SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

THE HONORABLE GEORGE C. HERNANDEZ, JUNIOR, PRESIDING

DEPARTMENT NUMBER 17

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JOE REQUA, et al.,

Plaintiff,

vs. Case No. RG-10-530492

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendants,

_____/

Reporter's Transcript of Proceedings

October 15, 2014

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OCTOBER 15, 2014 **MORNING SESSION**

P R O C E E D I N G S

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THE COURT: Requa versus Regents of the University of California. Counselors, if you could note your appearances starting with the Petitioner.

MR. SINCLAIR: Andrew Thomas Sinclair for the Petitioners, your Honor.

MR. HEBERT: Bill Hebert for the Petitioners, your Honor.

THE COURT: Okay.

MS. LIU: Dorothy Liu for the University.

THE COURT: All right.

MR. McNAUGHTON: Michael McNaughton for the Regents.

THE COURT: Okay.

MS. TAKEHANA: Jennifer Takehana for the University.

THE COURT: Very good. Thank you, Counselors. You may be seated.

All right. This is a motion for class certification. And the Court spent quite a bit of time reviewing the information provided. Bottom line, I have nine pages of tentative ruling and this isn't even the first draft, I'll tell you.

But in the end, the Court essentially granted the motion in part for the reasons explained, specifically as to the implied contract claim and denied as to the remaining.

So what I'm going to do, then, is I'm going to permit the moving party, the party seeking class certification, to address the Court in whatever fashion they feel will help their cause.

And then once that occurs, I will allow the Regents to respond. And since, indeed, this is a motion that -- where the burden is on the moving party Plaintiff, you will have the last word. So go ahead.

MR. SINCLAIR: Thank you, your Honor. The Petitioners will not challenge the estoppel portion of the tentative ruling.

We don't have any substantive argument with the implied contract ruling.

The Court did indicate that it had not gotten through the evidence and wanted to know what made a difference. I can address that if you want.

THE COURT: If you would like.

MR. SINCLAIR: All right. I think it all boils down to this, your Honor. Our primary concern is that the declarations, to a large extent, were not offered on personal knowledge and contained hearsay and conclusions.

That's really what it boils down to. I know it took a long time to say that, but many of the declarations concern statements that were made by other people or to unidentified people. And often the statements concern the ultimate legal issue in the case.

So, that's pretty much what we have to say with respect to the evidentiary objections.

THE COURT: Okay.

MR. SINCLAIR: I don't have anything else to add. I realize the Court has spent a great deal of time on this. If there are any questions that the Court has, I'm happy to answer whatever they are.

THE COURT: I think we struggled through addressing the questions and answering them to the extent that we could in part of that. But there no doubt will be a position from the Regents. So who wishes to speak on behalf of the Regents?

MS. LIU: Thank you, your Honor. Dorothy Liu on behalf of the Regents.

THE COURT: Sure.

MS. LIU: The Regents, we contest the tentative ruling as to the implied contract claim and respectfully request that your Honor reconsider and deny certification as to the implied contract claim --

THE COURT: Okay.

MS. LIU: -- on several grounds. I will go through them one by one, but I will go through them in detail.

First, contrary to what's stated at page 3 of the Court's tentative ruling, there has been no determination and no finding whatsoever of a written agreement between the University and the laboratory employees. This was conceded by Petitioners on appeal. And it was remarked, noted upon, by the DCA First Appellate District in its opinion at Footnote 9. So it was an issue that Petitioners initially had brought forward, but then dropped any claim or allegation of a written contract.

So, we need to start from that premise going forward. So that's the first issue I will address.

The other issues are the essential elements of the implied contract theory as held by the First Appellate District in this case, and as pled by Petitioners, absolutely include elements of knowledge, the employees' knowledge of the offer, understanding of what the offer was, and reliance on the offer to the purported offer, alleged offer, in order to remain working at the lab. So that's the second issue that I will address.

And then within the framework of the essential

key elements that the First Appellate District laid out for us, we can see even among the Petitioners themselves in their depositions that there are differences that will require individualized inquiry that will prevent common evidence as a method of proof for a trial plan in this case.

So, for those reasons, and then -- well, then I'll go also to the knowledge element. Your Honor had asked in the tentative ruling about mutuality and about knowledge. The cases cited by Petitioners which were cited on reply for the first time so we did not have a chance to address it in our opposition. Those cases do not stand for the proposition that knowledge is not required or that knowledge is somehow irrelevant.

In fact, in the case cited by Petitioner, knowledge was absolutely talked about and emphasized by the Court in its decision in the 1948 case.

And finally, your Honor had asked in the tentative ruling for the parties to address the Guz, Foley and Scott line of cases on implied contract. So for reasons I'll explain, that line of cases, they don't apply to public employers.

But even if they did, under the limited exception carved out by the Supreme Court in the REAOC decision, even if that line of cases were to apply, they

also emphasize the employees' reasonable reliance on the offer that would have been accepted.

So for all those reasons, we would say that this is not suitable for class certification, because there is no common evidence as to all of the elements that need to be proven.

So starting from the very first premise, the starting point, is that there is no -- there is no written contract in this case. There has been no determination, and the First Appellate District noted that there was no written contract. And so what the First Appellate District held in our case, which we are bound by, is that the essential elements that Petitioners must prove are that the Regents authorized UC-sponsored health benefits to retirees.

And then -- and then if there's a finding that the Regents authorized the benefits, then the Court -- the Court held that the elements that have to be proven is that during the Petitioners' employment at Livermore, they were made offers through representations, booklets, and so on and so forth, of retiree health plan and that the retirees accepted it, continued to work there based on the understanding that that was what they would receive when they retired.

And so this is spelled out at 213 Cal.App.4th,

213 at pages 227 to 228.

And so Petitioners, in their Third Amended Petition, and also in the Second Amended Petition, mirrored these allegations as their essential element. That's what they needed to prove. And that's at paragraphs 134 to 137.

And I quote, "Petitioners plead under their cause of action for implied contract that they need to prove that, one, by their conduct, representations and authorization of retiree medical benefits the Regents offered Petitioners and class members continued UC-sponsored health group -- group health plan coverage when they retired.

"Two, that Petitioners and class members accepted the Regents' offer by working at the lab.

"And three, that Petitioners and class members accepted work and remained at the lab based in significant part on the understanding that the Regents would provide them with medical benefits throughout retirement, i.e.,

lifetime medical benefits."

And so, even in Petitioner's reply brief to this motion, the Petitioners concede at page 9 that the employees' knowledge of the offer is an element and is critical. They have cited it twice in their brief that the employee and offeree must have knowledge of what the offer was.

So what that means in our case is the, you know, District, the First District -- First Appellate District held that the formation of the contract, whether there is even an implied contract, could possibly be shown by all of these -- all of this conduct if it is proven. But the Court also cautioned that it could be not proven at trial. It might not be -- it might not be an implied contract.

So there was absolutely no -- no finding in the prior proceedings at trial or on appeal of an express -- excuse me -- of a written agreement or any contract between the University and the employee.

And this is significant because in REAOC, the framework that the Supreme Court set forth is, is there are two different analytical frameworks.

One, if there is a contract, if there is an employment contract governing the employment relationship such as an MOU, labor agreement, collective bargaining

agreement, then the Court held that you can have -- you can construe an implied term within that written contract so long as there is no statutory bar to it.

And so that was the case in REAOC III, as I'm sure your Honor well knows, so the issue there was whether the pooling -- the pooling requirement to pool actives and retirees for health care -- health insurance premiums, whether that was an implied term within the already-existing MOU within the labor union.

So the Court spent a lot of time talking about bilateral contracts and the intent that was required by both sides, both contracting parties. And so there's language all throughout the REAOC opinion about bilateral contracts. And so your Honor has asked about mutuality and the Supreme Court spoke to that.

In addition, the Supreme Court in REAOC also found that if there is no contract, then perhaps there could be a -- there could be an implied contract based on a legislation or statute. Based on legislation or statute. So perhaps there could be a contract, but that the intent of the parties had to be clear.

And the Court went on to emphasize that the vesting and whether retiree health benefits in particular vested remains a matter of the parties' intent.

And what's illustrated there is when the Court

was discussing vesting and whether retiree health benefits are vested, and whether the intent of the parties can be shown, the Court cited and discussed Sappington which is a case which we had cited to in our papers and in Sappington, Sappington illustrates the requirement of mutuality among the parties' understanding as to whether a right is vested.

So in Sappington, which is -- excuse me.

Sappington, which is 119 Cal.App.4th 949, the school district had provided 20 years of free PPO coverage and the district then had to, for budgetary reasons, not offer that anymore, and asked the unions to pay a buy-up charge or pick-up charge to cover the difference between the HMO plan and the PPO plan.

And so the retirees brought suit claiming it had a vested right to free PPO coverage. And in determining whether that was the case, the Court looked to both parties' intent.

The Court actually looked to whether -- whether there was any evidence, either individually or as a group, whether there was a reasonable expectation that the district would always provide free PPO coverage as part of the medical insurance program. And I'm quoting at page 995.

There is testimony establishing the retiree

relied on the District's promise of free lifetime health benefits, but no evidence they believed that promise specifically included free lifetime PPO coverage.

And the Court went on to talk about how 20 years of providing a generous benefit was just that: It was generous and it wasn't a contract. It didn't form a contract just by having provided the benefit and having the retirees accept the benefit. The Court specifically rejected the retiree's argument that simply by accepting the benefit there was a contractual entitlement to it.

So it's clear from the cases, and the cases that REAOC is relying on and citing to, that there has to be intent by both parties. It can't just be having given the benefit, per se, means that there's a contract.

And the Supreme Court in REAOC was very, very careful and took time to talk about how a resolution, in that case it was a county board, how a resolution is not a contract. And that's because county boards use resolutions to create policy and make policy and these are policies that can be revised and repealed.

And so that's where the Court then comes in and talks about the high, high standard that your Honor noted in the tentative ruling, that the retirees would have in establishing an intent by the parties to create a vested right to lifetime UC-sponsored health benefits. So, it's

within this framework and these are the elements that the retirees would have to prove.

And I would like to take this opportunity to address the Hunter case your Honor had asked in the tentative ruling for the Regents to address, Hunter versus Sparling, 87 Cal.App.2d 711. And this was one of the cases that was cited to for the first time in Petitioner's reply, which is why we did not address it in our opposition.

So, Hunter -- the Petitioners have cited to Hunter for the proposition that knowledge of an implied term, and in that case it was an employer's pension plan, is not required. But the case does not stand for that at all. The case -- the allegations, the very allegations in the Hunter case are that the employee worked for the bank, and knew, had knowledge, of the pension plan, had talked to people about it, had talked to managers about the pension plan and had the -- there was evidence he that relied and knew about this and relied on the pension plan in order to turn down other job offers and therefore stay at the bank.

The only thing he didn't know was he didn't know the specific formula by which the pension was to be calculated. And in fact, in that case, the bank actually paid him part -- partial payment of the pension when he

retired and then signed over a letter, basically an IOU, saying, "I'll pay you the rest later".

And then the war intervened. This was in 1948. And, you know, the bank never -- never lived up to its part of the bargain. And so there, the Court was asked to determine whether pension benefits back then, in 1948, whether that was a vested right, whether he had an enforceable right to collect the balance of that pension.

And the Court relied on Kern versus City of Long Beach, which had just come out the year before, 1947, which held that pension benefits are vested rights which vest upon acceptance of employment and that has been the rule for pension benefits since that time, since 1947.

It is not the rule for retiree health benefits. Instead, the retiree health benefits are governed by the watershed REAOC that came out a couple years ago. That's why the legal framework and vesting analysis has to begin and end with the REAOC analysis --

Now, I'll just mention briefly that in REAOC, the Court also did still acknowledge and recognize the well-settled principle and rule of law that public employment is governed by statute and not by contract. And that's why Guz, Foley, Pugh, and Scott, those lines of cases, that's why they do not apply to public

employers. Implied contracts just don't apply to public employers and get dismissed routinely.

But there was this exception that was carved out in REAOC. And REAOC did not talk at all about extending the exception to encompass Guz and Foley and those lines of cases.

So they do not and should not have application here because the REAOC Court was very, very specific in showing that you had to have a heightened burden in order to meet the requirement of finding unmistakable intent by the parties to confer a vested right to lifetime retiree health benefits.

But, even if you were to take a look at Guz and Foley and Pugh and Scott and that line of cases holding that personnel policies possibly could give rise to an implied contract, not to terminate for good cause, that line of cases, if you were to inject that standard into our framework, you would still find that those courts all emphasize and talk about showing the employees' reasonable reliance on -- on the representation.

And in those cases, they were all representations to not be disciplined, to not be demoted, to not be terminated for good cause, showing that managers have vetted, that personnel policies talked about it and so taking all of those -- excuse me -- the

totality of all of the conduct involved, the courts come down saying: These are summary judgment cases. The courts come down saying: Well, it's a triable issue of fact.

But, that doesn't negate that it is -- it is still required to show an employee-employer's reasonable reliance and awareness of the offer.

So I will just cite as an example, Guz, citing Foley, states that courts seek to enforce the actual understanding of the parties, of the mutual intent by the parties, of what was agreed upon to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment.

And that's Guz 24 Cal.4th 317 at 337, citing Foley. Both Foley and Guz repeatedly talk about the issue whether the employer's word or conduct on which an employee reasonably relies gave rise to that specific understanding. And that's at page 342 of the Guz case.

And here again, I keep repeating, an employer's written personnel policies may be an important source of an implied contract, made it clear that the trier of fact can infer an agreement to limit the grounds for termination based on the employee's reasonable reliance on the company's personnel policies.

That's Guz at 344, citing Foley 47 Cal.3d 654

at 681 to 682. And in Guz there were, like I mentioned, there were -- there was evidence and testimony of statements by managers, of managers' awareness of the risk guidelines, layoff guidelines and what was supposed to happen when a layoff occurred. And so the Court found that there was enough to go to a jury on that issue.

So, with these -- with the legal principles in mind, I'll turn to my cocounsel for the application in this case and why this would require individualized inquiries and why common issues would not predominate and why you wouldn't have common evidence to prove all of the elements as to contracts between the UC -- whether there was a contract between the University and the Livermore retirees.

THE COURT: Thank you.

MR. McNAUGHTON: Thank you, your Honor. I would like to address some of the other points in your tentative ruling that Counsel did not address, as she mentioned.

And that is just why this makes a difference. And why it makes a difference with respect to the issue before you and that is whether class certification is appropriate in an implied contract claim.

And the reason why is that their implied contract claim, based on their pleading, based on the

Court of Appeal findings of what the essential elements are, are tied into the brochures as the offer and then the acceptance from the Petitioners or the retirees in response to the offers.

So, what that -- what those brochures say or what information was provided to the individual employees at the time, the retirees or potential employees, what their body of knowledge was at that moment is absolutely relevant to whether or not a contract was entered into between them.

This is, again, not the case of an MOU or broad contract that covers this entire class to begin with and then you go back and determine whether that broad contract, you can apply these terms to that broad contract.

Here the reason the essential elements that are stated as they are is because we have no contract. We have an authorization based on the '61 Resolution, accepting their theory of the case for purposes of this.

We don't think the '61 resolution says what they say it does, but for purpose of class certification we accept that. But in addition, they have to say -- show as they admit, and as the Court of Appeal said, that through these brochures, through these representations, an offer was made for benefits and then that was

accepted.

So, what were those representations?

The other point I think in context that's important is that the Court of Appeal decision, the procedural framework of that case, that was not a -- the case was not -- no class action was alleged. There was no putative class that was alleged. That was just an individual claim by four retirees based on -- and four retirees that all pretty much were hired and -- at about the same time, very early on in the process when the exposures to the brochures and so forth, the brochure said one thing, it did not have the express qualifying language that the Petitioners admit does come up much later.

And the Court of Appeal made notice of the fact that even with -- when talking about the later disclaimers, it is, "Well, these Petitioners -- maybe those disclaimers came later because they had worked for a whole series of years before those disclaimers came."

Well, that may be true for the Petitioners that were before the Court of Appeal at that time. That's not true with the entire class.

What the body of knowledge, the information that was provided, the representations that were made by the University to an employee that began in 1985 or 1988

or 1978, is going to be much different, much, much different, than the representations that were made to employees that started in the '60s or early '70s. The tentative ruling says that the brochures did very much materially. And I take issue with that and I think that that's not been the position that the Petitioners have taken and I don't think it's supported by the record.

The brochures, the later brochures all contain -- almost universally contain language, and I quote here, health and welfare benefits are subject to legislation -- legislative appropriation and are not accrued or vested benefits entitlements, period. No qualification, no -- that's a brochure that is in the -- well, that particular one that I read one was from 2000. It was -- I'm sorry. That's the notation there.

That was attached as the Petitioner's -- that was a 2000 brochure, but that was attached as an exhibit to the Third Amended Complaint.

But there's a series -- the record shows that there's a series of brochures, representations -- booklets and retirement handouts, starting from the mid 1980s that had this very clear language.

So for the employee that only got that information, did not get earlier versions of brochures, would not have had access to earlier brochures, but were

only told -- were only given the one brochure or the representation that we will provide a retirement health benefit; however, in the same breath, in the same brochure, saying that this is not vested, this is not guaranteed, and later language that the University could terminate it at any time, period.

The person who hears that, whether we're dealing with a subjective standard or objective standard, whether a reasonable person would have done that or not, the person in that category that only had those representations, obviously would have had a much different -- you couldn't say that any kind of implied contract to have a vested right was given because the -- the offer itself was very clear that it wasn't a vested right.

But in addition to the brochures, the evidence before you show that these same employees throughout different time periods were given different information from counselors, anyone who went to a counselor starting in the '70s, were -- and asked the question, were told expressly that this was not a vested right.

Others that went to -- the thousands of people that went to retirement workshops, where it was told to them, put up on PowerPoints, specifically stated that this is not a vested right.

Those people, those people in those categories had a much -- the offer that was made to them was not an offer of vested retirement amounts that would then have been accepted.

Different situations, perhaps, with a -- with the Petitioners that were hired much, much earlier, which brochures did not have that explicit language, we still argue that there wasn't enough in order for a contract, but for purposes of this analysis -- and it makes a difference -- the case that -- we cite several cases. One of the cases, the Fletcher case, the Fletcher versus National Security Bank. This was a California Supreme Court case. That was a breach of contract case, a putative class action by bank customers that took -- that signed up for loans on the bank and the question was in terms of calculating interest, the bank calculated interest in one way that created a higher interest rate, using a 360 day calendar, whereas a 365 day calendar would come up with a lower interest amount.

In that case, the Court held -- denied class certification. The Supreme Court held that class certification was improper because different customers heard -- got different representations at different times about -- about what type of calculation would be made.

Some were told, and it was presumed some were

told before they entered into the contracts or while they were there, interest would be calculated in a certain way. And the Court said because we don't know -- I can't tell and we can assume that some were provided information that it's one way, others were provided information it's another way that it's not appropriate for class-wide basis.

That's the exact same thing that's happening here. We can -- the record before you is that some were told specifically that this is not a vested right. Others were given information where that was not made explicit. The Petitioners themselves in their depositions, at least two of the Petitioners in their depositions, Mr. Becker and Mr. Davis both testified under oath that they did not believe that they understood that this was not a vested right that they were -- that they were getting. So even among the Petitioners themselves, there isn't that understanding based on what was presented to them.

The petitioners on the Fletcher case and in your tentative ruling distinguish the Fletcher case because that involved an express contract as opposed to an implied contract. I would submit that in an implied contract situation where you're -- you don't even have a written contract that you're going to try to interpret,

or in an implied contract situation where all you're dealing with, the only thing you're dealing with is what representations were made, what oral representations or external representations were made. If that's all you're talking about, then the representations, what was made, have even a heightened significance and relevance to the inquiry.

We cited a number of cases dealing in the fraud context and misrepresentation context and it was argued that those are distinguished because they don't involve the same fact pattern that we have here.

The relevance of those cases and the importance of those cases is when representations are key to an essential element, as the Court of Appeal held it was in this case, when the representations are an element that must be proven, then if you don't -- if the representations are not uniform -- if there's uniform representations across the entire putative class, and they all got the same documentation, they were all told the same thing, none of them were told anything differently, in that case, then the representation -- then class certification may be appropriate.

But when the representations differ and some were told one thing, some were told another thing, in that case, class certification is routinely denied. And

here's a situation where you're dealing with employees that came and left over a period of 50 years when each were getting different types of representation, some very clear and understood that what is being promised is not a vested benefit, which is the core of the case, then we can say that certification should not be granted on the strength of those authorities.

I want to address a couple of points in your tentative. We had mentioned the -- you have sections here with the affirmative defenses that we have raised and we would state that among the class members, there are certainly significant numbers of class members that would have the benefit of certain affirmative defenses.

One of the examples we give is the class representatives that accepted the significant early retirement benefits. And in connection with the documentation that they signed off on when they took and accepted these early retirement benefits, it was clear within that documentation there was express statements that you would have retirement health benefits but those were subject to termination and were not vested and could stop.

Those that accepted the benefits are subject to various affirmative defenses that we have alleged, we have affirmative defense of novation, so in this case

there would be a novation. A new contract was entered into by the employees that signed off that got the benefits of early retirement with the understanding that their health benefits would be subject to change of termination. There's also elements of the labor and estoppel that have been alleged as affirmative defense. And so the tentative ruling asked which affirmative defenses we're identifying there and those are at least three there.

But also the affirmative defense of those employees, those retirees or those members of this putative class that only would have received information that were given specific information and only understood that whatever health benefits were being promised, it was being promised with the understanding that it could terminate at any time. Those who had not received or could have had access to the earlier brochures -- I mean the earlier brochures can't be imputed on the later employees.

And none of the cases that are here and that are cited in your tentative ruling that dealt with cases where certain promises were made in publications and brochures, those weren't class cases. Those were -- brochures and so forth dealt with specific plaintiffs with specific brochures, one-on-one and did the

circumstances lend itself that there was an implied agreement between the two based on a finite set.

But here we're trying to impute or it would be improper to impute publications, representations made at one period to a group of employees that weren't even -- weren't even born or weren't even working age at a different period, particularly when those employees were told quite the opposite, were told very expressly that there's no vested agreement.

So that would be -- those would be -- in one way it goes to the essential element of the claim, which the -- as to those, they would not be able to prove as an essential element that there was an implied contract, that there was an offer by virtue of the brochures and acceptance of that offer as required.

But at the same time, it would give rise to an affirmative defense of a waiver or estoppel as well. And in the Fletcher case, the Court made reference that those -- those bank clients who had knowledge of the way that the -- that the bank would traditionally calculate its interest, those that had prior knowledge of it or had existing knowledge of it, would use that as a defense in that claim.

So as to those, I think it both goes to the prima facie case, but it's also an element as well, which

is also why we've stated in our papers that the class that's been identified, or that's been defined, that -- for class certification is overbroad. It is including people -- including people that would not have been privy to the same types of representations that some of the earlier hirees were privy to, such as the named petitioners that -- whether this calls for subclasses or whether -- if there's a -- if the Court is inclined to stick with the tentative, we hope that's not the case and don't think it's appropriate that it would be, we would like the invitation to be able at some time to have either -- either that the Court certification be limited to a class that does not include categories of people that should clearly be outside the class, like the early retirement people, like those that were hired after -- in the 1980s that were subject to -- you know, that were given very clear information.

The basic point is that for purposes of this motion and what's being heard here is the class as defined is overbroad and would include people where the elements of their prima facie case cannot be met and where affirmative defenses would be available to them.

I was going to address some of the estoppel arguments, but Counsel has submitted to the -- to your tentative ruling to that so I assume you don't need me to

address that.

THE COURT: All right. Thank you.

Counsel, do you have anything to add?

MS. TAKEHANA: Just to address some of Petitioners' evidentiary objections.

THE COURT: Sure.

MS. TAKEHANA: First of all, the objection that the declarations themselves lack foundation is completely without merit. In Tutti Mangia Italian Grill 197 Cal.App.4th 733 at page 742, it clearly states that there's no magic words required to demonstrate that an individual has personal knowledge. So they don't have to state explicitly in their declaration that, you know, they have personal knowledge.

In fact, what you should be doing in the declaration is demonstrating through the declaration itself what are the bases of that knowledge. And that is exactly what we've done in all of the declarations at issue and on the record.

Just to address a few of those, in particular, they talk about Patrick Clellen (phonetic) not having established any personal knowledge of how the University's determination of benefits occurred. And in fact, the -- everything that Patrick Clellan discusses throughout the declaration, but especially in paragraphs

2 through 5, he's discussing his experience going to training sessions, hearing from the University itself what it believes its University's program to be or health benefits program to be, the seminars that he attended, reviewing the booklets themselves as well as the general insurance regulations, summary plan descriptions and other benefit booklets. So all of these pieces go to demonstrate the fact that he does have personal knowledge of what the University was representing its benefits to be at that time.

And similarly, throughout the other declarations, you will find the same types of averment. So in terms of lack of foundation that's just completely without merit.

Petitioners also mentioned that there were several hearsay issues. And in general, the issue with their hearsay objection is that most of the statements, either they're objecting to things that are not statement, or the statements are not being offered for the truth of the matter asserted, or the statement is -- falls under one of the hearsay objections.

So, for example, Patrick Clellan began, and I'm just going with him because he's the first in their list, a very, very long list of objections.

He made a statement in Paragraph 4 of his

declaration that the University made it clear in trainings that the only vested benefit was the University's pension plan. But that does not -- that was not being offered to prove that the University's pension plan was a vested benefit. There was no -- that's not the purpose of the statement.

The statement was offered to demonstrate the effect on Patrick Clellan, his then-existing state of mind and its affect on his acts and conduct.

What did he then inform people, how did he understand the University's benefits to be and how did he represent the University's benefits to other individuals?

And finally, there was some issue of whether the statements in the declarations themselves are touching upon the ultimate legal conclusions, but those are also misstated.

The ultimate legal conclusion is certainly whether there was a vested benefit, but the employees themselves are demonstrating that they have a certain understanding of what that benefit was at a particular time. That does not prove or disprove whether there was a benefit. But that goes to showing what the intent of the University could have been at any particular time and what they would have represented to individuals at these different seminars, presentations, and individual

counseling sessions that they undertook with the various LLNL employees and retirees.

THE COURT: Finally, this is the moving parties's last word. Go ahead.

MR. SINCLAIR: All right. I want to go through the points that were made, but let me start with something that Mr. McNaughton indicated at the end of his argument. And that is that, for example, the VERIP, individuals should clearly not be part of the case.

In the Creighton case, which involved VERIP which was an early retirement plan, the issue came up of specific language that was in the plan saying it is not a vested or accrued benefit.

During the hearing in the trial court the petitioners argued, "Well, does, that mean that an employee could retire, the University could pay the benefit for a month and then stop?"

The University said, "Well, of course not. Once they retire, then the benefit is certainly vested and cannot be changed."

The Court of Appeal looked at this and said that the meaning of that concession was that at the time of retirement, there was a separate contract, separate binding contract formed. And so, the Creighton case shows that even if modifications could be made before the

point of retirement, at that point in time, the individual has received information about what they would have during retirement, they've relied on that information, they've made a decision to retire, and that then becomes a separate binding contract.

Let me go back to the earlier points that Ms. Liu was making.

There is -- there was a lot of discussion of the question of knowledge of the Petitioners with respect to the benefit. And maybe I should say to begin with that this statement that Ms. Liu began with on page 3 of the tentative ruling, referring to the parties's written agreement, that is a reference to the enactment of the resolution in 1961. Our side doesn't think that that was a written agreement. It was a resolution passed by the Regents which is no more, no less than that. Under governing law it has the effect of a state statute. So it's like the legislature passing a statute saying, "We're going to provide these benefits."

I don't think that makes much difference to the analysis. But I did want to acknowledge it.

The question of knowledge is an important one. Petitioners are not arguing that it doesn't make any difference what they knew while they were employed. They are saying that they did not have to have detailed

knowledge of what the benefit was. One place that is not disputed in the evidence is all of the Petitioners knew throughout the time that they were employed that the Regents offered retiree medical benefits. That is uniform and it's undisputed.

The fact that they didn't know the specifics or they didn't read a specific brochure really doesn't matter under the Hunter case, which is the case that was cited by the Court of Appeal in saying that they -- all that was required was knowledge of the benefit.

Now, if they had -- if the petitioners were saying no, I didn't know that I got that. I just found out after I retired that I was going to get that, then this would be an entirely different case.

But that's not what they're saying. They're all saying across the board that they knew that they got retiree medical benefits. They observed their friends retiring and getting the same benefits while they were employed. And the individuals were generally employed for about 30 years, most or all of their working lives at the laboratory, and they observed that this system was in place for everyone. Everybody who retired got these benefits and the same benefits as active employees got.

So, then the question of reliance. Reliance generally is not an element in offer and acceptance of a

contract.

I think what counsel is referring to, I'm sure I'll be corrected by saying "reliance", is knowledge. They had to know that there was a benefit and they had to expect that benefit when they retired.

If you look at what Requa says, the Petitioners have to show, the court said retirees -- I'm going to skip a little language in here -- that the University's obligation to provide lifetime retirement medical benefits to them on the same terms as other University employees may be implied from one, authorization of those benefits in 1961, that's undisputed.

Two, uninterrupted provision of those benefits for more than fifty years. That is undisputed so far as I can tell.

And from the University's publications ensuring employees they would receive healthcare benefits when they retired.

The representations in the brochures as to receipt of the benefit really did not change over the entire period of time. We have provided the Court with a summary of the statements from the time that the resolution was passed in 1961, to the time -- 2006-2007 when they were discontinued.

What changes in the brochures is that in the

1980s, the Regents began to say: These are not vested or accrued benefits. But they said that about pension benefits too. And yet they now concede that pension benefits were vested at the time those statements were being made.

Further, those statements were almost always made in five- or six-point language, scarcely readable, buried at the back of the brochures and did not provide notice to the Petitioners that the University was making a substantive change.

So, it seems, to our side at least, that the -- that what we needed to show is that the Petitioners all knew that they would get these benefits when they retired and that those -- those were reasonable expectations given how common the knowledge was, and given the explicit statements in the brochures.

The Court has raised a question about the Guz case and we don't agree that it's inapplicable to public employees. But, it involved a unilateral offer that -- and the issue was: Well, can this unilateral offer be changed?

In our case, the Court of Appeal has said that an offer was made, it was accepted, there was an agreement. If that's true, then an agreement came into existence when the employees continued to work and

accepted the offer.

The Court also notes that in Creighton, the Court recognized that retiree medical benefits were vested benefits which vest upon acceptance of employment.

So, you could look at this as a unilateral offer case that extended up to the point of retirement and argue about whether the University could change that unilateral offer or not.

Or you could look at it as a contract that vested at the time that the Petitioners went to work. Or you could look at it as a contract that became binding after the petitioners worked enough time to indicate their assent and their acceptance of that offer.

Those are issues that I think will have to be sorted out in the future. But I don't think that they change anything about the commonalty requirement. They apply to everyone. And I think they can be cited, they can be decided by the Court on a basis that applies to all of the people in the class.

There was an indication that at least a couple of the petitioners said they didn't think the benefit was vested.

What evidentiary value does that have? First of all, as we pointed out in the papers, one of the petitioners corrected the testimony and said that's

really for the lawyers to decide.

But let's say that the -- a petitioner comes in and said, "I have a vested right." What is the value of that in terms of evidence?

Let's say that a petitioner says, "I had a contract." For over 100 years the California Courts have held that testimony to that effect is irrelevant and inadmissible because it goes to the ultimate legal question in the case.

So, as long as the Petitioners knew that they were being promised a medical benefit when they retired, and they accepted that promise in one means -- by one means or another, that is what's critical.

The thing that makes this case much different than a number of other cases is that the change was made years after the individuals' retirement. They retired with certain understandings. They went to seminars conducted by the University about what they would need during retirement, about being sure they had sufficient resources. And one of the things that went into those calculations was: We will have, we will be part of this University pool of retirees so that when the University goes out and negotiates with insurance companies, they are negotiating for the entire active retiree people, about 175,000 people, and they will get a better deal

than people who happened to work at the Lawrence Livermore National Laboratory and are segregated into a separate group. Over time there is simply no way that those people don't -- their rates do not go up and up and up because no younger people are coming in to balance the aging process that's taking place among that group.

I will say something about the evidence then I'll conclude.

The contention that the declarations, for example Mr. Clellan are well-founded because he went to seminars and he's just saying what he was told at the seminars, well, what he's being told is a legal conclusion. It's hearsay. And it does not advance the case. It may help to indicate what he may have said to others at the laboratory. But again, it's a legal conclusion. Just because the benefit counselors say it is not vested does not mean that there's no implied contract or there could be no implied contract.

And what he was told it is simply hearsay.

I'll conclude with that, unless there are any questions, your Honor.

THE COURT: No, I don't have any questions.

MR. McNAUGHTON: Your Honor, may I respond to a couple points he made?

THE COURT: I don't know, because remember I

told you how this would go. There would be a petitioner, there would be a response and there would be a final statement. If there's something critical -- I just don't want this to go on forever. So go ahead.

MR. McNAUGHTON: I'll try to be brief.

THE COURT: Very brief.

MR. McNAUGHTON: Okay. Just on a couple of points.

Counsel had said that he -- what matters, it is not what matters -- counsel acknowledged that knowledge of this offer is crucial, they just don't need to know the details of it.

We're not talking about a detail here. We're talking about a fundamental issue here and that is whether or not there was a guaranteed right to lifetime health benefits, whether it was being offered just now. With -- whether it is guaranteed and cannot be changed, whether it is vested or whether it's not vested. That's a fundamental -- that's the fundamental question about what was promised.

THE COURT: That would depend upon what was represented to the retirees by the University, by the Board of Regents.

MR. McNAUGHTON: Exactly.

THE COURT: What I see is, for example, over a

period of time, and the time is suggested, that the Regents made various representations about the nature of the coverage that a retiree would receive. And I understand that the representations changed over time. And therefore, each -- based upon each representation, then the suggestion by the Regents is that -- that each retiree at the time the representation was made would have to respond individually to that individual representation and that to -- and that by necessity means that you have have individual analysis by each one of these representations and each response by retirees; right?

MR. McNAUGHTON: Yes, your Honor.

THE COURT: So, the issue, though, before the Court is whether or not it is possible to certify a class for purposes of determining whether -- for purposes of determining whether or not during the period of time which expands over time, whether or not the Regents in the various forms of representations it made to its various retirees, whether by their behavior and what they said, they created an implied contract to say that the nature of the retirement benefit would be to be in the larger pool. That's what the Court would have to determine.

MR. McNAUGHTON: Right.

THE COURT: And so, I understand that it is the opinion of the -- maybe I should -- make sure that I do understand.

Is it the opinion of the Regents that it is -- that it is impossible to prove through a class action that the University made these -- made these statements? Or made these agreements?

See I understand -- this is what my vision of this is. And it's a little bit like I discussed earlier in another case.

How is this going to be proved? It could be that the Plaintiff could prove over time from the period that's relevant that the University, when it came time to make statements or representations or to express to their workers and their employees and their retirees about the benefits, that they made different representations over time. That's possible.

And it's possible for the Plaintiff to show that they made different representations over time.

If those representations, if true, create an implied contract, then it would seem that the defense would be that, yes, indeed you may have shown that the University has made these representations. It could be that these representations could support an implied contract. And that the defense, would say, but if you

read -- if you look at these implications, you will determine that, in fact, they didn't form a contract.

I guess my issue is whether or not -- and I think we can -- the -- whether the Court can say that for purposes of this class certification motion, whether or not it's possible to have and to treat and to prepare for the jury the behavior of the University making various representations over time, and whether or not that would support possibly a determination that that course created an implied contract.

Go ahead.

So that's -- I understand what happens is -- what I understand is you indicated that you can't make that determination because each representation was different over time. And that each person who responded, responded differently over time and therefore none of those behaviors would result in the creation of a contract.

MR. McNAUGHTON: The point we're making in terms of the relevance to this motion in the class certification situation, because that inquiry is going to be different from class member -- putative class member to putative class member, the representation that was made to one class member is going to be different than the representation --

THE COURT: I understand that.

MR. McNAUGHTON: -- made to a different class member.

THE COURT: I understand that over a period of time the representations made by the University were different. I see it -- there were different brochures. The words were different.

MR. McNAUGHTON: And there are different oral representations.

THE COURT: Right. But what's consistent is that the University made representations about the nature of the retirement benefits.

MR. McNAUGHTON: They weren't same the representations to everyone.

THE COURT: I know.

MR. McNAUGHTON: And that's --

THE COURT: I understand that. So maybe we can understand one another. It appears -- I understand that the University made different representations over time, but the topic was the same. The topic had to do with the extent to which there would be -- the nature of the coverage that you may have after you retire.

MR. McNAUGHTON: The subject was quite different. I mean the --

THE COURT: Okay.

MR. McNAUGHTON: The representations were made to numerous class members that this is not a vested --

THE COURT: I heard that. Yeah.

MR. McNAUGHTON: And that's a -- that's a critical thing for each person. And all the cases that we cite, the representations were -- representations matter and they matter here. Then unless the representations were uniform, if different things were said to different people, one person will say this was vested another person would --

THE COURT: But the topic was the same.

MR. McNAUGHTON: But the --

THE COURT: Wasn't the topic the same? Wasn't this the nature of the medical services provided to you upon retirement?

MR. McNAUGHTON: No, the topic -- the critical topic here is whether or not it is a vested right as opposed to not a vested right. That's the -- that's the issue. That's the question. And whether it was represented as such or not.

And as to that -- because then all the representation cases we're talking about where there were varying representations, the topic of those representations were the same. It was about whatever subject the case was about.

THE COURT: Right.

MR. McNAUGHTON: But the substance of those conversations on critical -- on the critical point were different and here the substance of those communications on critical points were different from class member to class member. And Counsel has said what is common is that these petitioners believed that an offer was made, that these petitioners who happened to have worked there for many, many years before the conversation, before the representations changed --

THE COURT: Right.

MR. McNAUGHTON: -- believed. But the question before the Court right now is not what these he Petitioners believed --

THE COURT: What the University did.

MR. McNAUGHTON: It's what the putative class would have believed, would have understood.

THE COURT: I understand that that's how your -- but from the Court's perspective, I have to determine what is it that the University did? Right?

And then because it just based -- because the University didn't do anything, then there is nothing. I mean, I understand that there is the question: How did the putative class respond to whatever the University did over time?

So, aren't we asking the question, what is it that the University represented and the University represents that we said it didn't vest. It had no value. I mean, it was something subject to whatever, but you were still talking about the same topic and the topic is, what sort of benefit, retiree, will you be getting upon retirement?

MS. LIU: May I respond, your Honor?

THE COURT: Please.

MS. LIU: I think what's missing from that analysis is it's not just about the University's actions and what the University communicated, it is also about whether the person, what the person heard and understood and what they relied on in continuing to work there. Did they rely on that?

And that's what the First District held was one of the elements and that's why we cited the consumer class action cases where reasonable expectations when that's an element, an objective expectation of element, that's where class is not certifiable because you need to look at even -- person to person, even under an objective expectation standard, you need to look at person to person, what that person would have objectively believed, someone standing in their shoes, based on their experiences, based on their experiences with a company,

in this case their experiences with the University, based on their experiences how long they worked there, what they've heard, what they understood, and what they've read. And that's why it is an individual inquiry. It is not a trial based on what the University -- what the booklets were. That's not what this is about. And that's what the First District remanded for.

THE COURT: Okay. Counsel, finally?

MR. SINCLAIR: Well, the -- go back again to what the case requires the petitioners to show. Authorization, uninterrupted provision of benefits, publications. There's nothing about subjective intent. Page 226, nothing about subjective intent. We have agreed that they had to know that the Petitioners and the class members had to know there was a benefit in order to accept it. They just didn't have to know the details of it.

THE COURT: Right.

MR. SINCLAIR: And again, if you go through the statements that were made over time, they really don't change. You will receive benefits, retiree medical benefits when you retire. You will receive University sponsored medical benefits. You can keep your benefits when you retire.

They are different words with the same meaning

and the meaning does not change over a very long period of time from the earliest brochure in the 1960s to the latest one in 2008.

They did start putting reservation of rights language in, but the language about what you will receive did not change.

THE COURT: All right. Great. Thank you.

MR. SINCLAIR: Thank you.

MR. HEBERT: Thank you, your Honor.

THE COURT: He will get my decision probably by Monday.

(Proceedings concluded.)

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State of California)
) Ss.
County of Alameda)

I, Connie J. Parchman, CSR #6137, do hereby certify that I am a certified shorthand reporter; that I was personally present in the above-mentioned proceedings; that I took down in shorthand the proceedings and thereafter transcribed said notes into longhand; that the forgoing pages constitute a full, true and correct transcript of the said notes in said proceedings; and that I have no interest in the outcome of the case.

_____

Connie J. Parchman, CSR #6137