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

Mary J. Jones, *et al.*, Plaintiffs,	)	
v.	)	Case No. 14 CH 20027
Municipal Employees' Annuity and Benefit Fund of Chicago, *et al.*, Defendants.	)	Honorable Rita M. Novak
and	)	
City of Chicago, Intervenor-Defendant.	)	

MOTION FOR A STAY PENDING APPEAL

Pursuant to Supreme Court Rule 305(b), intervenor-defendant, the City of Chicago (the "City"), respectfully requests a stay of the Court's July 24, 2015 Order pending the appeal to, and mandatory review by, the Illinois Supreme Court.[1] In support of this Motion, the City states as follows:

[1] The Court's July 24 Order disposes of all substantive claims for relief in both this case, *Jones*, which was brought against the Municipal Employees' Annuity and Benefit Fund of Chicago ("MEABF") alone, and the *Johnson* case, No. 14 CH 20668, which was brought by separate plaintiffs against both MEABF and the Laborers' Retirement Board Employees' Annuity Benefit Fund of Chicago ("LABF" and, along with MEABF, the "Funds"). However, while the Court's July 24 Order is final and appealable in *Jones*, it may not be final in *Johnson* because the *Johnson* plaintiffs' motion for class certification remains pending. Counsel for the City believes the class certification motion in *Johnson* is moot, and have asked counsel for *Johnson* to dismiss it voluntarily, but thus far he has declined to do so. Thus, the City intends to ask the Court to deny the class certification motion in *Johnson* so that a notice of appeal can also promptly be filed in *Johnson* and it can be heard by the Supreme Court along with *Jones*. If that motion is granted, the City also intends to promptly appeal in *Johnson* and to have the request for stay brought in this motion apply that case as well.

INTRODUCTION

1. As the Court previously recognized, this is a case of critical importance to the Funds, their participants, and the City. MEABF and LABF are in crisis, with approximately $10 billion in unfunded liabilities.[2] Without action by the General Assembly that is upheld by the courts, the Funds' $10 billion in unfunded liability will continue to increase by approximately *$2.48 million per day*, and in a matter of years the Funds will run out of money and be unable to pay benefits as they become due.[3]

2. Senate Bill 1922 ("SB1922") was negotiated between the City and the more than 30 unions representing fund participants, and enacted by the General Assembly, to reverse this state of affairs and save both Funds from insolvency. Starting with a massive influx of new City funding, and culminating in a requirement that the City fund MEABF and LABF fully and on an actuarial basis going forward, SB1922 will—if it is ultimately upheld—ensure that the Funds have the money to pay pension benefits as they come due.[4] That is why the overwhelming majority of fund participants and their representatives, as well as the Funds' trustees (who have fiduciary duties to all participants), supported the enactment of SB1922 and are now supporting the legislation in this lawsuit.[5]

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2 *See* Aff. of Michael Schachet (the "Schachet Aff."), Exhibit A to the City of Chicago's Memorandum in Support of its Motion for Summary Judgment ("City Mem."), ¶¶ 4, 14.

3 *Id.* ¶¶ 30-34.

4 *Id.* ¶¶ 35-40.

5 *See* City Mem., Ex. D, 4/8/2014 Sess., Ill. Sen., at 103 (Sen. Cullerton) ("this bill received the support of thirty unions"); Reply Mem. in Support of the City of Chicago's Motion for

3. While this Court found that SB1922 violates the Pension Clause, the City respectfully disagrees and will directly appeal to the Supreme Court pursuant to Supreme Court Rule 302(a), which provides that the Supreme Court "shall" hear an appeal directly when the circuit court holds a state statute unconstitutional. The City intends to file a Motion to Accelerate Docket requesting that the Supreme Court hear the case in November. The question presented here is whether, pending the Supreme Court's decision: (a) the status quo should remain in place; or (b) the parties should revert to the pre-SB1922 status quo for the time between September 2015 (the next date for which payments could conceivably revert to pre-SB1922 law) and the date on which the Supreme Court rules.

4. The equities weigh heavily in favor of a stay. It makes no sense to require the Funds to revert to pre-SB1922 law for the few months until the Supreme Court rules. Such a change in the status quo would require that the Funds re-program and revise their annuity calculations and payment files twice, if the City prevails on appeal. It would also require that the Funds engage in a burdensome and costly collection process to recover the automatic annual increases ("AAIs") paid to retirees and reduced contributions paid by employees during the interim period, including collecting from the heirs and/or estates of retirees who pass away and from employees who leave the City. And, it would result in substantial losses (overpayment of AAIs and underpayment of employee contributions, as well as lost

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Summary Judgment ("City Reply"), Ex. F, 4/2/2014 Ill House Pensions Committee Tr. at 25 (Speaker Madigan) (only 3 of 31 affected unions opposed SB1922).

investment returns) that could not be recovered. These unrecovered losses would fall on the Funds in the first instance, and ultimately on the City, since under SB1922's actuarial funding obligation, the City will be obligated to make up any shortfall between the Funds' assets and the amounts required to ensure that the funds are actuarially funded. In short, while Plaintiffs can and will promptly be made whole if they prevail before the Supreme Court, the City cannot be made whole—even if it succeeds on appeal—if this Court imposes pre-SB1922 law for the interim period until the Supreme Court rules. Thus, the equities overwhelmingly compel that the Court retain the status quo until the Supreme Court's decision.

BACKGROUND

5. SB1922 was signed into law on June 9, 2014. In enacting SB1922, the General Assembly found that SB1922 was necessary to save the Funds from insolvency and would result in a significant benefit to the Funds and their participants.[6] For that reason, as Speaker Madigan and Senate President Cullerton noted, SB1922 had wide support from the overwhelming majority of affected unions, who supported the bill in the General Assembly and do not challenge it here.[7]

6. Plaintiffs—four (of thirty-one) unions representing participants—immediately announced that they would sue to challenge SB1922.[8] However, Plaintiffs then waited more than six months to do so, and this case was not filed until

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[6] *See* CX14, SB 1922 Leg. Findings, ¶ 1.

[7] *See supra* n.5.

[8] *See* Exhibit A hereto.

December 16, 2014—a mere two weeks before SB1922 was scheduled to impact annuity payments for the first time. Plaintiffs then filed a motion to preliminarily enjoin SB 1922, which they initially noticed for December 29, 2014, days before the first payments subject to SB1922 were scheduled to be made.

7. By the time the lawsuit was filed, it was too late for Plaintiffs to obtain relief before SB1922 went into effect. The reason was that, during the six months between SB1922's passage and the filing of this suit, MEABF and LABF had taken the steps necessary to implement and comply with SB1922 for payments beginning on January 1, 2015, as required by the statute.[9] In particular, the Funds had already modified their payment systems and provided their payment agent, Northern Trust, with a data file instructing it to pay annuitants the AAIs specified by SB1922. Because of Northern Trust's notice requirements and the additional time it would take the Funds to create and provide a new, pre-SB1922-based file to Northern Trust, the Funds *had* to implement SB1922, at least for the January 2015 payment.[10]

8. Moreover, and as the Funds subsequently explained in connection with Plaintiffs' motion for a preliminary injunction, while the Funds could revert back to pre-SB1922 law for future payments, doing so would entail a burdensome collection process—one that would not be entirely successful—if SB1922 were ultimately upheld.[11] In that event, the Funds would have a statutory duty to collect the

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[9] *See* City's Opposition to Plaintiffs' Motion for Preliminary Injunction, Exhibit I, Affidavit of James Mohler ("Mohler Aff"), ¶ 2

[10] Mohler Aff. ¶¶ 2, 6

[11] *Id.* ¶¶ 6, 10; *see also* 2/6/15 Tr. (Mohler) 731-32.

overpayments made to retirees in the form of increased AAI's and the underpayments made by current employees in the form of reduced contributions, and would incur substantial "attorneys' costs, litigation costs, [and] collection costs" in doing so that they could never recoup.[12] Further, the Funds *would not* be able to collect all of the overpayments and underpayments; based on their prior experience, they knew that they would have difficulty collecting from the heirs and/or estates of those participants who pass away in the interim, as well as from employees who stop working for the City.[13]

9. Nevertheless, the parties agreed to a schedule by which Plaintiffs' motion for a preliminary injunction would be tried promptly. But after Plaintiffs had completed their case, but before the City and MEABF were scheduled to present theirs, Plaintiffs filed an "emergency" motion seeking to delay the hearing on their own motion for a preliminary injunction.[14] Over the City's objections, this Court granted Plaintiffs the delay that they sought. Thereafter, when the stay requested by Plaintiffs expired, the parties agreed to move directly to summary judgment briefing and Plaintiffs agreed that there was "no necessity to resume any proceedings concerning the preliminary injunction motion."[15]

10. As a result, SB1922 has been fully implemented and in full force and effect for seven months at this point. And for the same reasons that SB1922 had to

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[12] 2/6/15 Tr. (Mohler) 744-45.

[13] 2/6/15 Tr. (Mohler) 745, 749.

[14] Plaintiffs' Emergency Motion to Stay Preliminary Injunction Proceedings (2/19/15).

[15] 5/13/15 Tr. (Plaintiffs' Counsel) 6.

remain in effect with respect to the annuity payments due in January 2015, SB1922 must continue in effect through at least the payments due participants in August 2015. As the Court will recall from the undisputed testimony and other evidence at the preliminary injunction hearing, changing the formula for calculating benefit payments is not like turning a light switch on or off. Instead, if the Court ordered the Funds to revert to pre-SB1922 law now, the Funds would have to re-create new data files for Northern Trust, and (as the evidence introduced during the preliminary injunction demonstrated) there would be insufficient time at this point to do so prior to the payments that must be made to retirees in August.[16] Thus, the first payment to which the pre-SB1922 law could possibly apply would be the payment to retirees in September.

11. Respectfully, it makes no sense to modify the payments to comply with pre-SB1922 law beginning in September given that, if the appeal succeeds, pre-SB1922 law would only be in effect for a few months. Indeed, Plaintiffs' counsel previously agreed that the City's desire to have this case heard by the Supreme Court before the end of 2015 "should be achievable,"[17] and thus there can be no dispute that the stay requested by the City through this motion would likely be brief.

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[16] PX40, introduced by plaintiffs during the cross-examination of Mr. Mohler, is the calendar for 2015 provided to MEABF by Northern Trust, indicating the 2015 dates by which Northern Trust needs instructions from MEABF in order to process monthly annuity payments. That calendar demonstrates that the deadline for modifying the payment instructions for the annuity checks to participants in August 2015 has already passed. *Id.*; *see also* 2/6/15 Tr. (Mohler) 712-13.

[17] 5/13/15 Tr. (Plaintiffs' Counsel) 17.

12. Significantly, City employees and retirees will not be harmed if a stay is entered. Should Plaintiffs ultimately prevail in the Supreme Court, the Funds will calculate and promptly pay the additional AAIs to retirees and return the additional employee contributions to current employees.[18] Thus, once this case is fully and finally resolved, fund participants would be made whole for any overpayments made into the Funds, or underpayments made from the Funds, during the interim period.

13. By contrast, if the parties revert to pre-SB1922 law now, and then SB1922 is ultimately upheld by the Supreme Court, the Funds would have statutory duties to collect the overpayments made to retirees, and the insufficient contributions made by current employees, during the interim period.[19] But this would impose on the Funds material costs that they could never recover and, as James Mohler testified during the preliminary injunction hearing, a "significant amount" of the overpayments would not be realistically collectable by the Funds even after they (as they would have to do) initiated lawsuits against the estates of participants who pass away in the interim.[20]

14. Finally, the City has already budgeted the additional payments that it is required to make under SB1922 and has taken steps to ensure that the City will

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[18] 2/6/15 Tr. (Mohler) 743-44; Mohler Aff. ¶¶ 7 (If SB1922 is ultimately overturned, "MEABF would be able to calculate the amount that employee annuitants would have received but for [SB1922], and would be able to pay that amount promptly after the resolution of the litigation."), 8 (if SB1922 is overturned, "MEABF would be able to calculate the total 'overpayment' by employees into the MEABF and would be able to return those funds to the proper party after resolution of this litigation.")

[19] 2/6/15 Tr. (Mohler) 744-45.

[20] *Id.* at 744-46.

have the funds available to make those additional payments if SB1922 is upheld. Therefore, no one—neither the Funds, nor Plaintiffs, nor any participant in the Funds—will be placed at risk by staying the Court's Order pending a decision by the Supreme Court on appeal.

ARGUMENT

15. Supreme Court Rule 305(b) permits the Court to "stay the enforcement of any judgment, other than a judgment, or portion of a judgment for money, or the enforcement, force and effect of appealable interlocutory orders or any other appealable judicial or administrative order."[21] Rule 305(b) stays are frequently entered where, as here, a trial court declares a statute unconstitutional.[22]

16. "In making the determination whether or not to grant a stay pending appeal, the court, of necessity, is engaged in a balancing process as to the rights of the parties, in which all elements bearing on the equitable nature of the relief sought should be considered."[23] Illinois courts do not follow a "ritualistic formula" for determining if a stay is appropriate, but they generally consider three factors: (1) whether a stay is necessary to secure the fruits of the appeal in the event the movant is successful; (2) the likelihood that the respondent will suffer hardship until the

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[21] Ill. S. Ct. R. 305(b); *see Stacke v. Bates*, 138 Ill. 2d 295, 302, 562 N.E.2d 192, 195 (1990).

[22] *E.g., Cutinello v. Whitley*, 161 Ill. 2d 409, 641 N.E.2d 360 (1994) (statute regarding motor fuel taxes declared unconstitutional, but order stayed pending appeal); *In re Rodney H*, 223 Ill. 2d 510, 861 N.E.2d 623 (2006) (part of Juvenile Court Act declared unconstitutional, but order stayed pending appeal); *Appanouse Tp. v. Cty Supervisor of Assessment*, 91 Ill. 2d 158, 435 N.E.2d 461 (1982) (statute creating multi-township assessment districts declared unconstitutional, but order stayed pending appeal).

[23] *Stacke*, 138 Ill. 2d at 308-09, 562 N.E.2d at 197-98.

appeal is resolved; and (3) the movant's likelihood of success on the merits of the appeal.[24] The importance of each factor "will vary depending on the facts of the case."[25] Here, all of these factors weigh strongly in favor of a stay.

17. *First*, the undisputed evidence shows that a stay is necessary to ensure that the fruits of the appeal flow to the City and the Funds in the event that the appeal succeeds. As described above, if the Court requires the parties to revert to pre-SB1922 law now, the Funds will receive less in contributions, and will pay out more in benefits, during the interim before the Supreme Court's decision. If the Supreme Court then reverses this Court's Order and upholds SB1922, the Funds will have a statutory obligation to pursue retirees who received more than they would have received under SB1922, and to pursue employees who paid in less than they would have paid under SB1922. The Funds would incur substantial costs in doing so, and a material amount of these funds would not be recoverable—for example, if retirees pass away, or employees stop working for the City, during the interim period.[26] But the ultimate harm in reverting to pre-SB1922 law now would fall on the City because of SB1922's actuarial funding requirement. Under SB1922, beginning in 2020, the City's annual contributions must be the amounts actuarially calculated each year to ensure that the Funds are 90% funded by 2055.[27] An actuarial funding requirement calculates the City's annual contributions based on the amount

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[24] *Id.* at 305-08, 562 N.E.2d at 196-99.

[25] *Id.* at 305, 562 N.E.2d at 196-97.

[26] 2/6/15 Tr. (Mohler) 744-45.

[27] *See* 40 ILCS 5/8-173(a-5); 40 ILCS 11/169(a-5).

of underfunding each year, regardless of the reason for it (whether as a result of poor investment returns, deflation, or any other reason, such as the Funds' inability to recoup overpayments to participants made during this appeal).

18. Therefore, if there are overpayments made to retirees or underpayments by employees during the period between the Court's Order and the Supreme Court's reversal, and the Funds cannot recover them, the City would ultimately be obligated under SB1922 to cover them. And even if the overpayments and underpayments could be fully recouped, the lost investment return on such amounts could not be and, therefore, would fall to the City to cover. For that reason, without a stay, the City and the Funds would not be able to secure the full benefit of a victory on appeal. This factor weighs heavily in favor of a stay.[28]

19. *Second*, Plaintiffs will not suffer any harm from a stay, and it is undisputed that all participants can be made whole if the Supreme Court agrees with this Court's view that SB1922 is unconstitutional.[29] SB1922 has been the law since January 1, 2015, and, as described above, Plaintiffs are responsible for the overwhelming majority of the delay in getting their challenge to SB1922 fully and finally resolved. Had they sued promptly, this case likely would already have been resolved by the Supreme Court. And if Plaintiffs really believed they were suffering "irreparable" harm, they would not have moved to stay their own motion for

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[28] *Stacke*, 138 Ill. 2d at 308-09, 562 N.E.2d at 196-98; *see also In re A.P.*, 285 Ill. App. 3d 897, 901 (2d Dist. 1997) ("A stay pending appeal is intended to preserve the status quo and to preserve the fruits of a meritorious appeal where they might otherwise be lost.").

[29] Mohler Aff. ¶¶ 7-8; 2/6/2015 Tr. (Mohler) 743-44.

preliminary injunction for several months. A Rule 305(b) stay will merely maintain the status quo briefly, until the Supreme Court hears and finally decides this case. If Plaintiffs prevail, the Funds will be in a position to make them whole promptly thereafter.

20. In any event, there is no evidence that the additional 0.5% employee contributions being paid by current employees as a result of SB1922 is causing any material, let alone irreparable, harm to anyone. And as to Plaintiffs' claim that the reductions in AAI were causing harm to some participants, the testimony of the two plaintiffs to that effect was substantially undermined by their own admissions during direct and cross-examination during the preliminary injunction hearing,[30] and there is no evidence that their situation is representative of the other plaintiffs, let alone the other 61,000 fund participants.

21. *Third*, the City respectfully submits that it has strong arguments on the merits, as demonstrated by the voluminous briefing and argument that preceded entry of the Court's Order, which it does not repeat here, but instead incorporates by reference.[31] As a threshold matter, SB 1922, like any other statute, is presumed to be constitutional. Moreover, the reality is that, absent SB1922, the Funds' $10 billion unfunded liability will continue to increase by approximately $2.48 million per day,

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[30] *See, e.g.,* 2/6/15 Tr. (Jones) 655-62 2/6/15 Tr. (Lomax) 698-704).

[31] *See* City Mem.; City of Chicago's Opposition to Plaintiffs' Motion for Summary Judgment (June 19, 2015); City Reply; MEABF and LABF Motions for Summary Judgment (June 4, 2015); MEABF and LABF Oppositions to Plaintiffs' Motions for Summary Judgment (June 19, 2015); MEABF and LABF Replies In Support of Their Motions for Summary Judgment (July 2, 2015); *see also generally* 7/9/15 Tr.

and the Funds will run out of money and be unable to pay benefits as they become due in a matter of years. Respectfully, the City does not believe that Plaintiffs (or anyone else) can credibly argue that a statute which protects the Funds from insolvency and indisputably leaves participants substantially better off, has no chance to survive a challenge that it nonetheless unconstitutionally diminishes or impairs pensions. Nor can it be disputed that there are significant differences in the statutory obligations imposed upon the State to fund state pensions and those previously imposed upon the City to fund the MEABF and LABF—one of several distinctions between SB1922 and the statute held unconstitutional in *In Re Pension Reform Litigation*. Although this Court did not view those distinctions as dispositive, it remains to be seen whether the Supreme Court will.

22. What is clear is that the Supreme Court has yet to address the "net benefit" argument at all, and so of course has not assessed that argument in the context of a statute that imposes new and very substantial obligations on the City, ensuring that funds that would otherwise become insolvent will, instead, become fully funded and able to pay benefits as they become due. Likewise, the Supreme Court has yet to fully address the consideration argument referenced in footnote 12 of its Opinion in *In Re Pension Reform Litigation*. These and other highly significant questions await the Supreme Court's consideration.

23. As all parties and this Court have recognized from the outset, these issues and the fate of SB1922 will ultimately be resolved by the Supreme Court. Until then, this Court's Order should be stayed. Indeed, all of the factors relevant to the

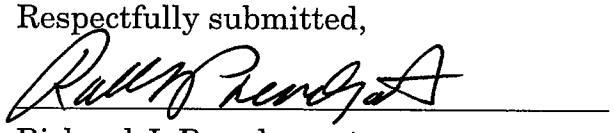
stay inquiry are satisfied—(1) a stay is necessary to ensure that the City would fully benefit from a victory on appeal; (2) a stay will not cause any material harm to Plaintiffs because, if they prevail before the Supreme Court, the Funds will promptly make them whole; and (3) the City has strong arguments on appeal.[32]

CONCLUSION

For the reasons stated here, the City respectfully requests that this Court stay its Order pending appeal pursuant to Supreme Court Rule 305(b).

Dated: July 27, 2015

Respectfully submitted,



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[32] *Stacke*, 138 Ill. 2d at 308-09; *In re A.P.*, 285 Ill. App. 3d at 901.

Exhibit

A

June 09, 2014

Coalition Responds to Signing of SB 1922 -- Unions Will Sue

The following statement is attributable to the We Are One Chicago union coalition in response to Governor Pat Quinn's signing of Senate Bill 1922:

"Mayor Rahm Emanuel's pension-slashing plan, now signed by the Governor, is wrong for Chicago. This is no victory for the Mayor, but a huge, missed opportunity to find a truly fair, constitutional solution.

"Senate Bill 1922 would slash the value of pensions by one-third within twenty years of retirement. It inordinately hurts women, people of color, and low-income workers and retirees, disrupting and harming our city's communities.

"Our coalition has presented numerous alternatives that would rebalance our tax code and ask those who can most afford it -- the wealthiest among us -- to pay their fair share. Unfortunately, some elected officials have chosen to ignore the constitution and these fairer revenue alternatives, opting instead to slash the retirement life savings of our city's public health professionals, teachers' aides, librarians, cafeteria workers, and other public employees and retirees.

"The Mayor's plan is unfair and unconstitutional, and our unions intend to seek justice and will be preparing to file suit."

Coalition members opposing SB 1922 include the Chicago Teachers Union, AFSCME Council 31, the Illinois Nurses Association, the Fraternal Order of Police Lodge 7, Chicago Firefighters Union Local 2, and the Chicago Sergeants and Chicago Lieutenants Associations/Police Benevolent and Protective Association Unit 156.