IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DELAWAREANS FOR EDUCATIONAL OPPORTUNITY and NAACP DELAWARE STATE CONFERENCE OF BRANCHES, Plaintiffs, v. JOHN CARNEY, Governor of the State of Delaware; SUSAN BUNTING, Secretary of Education of the State of Delaware; KENNETH A. SIMPLER, Treasurer of the State of Delaware; SUSAN DURHAM, Director of Finance of Kent County, Delaware; BRIAN MAXWELL, Chief Financial Officer of New Castle County, Delaware; and GINA JENNINGS, Finance Director for Sussex County, Defendants.	)	C.A. No. 2018-0029-JTL

DEFENDANT GINA JENNINGS' REPLY BRIEF IN SUPPORT OF HER MOTION TO DISMISS THE VERIFIED COMPLAINT PURSUANT TO COURT OF CHANCERY RULE 12(B)(6).

MARGOLIS EDELSTEIN

/s/ Herbert W. Mondros
Herbert W. Mondros, Esq.
ID No. 3308
Helene Episcopo, Esq.
ID No. 6406
300 Delaware Ave., Suite 800
Wilmington, DE 19801
(302) 888-1112
Email:hmondros@margolisedelstein.com
Counsel to Defendant Gina Jennings

DATED: July 18, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DELAWAREANS FOR EDUCATIONAL OPPORTUNITY and NAACP DELAWARE STATE CONFERENCE OF BRANCHES, Plaintiffs,	)	C.A. No. 2018-0029-JTL
v.	)	
JOHN CARNEY, Governor of the State of Delaware; SUSAN BUNTING, Secretary of Education of the State of Delaware; KENNETH A. SIMPLER, Treasurer of the State of Delaware; SUSAN DURHAM, Director of Finance of Kent County, Delaware; BRIAN MAXWELL, Chief Financial Officer of New Castle County, Delaware; and GINA JENNINGS, Finance Director for Sussex County, Defendants.	)	

DEFENDANT GINA JENNINGS' REPLY BRIEF IN SUPPORT OF HER MOTION TO DISMISS THE VERIFIED COMPLAINT PURSUANT TO COURT OF CHANCERY RULE 12(B)(6).

Defendant Gina Jennings filed a Motion to Dismiss Plaintiffs' Complaint on April 13, 2018. Plaintiffs filed their Response in Opposition on May 22, 2018. Defendant Gina Jennings replies to Plaintiffs' Response in Opposition, and

incorporates any and all arguments presented in her Opening Brief in support of her Motion to Dismiss, as well as the arguments made by the other Defendants in their respective motions. Defendant Jennings respectfully requests that this Court enter an Order dismissing all claims against her because (1) she is an improper party to this action; and (2) this Court lacks subject matter jurisdiction.

A. DEFENDANT GINA JENNINGS IS AN IMPROPER PARTY TO THIS ACTION.

As set forth in more detail in Defendant Jennings's Opening Brief in support of her Motion to Dismiss, Defendant Jennings is an ***improper party*** to this law suit. Plaintiffs contend that the County Defendants are proper parties to Counts I and II of this matter because "by collecting insufficient taxes, they contribute to the inadequacy of educational support." Pls.' Resp. at page 30. Defendant Jennings is not a member of the Department of Education, as she is a member of the Department of Finance, ***appointed by Sussex County***. 9 *Del. C.* § 7004(b) (emphasis added). Defendant Jennings's duty, as Director of Finance of Sussex County is to collect taxes. 9 *Del. C.* § 7004(c).

However, Defendant Jennings is not delegated any power to levy taxes for school purposes, as that authority lies with the district. 14 *Del. C.* § 1902. Sussex County retains the power to "fix the rate upon the assessed valuation of all real property in Sussex County subject to assessment by the County." 9 *Del. C.* § 7001. Notably, Defendant Jennings ***is not one of the five (5) members of the County***. 9

Del. C. §§ 7001, 7002. Plaintiffs did not contest any of Defendant Jennings' arguments pursuant to the requisite statutes. Therefore, as Defendant Jennings is not a member of the Department of Education, is not delegated the power to levy taxes for school purposes, and does not retain the power to fix the tax rate, this Court must dismiss all claims against her.

B. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

1. Plaintiffs' Complaint Does Not Seek An Equitable Remedy.

Plaintiffs' argument that there is no adequate remedy at law is flawed. First, it is Plaintiffs' burden to demonstrate that this Court has equitable subject matter jurisdiction. *Gladney v. City of Wilm.*, 2011 Del. Ch. LEXIS 182, at *9 (Del. Ch. Nov. 30, 2011). The Court's "jurisdictional inquiry is a serious one involving a close examination of the plaintiff's claims and desired relief, not a perfunctory verification of the plaintiff's incantation of magic words sounding in equity." *Id.* (citing *Savage v. Savage*, 920 A.2d 403, 408 (Del. Ch. 2006))(quotations omitted). Plaintiffs have not met their burden.

Plaintiffs contend that a writ of mandamus is not available "for restraining or preventing action,"[1] and Plaintiffs' contend that the relief sought in Count III is an order ***"preventing County Defendants from continuing to collect county and***

[1] Pls.' Resp. at 10, citing *Moore v. Stango*, 1992 WL 114062, at *4 (Del. Super. May 8, 1992).

school district taxes because the tax collection disregards the requirement that real property be assessed for the purposes at its true value in money." *See* Plaintiff's Response in Opposition to County Defendants' Motion to Dismiss at page 10 (hereinafter referred to as "Pls.' Resp."). Count III of Plaintiffs' Complaint alleges the following:

> Delaware law, 9 *Del. C.* § 8306(a), requires that each property be assessed for tax purposes at its "true value in money." ¶ 185 Nevertheless, taxes are being collected based on property assessments conducted in 1987 (Kent County), 1983 (New Castle County) and 1974 (Sussex County). ¶ 186. This failure to collect the appropriate amount of property taxes for schools results in less tax revenue available for schools. ¶ 187. This under-collection harms Disadvantaged Students by reducing the resources available for their education. ¶ 188. Plaintiffs are entitled to an order that will require compliance with 9 *Del. C.* § 8306(a). ¶ 189.

Thus, entirely contrary to Plaintiffs' Response, the plain language of Plaintiffs' Complaint does not mention relief sought as an order "preventing County Defendants from continuing to collect county and school district taxes." Pls.' Resp. at 10. Rather, the plain language of Count III of their pleading demonstrates that they seek an order "***that will require compliance with 9 Del. C. § 8306(a).***" This requisite statute, 9 *Del. C.* § 8306(a) requires that "[a]ll property subject to assessment shall be assessed at its true value in money." Thus, regardless of the creative play on words presented by Plaintiffs' Response, Count III of Plaintiffs' Complaint seeks (1) a declaration that Defendants violated, and are violating, 9 *Del. C.* § 8306; and (2) to the extent that Defendants are failing to act, Plaintiffs seek a

writ of mandamus to impose a duty required under law.[2] Therefore, Plaintiffs' argument that a "mandamus is not available for restraining or preventing an action"[3] fails, because Plaintiffs did not plead for that relief.

2. Plaintiffs' Have An Adequate Remedy At Law in the Form of a Declaratory Judgment

Without reiterating the arguments in Defendant Jennings Opening Brief, Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction. Plaintiffs state that "[i]n the absence of the Declaratory Judgment Act, Count III would require injunctive relief, since the goal of Count III is to ***stop County Defendants from collecting taxes on the basis of out-of-date assessments***." Pls.' Resp. at 14 (emphasis added). Again, Plaintiffs prayer for relief in Count III of the Complaint does not seek an order to "stop" the County Defendants from collecting taxes on the basis of an out of system. In fact, Plaintiffs' Complaint does not seek either a preliminary or a permanent injunction related to the collection of taxes. Rather, ¶ 189 states "Plaintiffs are entitled to an order that will require compliance with 9 *Del. C.* § 8306(a)." Compl. at ¶ 189.[4] Additionally, Count I requests that the

[2] Black's Law Dictionary defines "mandamus" as a "writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act."
[3] Pls.' Resp. at 10-11.
[4] Plaintiffs later state in their Response that "Plaintiffs seek an order that will require compliance with the statute – a declaration that prevents County Defendants from continuing to collect taxes on the basis of those assessments." Pls.' Resp. at 20. Again, Plaintiffs state that "Count III presents a justiciable issue because it, too, turns

court enter an order that "requires defendants to cure that violation" Compl. at ¶ 180, and Count II asks the court to enter an "order that will require that Delaware cease its violation and meet its constitutional obligations." Compl. at ¶ 184. Thus, as presented in Defendant Jennings' Opening Brief, these prayers for relief can adequately be addressed as a matter of law.

Plaintiffs' cite to *Jefferson Chem. Co. v. Mobay Chem. Co.*, 253 A.2d 512 (Del. Ch. 1969) for the proposition that the "Declaratory Judgment Act was not intended to alter the jurisdictional balance between the courts." Pls.' Resp. at 13. Although this statement of law is an accurate statement, Plaintiffs misapply *Jefferson Chem.*. First, the *Jefferson Chem.* court acknowledged that the "law of the case is that ***unless there is some special basis for equity jurisdiction, measured by traditional standards, [Chancery Court] does not have jurisdiction in a declaratory judgment action***." *Jefferson Chem.*, 253 A.2d 512 at 514. The court inquired into the relief that the complaint truly sought, and the court noted that the case revolved ***around contract interpretation*****,** vesting legal title to patents in the plaintiff, which was not disputed by the defendant**.** 253 A.2d at 514-515 (emphasis added). Specifically, the

---

on the meaning of a statute and ***whether the county is complying with the statute at a particular point in time***." Pls.' Resp. at 22. Thus, Plaintiffs recognize that their prayer for relief in relation to Count III is a declaratory judgment as to whether 9 *Del. C.* § 8306 is violated. As discussed in Defendant Jennings's Opening Brief, an injunction to comply with a declaration is not necessary and jurisdiction for this matter lies in the Superior Court.

court noted that the true relief sought was an order to prevent the defendant from "interfering with the exercise of whatever rights" the plaintiff was found to have under the contract, and to "effectively stop" the defendant from "taking any action to remove title to the patents or to otherwise interfere" with the plaintiff's rights to use the patents pursuant to the contract. *Id.* at 515. Based on this assessment, the court determined that subject matter jurisdiction existed. *Id.*

Plaintiffs' reliance on the *Jefferson Chem.* decision is inapposite. First, this present action does not involve a contract interpretation between two private parties. Rather, Plaintiffs contend that Defendant Jennings is violating 9 *Del. C.* § 8306 and other applicable state laws and/or constitutional obligations. Compare the court's opinion in *Jefferson* to a more recent decision, *Tunnell Cos., L.P. v. Del. Div. of Revenue*, 2009 Del. Ch. LEXIS 123 (Del. Ch. July 13, 2009). In *Tunnell*, the court cited to the *Jefferson* court's holdings on subject matter jurisdiction. The Vice Chancellor held that this Court lacked subject matter jurisdiction over a dispute involving "the proper construction of 30 *Del. C.* § 2110, a general provision of the state tax code" that the Attorney General allegedly interpreted "in a certain way that interfere[d] with the plaintiff's normal business operations." *Tunnell*, 2009 Del.Ch. LEXIS 123, at *1.

In *Tunnell*, the plaintiff alleged that the interpretation by the Attorney General as applied to the plaintiff was discriminatory, thus violating the United States

Constitution and the Constitution of this State. *Id.* at *1-2. The court analyzed the relief sought in the plaintiff's complaint, and the court noted that the complaint sought a declaratory judgment as to the proper interpretation of the statute, and "such further relief as may be just and proper." *Id.* at *2. The court also stated that the complaint did not allege that the Attorney General was "threatening coercive action against the plaintiff based on the challenged interpretation or that such coercive action, if it occurred, would threaten the plaintiff with irreparable harm." *Id.* Likewise, the court asserted that the complaint did not "specifically seek any equitable relief." *Id.* The *Tunnel* court cited to the *Jefferson Chem.* decision noting the following:

> [T]he question of subject matter jurisdiction in the case of an action for declaratory judgment is based upon application of the same criteria that would obtain if the Declaratory Judgment Act were not there. Here, the complaint is not based on any claim that falls within the inherent jurisdiction of the Court of Chancery; indeed, it is clear that issues of ***statutory construction and claims of unconstitutionality give rise to no particular equitable remedy.*** Moreover, there is no reason to believe that, once a court of competent jurisdiction has construed the act in question and issued a final judgment, the Attorney General would, nevertheless, act in contravention of that judgment. Thus, there is no colorable argument that an equitable remedy will ever be required in this case.

Id. at *2-3 (internal quotations omitted)

Here, Plaintiffs seek an order requiring "compliance" with 9 *Del. C.* § 8306. Thus, the Court would first have to determine whether the Defendants violated the 9 *Del. C.* § 8306 and the other applicable and relevant statutes. Next, the Court

would have to determine the constitutionality of applicable provisions as related to this cause of action. Like the court emphatically stated in *Tunnell*, there is no colorable argument that an equitable remedy will be required in this case.

Plaintiffs' Response attempts bolster their argument with piecemeal portions of relevant case law. In pertinent, Plaintiffs' brief states:

> "Nothing about the presumption changes the answer to that question, which is still answered based on what kind of enforcement would be necessary in the event there was no declaratory judgment or it were not followed. ***As acknowledged in Gladney, notwithstanding the presumption, "[i]t may actually be the case that a particular agency does not follow such judgment,"*** 2011 WL 6016048, at *4 (internal citation and quotation omitted), and the jurisdiction question is what order would be required in that case. *See Heathergreen*, 503 A.2d at 642 (holding that jurisdiction is determined by considering what kind of coercive action would be necessary)." Pls.' Resp. at pg 15-16.

Contrary to the way Plaintiffs cite to *Gladney*, the language Plaintiffs cite to states, in whole:

> It would be an anathema to our form of government to believe, as a bassline principle, that after a court renders a declaratory judgment another governmental agency would not follow that decision. ***It may actually be the case that a particular agency does not follow such judgment, but a party should only seek injunctive relief if that agency actually refuses to comply with the judicial declaration.***

Gladney, 2011 Del.Ch. LEXIS 182, at *17 (emphasis added).

Likewise, Plaintiffs cite to *Doe v. Coupe*, 2015 Del. Ch. LEXIS 187, 2015 WL 4239484, (Del. Ch. July 14, 2015) for the proposition that "it would have been a misapplication of the Declaratory Judgment Act 'to dismiss the Complaint on the

grounds that Plaintiffs do not really 'need' injunctive relief . . . because they could file in Superior Court for a declaratory judgment . . . and that such judgment would be 'final' and would obviate the need for any further injunction (assuming Defendant abides by the judgment)." Pls.' Resp. at 16. Again, piecemeal quotations presented by the Plaintiff, when analyzed as a whole, are not persuasive. First, *Doe v. Coupe* was a criminal matter seeking an "order requiring that the Department of Correction ***stop forcing Plaintiffs to wear GPS-monitoring ankle bracelets***." 2015 Del. Ch. LEXIS 187, at *6, 2015 WL 4239484 (emphasis added). In *Doe*, the plaintiffs were convicted and incarcerated for sex crimes, and subsequently released on probation. *Id.* at *1. A statute was enacted after the convictions of each plaintiffs, which required the plaintiffs to wear a GPS monitoring device while out on probation. *Id.* at *1-2. The plaintiffs sought an order from the court "preliminary and permanently enjoining Defendant from requiring them to continue wearing the GPS devices. Plaintiffs also [sought] a declaration that 11 *Del. C.* § 4121(u) on its face and as applied by Defendant violates the Fourth Amendment to the United States Constitution." *Id.* at *3. The defendant attempted to dismiss the case based on lack of subject matter jurisdiction on the basis that a declaratory judgment on the constitutionality would be sufficient, and require no injunctive relief. *Id.* at *3-4. The court held that subject matter jurisdiction resided in Chancery Court because the plaintiffs demonstrated that "the harms the GPS monitors allegedly inflict upon them

probably cannot be cured by a legal remedy such as damages," and the plaintiffs "primarily sought to have the GPS monitor bracelets removed from their ankles; no legal remedy would be adequate to redress that grievance." *Id.* at *6-7. Unlike the plaintiffs in *Doe v. Coupe*, Plaintiffs have not presented any form of irreparable harm or irreparable injury, or that a legal remedy- such as a declaratory judgment- would not be adequate.[5]

[5] "The Court may grant a preliminary injunction where the moving party demonstrates: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balancing of the equities tips in its favor." *Zrii, LLC v. Wellness Acquisition Group, Inc.*, 2009 Del. Ch. LEXIS 167, at *25, 2009 WL 2998169 (Del. Ch. Sept. 21, 2009). "To obtain a permanent injunction, [the plaintiff] must show: (1) actual success on the merits; (2) irreparable harm; and (3) a balance of the equities favoring such relief." *Revolution Retail Sys., LLC v. Sentinel Techs., Inc.*, 2015 Del. Ch. LEXIS 279, at *77, 2015 WL 6611601 (Del. Ch. Oct. 30, 2015).

CONCLUSION

Based on the arguments asserted in Defendant Jennings's Opening Brief in support of her Motion to Dismiss, and the arguments presented in this Reply, Defendant Jennings respectfully requests that this Court dismiss the Complaint in its entirety.

MARGOLIS EDELSTEIN

/s/ Herbert W. Mondros
Herbert W. Mondros, Esq.
ID No. 3308
Helene Episcopo, Esq.
ID No. 6406
300 Delaware Ave., Suite 800
Wilmington, DE 19801
(302) 888-1112
Email:hmondros@margolisedelstein.com
Counsel to Defendant Gina Jennings

Words: 2881

DATED: July 18, 2018