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

MICHAEL W. UNDERWOOD, *et al.*,	)	
	)	
Plaintiffs,	)	Case No. 13 CH 17450
	)	
v.	)	Hon. Neil H. Cohen
	)	
CITY OF CHICAGO, a Municipal Corporation, *et al.*,	)	
	)	
	)	
Defendants.	)	

CITY OF CHICAGO'S SECTION 2-619.1
MOTION TO DISMISS FOURTH AMENDED COMPLAINT

Defendant City of Chicago ("City"), through its counsel, respectfully moves the Court to dismiss Plaintiffs' Fourth Amended Complaint pursuant to Section 2-619.1, and in support thereof states as follows:

On June 29, 2017, the appellate court affirmed in part and reversed in part this Court's dismissal of Plaintiffs' Third Amended Complaint (2017 IL App (1st) 162356). Plaintiffs' request for further review by the Illinois Supreme Court was denied. Although the appellate court's decision upheld with finality this court's dismissal of Plaintiffs' claims other than the pension protection clause claim (Count I, which the appellate court limited to the 1983 and 1985 amendments to the Pension Code), those same claims (Counts II-VII) have now improperly reappeared in the Fourth Amended Complaint. Indeed, the refusal to accept prior, binding rulings is part of a pattern and practice for Plaintiffs. They have sought on numerous occasions, without success, to secure interim injunctive relief, and have been confronted with one ruling after another rejecting baseless assertions that they have been denied equal protection, that the City has been guilty of impairment of contract, that the City is in breach of contract, that the City should somehow be held liable for the passage of special legislation that the City did not even

enact, that the City is judicially estopped from denying liability, and a variety of other groundless arguments. Plaintiffs' refusal to accept the prior rulings of this Court and the appellate court is indefensible, as these claims are clearly barred by the doctrines of law of the case and *res judicata*.

"The law of the case doctrine provides that rulings on points of law made by a court of review are binding in that case upon remand to the trial court and on subsequent appeals to that same reviewing court unless a higher court has changed the law." *Emerson Elec. Co. v. Aetna Cas. & Sur. Co.*, 352 Ill. App. 3d 399, 417 (1st Dist. 2004); *see also People v. Tenner*, 206 Ill. 2d 381, 395 (2002), as modified on denial of reh'g (Mar. 31, 2003); *Vill. of Ringwood v. Foster*, 2013 IL App (2d) 111221, ¶ 33, as modified on denial of reh'g (Mar. 21, 2013). Similarly, "[t]he doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008); *see also Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). *Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided. *Hudson*, 228 Ill. 2d at 467. Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Id.* As detailed below, in affirming this Court's dismissal of the vast majority of the claims in Plaintiffs' Third Amended Complaint, the appellate court rejected with finality the claims that Plaintiffs now put

forward in Counts II through VII of their Fourth Amended Complaint. Therefore, this Court should dismiss Counts II through VII pursuant to 735 ILCS 5/2-619(a)(4) and 5/2-619(a)(9). [1]

The pension protection clause claim (Count I) suffers from similar, and additional, flaws. The appellate court held that the pension protection clause of the Illinois Constitution protects the fixed-rate subsidies embodied in the 1983 and 1985 amendments to the Pension Code. 2017 IL App (1st) 162356, ¶ 35. Significantly, the appellate court also concluded that those benefits "represent the highest level of benefits to which the retirees ever had an enduring right. . . . [T]he pension protection clause entitles the retirees to nothing more." *Id.* ¶ 40. Thus, the appellate court ruled that "we affirm all but the trial court's ruling that members of subclass four have no claim whatsoever under Count I. Instead we hold that any retiree that began participating in the system before the 2003 settlement was executed has a claim for relief based on the 1983 and 1985 amendments by operation of the pension protection clause." *Id.* ¶ 66. Notwithstanding these holdings, Count I includes allegations that retirees are entitled to more than the benefits protected by the 1983 and 1985 amendments (¶ 188) and to relief for "illegal impairment of contact" (¶ 194). These paragraphs should be stricken. Beyond that, Count I should be dismissed in its entirety as it does not state a claim *against the City*. Rather, the allegations of Count I are limited to asserting what Plaintiffs contend are *the Funds' obligations* to provide a healthcare plan and to pay statutory subsidies required under the 1983and 1985 amendments (¶¶ 190-191). There is no allegation that the City is obliged under either

[1] Equally improper is the re-pleading of Plaintiffs' federal law claims (in Counts IV and V). Although Plaintiffs qualify these claims by indicating that no answer is required, there is no basis to include these claims in the Fourth Amended Complaint in the first place. Plaintiffs' federal claims were dismissed by the U.S. District Court, and that dismissal was affirmed by the Seventh Circuit Court of Appeals in a decision of which Plaintiffs declined to seek further review. Thus, Plaintiffs' federal claims (and any other federal law claims which could have been brought by Plaintiffs, for that matter) should be dismissed as barred by the doctrines of law of the case and *res judicata*.

amendment to provide a plan or pay statutory subsidies to annuitants. Thus, Count I of the Fourth Amended Complaint seeks relief only against the City's codefendants, not the City, and therefore does not state a cause of action against the City.

Over the years that this litigation has been pending, significant judicial resources have been committed to resolving the legal sufficiency of the various claims asserted by Plaintiffs in various complaints filed in this action in both state and federal courts. The federal courts, this Court, and the appellate court, have patiently considered all of these claims, and largely dismissed them as insufficient as a matter of law. Plaintiffs now want to start all over again as if they are not bound by prior adverse adjudications. Supreme Court Rule 137 is explicit in its direction that the signature of an attorney on a pleading constitutes that attorney's certification that the pleading is "warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and that is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Nevertheless, when given the opportunity to file a Fourth Amended Complaint,[2] Plaintiffs ignored the mandate of the Illinois Appellate Court and proceeded to pursue claims that that have been dismissed with finality. [3] We address each of the counts in turn.

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[2] On April 30, 2018, this Court allowed Plaintiffs' complaint to be amended "to track your amended class certification motion, because you have paragraphs in the viable complaint now which are going to be tracking the amended class certification motion." (4/30/18 Tr. At pp. 95-96). The only "viable" claim that remained at that point was Count I based on the 1983 and 1985 amendments. The purpose of allowing the complaint to be amended was not to permit further litigation of claims (such as those in Counts II-VII) whose dismissal had been affirmed on appeal.

[3] It would be appropriate, under the circumstances, to seek sanctions under Rule 137. Indeed, this Court may deem sanctions to be warranted and, for example, require payment of the City's attorney's fees incurred in connection with this motion to dismiss. But the City has not taken the step of formally moving for such relief in the interest of bringing this litigation to an end, rather than extending it. All that remains of this case is this Court's pending decision on whether the obligation to pay the subsidies under the 1983 and 1985 amendments is required to be borne by the Funds or the City. That issue has been fully briefed and is pending before this Court. As detailed in the City's Response memorandum on that

COUNT I

Count I is flawed in two respects. First, Count I contains allegations that ignore the mandate of the appellate court and asserts claims that have been dismissed with finality.

Specifically, Paragraph 188 repeats the now rejected assertion that the pension protection clause protects the "healthcare coverage," "terms[,] and Fund subsidy" "as they existed on a participant's entry into their particular retirement system (and with improvements thereafter)." As explained, *supra*, the appellate court held that the fixed-rate subsidies embodied in the 1983 and 1985 amendments "represent the highest level of benefits to which the retirees ever had an enduring right. . . . [T]he pension protection clause entitles the retirees to nothing more." 2017 IL (1st) 162356, ¶ 40. Accordingly, Paragraph 188 should be stricken as barred by law of the case and *res judicata*. *See supra* at p. 2-3.

Similarly, the final paragraph of Count I (¶ 194) suffers from the same refusal by Plaintiffs to accept the rulings of this Court and the appellate court. Paragraph 194 alleges that "[t]he defendants' actions and declared rights to reduce that benefit also constitute unlawful impairment of Contract, under Art I sec. 16 of the 1970 Illinois Constitution." The same claim was made in the Third Amended Complaint (Count V) and was dismissed by this Court. In affirming, the appellate court held "the claim fails because the allegations, if proved, would be insufficient to support a claim for any violation of the contracts clause. The retirees cannot state a claim on Count V of the third amended complaint." 2017 IL App (1st) 162356, ¶ 55. As discussed, *infra*, the allegations set forth in Count V of the Third Amended Complaint pertaining

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subject, the prior appellate court decisions, as well as the statutory language of the 1983 and 1985 amendments themselves, support the City's position that the responsibility for the payment of the subsidies resides with the Funds. This is apparent even to the Plaintiffs, who in Count I of the Fourth Amended Complaint seek payment of the subsidies from the Funds alone.

to impairment of contract do not differ, in any material respect, from those alleged in the Fourth Amended Complaint. Accordingly, Paragraph 194 of the Fourth Amended Complaint should be stricken.

Beyond Paragraphs 188 and 194, Count I should be dismissed in its entirety as it does not state a claim *against the City*. It recites several legal conclusions to preface its factual allegations, but when it then turns to articulate those facts and, particularly (1) the relief Plaintiffs seek and (2) against whom Plaintiffs seek it, the City is noticeably absent. Rather, Count I alleges that the 1983 in 1985 amendments to the Pension Code obligate "the four Funds and their trustees (a) to provide a healthcare plan for their annuitants, and (b) to subsidize annuitants' premium costs by at least the amount stated in their applicable statute." (¶ 190). Count I then alleges (¶ 191) that "the Funds have, since 2013, not fulfilled their obligation to provide a healthcare plan for the retirees, and since January 1, 2017 to the present, failed to pay the statutory subsidies." In short, the allegations of Count I are limited to asserting what Plaintiffs contend are *the Funds' obligations* to provide a healthcare plan and to pay statutory subsidies required under the 1983and 1985 amendments to the Pension Code. There is no allegation that the City is obliged under either amendment to pay statutory subsidies to annuitants, or otherwise has failed to perform its duties under the 1983 in 1985 amendments to the Pension Code.

Bearing in mind that the appellate court's decision focused on the terms of the 1983 and 1985 amendments as the sole bases for the obligation to provide annuitants healthcare benefits protected under the pension protection clause, Plaintiffs' Fourth Amended Complaint alleges that those benefits are payable by the Pension Funds – not the City. Thus, Count I of the Fourth

Amended Complaint seeks relief only against the City's codefendants, not the City, and therefore does not state a cause of action against the City.

COUNTS II THROUGH VII

It is not uncommon, in instances where a complaint has been dismissed and a plaintiff has been given leave to file an amended complaint, for the plaintiff to replead counts in the amended complaint that have been dismissed, in order to preserve them for appeal. But the present case stands in a much different posture. The claims asserted in Counts II through VII were dismissed by this Court, have since been the subject of appellate review, and, as noted, the appellate court affirmed this Court's rulings (and the Supreme Court's denied plaintiffs' petition for leave to appeal). As a result, Counts II through VII have previously been resolved with finality. The rulings by this Court dismissing them and by the appellate court affirming their dismissal are now law of the case, and constitute final judgments on the merits for purposes of *res judicata*. *See supra*. There is, therefore, no basis upon which those previously dismissed claims may now be pursued anew as part of Plaintiffs' Fourth Amended Complaint. They do not state a cause of action and are barred under 735 ILCS 5/2-619(a)(4) and 5/2-619(a)(9) by the appellate court's decision. *See, e.g.*, *Hudson*, 228 Ill. 2d at 466.

COUNT II

Count II of the Fourth Amended Complaint purports to be a claim for common law breach of contract. Plaintiffs allege that the City reached a contractual agreement to provide healthcare coverage for annuitants (¶ 196), and that the annuitants thereby obtained, pursuant to Article VIII, Section 5 of the Illinois Constitution, a fixed-for-life contractual right to subsidized health care premiums in effect on their retirement date (¶ 196-97). Count II further alleges that,

under common law principles of contract, Plaintiffs have a contractual right to the plan in effect during the period of October 1, 1987 to October 23, 1989 (¶ 198).

Count II incorporates Paragraphs 1-194 of the Fourth Amended Complaint, including allegations that in 1984, the City distributed a booklet to employees that referred to annuitant medical benefits and specified eligibility criteria for participating in the City's annuitant medical care plan (¶¶ 66-67). In addition, Paragraphs 68-72 allege that pre-retirement seminars were conducted promising a subsidized fix-rate plan for their lifetime following retirement from their city employment. There is nothing new about these allegations. They have been reviewed and rejected by this Court and the appellate court repeatedly.

Indeed, Count II of the Fourth Amended Complaint does not differ in any material respect from Count II of the previously dismissed Third Amended Complaint. As noted, the appellate court's June 29, 2017 decision (2017 IL App (1st) 162356) affirmed this Court's dismissal of that count, and there is no basis for this Court to permit plaintiffs to pursue this claim in light of these prior rulings. Plaintiffs' virtually identical breach of contract claim under the Fourth Amended Complaint does not state a cause of action and seeks to relitigate an issue clearly and finally decided by the appellate court's 2017 affirmance of this Court's decision.

COUNT III

Similarly, Count III of the Fourth Amended Complaint, entitled Common Law Estoppel, is essentially identical to Count III of the Third Amended Complaint. The appellate court previously identified the requirements for pleading an equitable estoppel claim against a municipality, citing *Vaughn v. City of Carbondale,* 2016 IL 119181, ¶ 48, and held that plaintiffs had "failed to plead or even support an argument with facts to support such a claim." (2017 IL App (1st) 162356, ¶¶ 50-51). This Court's dismissal of the estoppel claim alleged under Count

III of the Third Amended Complaint, affirmed by the appellate court, requires the dismissal of Count III of the Fourth Amended Complaint.

COUNTS IV AND V

Count IV of the Fourth Amended Complaint, like Count IV of the Third Amended Complaint, purports to allege a deprivation of property rights "secured under the Fourteenth Amendment and actionable under 42 U.S.C. § 1983." Count V of the Fourth Amended Complaint, like Count V of the Third Amended Complaint, purports to allege a claim for impairment of contract under the federal and state Constitutions. With respect to Count IV, Plaintiffs state that this Count has been included "For Record Purposes Only – No Answer Is Required." With respect to Count V, Plaintiffs state "No Answer Is Required… with regard to Federal Constitutional Contract Clause Violation."

First, with respect to Plaintiffs' federal law claims (Count IV and Plaintiff's federal Contract Clause claim under Count V), while Plaintiffs have indicated that no answer is required, these claims should not have been repled at all. These claims were previously dismissed by the U.S. District Court, and that dismissal was affirmed by the Seventh Circuit Court of Appeals in a decision of which Plaintiffs declined to seek further review. As such, these federal law claims (and any other federal law claims that could have been brought by Plaintiffs) are barred under the doctrines of law of the case and *res judicata*. Again, while the City recognizes that sometimes a plaintiff will replead dismissed claims to preserve them on appeal, like Plaintiffs' state law claims in Counts II through VII, these claims have been dismissed with finality and should be dismissed as barred.

In addition, with respect to Count V as it pertains to the purported Illinois Impairment of Contract Claim, this claim is similarly barred by the doctrines of law of the case and *res judicata* and must be dismissed. In affirming the dismissal of Plaintiffs' Illinois Impairment of Contract Claim in the Third Amended Complaint, the appellate court not only held that the impairment of

contracts claim had been forfeited (2017 IL App (1st) 162356, ¶ 55), but in addition that "the claim fails because the allegations, if proved, would be insufficient to support a claim for any violation of the Contract Clause." The same is true with respect to the identical Count V of the Fourth Amended Complaint, and accordingly Count V should be dismissed.

COUNTS VI AND VII

Count VI of the Fourth Amended Complaint, entitled Denial of Equal Protection, is identical to Count VI of the Third Amended Complaint. Count VII of the Fourth Amended Complaint, entitled Invalid Special and Local Legislation, is identical to Count VII of the Third Amended Complaint. Again, both of these Counts of the Third Amended Complaint were dismissed by this Court, and this Court's decision was affirmed by the appellate court. The appellate court held that the Equal Protection and Special Legislation claims are "judged by the same standard." 2017 IL App (1st) 162356, ¶ 56, citing *General Motors Corp v. State of Illinois Motor Vehicle Review Board*, 224 Ill. 2d 1, 30-31 (2007). After discussing the applicable standard, the appellate court concluded that "the retirees cannot state a claim on Count VI or VII of the Third Amended Complaint." *Id.* ¶ 57. That ruling is controlling with respect to the identical Counts VI and VII of the Fourth Amended Complaint. As such, these counts should likewise be dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that, as to the City of Chicago, the Fourth Amended Complaint should be dismissed with prejudice, and that this Court should retain jurisdiction to resolve the sole and fully briefed issue remaining to be decided (*i.e.* whether it is the City or the Funds that have the duty to pay the subsidies provided for under the 1983 in 1985 amendments to the Pension Code).

Dated: July 30, 2018

Respectfully submitted,

EDWARD N. SISKEL
Corporation Counsel
of the City of Chicago

BY: /s/ *Richard J. Prendergast*

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

MICHAEL W. UNDERWOOD, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	No. 13 CH 17450
CITY OF CHICAGO, a Municipal Corporation,	)	
	)	
Defendant,	)	
	)	
And	)	
	)	
Trustees of the Policemen's Annuity and Benefit Fund of Chicago;	)	
	)	
Trustees pf the Firemen's Annuity and Benefit Fund of Chicago;	)	
	)	
Trustees of the Municipal Employees' Annuity and Benefit Fund of Chicago; and	)	
	)	
Trustees of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago, *et al.*	)	
	)	
Defendants.	)	

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on **Monday, July 30, 2018**, I caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, **City of Chicago's Section 2-619.1 Motion to Dismiss Fourth Amended Complaint**, a copy of which is hereby served upon you.

/s/ *Richard J. Prendergast*

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CERTIFICATE OF SERVICE

Richard J. Prendergast, an attorney, certifies that he caused a copy of the **Notice** and **City of Chicago's Section 2-619.1 Motion to Dismiss Fourth Amended Complaint**, to be served upon the following Service List, on this **30th** day of **July**, 2018.

/s/ *Richard J. Prendergast*

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