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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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1 **OCTOBER 15, 2014**

MORNING SESSION

2 P R O C E E D I N G S

3 ---000---

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

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

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

11 **THE COURT:** Okay.

12 **MS. LIU:** Dorothy Liu for the University.

13 **THE COURT:** All right.

14 **MR. McNAUGHTON:** Michael McNaughton for the
15 Regents.

16 **THE COURT:** Okay.

17 **MS. TAKEHANA:** Jennifer Takehana for the
18 University.

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

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

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

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

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

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

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

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

21 **THE COURT:** If you would like.

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

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

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

8 **THE COURT:** Okay.

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

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

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

20 **THE COURT:** Sure.

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

25 **THE COURT:** Okay.

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

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

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

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

25 And then within the framework of the essential

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

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

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

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

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

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

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

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

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

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

1 213 at pages 227 to 228.

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

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

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

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

1 lifetime medical benefits."

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

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

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

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

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

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

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

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

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

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

25 And what's illustrated there is when the Court

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

8 So in Sappington, which is -- excuse me.

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

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

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

25 There is testimony establishing the retiree

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

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

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

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

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

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

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

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

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

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

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

9 And the Court relied on Kern versus City of
10 Long Beach, which had just come out the year before,
11 1947, which held that pension benefits are vested rights
12 which vest upon acceptance of employment and that has
13 been the rule for pension benefits since that time, since
14 1947.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 **THE COURT:** Thank you.

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

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

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

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

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

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

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

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

1 accepted.

2 So, what were those representations?

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

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

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

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

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

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

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

19 But there's a series -- the record shows that
20 there's a series of brochures, representations --
21 booklets and retirement handouts, starting from the mid
22 1980s that had this very clear language.

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

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

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

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

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

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

5 Different situations, perhaps, with a -- with
6 the Petitioners that were hired much, much earlier, which
7 brochures did not have that explicit language, we still
8 argue that there wasn't enough in order for a contract,
9 but for purposes of this analysis -- and it makes a
10 difference -- the case that -- we cite several cases.

11 One of the cases, the Fletcher case, the Fletcher versus
12 National Security Bank. This was a California Supreme
13 Court case. That was a breach of contract case, a
14 putative class action by bank customers that took -- that
15 signed up for loans on the bank and the question was in
16 terms of calculating interest, the bank calculated
17 interest in one way that created a higher interest rate,
18 using a 360 day calendar, whereas a 365 day calendar
19 would come up with a lower interest amount.

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

25 Some were told, and it was presumed some were

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 address that.

2 **THE COURT:** All right. Thank you.

3 Counsel, do you have anything to add?

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

6 **THE COURT:** Sure.

7 **MS. TAKEHANA:** First of all, the objection that
8 the declarations themselves lack foundation is completely
9 without merit. In Tutti Mangia Italian Grill
10 197 Cal.App.4th 733 at page 742, it clearly states that
11 there's no magic words required to demonstrate that an
12 individual has personal knowledge. So they don't have to
13 state explicitly in their declaration that, you know,
14 they have personal knowledge.

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

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

1 2 through 5, he's discussing his experience going to
2 training sessions, hearing from the University itself
3 what it believes its University's program to be or health
4 benefits program to be, the seminars that he attended,
5 reviewing the booklets themselves as well as the general
6 insurance regulations, summary plan descriptions and
7 other benefit booklets. So all of these pieces go to
8 demonstrate the fact that he does have personal knowledge
9 of what the University was representing its benefits to
10 be at that time.

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

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

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

25 He made a statement in Paragraph 4 of his

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 contract.

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

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

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

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

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

25 What changes in the brochures is that in the

1 1980s, the Regents began to say: These are not vested or
2 accrued benefits. But they said that about pension
3 benefits too. And yet they now concede that pension
4 benefits were vested at the time those statements were
5 being made.

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

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

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

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

1 accepted the offer.

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

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

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

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

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

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

1 really for the lawyers to decide.

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

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

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

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

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

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

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

19 And what he was told it is simply hearsay.

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

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

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

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

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

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

6 **THE COURT:** Very brief.

7 **MR. McNAUGHTON:** Okay. Just on a couple of
8 points.

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

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

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

24 **MR. McNAUGHTON:** Exactly.

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

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

13 **MR. McNAUGHTON:** Yes, your Honor.

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

25 **MR. McNAUGHTON:** Right.

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

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

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

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

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

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

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

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

11 Go ahead.

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

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

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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.

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

3 **THE COURT:** I heard that. Yeah.

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

11 **THE COURT:** But the topic was the same.

12 **MR. McNAUGHTON:** But the --

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

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

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

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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?

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

8 **MS. LIU:** May I respond, your Honor?

9 **THE COURT:** Please.

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

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

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

8 **THE COURT:** Okay. Counsel, finally?

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

18 **THE COURT:** Right.

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

25 They are different words with the same meaning

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

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

7 **THE COURT:** All right. Great. Thank you.

8 **MR. SINCLAIR:** Thank you.

9 **MR. HEBERT:** Thank you, your Honor.

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

12 (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