inc.*, 2014 Ill. App. (1st) 132639, ¶ 36 (1st Dist. 2014) ("Even when a person has received a benefit from another, he or she is liable for payment 'only if the circumstances of its receipt or retention are such that, *as between the two persons,* it is unjust for him to retain it. The mere fact that a person benefits

another is not of itself sufficient to require the other to make restitution therefor.'") (citations omitted) (emphasis added). Although a plaintiff does not necessarily have to prove loss or damages, it "must show a detriment—and, significantly, *a connection* between the detriment and the defendant's retention of the benefit." *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 516 (7th Cir. 2011) (emphasis added) (affirming dismissal of claim where plaintiffs failed to show connection between detriment and the defendant's retention of the benefit).

Here, as the Circuit Court correctly found, there is no connection, let alone a direct one, between Plaintiffs and the Internet Retailers such that, as between them, it would be unjust for the Internet Retailers to retain funds that Kankakee or Channahon freely rebated to them through the brokers. (Order at 10-12.) Pursuant to 65 ILCS 5/8-11-20, any monies received by the Internet Retailers were received from the defendant brokers, not from Plaintiffs. Prior to rebating any monies to the Internet Retailers through the brokers, the defendant municipalities received it from the IDOR, not from the Plaintiffs. If Kankakee improperly received tax benefits, then that may be an issue between Plaintiffs and Kankakee, or between Kankakee and IDOR. Plaintiffs, however, have no more direct connection with the Internet Retailers than any other taxpayer in the State of Illinois. Under these circumstances, any claim for unjust enrichment by Plaintiffs against the Internet Retailers is futile because Plaintiffs' claim of entitlement is, at best, entirely derivative. *See State Farm Gen. Ins. Co. v. Stewart*, 288 Ill. App. 3d 678, 691 (1st Dist. 1997) (affirming dismissal of unjust enrichment claim because the plaintiff conferred no direct benefit on the defendant and the defendant's retention of the benefit was not unjust as to the plaintiff).

Nowhere in its opinion did the Appellate Court address this fatal flaw in Plaintiffs' claim for unjust enrichment against the Internet Retailers. Ignoring the direct connection requirement would allow Plaintiffs, and more than 200 other municipalities, to pursue claims against *any* Illinois taxpayer they believe improperly received a benefit as a result of *any* municipality's alleged wrongful receipt, and later distribution, of the tax. (*See* Order at 15 "[I]f these two plaintiffs can [assert claims against Internet Retailers], cannot any of Illinois' other 200-plus home rule communities do the same thing? .... One cannot be so sanguine about opening the courts to large (potentially unlimited) numbers of such disputes in the courts, thereby undercutting IDOR's authority.")) Indeed, authorizing Plaintiffs to pursue such misplaced unjust enrichment claims for allegedly missourced use tax claims against the Internet Retailers would arguably create a new cause of action for unjust enrichment against *any* Illinois taxpayer for missourcing or mispayment of *any* tax.

Plaintiffs argued in their appellate briefing that a defendant's receipt of a benefit from a third party does not defeat an unjust enrichment claim. They are mistaken. The retention of a benefit given by a third party is unjust *only* "where (1) the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead, (2) the defendant procured the benefit from the third party through some type of wrongful conduct, or (3) the plaintiff for some other reason had a better claim to the benefit than the defendant." *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145 (1989). The Appellate Court below incorrectly found that these elements were met, again solely by echoing Plaintiffs' conclusory allegation that "the retailers misreported sales as having taken place in the defendant municipalities and, like the broker defendants, the retailers retained a portion of the sales tax revenue in the form of a rebate that rightfully

should have been plaintiffs' share of the use tax." *City of Chicago v. City of Kankakee*, 2017 IL App (1st) 153531, ¶ 38. In reality, these elements are missing here. The Appellate Court did not address the fact that the contractual rebates received by the Internet Retailers were the result neither of a mistake nor of wrongful conduct directed at Plaintiffs-Appellants. Instead, they were the result of valid contracts expressly authorized by state law. 65 ILCS 5/8-11-20.

Finally, neither Plaintiffs nor the Appellate Court identified a single viable reason why Plaintiffs have a better claim to the rebates than the Internet Retailers or, for that matter, any of the hundreds of other municipalities in the State of Illinois. Thus, under these circumstances, the Appellate Court incorrectly concluded that an underlying cause of action existed upon which the Court could afford the remedy of unjust enrichment.

III. Plaintiffs' claim against the Internet Retailers for constructive trust fails as a matter of law.

Under Illinois law, a constructive trust is a restitutionary remedy, not a stand-alone cause of action, that is imposed by a court in situations where a person holding money or property would profit by a wrong or be unjustly enriched at the expense of another if he were permitted to retain it. *People ex rel. Daley for Use of Cook County v. Warren Motors, Inc.*, 136 Ill. App. 3d 505, 510 (Ill. App. Ct. 1985). A constructive trust arises by operation of law against one who, by fraud, wrongdoing, or any other unconscionable conduct, either has obtained or holds legal right to property which he ought not to, in good conscience, keep and enjoy. Restatement of Restitution §§ 17, 28. ("Some form of wrongdoing is needed to impose a constructive trust.") *Salt Creek Rural Park Dist. v. Dep't of Revenue*, 334 Ill. App. 3d 67, 71 (1st Dist. 2002) (citing *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988)).

Plaintiffs' proposed Fourth Amended Complaint failed to allege any underlying actual or constructive fraud, wrongdoing, or other unconscionable conduct inflicted by the Internet Retailers on Plaintiffs that would give rise to the extraordinary equitable remedy of a constructive trust. The Internet Retailers simply received a rebate freely given by Kankakee or Channahon in accordance with Illinois law. The Appellate Court found that constructive trust was an appropriate remedy because it found that Plaintiffs' proposed Fourth Amended Complaint "stated valid claims for unjust enrichment." *City of Chicago v. City of Kankakee*, 2017 IL App (1st) 153531, ¶ 42. As discussed above, Plaintiffs' claim against the Internet Retailers for unjust enrichment fails as a matter of law. It then follows that Plaintiffs' attempt to plead a stand-alone claim for "constructive trust" fails as a matter of law also.

IV. Plaintiffs' claim against the Internet Retailers for "restitution" fails as a matter of law.

Finally, the Circuit Court correctly held that Plaintiffs' claim for "restitution" failed as a matter of law. Although the Appellate Court did not address Plaintiffs' claim for "restitution" in its opinion, we address it here because Plaintiffs asserted this claim against the Internet Retailers in their proposed Fourth Amended Complaint. Restitution is a catch-all term that refers to various equitable remedies, such as unjust enrichment and constructive trusts. *See generally*, Kiely, *Damages, Equity, and Restitution—Illinois Remedial Options*, 24 DEPAUL L. REV. (Winter 1975). "The traditional means of effecting restitution has been to seek the imposition of a constructive trust on the subject of the dispute, upon a showing of fraud or the abuse of a fiduciary relationship, with an accompanying order or re-conveyance or transfer of the disputed proceed to the plaintiff." *Id.* at 300.

Here, Plaintiffs failed to allege in their proposed Fourth Amended Complaint any facts that, if proven at trial, would demonstrate fraud, abuse of a fiduciary relationship, or other extreme tortious conduct by the Internet Retailers that would entitle Plaintiffs to the remedy of "restitution." The Circuit Court, therefore, did not abuse its discretion in denying Plaintiffs' Leave Motion. *See Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455 ¶ 41 (applying abuse of discretion standard to motion for leave to file amended complaint).

CONCLUSION

For the foregoing reasons, the Internet Retailers respectfully urge this Court to reverse the decision of the Appellate Court below.

Respectfully submitted,

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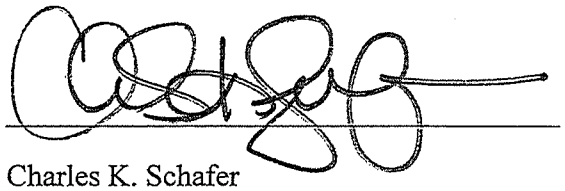

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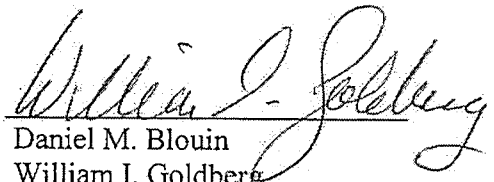
By: 

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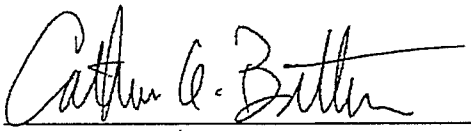
By: 

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EXHIBIT 1

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

THE CITY OF CHICAGO, et al.,	)	
	)	
Plaintiffs,	)	No. 11 CH 29745
	)	
v.	)	Consolidated With:
	)	11 CH 29744,
THE CITY OF KANKAKEE, et al.,	)	11 CH 34266
	)	Honorable Peter A. Flynn
Defendants.	)	

JOINT MEMORANDUM OF CERTAIN PROPOSED INTERNET RETAILER DEFENDANTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT

Dell Marketing L.P. ("Dell"), Hewlett Packard Company ("HP"), WESCO Distribution, Inc. ("WESCO"), Cabela's Wholesale, Inc., Cabela's Catalog, Inc., Cabelas.com, Inc., Cabela's Marketing & Brand Management, Inc. (collectively, "Cabela's"), NCR Corporation ("NCR"), Williams-Sonoma, Inc., Williams-Sonoma Stores, Inc. (collectively, "Williams-Sonoma"), HSN, Inc.[1] ("HSN"), and Shaw Industries, Inc. ("Shaw") (collectively, "Proposed Internet Retailer Defendants"), by and through their undersigned attorneys, submit this joint memorandum opposing the City of Chicago's and the Village of Skokie's ("Plaintiffs") Motion for Leave to File Fourth Amended Complaint ("Motion").

INTRODUCTION

This Court in its March 17, 2015 order ("Order") provided unambiguous directions regarding how the case should proceed. In that Order, the Court quashed Plaintiffs' attempt to obtain detailed information and records from third-party subpoena recipients, including the Proposed Internet Retailer Defendants, as duplicative and burdensome. Order at 15. The Court prohibited Plaintiffs from taking third-party discovery against any internet retailers at this stage of the case. *Id.* The Court further directed Plaintiffs to identify *one* "suitable 'test case' (presumably one in which they do not consider

[1] Plaintiffs additionally name Home Shopping Network, Inc. as a proposed defendant. (FAC ¶ 15.) However, Home Shopping Network, Inc. is not a legal entity.

further discovery essential to articulate their position)" involving *procurement subsidiaries* "for an appropriate substantive motion." *Id.*

Instead of identifying *one* procurement subsidiary as directed by the Court, Plaintiffs seek leave to file a Fourth Amended Complaint ("FAC") adding four new claims against nearly *thirty* new defendants, including the Proposed Internet Retailer Defendants. Not only have Plaintiffs flouted this Court's Order in their blunderbuss filing, but their proposed amended complaint is devoid of *any* allegations concerning the specific activities of any of the Proposed Internet Retailer Defendants, let alone allegations that might allow them to state a claim against any of these entities. Moreover, Plaintiffs' proposed amendment fails to identify any causes of action for which they can state a legally viable claim under Illinois law against any of the Proposed Internet Retailer Defendants.

Because Plaintiffs fall woefully short of stating any claim against the Proposed Internet Retailer Defendants and their proposed amended complaint is futile, the Court should deny Plaintiffs' Motion.

ARGUMENT

I. Plaintiffs' Motion For Leave To Amend Should Be Denied Because It Violates This Court's March 17, 2015 Order.

In Illinois, "[t]he right to amend pleadings ... is not absolute." *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 110 (1st Dist. 1993). Generally, whether to grant leave to amend a pleading rests in the discretion of the trial court. *Loyola Acad. v. S & S Roof Maint., Inc.*, 146 Ill. 2d 263, 273 (1992); *I.C.S. Illinois, Inc. v. Waste Mgmt. of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010). A trial court's appropriate exercise of its discretion to deny a motion for leave to amend will not lightly be set aside by the appellate court. *Hayes Mech., Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 7 (2004).

Moreover, this Court has inherent authority to control its docket and to impose sanctions, including denying leave to amend pleadings, for failure to comply with the Court's orders. *See Sander v. Dow Chem. Co.*, 166 Ill. 2d 48, 65 (1995) (court has inherent authority to control its docket and impose sanctions for the failure to comply with court orders, including orders regarding pleadings);

Master Hand Contractors, Inc. v. Convent of Sacred Heart of Chicago, Ill., 2013 Ill. App. (1st) 123788-U, ¶ 19 (1st Dist. 2013) (affirming dismissal of complaint for plaintiff's noncompliance with orders, because "court rules and orders are not merely suggestions to be complied with if convenient") (internal quotations omitted).

Here, Plaintiffs' Motion plainly violates this Court's Order. In its Order, the Court requested that Plaintiffs identify a "suitable test case" with respect to the counts relating to the Illinois Operating and Procurement Companies. Acknowledging their defiance of that Order, Plaintiffs state in their Motion that they "believe that a 'test case' procedure would be useful for not only the Illinois Operating and Procurement Companies scenario, but also for the Internet Retailers scenario, and the Fourth Amended Complaint facilitates such test cases by identifying specific Illinois Operating and Procurement Companies and Internet Retailers." Mot. at 3. Plaintiffs offer no explanation, however, for why their new belief should trump this Court's Order. Plaintiffs also fail to explain how the Court's suggested "test case" procedure could possibly require adding dozens of new defendants and multiple new theories of relief. Plaintiffs similarly fail to explain why this new belief only occurred to them after four years of litigation and why they should be excused for the delay. Plaintiffs do not attempt to explain their new belief because no good explanation exists.

Despite paying lip service to complying with this Court's Order, Plaintiffs effectively seek reconsideration of the Order through their Motion, but offer no new facts or law. *See In re Gustavo H.*, 362 Ill. App. 3d 802, 814 (2005) ("The purpose of a motion to reconsider is to bring to the court's attention a change in the law, an error in the court's previous application of existing law, or newly discovered evidence that was not available at the time of the hearing." (quoting *In re Ashley F.*, 265 Ill. App. 3d 419, 426 (3d Div. 1994)). Indeed, Plaintiffs offer no explanation whatsoever for why they should be allowed to proceed in defiance of this Court's Order. For this reason alone, this Court should deny Plaintiffs' Motion.

II. The Proposed Amendment As To The Proposed Internet Retailer Defendants Is Futile.

To determine whether leave to amend is warranted, courts consider the following factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Hayes Mech., Inc.*, 351 Ill. App. 3d at 7 (citing *Loyola Acad.*, 146 Ill. 2d at 273). Plaintiffs are required to establish each of the four factors. *Id.*

The first factor requires that the movant demonstrate that the proposed amendment is not futile. A proposed amendment is futile when it is apparent that the proposed amendment does not state a cognizable claim. *Id.*; *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 611 (1st Dist. 1999) (motion for leave to amend properly denied where amended complaint did not assert viable claim); *Caballero v. Rockford Punch Press & Mfg. Co., Inc.*, 244 Ill. App. 3d 333, 340 (1st Dist. 1993) ("If there is an objection to a motion to amend and the objection demonstrates that the amendment would not state a viable cause of action, then the motion to amend is properly denied."); *Wilk v. 1951 W. Dickens*, 297 Ill. App. 3d 258, 265 (1st Dist. 1998) (same; "plaintiff's amended complaint allegations do not establish a cognizable claim"). When Plaintiff has failed to state a cognizable claim, the court need not examine the remaining factors. *Hayes Mech., Inc.*, 351 Ill. App. 3d at 7; *I.C.S. Illinois, Inc.*, 403 Ill. App. 3d at 219.

Here, as demonstrated below, the Court should deny Plaintiffs' Motion as to the Proposed Internet Retailer Defendants because Plaintiffs fail to state any cognizable claim against them.

A. The Proposed Amendment Fails To Plead Any Facts Demonstrating An Entitlement To Relief Against The Proposed Internet Retailer Defendants.

The FAC is futile because Plaintiffs fail to plead facts that might give rise to any cause of action against any of the Proposed Internet Retailer Defendants. Illinois is a fact pleading state, which requires that complaints set forth facts sufficient to give rise to a plaintiff's cause(s) of action. *See* 735

ILCS 5/2-601; 735 ILCS 5/2-603. A complaint must contain more than general conclusions to satisfy this standard; instead, "sufficient allegations of fact to state a cause of action" are required. *Adkins v. Sarah Bush Lincoln Health Ctr.*, 129 Ill. 2d 497, 519 (1989) ("It is fundamental that facts and not conclusions are to be pleaded."). Moreover, in a multi-defendant case like this one, a complaint must allege facts sufficient to state a cause of action against *each individual defendant*. *See Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1060 (5th Dist. 2002) (finding complaint insufficient where plaintiffs failed to allege facts sufficient to show duties, acts, or omissions of each respective defendant); *see also In re Beatty*, 118 Ill. 2d 489, 499 (1987) (requiring that complaint contain "specific factual allegations" charging personal misconduct "as to each defendant"). The same standard applies to proposed amended complaints; where the proposed amended complaint fails to set forth facts sufficient to state a claim, the motion to amend must be denied. *See Poliquin v. Sapp*, 72 Ill. App. 3d 477, 481 (4th Dist. 1979) ("The allegations of a complaint are not rendered sufficient by mere conclusions of law and, thus, the denial of the motion to amend must be sustained.")

Rather than abide by Illinois fact pleading requirements, Plaintiffs' proposed amended complaint merely identifies the names of each of the twenty-nine entities Plaintiffs propose adding as defendants, and then lumps them all together through general allegations that they were either engaged in the "use tax-sales tax swap" or "procurement company" sourcing. (*See, e.g.*, FAC ¶¶ 40-41, 45.) The lack of specific facts about any of the proposed defendants, including the Proposed Internet Retailer Defendants, dooms Plaintiffs' FAC. *See Weidner*, 328 Ill. App. 3d at 1060 (finding court properly dismissed complaint where there was "absolutely no differentiation" between defendants in complaint and plaintiffs stated the same allegations "regardless of which defendant" was listed). Plaintiffs have not made "sufficient allegations of fact to state a cause of action" against any proposed defendant, including the Proposed Internet Retailer Defendants. *Adkins*, 129 Ill. 2d at 519. For this reason alone, the Motion should be denied as futile. *See Poliquin*, 72 Ill. App. 3d at 481.

B. The Proposed Amendment Seeking A Declaratory Judgment As To The Proposed Internet Retailer Defendants (Count III) Is Futile Because Of The Absence Of Any Case Or Controversy.

Not only do Plaintiffs fail to allege any facts sufficient to state a claim, but they also fail to allege any valid cause of action against the Proposed Internet Retailer Defendants. Specifically, Count III of Plaintiffs' FAC seeks a declaratory judgment against the Proposed Internet Retailer Defendants. But Plaintiffs' own allegations make clear that they do not have standing to seek a declaratory judgment against the Proposed Internet Retailer Defendants. Count III is therefore futile and leave to amend should be denied.

The Declaratory Judgment Act provides that a "court *may*, in cases of actual controversy, make binding declarations of rights." 735 ILCS 5/2-701(a) (emphasis added.) "The appropriateness of the Declaratory Judgment Act as a vehicle for relief is a question for the trial court's discretion, and review is deferential." *Int'l Union of Operating Eng'rs, Local 965 v. Office of the Comptroller, State*, 2014 Ill. App. (4th) 131079, ¶ 19 (4th Dist. 2014) (quotations omitted.)

Declaratory relief is only appropriate when, "under the facts alleged there is a substantial controversy between the parties having adverse legal interests of sufficient mmediacy (sic) and reality to warrant the issuance of declaratory judgment." *People ex rel. Hamer v. Bd. of Ed. of Sch. Dist. No. 113*, 22 Ill. App. 3d 130, 134 (2nd Dist. 1974). In other words, for a declaratory judgment to issue, there must be a *current* case or controversy. *See id.*; *Kalven v. City of Chicago*, 2014 Ill. App. (1st) 121846, ¶ 10 (1st Dist. 2014) ("Injunctive and declaratory relief are prospective forms of relief because they are concerned with restraining or requiring future actions rather than remedying past harms.") (citation omitted). Courts do not issue advisory opinions in the form of declaratory judgments on moot issues. *AEH Const., Inc. v. State, Dep't of Labor*, 318 Ill. App. 3d 1158, 1161 (3d Dist. 2001) (affirming dismissal of declaratory judgment claim relating only to past conduct); *Kert v. Oasis Legal Fin., LLC*, 2013 Ill. App. (1st) 120272, ¶ 24 (1st Dist. 2013) (same).

This Court has also recognized the appropriate application of the Declaratory Judgment Act in ruling on an earlier Motion to Dismiss in this matter:

> The reason declaratory relief is not off the table here, in my view, is this is not a case where the only relief sought is with respect to past conduct as to which the parties' positions have become fixed. In that situation, a claim for declaratory relief is just putting a funny label on a breach of contract or some other action... And since the only contracts you are addressing in that regard, as I understand it, are contracts that are still in force, then relief is being sought with respect to the relations of the parties going forward. In terms of what is and is not a permissible declaratory relief request, then I think the request for declaratory relief is okay.

(Nov. 7, 2012 Tr., attached hereto as Ex. A, at 31-32.)

Here, Plaintiffs have not, and cannot, assert a declaratory judgment claim against the Proposed Internet Retailer Defendants. Plaintiffs' FAC makes clear that Plaintiffs are seeking "relief only as to periods prior to November 21, 2013, when the Illinois Supreme Court issued its decision in the case of *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 (2013)." (*See* FAC ¶ 55.) That admission, standing alone, is sufficient to defeat Plaintiffs' request for declaratory relief. *See AEH Const., Inc.*, 318 Ill. App. 3d at 1161; *Kert*, 2013 Ill. App. (1st) 120272, ¶ 24. However, even if Plaintiffs sought relief for post-*Hartney* periods, such claims would also be futile. Notably, Plaintiffs' FAC does not allege that the Proposed Internet Retailer Defendants are currently sourcing any Retailer's Occupation Tax ("ROT") to Kankakee or Channahon. Plaintiffs' FAC is silent on this critical point because, as Plaintiffs well know, none of the Proposed Internet Retailer Defendants are still sourcing any ROT to Kankakee, Channahon, or any other Illinois municipality pursuant to a rebate agreement.

Specifically, through mid-2014, Illinois regulation Title 86 Part 130 Section 130.610 authorized the Proposed Internet Retailer Defendants' sourcing of sales to Kankakee or Channahon. Contemporaneously with the Illinois Department of Revenue's ("IDOR") repeal of this regulation in 2014, Dell began sourcing sales outside of Illinois, which consequently rendered such sales subject to use tax. HP, Wesco, Cabela's, NCR, Williams-Sonoma, the operating subsidiary of HSN, and Shaw

have likewise stopped sourcing sales to Kankakee and/or Channahon. Accordingly, there is no alleged future harm to restrain, and a declaratory action is therefore improper.

Plaintiffs' reliance on *Village of Itasca v. Village of Lisle*, 352 Ill. App. 3d 847 (2d Dist. 2004), in their Motion is misplaced. Unlike the defendant in *Itasca*, none of the Proposed Internet Retailer Defendants are currently sourcing their sales to an Illinois municipality and there is no risk of "future harm." Moreover, unlike the plaintiffs in *Itasca*, Plaintiffs here seek a determination of liability solely for the Proposed Internet Retailer Defendants' *past* conduct (*see* FAC ¶ 55), rather than prospective relief to prevent future action. Under these circumstances, a declaratory judgment remedy is unavailable as a matter of law. *See Kalven*, 2014 Ill. App. (1st) 121846 ¶ 10 (declaratory relief is not a remedy for alleged past harms); *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 2014 Ill. App. (1st) 111290, ¶ 46, *appeal denied*, 20 N.E.3d 1256 (5th Dist. 2014) (affirming dismissal with prejudice where plaintiff failed to plead facts showing that actual controversy existed); *Kert v. Oasis Legal Fin., LLC*, 2013 Ill. App. (1st) 120272, ¶ 24 (1st Dist. 2013) (affirming dismissal of declaratory judgment claim relating only to past conduct); *AEH Const., Inc.*, 318 Ill. App. 3d at 1161 (same); *Sharma v. Zollar*, 265 Ill. App. 3d 1022, 1028 (5th 1994) (dismissing declaratory judgment claim where plaintiff's need for the requested relief was eliminated).

C. The Proposed Amendment Claiming "Unjust Enrichment," "Constructive Trust," And "Restitution" (Count IV) Against The Proposed Internet Retailer Defendants Is Futile.

Apparently recognizing the futility of their proposed Declaratory Judgment count (Count III), which will not get them any money, Plaintiffs attempt in Count IV to throw in a kitchen sink of monetary remedies, namely "unjust enrichment – constructive trust – restitution." Plaintiffs, however, plainly misunderstand the applicability of these equitable remedies. Not only are the equitable remedies barred because Plaintiffs have an adequate remedy at law, they are also remedies that cannot stand without an independent cause of action.

1. Plaintiffs' Equitable Claims Fail Because Plaintiffs Have An Adequate Remedy At Law Against The Municipalities Or IDOR.

Plaintiffs assert three equitable remedies. Equitable relief is unavailable, however, where there is an adequate remedy at law. *E.g.*, *Clarendon Associates v. Korzen*, 56 Ill. 2d 101, 110-115 (1973) ("equity will not assume jurisdiction to grant relief where an adequate remedy at law exists"); *Sullivan v. Board of Comm'rs of Oak Lawn Park Dist.*, 318 Ill. App. 3d 1067 (1st Dist. 2001) (same).

Here, Plaintiffs have at least two adequate remedies at law. Specifically, the General Assembly has provided Plaintiffs with two statutory remedies they could pursue to the extent they believe the Proposed Internet Retailer Defendants have improperly reported ROT or Use Tax to Kankakee or Channahon. First, 65 ILCS 5/8-11-21 provides a statutory cause of action and damages against municipalities related to sales tax rebate agreements entered into on or after June 1, 2004. Plaintiffs relied on this statutory remedy in their original complaint filed in 2011, in which Plaintiffs named as defendants municipalities and "brokers" that had local occupation tax rebate agreements.

Plaintiffs could also seek a redistribution of funds from the IDOR to the extent they believe the Proposed Internet Retailer Defendants have improperly sourced sales or improperly characterized transactions as subject to either ROT or Use Tax. *See* 30 ILCS 105/6z-18 (directing IDOR to distribute certain revenues collected from ROT and Use Tax to various local governing bodies); 20 ILCS 2505/2505-475 (granting IDOR authority to correct errors in tax distributions); *City of Kankakee v. Dep't of Revenue*, 2013 Ill. App. 3d 120599 (2013) (action by municipality against IDOR challenging redistribution of ROT proceeds). Plaintiffs therefore have adequate remedies at law against the municipalities or IDOR. The equitable remedies sought in the Plaintiffs' FAC are thus barred.

2. Plaintiffs' Claim For Unjust Enrichment Fails As A Matter of Law.

Plaintiffs' claims for "unjust enrichment – constructive trust – restitution" also fail because they are remedies without a supporting cause of action. Unjust enrichment, standing alone, does not constitute an independent cause of action. *Chicago Title Ins. Co. v. Teachers' Ret. Sys. of State of Ill.*,

2014 Ill. App. (1st) 131452, ¶¶ 17-18 (1st Dist. 2009). Rather, it is a remedy for "unlawful or improper conduct as defined by law, such as fraud, duress or undue influence." *Alliance Acceptance Co. v. Yale Ins. Agency, Inc.*, 271 Ill. App. 3d 483, 492-93 (1st Dist. 1995). As stated in *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.* (1985), 137 Ill. App. 3d 84, 90-92:

> The term "unjust enrichment" is not descriptive of conduct that, standing alone, will justify an action for recovery. Rather, it is a condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence, and may be redressed by a cause of action based upon that improper conduct.

This Court previously rejected an unjust enrichment claim asserted by Plaintiffs in an earlier complaint for this very reason, explaining:

> In this case, if there has been an unjust enrichment, it is because the enrichment violates some substantive principle, but if it violates some substantive principle, then the thing to do is address that principle. If on the other hand the enrichment which has occurred does not violate some substantive principle, then there is no separate cause of action to announce that it is unjust anyway.

(Nov. 7, 2012 Tr., attached hereto as Ex. A, at 28-29.)

Here, the Proposed Internet Retailer Defendants have not violated "some substantive principle," and therefore, there is no viable cause of action or remedy for unjust enrichment. Plaintiffs have failed to allege any fraud, duress or undue influence by the Proposed Internet Retailer Defendants. The most that Plaintiffs allege is that the "Internet Retailer Defendants' activities, described above have had the effect of wrongfully taking what should have been Plaintiffs' Local Share of the state use tax and diverting it to the use of the Internet Retail Defendants in the form of rebates of the Local Share of the state sales tax." (FAC ¶ 74.) Completely lacking are any alleged facts that, if proven at trial, would constitute fraud, duress, or undue influence by the Proposed Internet Retailer Defendants on the Plaintiffs.

To state a claim for fraud, a plaintiff must allege five elements: "(1) a false statement of material fact; (2) by one who knows or believes it to be false; (3) made with the intent to induce action by another in reliance on the statement; (4) action by the other in reliance on the truthfulness of the

statement; and (5) injury to the other resulting from that reliance." *State Security Ins. Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 592 (1994) (citing *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286). Here, Plaintiffs have alleged none of the required elements.

To state a claim for duress, a plaintiff must allege "a condition where one is induced by a wrongful act or threat or another to make a contract under circumstances which deprive him of the exercise of his free will. *Kaplan v. Kaplan*, 25 Ill. 2d 181, 185 (1962). Once again, Plaintiffs have not alleged any facts that if proven at trial would constitute duress by the Proposed Internet Retailer Defendants on the Plaintiffs.

Similarly, Plaintiffs have alleged no facts that if proven at trial would constitute undue influence by the Proposed Internet Retailer Defendants. "Undue influence" is a cause of action almost exclusively relegated in Illinois to probate matters. As stated by the Illinois Supreme Court in *Estate of Hoover*, 155 Ill. 2d 402 (1993), undue influence that will invalidate a will is "any improper... urgency or persuasion whereby the will of a person is overpowered and he is induced to do or forebear an act which he would not do or would do if left to act freely." *Id.* at 411. Here, Plaintiffs have alleged no improper urgency or persuasion that overpowered the will of Plaintiffs and induced them to do s overpowered and he is induced to do or forebear an act which he

Moreover, to the extent that Plaintiffs are claiming that the Proposed Internet Retailer Defendants engaged in some other egregious tortious conduct that justifies the remedy of unjust enrichment, they have failed to allege any such conduct in their proposed FAC. To the contrary, Plaintiffs' own conduct is egregious because they seek double or triple recovery. In their proposed FAC, Plaintiffs seek to recover from the Municipal Defendants, the Broker Defendants, and the Internet Retailers "***all sales tax revenue***" received by the Municipal Defendants, the Broker Defendants, and the Internet Retailers. Yet, the Proposed Internet Retailer Defendants already paid the full amount of taxes due the State of Illinois under either the Retailer Occupation Tax or the Use Tax. In other words, even if the Proposed Internet Retailer Defendants' sales were subject to Use Tax rather

than ROT, as alleged by Plaintiffs in their FAC, the Proposed Internet Retailer Defendants would owe no additional tax. The two taxes are in lieu of one another and, in the circumstances of this case, would only affect the manner in which the IDOR distributed the funds to various local governments. That the Proposed Internet Retailer Defendants decline to pay these taxes again hardly constitutes the type of egregious tortious conduct that justifies the imposition of the extraordinary remedy of unjust enrichment. *See Chicago Title Ins. Co. v. Teachers' Ret. Sys. of State of Ill.*, 2014 Ill. App (1st) 131452, ¶¶ 17-18 (1st Dist. 2014) (finding unjust enrichment unavailable because the defendant's refusal to pay taxes a second time that it already paid "hardly constituted misconduct of such an egregious nature as to invoke the extraordinary remedies available to victims of unjust enrichment.")

Plaintiffs' unjust enrichment claim against the Proposed Internet Retailer Defendants fails for an additional reason. Even if there was some underlying fraud, duress, undue influence, or egregious tortious conduct by the Proposed Internet Retailer Defendants (none is alleged by Plaintiffs), it is settled in Illinois that the remedy of unjust enrichment is not available absent a direct connection between the plaintiff and the defendant's retention of the benefit. *Saletech, LLC v. E. Balt, Inc.*, 2014 Ill. App. (1st) 132639, ¶ 36 (1st Dist. 2014). In other words, as between the two parties, it must be unjust for the defendant to retain the benefit. *Id.* ("Even when a person has received a benefit from another, he or she is liable for payment 'only if the circumstances of its receipt or retention are such that, *as between the two persons*, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.'") (citations omitted) (emphasis added). Here, Plaintiffs are required, and have failed, to "show a detriment—and, significantly, a ***connection*** between the detriment and the defendant's retention of the benefit." *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 516 (7th Cir. 2011) (emphasis added) (citing *HPI Health Care Services*, 131 Ill. 2d at 160); *Saletech, LLC*, 2014 Ill. App (1st) 132639. ¶ 36.

Simply put, no direct connection exists between the Proposed Internet Retailer Defendants and Plaintiffs such that, as between them, it would be unjust for the Proposed Internet Retailer Defendants

to retain funds that Kankakee or Channahon freely rebated to them. If Kankakee improperly received tax benefits, then that may be an issue between Plaintiffs and Kankakee, or between Kankakee and the IDOR. The Plaintiffs, here, however, have no more direct connection with the Proposed Internet Retailer Defendants than any taxpayer in the State of Illinois. Under these circumstances, any claim for unjust enrichment by the Plaintiffs against the Proposed Internet Retailer Defendants is futile because Plaintiffs' claim of entitlement is entirely derivative, at best. *See Harris, N.A. v. Olympus Partners, L.P.*, 2014 Ill. App (1st) 123313-U, ¶¶ 60-63 (1st Dist. 2014) (plaintiff could not assert a third-party unjust enrichment claim against defendant who received funds from third party because "any possible harm suffered by plaintiff is derivative[.]"); *State Farm Gen. Ins. Co. v. Stewart*, 288 Ill. App. 3d 678, 691 (1st Dist. 1997) (affirming dismissal of unjust enrichment claim because the plaintiff conferred no direct benefit on the defendant and the defendant's retention of the benefit was not unjust as to the plaintiff).

3. Plaintiffs' Claim For Constructive Trust Fails As A Matter of Law.

Under Illinois law, a constructive trust is a remedy imposed to prevent unjust enrichment by imposing a duty on the person receiving the benefit to convey the property back to the person from whom it was received. *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 55 (Ill. 1994). It is a restitutionary remedy, and not a stand-alone cause of action, which arises by operation of law, and is imposed by a court in situations where a person holding money or property would profit by a wrong or be unjustly enriched at the expense of another if he were permitted to retain it. *People ex rel. Daley for Use of Cook County v. Warren Motors, Inc.*, 136 Ill. App. 3d 505, 510 (Ill. App. Ct. 1985). A party seeking a constructive trust must establish "the existence of identifiable property to serve as the res upon which a trust can be imposed and possession of that res or its product by the person who is to be charged as the constructive trustee." *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 502 (Ill. App. Ct. 1986). A constructive trust is one that arises by operation of law against one who, by fraud, wrongdoing, or any other unconscionable conduct, either has obtained or holds legal right to

property which he ought not to, in good conscience, keep and enjoy. Restatement of Restitution §§ 17, 28. "A constructive trust is imposed where there is actual or constructive fraud or where there is a breach of a fiduciary duty. Some form of wrongdoing is needed to impose a constructive trust." *Salt Creek Rural Park Dist. v. Dep't of Revenue*, 334 Ill. App. 3d 67, 71 (1st Dist. 2002) (citing *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988)).

Here, Plaintiffs in their proposed FAC allege no underlying actual or constructive fraud, wrongdoing, or other unconscionable conduct inflicted by the Proposed Internet Retailer Defendants on the Plaintiffs that would give rise to the extraordinary equitable remedy of a constructive trust. The Proposed Internet Retailer Defendants simply received a rebate freely given by the Kankakee or Channahon. Plaintiffs also allege no identifiable property to serve as a *res* upon which a constructive trust could be imposed. Under these circumstances, Plaintiffs' claim for "constructive trust," which is not in any event a stand-alone claim, fails as a matter of law.

4. Plaintiffs' Claim For Restitution Fails As A Matter of Law.

Plaintiffs' claim for "restitution" fails for the same reasons stated above. Restitution is a catchall term that refers to various equitable remedies, such as unjust enrichment and constructive trusts. *See generally*, Kiely, Damages, Equity, and Restitution – Illinois Remedial Options, 24 DePaul L. Rev. (Winter 1975). "The traditional means of effecting restitution has been to seek the imposition of a constructive trust on the subject matter of the dispute, upon a showing of fraud or the abuse of a fiduciary relationship, with an accompanying order or re-conveyance or transfer of the disputed proceed to the plaintiff." *Id.* at 300.

Here, for the same reasons discussed above, Plaintiffs have alleged no underlying fraud, abuse of a fiduciary relationship, or other extreme tortious conduct by the Proposed Internet Retailer Defendants that would entitle Plaintiffs to their claimed remedy of "restitution."

D. Plaintiffs Fail To Establish Any Of The Remaining Necessary Factors For Leave To Amend.

Because Plaintiffs' Motion fails on futility grounds, the Court need not examine the additional factors. *Hayes Mech., Inc.*, 812 N.E.2d at 424. It should be noted, however, that Plaintiffs have not met their burden to establish any of the other factors necessary for an amendment to their complaint at this stage of the litigation.

For example, the proposed amendment is not timely as required by *Hayes Mech., Inc.*, 351 Ill. App. 3d at 7. The identities of the Proposed Internet Retailer Defendants are hardly a secret. Plaintiffs admit in their FAC that they became aware of the identities of the Internet Retailers they now seek to add as Defendants between April 2012 and July 2013. (*See* FAC, ¶¶ 56(c), 57(c).) Without explanation, Plaintiffs waited nearly three years to attempt to add the Proposed Internet Retailer Defendants as parties to this suit despite amending three times previously. Plaintiffs allege no additional facts discovered recently that they could not have discovered earlier to explain why they have waited so long to assert such claims. *See Freedberg v. Ohio Nat. Ins. Co.*, 2012 Ill. App. (1st) 110938, ¶ 50 (1st Dist. 2012) (denying leave to amend because plaintiff "waited nearly three years to file his motion for leave to file his verified amended complaint, he admitted that the facts had not changed, and he admitted that the reason for the amendment was 'to create multiple avenues' by which the trial court might reach an outcome in his favor.")

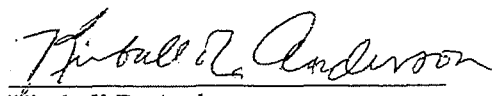
CONCLUSION

WHEREFORE, the Proposed Internet Retailer Defendants respectfully request that this Court deny the Plaintiffs' Motion for Leave to File Fourth Amended Complaint.

Dated: May 28, 2014

Respectfully submitted,

WINSTON & STRAWN LLP

By: 

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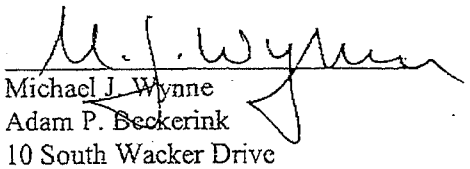
By: 

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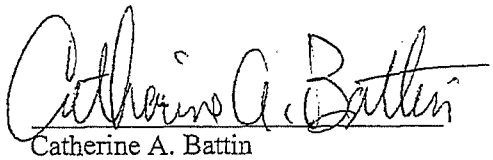
By: 

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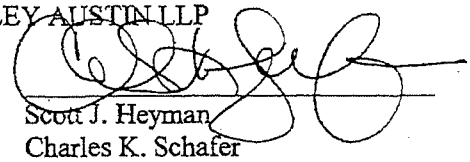
By: 

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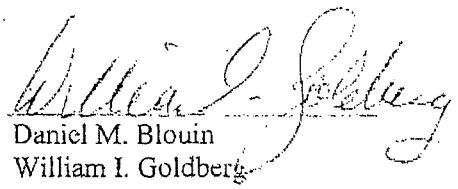
By: 

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EXHIBIT A

THE REGIONAL TRANSPORTATION AUTHORITY v. THE CITY OF KANKAKEE

PROCEEDINGS

November 7, 2012

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Bypassing the question of whether there is a cause of action for unjust enrichment, a question on which the Illinois Supreme Court has simultaneously expressed the views yes, no, and maybe, there are plenty of cases which explain that the key element of unjust enrichment is not enrichment but unjust, and an enrichment isn't unjust simply because the Plaintiff doesn't like it. An enrichment has to be unjust because it flunks some legal or equitable test.

The dilemma is, and the reason the Supreme Court has never quite decided whether there is an independent cause of action for unjust enrichment, that if an enrichment flunks some legal or equitable test and thereby can be characterized as unjust, you can sue for breach of whatever legal or equitable test it flunks. Okay?

You don't need a separate action that says exactly the same thing, which is why the Supreme Court has, in a number of cases, indicated that unjust enrichment is not a cause of action but a label on remedy.

In this case, if there has been an unjust enrichment, it is because the enrichment violates

some substantive principle, but if it violates some substantive principle, then the thing to do is address that principle.

If on the other hand the enrichment which has occurred does not violate some substantive principle, then there is no separate cause of action to announce that it is unjust anyway.

Either way, the unjust enrichment claim ends up being unavoidably redundant and somewhat confusing on top of that, because addressing an unjust enrichment claim addresses a legal claim which is already one layer of abstraction removed from the real issue. It makes better sense for us to talk about what the real issue is and vote that one up or down.

So I am going to dismiss the unjust enrichment claim as redundant without thereby implying anything about any of the Plaintiffs' other claims.

MR. BERTSCHY: I understand, your Honor, but could I just ask a couple of questions so I am clear about what it is you are saying.

THE COURT: Go ahead.

MR. BERTSCHY: Part of the purpose of he unjust

enrichment claim related to the pre-2004 conference and therefore would not be redundant by virtue of what is present within the 8-11-21 statute?

THE COURT: No, well, that is not quite true.

MR. BERTSCHY: All right.

THE COURT: You are correct that the pre-2004 contracts are not impacted by the 2004 statute, which says it doesn't impact. Nevertheless, if those contracts result in an unjust enrichment, it can only be because there is something wrong with those contracts.

MR. BERTSCHY: Right.

THE COURT: If the contracts, on the other hand, are in themselves perfectly legitimate, then any enrichment which would result from them is by definition not unjust.

MR. BERTSCHY: If the contracts are appropriate under Illinois law, I would agree entirely with you.

THE COURT: And if they aren't, then your remedy is to attack the appropriateness of the contracts under Illinois law, in which case you really don't need the unjust enrichment claim because you are already attacking the appropriateness of the contracts under Illinois law.

MR. BERTSCHY: That's fine. It appears to me that in the Village of Itasca vs. The Village of Lisle what the Plaintiff attempted to do there was to cast that under a constructive trust theory, because you will recall in that case, your Honor, the other cause of action on whether there was tortious interference claim that was dismissed, but there was also a constructive trust claim which survived that decision.

So my assumption is what they attempted to do is cast it in the frame of a constructive trust to give it some name as to cause of action. Is that -- I am trying to understand. Is that what the Court is getting at?

THE COURT: I think that, just as Itasca said, you can bring a declaratory judgment action as long as you are asking for the right sort of declaration. So here, you can appropriately ask for declaratory relief based on a legal theory as to the pre-2004 contracts. And if the legal theory is correct, then the relief may well be appropriate.

The reason declaratory relief is not off the table here, in my view, is this is not a case where the only relief sought is with respect to past

conduct as to which the parties' positions have become fixed. In that situation, a claim for declaratory relief is just putting a funny label on a breach of contract or some other action.

This is a case in which the object of the exercise is, at least in part, to provide guidance to everybody going forward. And with regard to the pre-2004 contracts, as I understand your position, it is that although the 2004 statute does not itself say anything about them either way, they would be fatally flawed, even if the 2004 statute had never been passed.

MR. BERTSCHY: That is precisely correct, your Honor.

THE COURT: And since the only contracts you are addressing in that regard, as I understand it, are contracts that are still in force, then relief is being sought with respect to the relations of the parties going forward.

In terms of what is and is not a permissible declaratory relief request, then I think the request for declaratory relief is okay.

MR. BERTSCHY: All right. And I believe, and we can check this out because, obviously, as you

NOTICE OF FILING

PLEASE TAKE NOTICE that on Thursday, February 22, 2018, the foregoing brief was filed in the Supreme Court of Illinois.

/s/ Kimball R. Anderson
Kimball R. Anderson

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the Rule 314(d) cover, the statement of authorities, and the 341(c) certificate of compliance, is 15 pages.

/s/ Kimball R. Anderson
Kimball R. Anderson

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the foregoing brief was filed and served upon the Clerk of the Illinois Supreme Court by electronic means and was serves on the following counsel via electronic mail on February 22, 2018:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes them to be true.

/s/ Kimball R. Anderson
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