IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

FRED SANBORN 7480 Demar Road Village of Indian Hill, Ohio 45243	:	**CASE NO. A 1200126** **Hon. Leslie Ghiz**
RUTH HUBBARD 5155 Miami Valley Road Village of Indian Hill, Ohio 45243	:	**FIRST AMENDED CLASS ACTION COMPLAINT**
MARY HUNT SIEGEL 4750 Drake Road Cincinnati, Ohio 45243	:	**JURY DEMANDED**
RICHARD COCKS 7355 Demar Road Village of Indian Hill, Ohio 45243	:	
AND ALL OTHER SIMILARLY SITUATED PARTIES **Plaintiffs,** **vs.**	:	
BOARD OF EDUCATION FOR THE INDIAN HILL EXEMPTED VILLAGE SCHOOL DISTRICT 6855 Drake Road Cincinnati, Ohio 45243	:	
ROBERT GOERING **HAMILTON COUNTY TREASURER** 138 East Court Street, Rm 402 Cincinnati, Ohio 45202	:	
DUSTRY RHODES **HAMILTON COUNTY AUDITOR** 138 East Court Street, Rm 304 Cincinnati, Ohio 45202	:	
Defendants.	:	

Now come Plaintiffs Fred Sanborn, Ruth Hubbard, Mary Siegel, and Richard Cocks, individually and on behalf of all others similarly-situated, and hereby allege as follows:

INTRODUCTION

This is an action brought on behalf of the named Plaintiffs in their own capacity and in their capacity as named representatives of the proposed class of all similarly-situated Indian Hill Exempted Village School District ("IHSD") taxpayers to (1) recovery unlawfully-imposed and unlawfully-collected real estate property taxes, along with interest and attorneys fees; and (2) enjoin the further collection of unlawful real estate property taxes and/or actions by Defendants' that may inhibit proper recovery. Accordingly, Plaintiffs request a declaratory judgment, temporary restraining order, preliminary and permanent injunction, damages, and attorneys fees arising from the Defendants' unlawful levying of a 1.25 mill Permanent Improvement Fund real estate property tax on Plaintiffs and all others similarly-situated.

PARTIES

1. Plaintiffs are owners of residential property within Indian Hill Exempted Village School District who have paid IHSD real estate property taxes since 2010, including all taxes levied pursuant to the unlawful 1.25 mill permanent improvement fund levy described more fully herein.

2. A class consisting of all IHSD real estate property taxpayers who have paid taxes pursuant to the unlawful 1.25 mill permanent improvement levy will also be party to this case.

3. This class includes all residential and commercial real estate property taxpayers, including those who may have paid real estate property taxes late, but does not include public utilities who have paid personal property taxes pursuant to the unlawful 1.25 mill permanent improvement levy.

4. The membership of the above class is more fully set forth below.

5. Defendant Board of Education for the Indian Hill Exempted Village School District ("IHSD") and is a "taxing authority" and "subdivision" within the meanings of R.C. 5705.01(C) and R.C. 5705.341, respectively.

6. Defendant IHSD levied the unlawful Permanent Improvement Fund tax increase, and threatens to do so again.

7. Defendant Robert A. Goering is the Hamilton County Treasurer ("Treasurer").

8. Pursuant to R.C. 323 *et seq.*, the Treasurer is responsible for preparing and mailing property tax assessments to property owners within IHSD.

9. Defendant Dusty Rhodes is the Hamilton County Auditor ("Auditor").

10. Pursuant to R.C. 319.13 and R.C. 319.14, the Auditor is required to certify all moneys to the public treasury and keep an accurate account current with the county treasurer, showing all moneys paid into the treasury.

JURISDICTION AND VENUE

11. This Court maintains jurisdiction over this matter pursuant to, *inter alia*, R.C. 2721 (Declaratory Judgment); R.C. 2727 (injunctive relief); and R.C. 2723 (recovery of unlawfully-paid taxes).

12. This action was originally filed on January 6, 2012, within one year of the first assessment of the unlawful tax at issue, that first assessment having taken place on January 8, 2011.

13. Venue is proper in Hamilton County, pursuant to Civ. R. 3(B)(1) and Civ. R. 3(B)(5), because all plaintiffs, defendants, and real property related to the property tax at issue are located in Hamilton County.

14. The amount in controversy exceeds $25,000.

FACTUAL ALLEGATIONS

Relevant Legal and Administrative Proceedings

15. On December 15, 2009, over the protests of Plaintiffs and other taxpayers, the Indian Hill Board of Education ("IHSD") unanimously adopted a resolution converting 1.25 inside mills levied for current expenses to 1.25 mills levied for permanent improvements.

16. IHSD then forwarded its "tax budget," which included the proposed tax increase, to the Hamilton County Budget Commission for its final approval.

17. The budget commission held hearings, at which Plaintiffs participated, in opposition to the tax increase, on April 13, 2010 and April 20, 2010.

18. The lead counsel for the BOE stated his opinion that the budget commission did not have authority to substitute its judgment for that of the BOE. The prosecutor's delegate and County Treasurer Goering clearly were convinced of the need to defer to the school board's judgment and discretion under these circumstances.

19. The budget commission voted two to one, with the treasurer and the prosecutor's delegate concurring, to accept the 1.25-millage conversion.

20. Auditor Dusty Rhodes dissented, explaining "this inside millage trick is. . . quite candidly a ruse to avoid going to the taxpayers."

21. The effect of the Hamilton County Budget Commissions' approval of the 1.25-millage conversion was to authorize the levying of a previously non-existent 1.25 mill "permanent improvement fun" tax on Plaintiffs, beginning in 2011.

22. Defendant IHSD created the permanent improvement fund to facilitate a property tax increase without the vote of IHSD voters: the fund contained no revenues or expenditures in 2008, 2009, and 2010.

23. On May 20, 2010, Plaintiffs and other IHSD taxpayers filed a timely Notice of Appeal with the Board of Tax Appeals ("BTA"), pursuant to R.C. 5705.341.

24. Through their Notice of Appeal, Plaintiffs asserted that the unvoted tax increase and Indian Hill's submitted budget encompassing it were unlawful and the Budget Commission erred in approving it because (1) "[u]nder current projections, in fiscal year 2011, Indian Hill will add to its reserve an amount in excess of five percent of the revenue credited to the fiscal year 2010 current operating expenses fund, in violation of R.C. 5705.13(A), and (2) the Unvoted Tax Increase, accomplished through the shifting of 1.25 inside mills, was not "clearly required" by the Indian Hill budget because there is no shortfall, and Indian

Hill has collected excessive taxes from taxpayers in past years, resulting in an enormous reserve fund that could be applied toward any subsequent shortfall, should any arise."[1]

25. Plaintiffs further asserted within their Notice of Appeal that "the Hamilton County Budget Commission's April 20, 2010 deliberations and certification were inconsistent with its statutory duties pursuant to R.C. 5705.341, R.C. 5705.31 and R.C. 5705.32, insofar as it abstained from weighing evidence demonstrating that the un-voted tax increase is not necessary," and that "the Hamilton County Budget Commission erred in abstaining from adjusting levy amounts to comply with law, as required by R.C. 5705.31 and R.C. 5705.32."[2]

26. Appellants made numerous efforts to expedite the determination of the lawfulness of the tax increase.

27. Defendants made numerous efforts, underwritten though use of Plaintiffs' own tax dollars, to delay the determination of the lawfulness of the tax increase.

28. On May 28, 2010, BTA indicated, by mail, "due to significant reductions effected to the board's budget and a dramatic increase in the number of newly filed appeals, parties are advised that the time within which an appeal may be scheduled for hearing will be lengthier than has been the board's practice."'

29. In response to the indicated delay, on August 24, 2010, Plaintiffs moved to preliminarily enjoin the imposition and collection of the property tax increase.

30. Defendants vigorously opposed Plaintiffs' efforts to determine whether the tax at issue here was lawful, filing extensive oppositions to Plaintiffs' Motion for Preliminary Injunction.

31. After receiving Defendants' opposition, on September 21, 2010, BTA denied Plaintiffs' Motion, concluding that it lacked the jurisdiction to grant equitable relief, including motions for preliminary injunctions.

---

[1] Appellants Notice of Appeal, BTA Case No. 2010-K-93.

[2] *Id.*

32. On November 12, 2010, Plaintiffs' counsel sent formal correspondence to BTA, inquiring as to whether it intended to render a decision in the appeal before December 20, 2010 - - the approximate date by which the Permanent Improvement Fund tax would again be billed and collected by Defendants.

33. On November 17, 2010, BTA responded, indicating that "at this time, BTA is unable to predict when a case filed in 2010 will be scheduled for further proceedings or when a decision will be rendered. * * * These delays result from reductions effected to the board's budget * * * For comparison purposes, the board has more than 7,500 active appeals pending, with those filed in October/November 2008 receiving their first scheduled hearing in January/February 2011."

34. In response to BTA's prediction of a multi-year delay, on December 14, 2010, Plaintiffs filed an Original Action in Procedendo and Mandamus in the Ohio Supreme Court, urging the Court to either render a decision on the tax, or in the alternative, order BTA to render a decision "forthwith," as is required by statute.

35. On January 7, 2011, Defendant IHSD moved to dismiss Plaintiffs' original action in the Ohio Supreme Court.

36. On March 2, 2011, the Ohio Supreme Court dismissed Plaintiffs' original action.

37. Plaintiffs filed this class action lawsuit on January 6, 2012 in the Hamilton County Court of Common Pleas on behalf of Plaintiffs and the class of Indian Hill School District taxpayers described herein.[3]

38. Defendants' immediately moved from dismissal of Plaintiffs' case, and opposed Plaintiffs' Motion to Certify a Class of all IHSD real estate property taxpayers.

39. On June 6, 2012, this Court issued an order staying "all further proceedings in this case pending ultimate resolution of the proceedings currently in the Ohio Board of Tax Appeals as Case No.

[3] *See* Hamilton County Court of Common Pleas Docket No. A1200126.

2010-K-938." This Court defined "ultimate resolution" as "termination of proceedings with no further avenue of appeal within the courts of the State of Ohio."

40. Since this Court's issuance of its 2012 stay, the BTA decided the matter in favor of Defendants, and Plaintiff-Taxpayers appealed to the Ohio Supreme Court.

41. On December 2, 2014, the Ohio Supreme Court determined Case No. 2010-K-938 in favor of these Plaintiff-Taxpayers. See *Sanborn v. Hamilton County Budget Commission*, 2014-Ohio-5218.

42. No motions or other matters remain pending before that Court.

43. In *Sanborn v. Hamilton County Budget Commission*, the Ohio Supreme Court held that the Hamilton County Budget Commission acted unlawfully on April 20, 2010 when it approved this Board of Education's December 15, 2009 resolution converting 1.25 inside mills levied for current expenses to 1.25 mills levied for permanent improvements, because the resulting tax increase was neither "necessary" nor "clearly required." See 2014-Ohio-5218, at ¶ 49, holding "But if due consideration is given, it is evident that, as a matter of law, the increased effective rate for the outside mills was not 'necessary to produce the revenue needed by the taxing district'—and therefore not 'clearly required'—under R.C. 5705.341."

44. The Ohio Supreme Court's decision applies to each subsequent collection of the tax in two clear ways: (1) each collection was made pursuant to the unlawful 2009/2010 actions; and (2) IHSD finances have remained incapable of meeting the R.C. 5705.341 standards.

45. Due to the procedural posture of the case - - a narrow but required appeal from the Budget Commission to the BTA - - The Ohio Supreme Court's decision in this matter was not able to reach the issue of whether wrongfully-imposed taxes should be returned to taxpayers; the Court stated "To the extent that the district seeks to retain the millage and the effective tax rates imposed in previous years, the issue presented in this case simply does not arise."

Funds collected from and owed to Taxpayers

46. The Hamilton County Auditor maintains accurate records of all taxes imposed and collected pursuant to the Defendants' 1.25 mill permanent improvement fund tax, which it characterizes as the IHSD

"Permanent Improvement Fund" on its "Statement of Semiannual Apportionment of Taxes," which it produced approximately every six months, in response to property tax collections. (A copy of the eight relevant Statements are attached hereto).

47. IHSD real estate property taxpayers paid property taxes on the unlawful property tax in eight periods over four years.

48. Using the Hamilton County Auditor's Records, the amount wrongfully imposed on IHSD real estate property taxpayers (commercial and residential combined), through the Permanent Improvement Fund wrongly approved in 2010, is determined by aggregating "Net Current Real Property" taxes and "Delinquent Real Property" taxes collected from the "Permanent Improvement" Source of Receipt.

49. Upon information and belief, the Hamilton County Auditor has attributed delinquently paid real property taxes to the period in which they were owed, rather than the period in which they were later paid.

50. Taxes paid by Indian Hill real estate property taxpayers on the Permanent Improvement fund tax, for each period from the inception of the tax, are as follows:

(a)	First half of 2010:	$753,885.75
(b)	Second half of 2010:	$697,235.21
(c)	First half of 2011:	$653,405.24
(d)	Second half of 2011:	$614,320.27
(e)	First half of 2012:	$674,603.36
(f)	Second half of 2012:	$597,333.61
(g)	First half of 2013:	$693,554.67
(h)	Second half of 2013:	$603,733.26

51. The total amount of taxes paid by Indian Hill real estate property taxpayers on the Permanent Improvement fund tax, over the eight tax periods, is **$5,288,071.28**. (The aggregate of items (a) through (h) above).

52. Plaintiffs and/or class members did not pay and are not seeking recovery of the Personal Property tax charged to public utilities.

53. Plaintiffs and/or class members did not pay and are not seeking recovery of "reimbursements" for the "Homestead" exemption, the "10 % rollback," or the "2 1/2 % reduction," each of which was wrongfully paid to IHSD by the State of Ohio, rather than by Indian Hill real estate property taxpayers directly.

54. Defendants are not entitled to offset the amount owed to taxpayers by the amount of auditor and treasurer fees attributed to collection of delinquent taxes, because neither the auditor nor the treasurer incurred any extra cost in collecting the permanent improvement fund tax.

55. To the extent that the auditor or the treasurer incurred any extra cost in collecting the permanent improvement fund tax, that cost should not be borne by taxpayer who were not rightfully liable for the tax.

56. Defendant IHSD maintains unencumbered funds well in excess of $5,288,071.28.

57. Unencumbered funds maintained by Defendants include funds now clearly belonging to IHSD real estate property taxpayers, rather than to IHSD.

58. As a matter of law, the BTA has determined that IHSD's general fund, which typically exceeds $30,000,000, is "unencumbered."

59. Upon information and belief, Defendant IHSD earned interest on funds collected and held pursuant to the Permanent Improvement Fund tax.

60. Plaintiffs would have invested and earned interest on the funds that Defendants wrongfully exacted from Plaintiffs.

DECLARATORY JUDGMENT AND INJUNCTION

61. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

62. An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning Plaintiffs' equitable, statutory, and constitutional rights to recovery of tax payments unlawfully imposed upon them by Defendants.

63. A judicial declaration is necessary and appropriate at this time as to all Counts.

64. There are no administrative remedies that Plaintiffs are required to exhaust before proceeding with this litigation. See, generally, *Rocca v. Wilke*, 53 Ohio App.2d 8 (1st Dst. 1977).

Class Action Allegations

65. This action is brought, and may be properly maintained, as a class action, pursuant to the provisions of Civil Rules 23(a), 23(b)(1), 23(b)(2), and 23(b)(3).

66. Named Plaintiffs bring this class action on behalf of themselves and all other similarly situated taxpayers.

67. Pursuant to Civ. R. 23(C)(4)(b), the members of the class are as follows: **All Indian Hill School District residential and commercial real property owners who paid real property taxes which included the 1.25 mill Permanent Improvement Fund Tax.**

68. This Court has already conditionally certified the class specified above.

69. Named Plaintiffs are members of Class specified above, and they possess the requisite standing to represent the class.

70. Plaintiffs filed a statutory protest letter on behalf of the Class during each tax period specified in Paragraph 48 above.

71. In its May 8, 2012 Memorandum in Opposition to its Motion for Immediate Class Certification, Defendant IHSD explained "if individual potential members of Class One do decide to file a

protest letter with their next tax payment, they will, by definition, become members of Class Two, and if the Court conditionally certifies that class, plaintiffs' counsel will be able to file subsequent protest letters on their behalf." See p. 2.

72. This Court granted Plaintiffs' Motion for Immediate Class Certification to permit Plaintiffs to fill tax protest letters on behalf of all IHSD taxpayers.

73. Accordingly, for this reason and others, the two classes chronicled in Plaintiffs' original Complaint have now been merged into the single class specified above.

74. The members of the class specified above are unambiguous and are easily identifiable and ascertainable by Defendants' tax records.

75. The exact number of the proposed class is easily ascertainable through records within the possession of Defendants.

76. Named Plaintiffs and all members are "similarly situated" insofar as they have been wrongfully assessed an unlawful tax, paid the tax, and are now entitled to a return of that tax.

77. The Claims of the Named Plaintiffs are typical of the claims of the class, insofar as Plaintiffs, like class members, are property owners within IHSD who paid unlawful taxes and now seek recovery of the unlawful taxes that they paid to IHSD.

78. The questions of law and fact are common to all class members, insofar as Plaintiffs, like class members, are property owners within IHSD who paid unlawful taxes and now seek recovery of the unlawful taxes that they paid to IHSD.

79. Named Plaintiffs will fairly and adequately protect the interests of the class specified above, because their interests are aligned, and are not antagonistic to those of other class members.

80. That the named Plaintiffs and their legal counsel, 1851 Center for Constitutional Law, will fairly and adequately protect the interests of the class specified above is proven by the fact that the Plaintiffs and their legal counsel are substantially the same parties responsible for having diligently pursued litigation, since April of 2010, that has ostensibly resulted in judicial invalidation of the unlawful tax.

81. Named Plaintiffs and their legal counsel, 1851 Center for Constitutional Law, have demonstrated that they are committed to successfully prosecuting this action by funding this litigation themselves since 2010, for approximately five years.

82. Plaintiffs' counsel is sufficiently experienced in relevant litigation, and will adequately protect the interests of the class.

83. Upon information and belief, the class specified above includes approximately 5,000 members.

84. Pursuant to Civ. R. 23(A)(1), the class specified above is sufficiently numerous so as to render joinder of each individual taxpayer impracticable.

85. The amount in controversy for each individual class member, which may only be a few hundred dollars in some cases, is too small to warrant that class member's hiring and payment of his or her own legal counsel, for the purposes of recovering these funds.

86. The claims of Named Plaintiffs are typical of the claims of the class, in that all of their claims are based upon the same legal theories, and no express conflict exists between the proposed class representatives and other class members.

87. Certification if further appropriate under Civ. R. 23(B)(1)(a) and Civ. R. 23(B)(1)(b) because the prosecution of separate actions by individual members of the proposed class would create a risk of inconsistent or varying adjudications and results, including different amounts being refunded at different rates, amounts not being refunded at all, or injunctions against future use of the funds or levying of the tax in some courts, but not in others.

88. Certification is appropriate under Civ. R. 23(B)(2) and Civ. R. 23(B)(3) because Defendants have acted or refused to act on grounds generally applicable to the class (through levying the tax), the plaintiffs seek qualifying declaratory, injunctive, and equitable relief on behalf of the class, which possesses the requisite cohesiveness, and the only questions presented by this are questions of law and fact which are

entirely common to the class as a whole, rather than questions unique to individual members, thereby rendering declaratory and/or injunctive relief appropriate for the class as a whole.

89. The potential difficulties associated with management of this case as a class action are minimal: the largest factual issues will likely be determining a formula for ensuring a proper refund amount to each taxpayer, and then determining the most appropriate way to return improperly- collected funds to each taxpayer.

90. Named Plaintiffs hereby affirm that, to the best of their knowledge, there is no other pending litigation involving any member of the proposed class under the same legal theories as those presented herein.

COUNT I: RESTITUTION

91. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

92. "Courts have broad equitable power to fashion appropriate remedies for adjudicated constitutional and statutory violations." *See Walker v. Toledo,* 2013-Ohio-2809, citing *Swann v. Charlotte–Mecklenburg Bd. of Educ.*,402 U.S. 1, 15–16, (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Carter–Jones Lumber Co. v. Dixie Distrib. Co.,* 166 F.3d 840, 846 (6th Cir.1999)("[A] court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in a particular case.").

93. Further, a suit seeking the return of specific funds wrongfully collected or held by a state or local government may be maintained in equity. *Walker,* supra., citing *Santos v. Ohio Bur. of Workers' Comp.,* 101 Ohio St.3d 74, 2004-Ohio-28, syllabus; *Accord Judy v. Ohio Bur. of Motor Veh.,* 100 Ohio St.3d 122, 2003-Ohio-5277; *Ohio Hosp. Assn. v. Ohio Dept. of Human Serv.,* 62 Ohio St.3d 97, (1991).

94. In Ohio, courts frequently address reimbursements related to unconstitutional governmental assessments through the lens of unjust enrichment. *See Walker v. Toledo,* 2013-Ohio-2809.

95. Unjust enrichment exists when there is: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the "unjust enrichment" element). *Id*.

96. Ohio law does not require that the benefitted party act improperly in some fashion before an unjust enrichment claim can be upheld; instead, unjust enrichment can result "from a failure to make restitution where it is equitable to do so. That may arise when a person has passively received a benefit which it would be unconscionable for him to retain without paying compensation." (Citations omitted.) *Advantage Renovations, Inc. v. Maui Sands Resort, Co., L.L.C.,* 6th Dist. No. E–11–040, 2012-Ohio-1866, ¶ 33.

97. Defendants are holding funds that they wrongfully collected from Plaintiffs through the levying and collection of an unlawful tax on Plaintiffs.

98. Through the Permanent Improvement Fund levy, Defendants have acquired funds from Plaintiffs that they are now not entitled to retain.

99. Defendants have failed to remit the aforesaid funds.

100. Defendants have knowledge that their Permanent Improvement Fund tax collections were unlawful, and therefore have knowledge that Plaintiffs have conferred a benefit on them, against Plaintiffs will, which Defendants are retaining.

101. Defendants have been unjustly enriched through retention and collection of the aforesaid funds, to an extent exceeding $6 million.

102. The Proposed Class is entitled to restitution in the amount of, at minimum, $5,288,071.28.

103. Upon information and belief, Defendant IHSD earned interest on funds collected and held pursuant to the Permanent Improvement Fund tax.

104. Named Plaintiffs and any class member could have invested and earned interest on, or otherwise used, the funds that Defendants wrongfully exacted from Plaintiffs.

105. The Proposed Class is entitled to interest approximating the greater of either (a) the lost interest class members could have earned had they retained and invested the funds themselves; or (b) the interest earned on their funds by Defendants, while Defendants wrongfully held those funds.

106. Defendants retention of taxes collected pursuant to the Permanent Improvement Fun tax would be unjust because that tax was unlawful and therefore voidable if not void.

107. Finally, Named Plaintiffs have, since 2010, expended an amount greater than $10,000 in costs to maintain this Action.

108. Named Plaintiffs are entitled to a refund of their expenses.

COUNT II: R.C. 2723 TAX RECOVERY

109. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

110. In addition to equitable relief through restitution, R.C. 2723.01 provides a statutory avenue for relief from unlawfully-collected taxes.

111. R.C. 2723.01 provides "Courts of common pleas may * * * entertain action to recover [illegal levy or collection of taxes] when collected, without regard to the amount thereof."

112. R.C. 2723.01 further provides that the recovery action must be brought within one year after taxes or assessments are collected.

113. R.C. 2723.02 mandates "Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made."

114. R.C. 2723.02 further provides that the County Auditor be joined in the action.

115. R.C. 2723.03, further provides that "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect them," and "Actions to recover taxes and assessments must be brought against the officer who made the collection."

116. Upon information and belief, the Hamilton County Treasurer is responsible for collecting and having collected the Permanent Improvement Fund tax.

117. Plaintiffs filed their lawsuit for recovery in this Court on January 6, 2012, within one year of the Defendants' first collection of the unlawful Permanent Improvement Fund tax.

118. Plaintiffs have satisfied each element on R.C. 2723, including but not limited to

119. R.C. 2723.03 provides that If a plaintiff in an action to recover taxes or assessments, or both, alleges and proves that he or the corporation or deceased person whose estate he represents, at the time of paying such taxes or assessments, filed a written protest as to the portion sought to be recovered, specifying the nature of his claim as to the illegality thereof, together with notice of his intention to sue under sections 2723.01 to 2723.05, inclusive, of the Revised Code, such action shall not be dismissed on the ground that the taxes or assessments, sought to be recovered, were voluntarily paid."

120. Through June 6, 2012 Order, this Court certified Plaintiffs' proposed class, stating "Plaintiffs January 27, 2011 Motion for Class Certification shall be conditionally granted, pursuant to Civ. R. 23(C)(1) and (C)(3) . . . solely for the purpose of preserving class members claims,"

121. Through June 11, 2012 Order, this authorized the Named Plaintiffs to file a protest letter meeting the requirements of R.C. 2723.03, stating "In order for members of the certified classes to be able to satisfy the requirements of R.C. 2723.03, counsel for Plaintiffs may file with the Hamilton County Treasurer a letter of protest on behalf of all members of the certified classes during each period for payment of the Hamilton County Real Estate tax bill."

122. Plaintiffs dutifully filed protest letters with the County Treasurer during each of the eight tax periods (The Court's Order permitted a protest letter to be filed for the period that has passed during the pendency of Plaintiffs' Motion in June of 2011).

123. R.C. 2723.05 mandates that the Plaintiffs' Permanent Improvement Fund tax payments be refunded in their entirety, stating "If, by judgment or final order of any court of competent jurisdiction in this state, in an action not pending on appeal, it is determined that any tax or assessment or part thereof was illegal and such judgment or order is not made in time to prevent the collection or payment of such tax or assessment, then such tax or assessment or such part thereof as is at the time of such judgment or order

unexpended and in the possession of the officer collecting the same shall be refunded to the person paying such tax or assessment by the officer having the same in his possession."

124. The Ohio Supreme Court has issued a final decision determining that the Permanent Improvement Fund tax was illegal because it did not meet the requirements of R.C. 5705.341 at the time it was approved.

125. The entire amount of funds paid by the proposed class is currently within the possession of Defendants.

126. Pursuant to R.C. 2723, the proposed class is entitled to a refund, from Defendants, of an amount not less than $5,288,071.28.

COUNT III: TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OR JUST COMPENSATION

127. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

128. Section 19, Article I, Ohio Constitution, states: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

129. In *Sogg v. Zurz*, the Ohio Supreme Court held "The question becomes: Does the first sentence of R.C. 169.08(D) enable the state to assume ownership of interest earned on unclaimed funds that the state holds for the owner without violating Section 19, Article I of the Ohio Constitution? * * * We conclude that the first sentence of R.C. 169.08(D)violates Section 19, Article I, Ohio Constitution, as to interest earned on unclaimed funds for which a claim is ultimately submitted." 121 Ohio St.3d 449 (2009).

130. Defendants' holding of Plaintiffs' funds through intentional collection of an unlawful tax, which now must be returned, is materially indistinguishable from state's holding of citizens' unclaimed funds in *Sogg v. Zurz.*

131. The Proposed Class is entitled to compensation for the property taken from them, in the amount of, at minimum, $5,288,071.28.

132. Upon information and belief, Defendant IHSD earned interest on funds collected and held pursuant to the Permanent Improvement Fund tax.

133. Plaintiffs would have invested and earned interest on the funds that Defendants wrongfully exacted from Plaintiffs.

134. The Proposed Class is entitled to interest approximating the greater of either (a) the lost interest class members could have earned had they retained and invested the funds themselves; or (b) the interest earned on their funds by Defendants, while Defendants wrongfully held those funds.

COUNT IV: INJUNCTIVE RELIEF ENJOINING UNLAWFUL TAXATION

135. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

136. R.C. 2723.01 provides "Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments . . ."

137. Defendant IHSD has indicated that will only discontinue collection of the unlawful Permanent Improvement Fund tax "in 2015. . . for one year only."

138. Because the Permanent Improvement Fund tax has been declared unlawful, and Defendants' must be enjoined from reinstituting it.

139. Pursuant to R.C. 5705.341, Defendant IHSD's finances do not permit it to levy an unvoted tax increases akin to the Permanent Improvement Fund tax.

COUNT V: INJUNCTIVE RELIEF ENJOINING MISAPPLICATION OF UNLAWFULLY EXPROPRIATED FUNDS

140. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

141. During the pendency of this action, Defendants must be prohibited from encumbering, dissipating, or otherwise misapplying funds rightfully belonging to Plaintiffs.

142. Plaintiffs respectfully request an order of this Court prohibiting Defendants from taking the above actions, or in the alternative, an order of this Court establishing a constructive trust or escrow, consisting of all $5,288,071.28 plus a reasonable rate of interest.

COUNT VI: INJUNCTIVE RELIEF ENJOINING UNLAWFUL CIRCUMVENTION OF THIS CLASS ACTION LAWSUIT

143. Plaintiffs hereby incorporate by reference the allegations in the foregoing paragraphs as if set forth fully herein.

144. Courts consistently prohibit defendants' efforts to "short-circuit" class actions by "picking off" named plaintiffs' claims or "buying off" the entire proposed class by tendering relief before the court has had an opportunity to certify the class.

145. As one court observed, the notion that a defendant could short-circuit a class action in such a fashion "deserves short shrift. Indeed, were it so easy to end class actions, few would survive." *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir.1978), aff'd *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) ("Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement."); *Hoban v. National City Bank*, 2004-Ohio-6115, ¶¶ 14-23 (8th Dist.) (quoting and following both *Roper* decisions and citing numerous cases in which courts rejected defendants' attempts to moot out class actions by tendering relief, even in cases where no class certification motion had been filed).

146. Further, Ohio Supreme Court precedent prohibits a class action defendant from communicating unilaterally with the members of a putative class. *See Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 76–77, citing *Kleiner v. First Natl. Bank of Atlanta* (11th Cir., 1985), 751 F.2d 1193 ("'A unilateral communications scheme, moreover, is rife with potential for coercion. '[I]f the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive.' … 'Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. The damage from misstatements could well be irreparable.'"); *see also Burns v. Prudential Securities, Inc.*, 145 Ohio App.3d 424, 428 (3d Dist. 2001) (following *Hamilton*).

147. When a defendant engages in a unilateral scheme to moot out the claims of putative class members, members who "settle" based on unilateral communications with the defendant are allowed to rejoin the class. *Hamilton*, 82 Ohio St.3d at 76-77.

148. Defendants must be enjoined from taking action to directly or indirectly circumvent this action.

149. Plaintiffs hereby incorporate all prior filings in this case, as if attached hereto, including all attachments to Plaintiffs' original Complaint and all evidence otherwise submitted by Plaintiffs and Defendants.

150.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and that the Court:

(1) Certify the Class that Plaintiffs have proposed herein, that Class being all Indian Hill School District residential and commercial property owners who paid property taxes which included the 1.25 mill Permanent Improvement Fund charge.

(2) Declare that the Class members are entitled to a refund of all taxes paid pursuant to the unlawful Permanent Improvement Fund tax.

(3) Declare that the Class members are entitled to a refund of, at minimum, as of the date of this filing, $5,288,071.28 plus a reasonable rate of interest.

(4) Preliminarily and Permanently Enjoin Defendants from levying the Permanent Improvement Fund tax.

(5) Preliminarily and Permanently Enjoin Defendants from misapplying, dissipating, or otherwise encumbering fund rightfully belonging to the Class members.

(6) Preliminarily and Permanently Enjoin Defendants from any and all acts having the effect of circumventing this legal action.

(7) Award Plaintiffs' Counsel reasonable attorneys fees, as a condition of and in conjunction with any Court Order or Award in Plaintiffs' favor.

(8) Award Named Plaintiffs their costs in maintaining legal action to prevail as against the Permanent Improvement Fund tax.

(9) Appoint a Special Master, pursuant to the Ohio Rules of Civil Procedure, to preside over the process reimbursing taxpayers.

(10) Grant such other and further relief as the Court deems equitable, just, and proper.

Respectfully submitted,

/s/ Maurice A. Thompson
Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
MThompson@ohioconstitution.org

Curt C. Hartman (0064242)
The Law Firm of Curt C. Hartman
7394 Ridgepoint Drive, Suite 8
Cincinnati, Ohio 45230
Tel: (513) 379-2923
hartmanlawfirm@fuse.net

Christopher Finney (0038998)
Finney Law Firm, LLC
4270 Ivy Pointe Boulevard, Suite 225
Cincinnati, Ohio 45245
(513) 943-6660 phone
(513) 943-6669 fax
Chris @Finneylawfirm.com

Paul M. DeMarco (0041153)
Markovitz, Stock, & DeMarco, LLC
119 East Court Street, Suite 530
Cincinnati, Ohio 45202
Tel: (513) 651-3700
PDeMarco@MSDLegal.com

CERTIFICATE OF SERVICE

A copy of the foregoing was served on this 26th Day of January, 2015, to the following:

Thomas J. Scheve
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202-1251

Harry J. Finke IV
Graydon Head & Ritchey LLP
1900 Fifth Third Center
511 Walnut Street
Cincinnati, Ohio 45202-3157

/s/ *Maurice A. Thompson*
Maurice A. Thompson