

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

DIXON O’BRIEN, JOHN COOK,)
INTERNATIONAL UNION OF)
OPERATING ENGINEERS, LOCAL 150,)
AFL-CIO, and CHICAGO REGIONAL)
COUNCIL OF CARPENTERS,)
UNITED BROTHERHOOD OF)
CARPENTERS AND JOINERS OF)
AMERICA,)

Plaintiffs,)

v.)

VILLAGE OF LINCOLNSHIRE,)
a Municipal Corporation; and)
the ILLINOIS MUNICIPAL LEAGUE,)
an unincorporated, nonprofit, nonpolitical)
association of Illinois cities, villages, and)
incorporated towns,)

Defendants.)

Case No. 18-cv-1310

Judge: John Robert Blakey

Magistrate Judge: Sheila Finnegan

MOTION TO ALTER OR AMEND JUDGMENT

Plaintiffs Dixon O’Brien, John Cook, International Union of Operating Engineers, Local 150, AFL-CIO, and Chicago Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (collectively “Union Plaintiffs”), hereby move, pursuant to Rule 59(e), Fed. R. Civ. P., to alter or amend this Court’s December 7, 2018 Memorandum and Order which dismissed Union Plaintiffs’ Third Amended Complaint with prejudice. Specifically, Union Plaintiffs seek to convert the effect of the Order to a dismissal without prejudice to allow a motion for leave to file an amended complaint (*see* Exhibit A). Alternatively, Union Plaintiffs seek

confirmation that the state law claims presented in Counts IV and V were dismissed without prejudice to refile in state court.

Background

1. On February 21, 2018, Plaintiffs O'Brien and Local 150 filed their Complaint against the Village of Lincolnshire ("Lincolnshire") (Doc. #1). In the Complaint, they argued that Lincolnshire violated their constitutional rights under the First and Fourteenth Amendments when it used tax dollars to fund the Illinois Municipal League's ("IML") speech, which they alleged to be a private organization (*id.*). Prior to any appearances or answer being filed, on February 28, 2018, O'Brien and Local 150 filed an Amended Complaint against Lincolnshire to add factual allegations and further explain the legal basis for their constitutional claims (Doc. #9).

2. On February 22, 2018, this Court sent notice to the parties that it was participating in the Mandatory Initial Discovery Pilot ("MIDP") (Doc. #7). The MIDP requires that responsive pleadings be filed notwithstanding a party's filing of a Rule 12(b) motion and requires that initial discovery responses be served within 30 days after a first responsive pleading is filed (*id.*).

3. On March 16, 2018, Lincolnshire filed its Answer to the Amended Complaint (Doc. #15). In its Answer, Lincolnshire admitted that the IML was a private organization (*id.* ¶ 12). Lincolnshire's Answer was filed by its counsel, Lorilea Buerkett of Brown, Hay & Stevens, LLP (*id.*). Brown, Hay & Stevens, LLP, had represented the IML since at least 2015, and the IML was funding Lincolnshire's legal defense in this case (Exhibit B, IML Third Responses to Requests to Produce, OBL 430; Exhibit C, Brandt Dep. Tr. at 37-38).

4. On May 4, 2018, O'Brien and Local 150 filed an unopposed motion for leave to file a Second Amended Complaint ("SAC") to add Plaintiffs John Cook and the Chicago Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America ("Carpenters")

who had identical claims to those of O'Brien and Local 150, respectively (Doc. #29). On May 7, 2018, this Court granted the motion and Union Plaintiffs filed their SAC (Doc. #31, 32).

5. On May 21, 2018, Lincolnshire filed a Motion to Dismiss Union Plaintiffs' SAC (Doc. #36). In its Motion, Lincolnshire challenged Union Plaintiffs' standing and argued that its payment of membership dues to the IML was "government speech" and therefore was not subject to First Amendment review (*id.* at 4-9). Lincolnshire did not argue that the IML was a governmental entity or that it was entitled to its own "government speech" protections. Instead, it argued that Lincolnshire adopted the IML's speech so there could be no First Amendment violation (*id.*). On May 22, 2018, this Court advised Union Plaintiffs to review its Standing Order concerning motions to dismiss and elect either to amend the SAC or proceed with briefing (Doc. #38).

6. On June 19, 2018, Union Plaintiffs elected to amend and filed their Third Amended Complaint ("TAC") (Doc. #40). In the TAC, Union Plaintiffs included additional facts related to standing, added the IML as a party and alleged that it acted outside of its statutory authority when it engaged in political activity, and alleged that Lincolnshire acted outside of its statutory authority when it used tax dollars to fund a political organization (*id.*).

7. On August 3, 2018, the IML and Lincolnshire filed a Motion to Dismiss the TAC (Doc. #51). In its Memorandum, Defendants argued that Lincolnshire's funding of the IML is not subject to First Amendment scrutiny because the IML is "not a legal entity separate from the public entities that comprise it;" therefore, "the IML's speech is the governmental speech of its members, including the Village" (*id.* at 7). Defendants' motion was filed by Lorilea Buerkett of Brown, Hay & Stevens, LLP (*id.*). Defendants did not file an answer along with their motion to dismiss as was at that time required by the MIDP.

8. In response, on August 24, 2018, Union Plaintiffs argued that the government speech doctrine is inapplicable because Lincolnshire is compelling taxpayers to fund the speech of a private entity, the IML, and Lincolnshire is not setting or controlling that speech (Doc. #53). Union Plaintiffs also maintained that the IML was statutorily prohibited from engaging in political activity, and, as a result, Lincolnshire was prohibited from being a member of the IML (*id.*).

9. In their Reply, filed August 31, 2018, Lincolnshire and the IML maintained that Lincolnshire's funding of the IML is not subject to First Amendment scrutiny because the IML's speech is not private, but rather "government speech," and that the IML was permitted to engage in political activity (Doc. #54).

10. On September 13, 2018, this Court heard oral argument on Defendants' Motion to Dismiss the TAC and took the motion under advisement. The Court explicitly directed the parties to adhere to the previously set discovery schedule (Doc. #56).

11. On September 11, 2018, Union Plaintiffs issued their First Set of Requests for Production and Requests to Admit to the IML (Doc. #72, Exs. 1, 2). Union Plaintiffs requested certain documents relevant to the IML's status as a public or private entity (Doc. #72, Ex. 1). Union Plaintiffs also requested that the IML admit that it is a private entity (Doc. #72, Ex. 2). Defendant IML refused to admit or deny that it was a private entity, and initially refused to provide any responsive documents or any documents in accordance with the MIDP (Doc. #72). After numerous Rule 37.2 conferences, Defendant IML provided selected documents in response to Union Plaintiffs' discovery requests on October 24, November 8, and November 21; however, Union Plaintiffs eventually were forced to file a Motion to Compel (Doc. #72).¹ Nevertheless, even the incomplete production provided new evidence proving that the IML is a private entity, a

¹ Union Plaintiffs' Motion to Compel was deemed moot when this Court entered its December 7, 2018 Order granting Defendants' Motion to Dismiss.

private organization is involved in the creation of the IML's speech, and the IML is involved in conduct that would be unconstitutional if the IML were a public entity. For example, it uses a private "strategic political communications" firm (Exhibit B, IML Third Response to Request to Produce No. 4, Ex. A, OBL 427), the IML and its events are substantially funded by "sponsorships" from private corporations (Exhibit D, IML Second Response to Request to Produce No. 3, Ex. 2), and that the IML makes financial contributions to private entities such as the Greater Springfield Chamber of Commerce and the American City County Exchange (a division of the American Legislative Exchange Council (ALEC)), and makes financial contributions to religious organizations (Exhibit B, IML Third Response to Request to Produce No. 4, Ex. A, OBL 424, 427, 439, 452, 456, 459; Exhibit E, IML Fourth Response to Request to Produce No. 4, Ex. B).

12. On September 17, 2018, Union Plaintiffs requested available dates for the depositions of Lincolnshire representatives Elizabeth Brandt and Brad Burke, and IML representatives Brad Cole and Patrick Hayes. After making multiple requests and serving several unilateral deposition notices because no dates were provided, Defendants finally agreed to the depositions at the earliest available dates for each witness: Patrick Hayes on November 5, Brad Cole on November 12, and Elizabeth Brandt and Brad Burke on November 27. The testimony provided during IML Executive Director Cole's deposition revealed that:

- the IML is not a municipality, local public entity, or a part of state government, and the IML claimed that it is not a public body subject to the Illinois Freedom of Information Act ("FOIA") (Exhibit F, Cole Dep. Tr. at 16-18, 117, 148);
- the IML functions like a private corporation with the Executive Director (a private citizen) serving as the CEO, and Board members (who are leaders of member municipalities, but do not serve in their governmental capacity while on the Board

of the IML) serving as the Board of Directors (Exhibit F, Cole Dep. Tr. at 46, 52, 55, 57);

- the IML carries separate directors and officers insurance to cover the liabilities of the Board members while serving in their capacity as IML Board members (Exhibit F, Cole Dep. Tr. 53-55);
- only approximately one third of the IML's revenue comes from membership dues (Exhibit F, Cole Dep. Tr. at 126);
- the IML has made contributions to a church and a Catholic school (Exhibit F, Cole Dep. Tr. 222-223);
- the IML makes financial contributions to private entities, such as the Greater Springfield Chamber of Commerce and the American City County Exchange (Exhibit F, Cole Dep. Tr. at 11, 119, 199-202, 208).

13. Union Plaintiffs also continued their own investigation into the IML's public/private status and private involvement in creation of the IML's speech. This investigation uncovered an email where IML Executive Director Cole admitted that the IML was a separate legal entity from its members (Exhibit G, OBL 170-171); a FOIA response from the IML stating that it was not a public body under the Illinois Freedom of Information Act (Exhibit H, OBL 172-174); documents discussing the IML's formation of private corporations (Exhibit I, OBL 165-169); and details about the IML's use of a private "strategic political communications" firm (Exhibit J, OBL 352). Union Plaintiffs also sent a subpoena to the IML's private "strategic political communications" firm after the IML refused to provide documents related to its involvement in the IML's decisions and communications; however, the IML filed a motion to quash that subpoena arguing in part that the requested documents would "result in the disclosure

of information, strategies, and methods that are not publicly available and constitute proprietary strategies for the IML to fulfill its purpose” (Doc. #78 at 4-5).

14. While this Court was taking Defendants’ Motion to Dismiss under advisement and Union Plaintiffs were conducting further investigation and discovery, Union Plaintiffs also were preparing a motion for summary judgment to include its newly discovered evidence, which was due to be filed no later than December 14, 2018.

15. On December 7, 2018, this Court dismissed Union Plaintiffs TAC, with prejudice, finding that while Union Plaintiffs had standing, the IML is not a private entity based on 65 ILCS 5/1-8-1, that Union Plaintiffs failed to plead private involvement in the IML’s decisions, and that it was declining to exercise jurisdiction over Union Plaintiffs’ state law claims as presented in Counts IV and V.

I. This Court Should Alter or Amend Its Order to Have Its Effect Be Without Prejudice.

16. This Court’s December 7 Order should be altered or amended to have its effect be without prejudice in order to allow Union Plaintiffs to seek leave to file an amended complaint. This amended complaint would include allegations based on newly discovered evidence which was not available at the time that Union Plaintiffs filed their most recent complaint or their Response to Defendants’ Motion to Dismiss. Specifically, the amended complaint would add facts regarding the IML’s status as a private organization, private involvement in the creation of the IML’s speech, and the IML’s involvement in conduct that would be unconstitutional if the IML were a public entity. In addition, the amended complaint would add counts, presented in the alternative, addressing the IML’s First Amendment violations in the event this Court determines that the IML is a governmental entity. A copy of the proposed amended complaint is attached as Exhibit A.

17. “A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e). Rule 59 motions “serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.” *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F.Supp.2d 704, 707 (N.D. Ill. 2006) quoting *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir.1996). “However, once the requirements of [Rule 59] have been met, a plaintiff does not lose the ability to amend a complaint under the liberal standard articulated in Rule 15 simply because the court entered judgment and she now must seek relief under Rule 59.” *Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015), citing *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Ind.*, 786 F.3d 510, 521 (7th Cir.2015). “In this situation, the liberal amendment policy embodied in Rule 15 continues to govern a court's decision to dismiss a complaint with prejudice and its consideration of a post-judgment motion to amend.” *Id.*

A. The Private Status of the IML Was Undisputed when Previous Amendments Were Filed.

18. In this case, when O’Brien and Local 150 filed its original Complaint, it alleged that Lincolnshire violated their constitutional rights under the First and Fourteenth Amendments when it used tax dollars to fund the IML’s speech, which they alleged to be a private organization (Doc. #1). In compliance with Rule 8(a)(2), this short and plain statement regarding the IML’s status as a private entity properly alleged that Union Plaintiffs were entitled to relief, and it was sufficient to provide Defendant with fair notice of the claim and its basis. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Indeed, Lincolnshire admitted that the IML was a private organization when it filed its Answer to the Amended Complaint (Doc. #15

¶ 12).² Lincolnshire made this admission while represented by Brown, Hay & Stevens, LLP, which was hired by the IML to represent Lincolnshire and had represented the IML since at least 2015 (*id.*; Exhibit B, IML Third Response to Requests to Produce, OBL 430; Exhibit C, Brandt Dep. Tr. at 37-38). Thus, there was no dispute over the IML's status as a private entity and no reason for O'Brien or Local 150 to seek leave to amend to plead more specifically that the IML was a private entity or had private involvement in its decision making or communications.

19. Similarly, when Lincolnshire filed its Motion to Dismiss Union Plaintiffs' Second Amended Complaint,³ it did not argue that the IML was a governmental entity or that it was entitled to its own "government speech" protections (Doc. #36). Instead, it argued that Lincolnshire adopted the IML's speech, so there could be no First Amendment violation (*id.*). Therefore, when Union Plaintiffs elected, pursuant to this Court's Standing Order, to amend the SAC, there was still no dispute over the IML's status as a private entity and no reason for O'Brien or Local 150 address this issue in more detail when it filed its TAC.

20. It was not until after Union Plaintiffs added the IML as a Defendant in its TAC that the IML and Lincolnshire filed a Motion to Dismiss the TAC, arguing that the IML was a public entity and enjoyed the governmental speech exemption from First Amendment scrutiny (Doc. #51). At this point, the Court did not offer Union Plaintiffs an opportunity to amend the complaint in response to the motion, the allegation that the IML was a private entity was well-pled, and was

² On February 28, 2018, O'Brien and Local 150 filed an Amended Complaint against Lincolnshire to add factual allegations and further explained the legal basis for their constitutional claims (Doc. #9). However, this was filed prior to any appearances or answer being filed and was done at Plaintiffs own instigation to clarify the pleading.

³ On May 4, 2018, O'Brien and Local 150 filed an unopposed motion for leave to file a SAC to add Plaintiffs Cook and the Carpenters who had identical claims to those of O'Brien and Local 150 (Doc. #29). On May 7, 2018, this Court granted the motion and Union Plaintiffs filed their SAC (Doc. #'s 31 & 32). There were no substantive changes made from the previously filed Amended Complaint. The amendment was simply to avoid the inefficiencies duplicate claims would have presented to Lincolnshire and this Court.

previously admitted by one of its members; therefore, Union Plaintiffs proceeded to briefing and oral argument on the motion while continuing its investigation and pursuing discovery on the private/public status of the IML.

21. These facts do not describe a situation where Union Plaintiffs unreasonably delayed seeking leave to file an amendment, nor was it the case that Union Plaintiffs repeatedly amended failing to cure a known defect where future amendments would be futile. The basis for the dismissal in the Order was that the IML is a public entity and the pleadings did not contain allegations that the IML had private involvement in their decisions (Doc. # 86). At the time Union Plaintiffs' TAC was filed, it was not disputed that the IML was a private entity. Under the theory presented by Union Plaintiffs, if the IML is a private entity, there would be no need to plead private involvement in their decision-making process. Accordingly, Union Plaintiffs request this Court grant its Motion to Alter or Amend to allow it to plead more specifically how the IML is a private entity, how it has private involvement in its decisions and communications, and how it engages in conduct that would violate the First Amendment if it were a public entity.

B. Union Plaintiffs Have Discovered New Evidence Which Cures Issues Raised in the Order.

22. Since the filing of the TAC and briefing on Defendants' Motion to Dismiss where this argument was first raised, Union Plaintiffs have uncovered new evidence which tends to prove the IML is a private organization, that it had private involvement in the creation of its speech, and that the IML is involved in conduct that would be unconstitutional for the IML to engage in if it were a public entity. If this Court grants the instant Motion, Union Plaintiffs intend to file promptly a Motion for Leave to file a Fourth Amended Complaint setting forth detailed factual allegations based on this newly discovered evidence.

23. First, Union Plaintiffs have uncovered additional facts proving the IML is a private entity. In addition to Lincolnshire's admission that the IML is a private entity, and the IML's refusal to deny that it is a private entity in response to Union Plaintiffs' Requests to Admit, Union Plaintiffs have discovered that the IML and its events are funded by "sponsorships" from private corporations (Ex. D); that the IML makes financial contributions to private entities such as the Greater Springfield Chamber of Commerce and the American City County Exchange (a division of ALEC) (Exs. B, E, F); the IML makes financial contributions to religious organizations (*id.*); the IML admits that it is not a municipality, local public entity, or a part of state government, and the claims that it is not a public body subject to FOIA (Exs. F, H); the IML is run by a private citizen and the members of the Board do not serve in their governmental capacity while on the Board (Ex. F); the IML carries separate directors and officers insurance to cover the liabilities of the Board members while serving in their capacity as IML Board members (*id.*); only approximately one third of the IML's revenue comes from membership dues (*id.*); the IML admitted that it is a separate legal entity from its members (Ex. G); and the IML has formed corporations, one of which competes with private businesses (Ex. I). These facts prove that the IML is a private entity, thus Lincolnshire violated Union Plaintiffs' First Amendment rights when it compelled them to subsidize a private third party's speech. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 11-13 (1990). Similarly, if the IML a governmental association acting only at the direction of its members, then Lincolnshire, through the IML, has violated Union Plaintiffs' First Amendment rights when it compelled them to subsidize the private speech of the other entities and religious organizations.

24. In addition, the newly discovered evidence proves that the IML had private involvement in the creation of its speech. Specifically, the IML uses a private "strategic political

communications” firm to craft its messaging to the public and to engage in political activity (Exs. B, F, J). The details surrounding the level of involvement by this firm in the decision-making and communications are not fully known because the IML was uncooperative throughout each step of discovery. The IML did not provide documents to Union Plaintiffs in accordance with the rules set forth in the MIDP, delayed the scheduling of all depositions until after the original deadline for the close of discovery, refused to respond adequately to Union Plaintiffs’ written discovery which prompted a Motion to Compel, and attempted to quash Union Plaintiffs third-party subpoena which was sent to the IML’s private “strategic political communications” firm. Plaintiffs contend that if the IML cooperated in the discovery process, the evidence supporting Union Plaintiffs’ claims would be much more substantial. Nonetheless, based on the new evidence obtained by Union Plaintiffs, it can adequately plead that a private firm was involved in the IML’s communications decision-making process.

25. Additionally, if this Court grants Union Plaintiffs’ Rule 59 Motion and subsequent motion for leave to amend, it will also include additional counts, pled in the alternative, alleging that the IML itself violated Union Plaintiffs’ constitutional rights under the First Amendment by compelling them to subsidize the speech of several private third parties. The new evidence gathered by Union Plaintiffs show that the IML has made contributions to a church, a catholic school, and schools affiliated with other religions and has also made financial contributions to private entities that engage in political activity that is not controlled by the IML or any of its members, such as the Greater Springfield Chamber of Commerce and the American City County Exchange (a division of ALEC) (Exs. B, E, F). If this Court determines that the IML is a public entity, then the IML’s use of taxpayer dollars to support these religious institutions and private speech violates Plaintiffs First Amendment rights. It would be more efficient to include these

claims in the current action as opposed to Union Plaintiffs bringing a second action against the IML for this conduct.

II. In the Alternative, this Court Should Confirm that the State Court Claims Were Dismissed Without Prejudice.

26. On page 18 of the Order, this Court states that it “declines to exercise its supplemental jurisdiction over [the] remaining state law claims (Doc. # 86). However, the Court then dismisses the entire TAC with prejudice (*id.*). Ordinarily, the declination of jurisdiction excludes the state law claims from the dismissal with prejudice (*see., e.g., Sweeney v. Zoeller*, 2013 WL 209047 *13 (N.D. Ind. January 17, 2013) (dismissing state law claims without prejudice to being litigated in state court, relying on *Chicago Tribune Co. v. Board of Trustees of Univ. of Illinois*, 680 F.3d 1001, 1002-1003 (7th Cir. 2012)), but Union Plaintiffs request clarification on that point so as to avoid arguments in state court if Union Plaintiffs refile those claims.

WHEREFORE, Union Plaintiffs hereby request that the Court convert the effect of the Order to a dismissal without prejudice in order to allow a motion for leave to file an amended complaint. Alternatively, Union Plaintiffs request that the Court issue an order confirming that the state law claims presented in Counts IV and V were dismissed without prejudice.

Dated: January 4, 2019

Respectfully submitted,

By: /s/Robert A. Paszta
One of the Attorneys for Local 150

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on January 4, 2019, he electronically filed the foregoing with the Clerk of Court using the CM/CM/ECF system, which sent notification to the following:

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