Filed 9/25/08 McGuigan v. City of San Deigo CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM J. MCGUIGAN, Plaintiff and Respondent, v. CITY OF SAN DIEGO, Defendant and Respondent, SAN DIEGO POLICE OFFICERS' ASSOCIATION, et al., Objectors and Appellants.	D050291 (Super. Ct. No. GIC849883)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed; motions to dismiss and to strike denied; motions for sanctions denied.

This appeal challenges a judgment by the superior court approving a class action settlement reached between a representative plaintiff, respondent William J. McGuigan, a retired city employee (Plaintiff), and the City of San Diego (defendant and respondent;

"the City"), in one of several pension litigation cases about the soundness of the City's retirement system (the San Diego City Employees' Retirement System (SDCERS)). The appellants, (1) the San Diego Police Officers Association (SDPOA) and (2) approximately 1,600 individually named police department employees (the *Aaron* Objectors), were potential class members and objectors in the proceedings below (sometimes collectively referred to as Appellants). Appellants raise various objections to the judgment, including the adequacy of the underlying procedures used to certify the class for settlement purposes, and the monetary sufficiency of the settlement.

All of these objectors and Appellants are plaintiffs in their own rights in two federal civil rights actions that are also pension-based litigation, raising variations of the same arguments. (*Aaron v. Aguirre*, USDC Case No. 06 CV 1451JM (RBB); *SDPOA v. United States District Court*, USDC Case No. 05 CV 1581H (POR) (the federal actions)). Appellants objected in the trial court in this action to a clause in the settlement agreement that released certain claims, contending the clause was overbroad and might jeopardize their ability to continue to litigate those federal actions.[1]

---

[1] In addition to Appellants, a group known as the "Qualified Objectors" (other large groups of city employees and retirees, approximately 6,000 persons) raised several objections in the trial court to the proposed class and settlement scope. This group included (1) the San Diego Municipal Employees Association (the MEA), (2) Local 127, American Federation of State, County and Municipal Employees, AFL-CIO, (3) San Diego City Firefighters, Local 145, and (4) 194 individually named persons (aka the "*Abdelnour* Objectors"). In this case, almost all of their concerns were resolved, and they are not parties to this appeal; however, the record has been augmented to include their objections in the trial court, to supplement the record about the remaining objections by Appellants. (See fn. 5, *post*.)

In June 2006, Plaintiff's negotiations with City officials resulted in a settlement on certain pension underfunding causes of action that he had brought on a representative basis, relating to the operation from 1996 to 2006 of SDCERS. As part of this settlement with the City, Plaintiff agreed to act as class representative for purposes of seeking approval and enforcement of a formalized settlement agreement, in which the City agreed to deposit monies in the retirement system, in a total amount of $173 million. (Code Civ. Proc., § 382; all further statutory references are to this code unless noted.) Beginning in August of 2006, Appellants appeared in numerous status hearings in the superior court, raising their objections to the proposed class settlement. After several months of negotiations, the settlement agreement was formalized and signed by both parties on September 6, releasing the settled claims (e.g., specified charter and municipal code violations that created an actuarially unsound fund). On the same date, an amended class action complaint was filed and an ex parte order issued to certify the proposed class for settlement purposes.

With the ongoing supervision of the trial court, in September 2006, Plaintiff and the City sent out notices to 18,006 potential class members of the proposed approval of the settlement, a procedure for filing objections, and an upcoming fairness hearing date of October 16. (Cal. Rules of Court,[2] rule 3.769, formerly rule 1859.) Numerous additional

---

[2] All future rule references are to the California Rules of Court unless otherwise indicated.

hearings took place from October 30 to December 12, 2006, at which the fairness of the settlement continued to be discussed.[3]

After the superior court, as part of the fairness hearing procedures, first requested and then required counsel for the parties, including Appellants, to meet and confer on a number of occasions in October through December 6, 2006, about any mutually acceptable modifications to the settlement agreement's release provision, they attempted to do so. No such final resolution was achieved, and at a hearing in November of 2006, counsel for Appellants suggested that a proposed judgment be prepared, in an effort to accommodate their objections to the settlement agreement's release provision, in preparation for the next hearing, set for December 12, 2006.

At the beginning of December 2006, Plaintiff and the City prepared and circulated a proposed stipulated judgment that requested that the court issue findings on the proper scope of the release, since the parties had not been able to agree on it. Appellants' counsel continued to discuss the matter with counsel for Plaintiff and the City, and on December 6, served papers about some remaining objections upon them, but without filing the objections in the trial court.

---

[3] During the same time period, as will be explained, the Qualified Objectors had also brought their own separate litigation alleging unlawful underfunding of the pension system. (*SDCERS v. City of San Diego* (Super. Ct. San Diego County, Consol. No. GIC841845), "the benefits cases.") The reporters' transcripts show that trial in the benefits cases was ongoing at the same time as many of these fairness hearings and status hearings were being conducted, and that counsel for Plaintiff and the City were seeking to avoid inconsistent rulings among the various cases.

At the scheduled hearing of December 12, 2006, counsel for Appellants did not appear nor supply any explanation for not doing so at the time. The trial court inquired of counsel for Plaintiff and the City, who stated that they did not know why counsel was absent, and they believed all the objections had been resolved in the proposed judgment. The court then signed the judgment, including its interpretation of the release provision and its approval of the class settlement. Thereafter, Appellants filed a motion for attorney fees as prevailing parties.

Next, Appellants filed their notice of appeal of the judgment. They first contend the trial court denied them due process and otherwise erred in conducting the fairness hearings, by failing to indicate conclusively and in advance that the December 12, 2006 hearing, at which counsel for Appellants did not appear, would be the "final" fairness hearing, within the meaning of the rules of court. (Rule 3.769, formerly rule 1859.) Appellants also challenge the adequacy of the class representative and class counsel, mainly arguing that as a retired employee, Plaintiff does not adequately represent public safety unions' interests, and Appellants would prefer their own counsel.

The main theme of Appellants' arguments is that the settlement is not in their best interests, because the release provision in the settlement agreement was excessively broad and not actually limited to the "Pension Underfunding Claims" (as defined by Plaintiff's pleadings), such that it might erroneously be accorded collateral estoppel effect in the federal actions that were then pending. Appellants contend the settlement should have been disapproved because, as summarized by the trial court, they fear that "class members are being required to release all claims against the City for all of the City's legal

liability relating to the entire unfunded liability of SDCERS, which is in excess of $1.3 billion, in exchange for payment to SDCERS of only $173 million, an amount which is inadequate and unfair."

In addition to the arguments on appeal, this court has been presented with motions to dismiss by each Respondent, on the grounds that Appellants lack standing to appeal as aggrieved parties, because the settlement agreement is actually beneficial to them, and in any case, Appellants waived any objections by failing to appear at the December 12 hearing. (§§ 902, 473.) We, as the merits panel, are also in receipt of motions for monetary sanctions by both Respondents, as well as a motion to strike, in which they claimed that this is a frivolous appeal and/or Appellants have violated several court rules without justification.

In reviewing this judgment, we examine the record of the proceedings in this case, including the lodged materials that were placed before the trial court and this court, describing several other related pension litigation matters in which Appellants have also participated. We evaluate the procedure utilized by the trial court in conducting the fairness hearings in light of applicable legal standards, including the rules of court, to determine if due process violations occurred. We also examine whether the trial court's certification of the "settlement class" represented an abuse of discretion. Further, we must determine if the trial court's interpretation of the release language in the settlement agreement was correct as a matter of law, as formalized in the judgment.

As we will explain, we conclude this appeal is not subject to dismissal on the grounds raised, because at least colorable arguments exist on Appellants' claims of denial

of due process and legal error in interpreting the settlement agreement. However, on the merits, we will reject those arguments. We conclude that the trial court correctly applied the appropriate legal standards to the record before it, in conducting the hearings and in approving the settlement and class definition, and there was no abuse of discretion. Any procedural irregularities or ex parte conduct of the hearings did not result in any prejudice to Appellants, who were fully apprised of the proceedings. We affirm the judgment.

Regarding the Respondents' motions for sanctions, they are denied for reasons to be explained in part VI, *post*.

FACTUAL AND PROCEDURAL BACKGROUND

A. Background of Pension Litigation; This Settlement/Proposed Class

In 1996 and 2002, the City adopted certain manager's proposals known as MP I and MP II, with regard to providing certain budgeted amounts of employer contributions to City pension plans from 1996-2006. As alleged in this action, these City funding agreements seriously underfunded the plans, by failing to contribute the actuarially-determined amounts of employer contributions that were due to the retirement system during that period, in violation of former city charter provisions and former municipal code sections.

These same City funding agreements, MP I and MP II, have been the subject of several other lawsuits in state and federal courts, including those cited above. For example, in July 2004, the City settled a class action lawsuit known as *Gleason v. San Diego* (Super. Ct. San Diego County, 2003, No. GIC803779) (*Gleason*), that was filed in January 2003 and was based on similar pension underfunding claims brought by retired

city employees. The settlement resulted in the City's payment of funds prospectively due to the pension plans for the years 2006-2008.

In August 2005, Appellant SDPOA filed its separate federal action referenced above, and Appellant Aaron did likewise in July 2006, in which they each made similar claims about pension underfunding, based upon civil rights claims and labor law arguments, such as violations of the applicable memoranda of understanding (MOU). SDPOA sought damages, declaratory and injunctive relief. (42 U.S.C. § 1983.) The *Aaron* group (approximately 1,600 individual SDPOA members) alleged that the pension underfunding had violated their civil rights in numerous ways, as well as violating the Pension Protection Act of 1992.

In June 2005, Plaintiff McGuigan filed this complaint on a representative basis for retired city employees, alleging specific violations of the city charter, ordinances, and other theories regarding underfunding, including requests for damages. The City responded by filing a notice of several related pension litigation matters (the benefits cases) and seeking consolidation, which was denied. (See fn. 3, *ante*.)

As amended, this complaint seeks a judicial declaration that the City's specified prior annual employer contributions to SDCERS resulted in underfunding of SDCERS. The complaint seeks declaratory relief and a writ of mandate directing the City to pay the amount of the shortfall in its annual employer contributions from 1996 to 2006, to SDCERS, the trustee of all class members, with interest. In March 2005 and September 2006, two of many professional reports were prepared by financial experts and analyzed by Plaintiff's actuary, to estimate the shortfall in the City's contributions to the plans and

related issues, such as the amount necessary to remedy the shortfall. Eight such reports were made available to the court and were considered during these proceedings, in support of the proposed settlement. Extensive discovery was conducted and discovery motions were noticed, and Plaintiff filed a motion for summary judgment and/or summary adjudication. The City opposed that motion and filed cross-motions.

After some hard-fought hearings on the summary judgment motions, and requests for discovery sanctions, Plaintiff, in his original representative capacity, engaged in settlement negotiations with the City, with the assistance of a mediator, the Honorable J. Lawrence Irving (Ret.). On June 8, 2006, those negotiations culminated in the signing of a "term sheet" by City officials, in which they agreed to contribute $173 million to the pension funds.[4] By that time, from April to June 2006, City officials had already been discussing the idea of contributing $100 million from tobacco securitization funds, as a means of remedying some of the pension underfunding. According to a declaration by executive assistant city attorney Don McGrath, those prior discussions were not conclusive and the City did not decide to use those funds for pension reimbursement, until the June 8, 2006 settlement agreement was reached. According to Plaintiff, the City had no obligation to utilize those $100 million funds in this manner, until the June 8 settlement term sheet was executed.

---

4 This $173 million figure represents the difference between the actual contribution made by the City ($507.3 million) and the amount that should have been made under the actuarially required contribution calculation ($639 million), plus seven percent simple interest.

It must be noted here that the parties have different positions about what this $100 million represents, as reflected in their arguments about whether past consideration was used for this portion of the settlement payment. That is, Appellants contend that this money was used to reimburse previous employee payroll deductions that were agreed to be made by employees (through City use of employee dedicated savings accounts) to strengthen the pension system. Respondents disagree, and seek to have that argument disregarded on appeal, contending the record citations given do not support Appellants' arguments.[5] We will discuss those issues further in part V.B, *post*.

The City paid the $100 million derived from the tobacco agreement funds into the pension plans on June 21, 2006. It also agreed to prepare security agreements for the remaining $73 million ("the Special Additional Contribution"), to be paid over five years, in the form of deeds of trust on specified, available city-owned property. The formalized settlement agreement was signed by the mayor September 6, 2006.

As part of the settlement, Plaintiff agreed to act as class representative of the 18,000-some current and retired city employees enrolled in the pension system, for purposes of seeking approval and enforcement of the settlement requiring the deposit of

---

[5] On this point, Appellants cite to material added to this record by an unopposed request to augment, i.e., the exhibits in support of the Qualified Objectors' opposition to the settlement agreement (opposition which was later withdrawn). The exhibits cited are a collection of city press releases, city council meeting records, and other records about the tobacco securitization agreement proceeds and different options for their use. On another note, the City has requested that this court take judicial notice of numerous lodged documents in connection with its motion to dismiss, but it also admits that the same documents appear in the clerk's transcript, so that judicial notice is not necessary. No separate ruling is required.

these funds. On September 6, 2006, Plaintiff and the City obtained approval of the court to amend the complaint accordingly, and to give notice of the proposed class definition and a procedure for filing objections. The proposed class was defined as "All past, present and future San Diego City Employees' Retirement System ('SDCERS') members and beneficiaries, their spouses, children, heirs, successors and assigns, and the representatives of such individuals, including, but not limited to, each of the plaintiffs or claimants in the Pension Underfunding Claims (as defined in the parties' Settlement Agreement and Release (collectively, the 'Settlement Class')." This notice was sent to 18,006 potential class members in the first few weeks of September.[6]

In the settlement agreement, the following description of the class claims to be released as part of the settlement is set forth, as pled by this representative plaintiff:

> "Those claims are: (a) that the City violated former Charter section 143; (b) the City violated former Municipal Code section 24.0801; (c) that the City's past practice of paying an employer contribution less than that recommended by the actuary employed by SDCERS rendered the pension fund actuarially unsound and thereby impaired the beneficiaries' contractual right to an actuarially sound pension fund; (d) for declaratory relief that the City underfunded the SDCERS pension system and must pay additional amounts, plus interest, to rectify such underfunding; and (e) for a peremptory writ of mandate directing the City to pay SDCERS the amount of the City's shortfall in employer contributions from 1996-2006 (collectively the 'Pension Underfunding Claims')."

---

[6] Appellants seem to contend that this settlement class definition is broad enough to include disputes over retiree health care benefits, but such health care benefits were expressly excluded from the released claims definition. This case concerns retirement benefits and pension underfunding.

Much of the dispute in this appeal centers upon the differences between Appellants' theories pursued in their federal actions (e.g., 42 U.S.C. § 1983), and the above-summarized theories referred to as the "Pension Underfunding Claims." Briefly, Appellants are seeking to pursue their civil rights and labor law claims in the federal trial and appellate courts, without hindrance (e.g., collateral estoppel effect) by this judgment accepting the settlement and issuing relief in mandamus.[7] On July 31, 2006, Appellants filed a "Notice of Divestiture" stating that they did not consider Plaintiff to be their representative in the pension litigation matters.

B. Hearing Set on Class Certification Issues; Type of Class; Objections

As outlined above, Plaintiff sought to implement the settlement agreement in September 2006, by requesting approval of class certification and amending the complaint. Appellants' attorneys had been notified of the settlement in June 2006, and they began to appear in court hearings in this matter August 4, 2006 through November 29, 2006. Twice, they sought temporary restraining orders from the federal district court in which their civil rights cases were pending that would have stayed the state court proceedings. Such orders were denied August 3 and September 22, 2006.

---

[7] The labor law claims in federal court include bad faith labor negotiations by the City that allegedly amounted to a scheme to take away vested retirement and health care benefits, and/or retaliation. Additional defendants are named in the *Aaron* action, including City officials and accounting firms.

At this point, it is important to note that in the class certification portion of the proceedings, the superior court made findings in support of treatment of the class as a "non-opt-out" class in the style of a Federal Rule of Civil Procedure, rule 23(b)(2) class action. The court relied on *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1605 (*Bell*), for the proposition that, "A rule 23(b)(2) class is appropriate where the 'party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.' [Citation.]" The court based its approach upon findings that "[t]he City's funding of its public pension system has been in a manner 'generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.' [Citation.]" Accordingly, notice was given to the potential class members without giving them an opportunity to opt out, to the extent their claims were the same as Plaintiff's, but with an opportunity to object to the sufficiency of the consideration the City had agreed to pay in settlement.

At the same ex parte hearing on September 6, 2006 in which the trial court accepted the amended complaint and a stipulation provisionally certifying the class action, for purposes of pursuing and formalizing the settlement, the court set a hearing date of October 16, 2006 for the fairness hearing on the settlement. In support of the proposed class certification and approval of the settlement agreement, Plaintiff and the City each filed points and authorities.

At the September 6 ex parte hearing, counsel for Plaintiff candidly explained to the court that he had already taken questions from interested parties about whether the settlement for $173 million actually represented a recovery of only eight cents on the dollar, when the total amount of the City's ongoing pension underfunding was taken into account. (Appellants' position is that over $1.3 billion was owed.) Counsel for Plaintiff explained to the court that his calculations showed that the settlement amount was reasonable for this type of public defined-benefit pension plan, when all the variables are taken into account, and it actually represented an amount greater than the actuaries were currently calculating was due for that period ($140-$159 million).[8] Counsel for the City explained to the court that this action and settlement represented "only part of what the city is doing to redress the overall pension underfunding." She said this settlement was reached in compromise of this lawsuit, and there were other issues being addressed in other arenas. For example, the Qualified Objectors were simultaneously pursuing their "benefits cases," which also addressed the legality of MP I and II.

In response to the class notices mailed, Appellants filed notices September 28 and 29, stating that they objected to the proposed class settlement and sought an evidentiary hearing and opportunities to speak at the October 16 fairness hearing, on a special

---

8 At the September 6 hearing, class counsel explained how defined benefit plans are normally funded: "[Y]ou pay, you don't pay, you know, when the stock market goes down one year, you don't have to fill it in the next year. You pay a contribution that's designed to cover the ongoing normal cost, plus an amortization of the debt, if you have one, under a reasonable amortization schedule. That's the payment that's owed. That's actually what the charter said and the municipal code said." The court responded, "There are very few defined benefit plans in the nation that are 100% funded."

appearance basis. They also filed notices that they reserved their rights to return to federal district court to dispose of their federal claims. They filed hundreds of declarations from individual union members about how they did not want Plaintiff's attorney to represent them, and they also requested hundreds of individual inspections of case records at the office of Plaintiff's attorney. These Appellants represented about 10 percent of the proposed class.[9]

Also in response to the receipt of class notice, specific objections were filed by the Qualified Objectors, other affected employees. (See fn. 1, *ante*.) They raised similar objections to the proposed class and settlement scope, which were ruled upon by the trial court in the judgment, as will be described later.

At the October 12 hearing in this case, Appellants' attorney characterized their federal claims as based on constitutional rights to a fully functioning, fully actuarially sound pension. (See fn. 7, *ante*.) The court discussed and postponed Appellants' request for further discovery, and addressed the distinctions between the federal claims Appellants were pursuing and the Plaintiff-authored claims to be released as part of this settlement. City Attorney Michael Aguirre explained the City's desired result of the release by outlining the history of the MP I and II, as follows:

---

9 The City lists a number of "questionable out of court tactics designed to derail the settlement" engaged in by Appellants, mainly large numbers of visits and telephone calls to Plaintiff attorney's office to overwhelm his resources, as well as the filing of extensive discovery requests and requests for large numbers of union members to individually address the court at the fairness hearings. It is not necessary for us to discuss those "tactics" at this time.

> "In 1996, the city agreed to pay into SDCRES budgeted rates, as opposed to actuarially determined rates. There is a schedule for that; we know exactly what the schedule is. Now, the experts have gone back and they have actually identified, using various theories, various ways to measure that, how much that all adds up to. [Plaintiff] did it. SDCERS has done it. So, from the city's point of view, if we don't get a release that gives us some benefit, there is no sense in entering into the agreement, at least at this stage. . . . [¶] . . . [¶] We want the fact that we agreed to a budgeted as opposed to actuarially formed rate, we want to be released from that. And the way we want to be released from that is by paying the amounts that the actuarial rate would have been had we paid at the time."

Later at the October 12 hearing, the court acknowledged that the release language as it appeared at that time included some "catchall" phrases, such as the release of matters concerning, relating to, or arising from the claims litigated by Plaintiff. The court urged all counsel to work to resolve the disputed issues about the scope of the release, to implement a fully negotiated settlement agreement, rather than a court-imposed order.

C. Fairness Hearings; Continuing Negotiations re: Release and Judgment

At the scheduled fairness hearing on October 16, Plaintiff argued that the matter should be resolved expeditiously, because the recovery would not include any interest until judgment was entered. The matter was continued until October 30 for further negotiation. On October 17, 2006, Appellants made a request to intervene in the action, which was denied on the basis that they were already participating as potential affected class members, who had been given notice and whose attorneys were attempting to protect their interests under the objections procedure allowed.

From October 16 until November 29, 2006, Plaintiff and City representatives and the various objectors appeared at a number of hearings before the superior court to

discuss the ramifications of the release clause of the settlement agreement. These will be described in more detail in the discussion portion of this opinion, since the sequence of events is key to Appellants' claims that they were prejudicially denied due process in the fairness hearing procedure. Here, we note only that at the direction of the superior court, from October 16 to early December 2006, the parties continued to negotiate about the Appellants' objections to the scope of the release, in an effort to amend the settlement agreement or to stipulate to a form of judgment, and to report to the court. At the hearing on October 16, the court told counsel for Appellants that it was not useful for them to speak only in generalities, and requested that counsel prepare specific language that could be considered by the court and counsel, to address Appellants' concerns. Apparently, counsel for Appellants prepared his written response December 6, by serving other counsel a proposed judgment called a "working draft" that listed his own objections, as well as language issuing a writ of mandamus, but that document was never filed with the court. Previously, on November 29, counsel for Appellants had suggested using this procedure for developing a proposed judgment, and had agreed to a hearing date to seek resolution of the matter on December 12. Inexplicably, there was no court appearance for Appellants that day, as next described.

D. Settlement Rulings; Judgment Entered; Appeal

At the scheduled hearing on December 12, the trial judge inquired about why counsel for Appellants was not in attendance. Plaintiff's attorney told him that he had spoken to counsel Gregory Peterson by telephone December 6 and learned that the remaining objections had been resolved. The City's attorney explained that she had not

received any further objections from Appellants. The attorney for the Qualified Objectors was present and stated she was not appearing for any other objectors, such as SDPOA.

After further discussion, the trial court signed the proposed judgment prepared by Plaintiff and the City, with input from the various objectors. The judgment recited that the court had conducted an inquiry into the fairness of the proposed settlement, pursuant to the rules of court. The court found that the settling parties were in a position, through discovery and motions, to have a clear view of the strengths and weaknesses of their cases and to make an informed compromise of disputed issues. The negotiated settlement was reached through mediation and was not the product of any fraud, overreaching, or collusion between the negotiating parties and counsel. It was of the non-opt-out class settlement variety authorized by Federal Rules of Civil Procedure, rule 23(b)(2). The court noted that the percentage of objectors is low (approximately 10 percent).

The court first observed that the parties had been unable to agree upon amendments to the settlement agreement to clarify the release language and its effect, and therefore the court was required to interpret the existing release language in the settlement agreement. The court ruled that the intent of the parties as shown in the settlement agreement was, upon the finality of this judgment, that "(1) no other causes of action are released by members of the class; and (2) no class member may prosecute the same causes of action (comprised of the primary right of the plaintiffs) or seek any additional damages on any legal theory based upon the City's failure to pay the amount annually determined by the SDCERS actuary and approved by the SDCERS Board from

1996 to 2006." The subject "*claims that arise from the facts that were alleged and prosecuted in this lawsuit by plaintiff McGuigan"* were the specified charter claims and municipal code claims, which included the theory that the beneficiaries' contractual right to an actuarially sound pension fund could not be impaired through the City's past practice of underpaying its employer contributions, below the level set by the actuary employed by the retirement system. The scope of the release was stated to be coextensive with the causes of action arising from the facts alleged by Plaintiff.

The court then dealt with the Qualified Objectors' remaining objections, and ruled, as relevant here, that the City may not interpret the settlement agreement to use employee pick-up savings accounts either directly or indirectly to satisfy the remaining balance of $73 million. Other findings were made about the lack of preclusive effect of the judgment in the related litigation in the "benefits cases" brought by the Qualified Objectors and pending at that time.

With regard to the specific objections made by Appellants, the judgment (judgment, para. 11, 2d. subd. (1), p. 8), includes these findings to interpret the scope of the agreement:

"1. [T]he release does not extend to any claims other than the claims or causes of action set forth in the Plaintiffs' Second Amended Complaint, and, specifically, the release does not extend to claims arising out of: (i) the City's alleged failure to fund the pick-up portion of the employee retirement contribution, (ii) the City's alleged underfunding of retiree health benefits, (iii) any conspiracy by the SDCERS actuary with the City to understate the City's employer contribution to SDCERS, or (iv) claims not

otherwise released or waived by the Settlement Agreement; *provided, however*, released claims would include damage claims under 42 U.S.C. section 1983 or any state, federal or common law *to the extent that they are based upon the City's failure to pay the amount annually determined by the SDCERS actuary and approved by the SDCERS Board from 1996 to 2006*, and any damages recovered for a claim under (iii) above would be limited to amounts in excess of the Special Additional Contribution [$73 million] paid by the City under the Settlement Agreement." (Italics added.)

"2. [T]he release does not relieve the City from its obligations to fully fund SDCERS or any retirement benefits or retirement health benefits in accordance with the City's obligations under law; and

"3. Section 6 of the Settlement Agreement was not intended to divest any other court of jurisdiction it currently has over pending claims." This resulted in the overruling of Appellants' objections.

The judgment further provides, "[b]ecause the Court has concluded that the only claims released under the Settlement Agreement *are the claims that arise out of the facts that were alleged and prosecuted by plaintiff McGuigan*, the fairness, adequacy and reasonableness of the $173 million consideration being paid by the City depends upon the value of only *those* claims, i.e., the 'Pension Underfunding Claims' defined by the parties. It does not depend upon the value of other claims that are not released. Based upon the evidence before the Court, the Court finds that the value of the Pension Underfunding Claims is between $140 million and $158.9 million. The consideration the City has

agreed to pay to SDCERS on behalf of the class--$173 million--is more than fair, adequate, and reasonable." (Italics added.)

Based upon these findings and the evidence presented, the court approved the settlement as, taken as a whole, "fair, adequate and reasonable to the plaintiff, the plaintiff class, and the City." Judgment was entered accordingly to issue a peremptory writ of mandate requiring the City to comply with the settlement and provide security. The court retained jurisdiction over the parties in order to enforce the terms of the judgment and settlement agreement.

E. Motions in Appellate Court

After the notice of appeal was filed, the record was designated and filed on July 9, 2007. Shortly beforehand, on May 31, 2007, counsel for Plaintiff requested to borrow the copy of the record from Appellants, but was unable to do so after several communications. He then filed a motion for sanctions on the grounds of Appellants' failure to comply with court rules. (Rule 8.153.) In Appellants' opposition, they claim no timely request was made and clerical error was at fault. We address that motion in part VI, *post*, as well as addressing the motion by Respondent City for an award of monetary sanctions. We also discuss to some extent the parties' dispute in the briefs about the proper characterization of the tobacco securitization funds, as part of the settlement consideration, or as previously earmarked for other purposes, such as reimbursement of employee paycheck contributions to remedy the pension underfunding problems. (See pt. V.B, *post*.)

Both Respondents have filed individual motions to dismiss the appeal, arguing Appellants are not aggrieved parties and therefore lack standing to appeal. Opposition was filed and the matter deferred to the merits panel. They are discussed in part III, *post*.

On April 15, 2008, this court denied a motion by Appellants "to find Jackson DeMarco law firm is counsel for appellant." Apparently, SDPOA's original lead attorney, Gregory Peterson, recently left the Jackson DeMarco firm and temporarily sought to take the case with him, but at this time, counsel for Appellants remains the Jackson DeMarco firm, specifically, Christopher Nissen, as reflected in the most recent filings.

DISCUSSION

We first outline the standards of review and principles governing class certification rulings and judicial approval of class settlements, and set forth in some detail this sequence of events and how the trial court administered these proceedings. We then address the grounds given in the motions for dismissal.

On the merits, we shall examine the record to determine whether any abuse of discretion occurred when the trial court applied legal standards in the course of certifying the class and conducting the fairness hearings over a period of several months. We will then determine whether the trial court's approval of the settlement is supported by the record, in terms of its interpretation of the release provision in the settlement and regarding the adequacy of the amount and consideration for the settlement. Finally, we address the requests for sanctions.

I

APPLICABLE STANDARDS: CLASS CERTIFICATION SETTLEMENTS

This case presents a particular variation of a class action, in which the trial court certified the class provisionally and for the limited purpose of considering whether the settlement agreement reached by the representative plaintiff should also be approved on a classwide basis, as an appropriate theory and level of recovery for all class members. (*Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1801 (*Dunk*).) The intertwined issues of certification and approval of the settlement must be viewed against the backdrop of the other related pension litigation matters, as shown in this record, and the activities of the various parties in those related matters.

For purposes of reviewing the trial court's evaluation of the relevant factors in deciding to certify the class, the abuse of discretion standard applies. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104-1106 (*Lockheed Martin*).) The trial court had to consider whether an ascertainable class and a community of interest had been demonstrated, and it utilized its discretion in evaluating the strength of the respective showings made by the parties. (*Id.* at p. 1104 [community of interest requirements include (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class].)

In resolving certification questions, the trial court is usually not required to address the merits of the case, but instead it will focus on whether common or individual questions are present in the action. "[I]n determining whether there is substantial

evidence to support a trial court's certification order we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327.) If the order is supported by substantial evidence, it normally will not be overturned " ' "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]" [citation] . . . . "Any valid pertinent reason stated will be sufficient to uphold the order." ' " (*Ibid.*)

At the same time as the certification criteria were being considered, the trial court was under an obligation to enforce due process requirements that apply when class members, who were not present when the settlement was negotiated, are brought into the action. The overall issue of adequacy of notice to the absent class members should be evaluated on review as a mixed question of law and fact, in which legal issues predominate. (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212; *McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 809-810.) " 'If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, *in a factual context*, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.' [Citation.]" (*Harustak, supra*, at p. 212.) Likewise, the application of standards created by statutes or rules to a set of undisputed facts is subject to de novo review. (*Ibid.*)

According to Appellants, the procedure used by this trial court in making the certification and approval rulings represents an erroneous interpretation of the applicable rules of court and due process standards. We will first evaluate the adequacy of the fairness hearing procedures used in this case, in the context of the provisional class certification granted and later confirmed. Appellants' arguments in this respect are mainly procedural in nature.

Next, we turn to the substantive issue of whether the judgment approving the settlement, including its interpretation of the release provision, adequately protects the interests of all class members. The trial court expressly adopted and applied the criteria laid out by the appellate court in *Dunk, supra,* 48 Cal.App.4th 1794, 1801, for evaluating the fairness and adequacy of such a class settlement. These include "the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." (*Ibid*.) The judgment and underlying rulings are primarily subject to review of the correctness of the rulings made under applicable legal standards, and secondarily, for whether any abuse of discretion occurred when the trial court evaluated the merits of the certification and settlement issues.

In reviewing this type of judgment, an appellate court "will not 'substitute our notions of fairness for those of the [trial court] and the parties to the agreement. [Citations.]' [Citation.] ' "So long as the record . . . is adequate to reach 'an intelligent

and objective opinion of the probabilities of success should the claim be litigated' and 'form an educated estimate of the complexity, expense and likely duration of such litigation, . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise,' it is sufficient." [Citations.]' " (*Dunk, supra*, 48 Cal.App.4th 1794, 1802.)

With these factors in mind, we next address certain preliminary issues about the sequence of events and hearings that took place here, to lay the groundwork for our evaluation of the motions to dismiss, as well as the merits of the appeal.

II

BACKGROUND REGARDING TIMING OF SETTLEMENT; STATUS OF RELATED LITIGATION

The parties disagree on the legal effect of many of the important events in this case, during the course of making and finalizing the settlement itself, and the course of the negotiations that were conducted toward the goal of finalizing the terms of the judgment granting approval of that settlement. These do not constitute factual disputes, but rather require us to draw legal conclusions from undisputed facts. For example, the operative date of the settlement between Plaintiff and the City is an important factor for evaluating the adequacy of the consideration paid by the City. Also, the terms of the release in the formalized settlement agreement must be interpreted in light of the record provided about the other litigation pending on related pension underfunding issues, as affected by the release, and the status of that related litigation may be informative on the issues before us.

A. Settlement Timing

The record reflects that this was one of several pending pension litigation matters in the spring of 2006. The Qualified Objectors were litigating the three consolidated "benefits cases" at that time, and some of the objectors, the MEA, were involved in negotiations about the use of the $100 million tobacco securitization funds, during April through June of that year. (See fn. 1, *ante*.) According to the McGrath declaration, he, as the executive assistant city attorney, considered that the negotiations in this case included the use of those $100 million funds. Those monies were paid June 21, approximately two weeks after the term sheet in this matter was executed June 8, 2006. After almost two months, the settlement agreement was formalized and signed by Plaintiff on August 31, 2006, and by the City's mayor on September 6, 2006.

According to Appellants, the settlement did not actually occur until Plaintiff signed the formalized document on August 31, so that the June 21 consideration may not be deemed to be sufficiently related to this settlement. Alternatively, Appellants contend that some of the language about the release was materially changed in the City's December 1 draft of the proposed judgment, to include language requested by Appellants about relief in mandamus, and to include language requested by Plaintiff and the City in other respects (mainly setting out the release terms more specifically).

At this point, we note that Respondent City has filed a motion to strike portions of the Appellants' reply brief, referring to these allegedly newly raised arguments on appeal about the effective date of the settlement (i.e., whether new terms were added to it December 1, 2006). We have received opposition by Appellant, essentially arguing those

issues are subsumed in the other issues raised. We agree and deny the motion, and will address only those arguments that we deem to be properly before us.

According to Respondents, the operative date of the settlement was the June 8 signing of the term sheet, when the basic terms of the settlement were agreed upon, subject to obtaining court approval of the class settlement. It is not disputed that the preparation and funding of the proposed settlement of the action occurred in stages. After June 8, the formal settlement agreement was prepared and signed by both parties by September 6, and it apparently attached an exhibit A, a proposed judgment to approve the settlement. Both before and after the notice was sent out to absent class members, the objection proceedings were litigated. In July Appellants filed their notice of divestiture, in an effort to exclude themselves from the class (although this was a non-opt-out type class, seeking only declaratory or injunctive relief, so that the effectiveness of their notice is questionable). Next, their attorneys appeared at the August 4 hearing and the other status hearings, as well as the noticed October 16 fairness hearing, all the while expressing their objections. The court repeatedly expressed its intentions from the outset of these hearings that any release provision that it approved should not have any unintended consequences, such as serving as a bar to the federal causes of action then being litigated by Appellants.

On this record, and as a preliminary matter, we will treat the class settlement as having been agreed to in concept June 8, and being partially executed by the City when the payment was made June 21. At this point, the fact that the settlement had not yet been formalized as anticipated, until August 31 and September 6, does not prevent a

finding that as a contractual matter, the agreement to settle became effective immediately, on a provisional and limited basis with regard to the class definition that the settling parties agreed would be affected by its terms. (Civ. Code, §§ 1641, 1642 [several agreements on same subject between same parties to be construed together].) The settling parties followed proper procedures to give notice to the absent class members, on a non-opt-out basis, that they would become part of the settlement, since the type of relief requested allowed that type of procedure under the Federal Rules of Civil Procedure, as adapted by California courts. (*Bell, supra,* 226 Cal.App.3d 1589, 1605.)

Moreover, all participants were attempting to reach a negotiated amendment to the release provision, at least until November 29, but they were unable to do so. At that point, with the approval of the court, their attention turned to negotiating the terms of the proposed judgment, which would require the trial court to interpret the September 6 agreement's release provision.

Therefore, for our purposes, we should analyze the date of the settlement as the date of agreement in concept, on June 8, subject to the parties' pursuing the process of formalizing it and using procedural methods to notify the appropriate absent class members. It is a separate issue whether those procedural methods were utilized properly, or whether any prejudice to Appellants occurred, as we will further discuss in part V, *post*.

B. Status; Other Litigation

In addition to the related consolidated pension "benefits cases," and the two federal actions, the record contains references to the settlement of previous, similar

pension litigation brought by retired City employees in *Gleason, supra*. During the summary judgment motion proceedings that occurred immediately before the June 8 settlement in this matter, the City was arguing that the *Gleason* settlement had a preclusive effect on Plaintiff's claims, and Plaintiff opposed that interpretation. As now explained by the City in its motion to dismiss, the 2004 settlement in *Gleason* resulted in additional payments being made by the City, prospectively, for the period between 2006 and 2008, above the payment previously authorized (by MP I or MP II). The class in *Gleason* was also a non-opt-out class settlement, of retired city employees, asserting similar pension underfunding claims beginning in 1996. Due to the settlement reached in the case before us, there was no court resolution of any res judicata or collateral estoppel arguments regarding the effect of the settlement in *Gleason*, upon this case. We need not address those issues either, as they are not before us.

With respect to the related consolidated pension "benefits cases," they were being tried in a nearby courtroom before Judge Barton, at the time of these proceedings. At the November 29 hearing, Plaintiff's attorney referred to rumors of a potential bankruptcy filing by the City, as part of the tactics being used in the benefits cases, and Plaintiff was arguing to the trial court that settlement approval should be forthcoming soon or else a bankruptcy filing might interfere with the security for the $73 million remaining payments. This lent some urgency to the proceedings, as did the fact that no interest was yet accruing, until judgment was entered.

In the "benefits cases," the judgment issued by Judge Barton is now on appeal to this court. The notice of appeal was filed September 25, 2007 by the City, and there are

pending motions to dismiss. (*SDCERS v. City of San Diego,* D051805.) We cannot address any arguments about the effect or influence of the benefits cases rulings, but note only that appeal is pending.

With respect to the two pending federal cases, examination of the docket in the SDPOA matter shows that the SDPOA filed notices of appeal in September 2007 and June 2008, after summary judgment was granted in part and denied in part on SDPOA's remaining federal claims and related matters. That matter is pending in the Ninth Circuit Court of Appeals. (With respect to the federal case filed by the *Aaron* group, the docket shows that the City prevailed on its summary judgment motion on the federal claims, and the state claims were dismissed without prejudice.)

With this understanding of the history of the case, only as it affects the scope of the issues before the trial court, we turn first to the motions to dismiss and then to the merits of the arguments on appeal.

III

MOTIONS TO DISMISS

The motions to dismiss are based on arguments by both Plaintiff and the City that Appellants lack standing, for several reasons, to contest the rulings on certification and approval of the settlement. First, the moving parties contend that Appellants are not aggrieved by the settlement, which represents payment of substantial sums to correct some of the pension underfunding from 1996 to 2006. (§ 902 ["Any party aggrieved may appeal in cases prescribed in this title"].) Before issuing the judgment, the trial court received and ruled upon Appellants' objections, such that moving parties contend

Appellants suffered no harm or undue prejudice, since their positions were taken into account, even though they did not prevail on each point. Moving parties note that the Qualified Objectors had dropped almost all of their objections to the settlement, including the "past consideration" argument regarding the $100 million payment.

Second, the moving parties contend Appellants waived or forfeited any objections by their absence, without explanation, from the December 12 hearing, which was effectively treated as the final fairness hearing, in the absence of any known problems. Appellants had previously participated in negotiating revised language in the proposed judgment regarding the release of any related claims and had apparently communicated to opposing counsel, through Attorney Gregory Peterson on December 6, that their concerns were satisfied (although there is some confusion in the record about that issue, in the dueling declarations filed in connection with the motion to dismiss).

Moreover, the moving parties contend that Appellants' failure to seek relief from default after the December 12 hearing, or to otherwise take action to object to the judgment, shows that they effectively adopted the judgment, at least until the notice of appeal was filed almost two months later. In fact, they appeared to endorse the judgment by publicizing it on their website on December 14, and by filing a motion for attorney fees as prevailing parties in February 2007.

In support of his motion to dismiss, Plaintiff submits a declaration by class counsel, Mr. Conger, to the effect that Appellants did not pursue the appeal diligently, since they were in default during the preparation of the record, and Plaintiff was required to prepare separate documents to be lodged in connection with the motion to dismiss.

Counsel states that in July of 2006 he began circulating drafts of the formal settlement agreement to known representatives of pension beneficiaries, such as counsel for the City and employee unions, including counsel for Appellants. He requested input from counsel regarding draft language of the settlement agreement. Regarding the draft judgment prepared December 1, 2006, counsel states that he received a call on December 6, from Appellants' then-attorney, Greg Peterson, stating that the proposed judgment was acceptable and satisfied his concerns. Also on December 6, Peterson's office served counsel for the City and Plaintiff with points and authorities in support of a stipulated application for writ order and entry of judgment and their proposed judgment. Although the documents were signed and stated that the proposed order was filed separately, Attorney Conger learned later that those two documents were not filed or lodged with the court.

In response to the motions to dismiss, Appellants submit the declaration of Mr. Peterson (now their former attorney), stating that neither he nor other attorneys at his firm approved the language of the release and the settlement agreement and judgment, and they did not waive their objections to the settlement. Appellants also submit a declaration from one of their current attorneys, Christopher Nissen, stating that he was prevented by traffic problems from attending the December 12 hearing, which was a further status conference, and he could not reach the court by telephone at that time. This is apparently the first explanation in the record why Appellants did not appear through their counsel at that hearing, i.e., that they believed a final fairness hearing would be set for a subsequent date, and counsel was unavoidably held up by traffic.

Appellants therefore argue that they are sufficiently aggrieved by the judgment, as objectors, and they have standing to raise issues on appeal. They point out that they raised numerous objections to the proposed settlement after they filed their notice of divestiture in July 2006, and participated in the hearings to continue to object at least through November 29, 2006. Also, to the extent that they could be bound by res judicata or collateral estoppel stemming from this judgment, they may be deemed to be aggrieved parties. (*In re Lauren P.* (1996) 44 Cal.App.4th 763, 771.) A party is aggrieved by a judgment if its rights or interests may be injuriously affected by it. (*County of Alameda v. Carlson* (1971) 5 Cal.3d 730, 736-737.)

We agree that Appellants have raised enough objections that were adequately preserved on appeal, in order that these issues should properly be addressed on their merits. As explained in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 395-396, "A class member who appears at a fairness hearing and objects to a settlement affecting that class member has standing to appeal an adverse decision notwithstanding the fact that the member did not formally intervene in the action." (*Ibid.*, citing *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128-1132; *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 139; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 253 (*Wershba*) [in "context of a class settlement, objecting is the procedural equivalent of intervening"].) Some of Appellants' objections to class certification and settlement approval were overruled and some were sustained. It is necessary for us to address the merits to determine the validity of those rulings, and we do not decide whether this appeal is

frivolous in the context of dismissal. (But see pt. VI, *post*.) For purposes of analyzing the propriety of the judgment as a whole, Appellants have a sufficient basis to claim that they were "aggrieved" by the trial court's rulings. (§ 902.)

Accordingly, the motions to dismiss are denied and we next turn to the merits.

IV

CERTIFICATION: PROVISIONAL AND CONFIRMED

This portion of the appeal requires us to assess the trial court's exercise of discretion in certifying the class, after provisionally establishing it through stipulation of the existing parties, subject to the giving of notice and an objection procedure. On appeal, Appellants make a preliminary argument that Plaintiff's class counsel was an inadequate legal representative of the class, and impliedly, they also claim inadequacy of Plaintiff himself, as a retired employee, to represent Appellants, who are public safety officers with a different labor law status and different benefits. We now address those particular certification issues before turning to Appellants' major arguments against the approval of the settlement on a classwide basis (e.g., their due process objections to the hearing procedures used; pt. V, *post*).

Normally, the case law criteria would require us to consider whether Plaintiff was an adequate class representative. (*Lockheed Martin, supra*, 29 Cal.4th at pp. 1104-1106.) Instead, Appellants' arguments mainly attack class counsel as an inadequate representative. Counsel for the City suggested below that this was a squabble among similarly skilled plaintiffs' attorneys, and Appellants' counsel apparently thought that they would do a better job. In any case, we will construe this argument to mean that the class

certification process as a whole allegedly did not adequately protect Appellants' interests. At all times from August 4, when Appellants began to appear at the hearings, those hearings had a dual purpose, both of examining the validity of the settlement as to all potential class members, and of setting up a reasonable class notification and certification procedure.

When Appellants, through their retained counsel, filed their notice of divestiture in July 2006, they took the first of a number of formal steps intended to pursue their individual interests in this case. At that time, they were already litigating the federal matters, and their counsel had been notified about the proposed class settlement by Plaintiff's counsel, and they began to appear in hearings in this case August 4. On September 6, by stipulation of the existing parties, provisional class certification for the limited purpose of implementing the settlement agreement was ordered on an ex parte basis. Appellants sought to intervene in the matter in October, but the court denied the request on the basis that they were already participating in the process. There were other objectors involved, the Qualified Objectors, whose interests were also being accommodated through the objection process, as shown by the augmentation material in the record.

When certifying the class provisionally, the trial court agreed with Plaintiff and the City that since primarily declaratory and injunctive relief would be implemented by the settlement, it was appropriate to determine whether a "non-opt-out" certification should be ordered, for purposes of accepting and enforcing the settlement agreement. This was authorized by Federal Rules of Civil Procedure, rule 23(b)(1)(B), providing that

a court may certify a proposed class to achieve such an adjudication with respect to individual class members, "that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications." Where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," class certification is allowed in that manner. (Fed. Rules Civ. Proc., rule 23(b)(2).)

Federal Rules of Civil Procedure, rule 23(c)(2)(A) also required the trial court to "direct appropriate notice to the class," upon approval of the proposed class. The trial court included in its judgment a statement that California trial courts have adopted this procedure, to discretionarily "certify a 'non opt-out' class in the style of a federal rule 23(b)(2) class action," citing *Bell, supra,* 226 Cal.App.3d 1589, 1603-1606. The court also relied on California authority that class actions are intended to promote " ' "considerations of necessity and convenience, adopted to prevent a failure of justice." ' (*Lowry v. Obledo* (1980) 111 Cal.App.3d 14, 26 [*Lowry*], quoting *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458; *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1270, 1280 [*Reyes*].)" In this case, the court determined effective relief could be provided through a class action "when it is alleged that a large number of persons have been improperly denied governmental benefits on the basis of an invalid administrative practice. (*Employer Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 265; *Reyes, supra,* at pp. 1270, 1279.)" Specifically, the court stated, "The City's funding of its public pension system has been in a manner 'generally applicable to

the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.' [Citation.]"

Further, the trial court in this case adapted class action procedures to require more notice than would be provided under Federal Rules of Civil Procedure, rule 23(b)(2), for a matter requesting primarily declaratory or injunctive relief. (*Lowry, supra,* 111 Cal.App.3d at p. 23; *Reyes, supra*, 196 Cal.App.3d at p. 1274). In its September 6 hearing, conducted ex parte with counsel for Plaintiff and the City, the court approved a procedure to give absent class members due notice of the proposed settlement and the opportunity to object to the sufficiency of the consideration the City had agreed to pay in settlement. The City mailed out 18,006 notices to proposed class members, providing for an October 16 hearing date. In the judgment, the court found due notice of the final approval hearing (that had been continued) had been given to the members of the Plaintiff class pursuant to the rules of court.

We find no fault with the procedures followed for provisional certification of this class, and the ultimate approval of the class definition for settlement purposes, under the relevant criteria. Current rules 3.769(c) and (d) prescribe the same procedures for preliminary approval of a class settlement, as found in former rule 1859. Current rule 3.769(e)-(h) also provides: "(e) Order for final approval hearing: If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing. [¶] (f) Notice to class of final approval hearing: If the court has certified the action as a class action, notice of the final approval

hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement. [¶] (g) Conduct of final approval hearing: Before final approval, the court must conduct an inquiry into the fairness of the proposed settlement. [¶] (h) Judgment: If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment." (Formerly Rule 1859, adopted, eff. Jan. 1, 2002, renumbered rule 3.769 and amended, eff. Jan. 1, 2007. This amendment made mainly formal changes.)

Here, the "fairness hearing" was originally noticed for October 16, 2006, but there were still remaining disputes about the scope of the release in the settlement agreement as formalized by the existing parties. After October 16, the court held status hearings on October 30, November 13, and November 29, at which counsel for Appellants was a full participant, and Appellants were put on notice that Plaintiff believed there were reasons for urgency in finalizing the matter (potential bankruptcy filing and lack of accrual of interest). The trial court noted that the public wants to see this retirement system funded properly and promptly. On December 6, counsel for Appellants continued to negotiate with Plaintiff and the City about the scope of the release terms and the format of relief to be granted (in mandamus). This shows some level of cooperation and recognition on Appellants' parts, even if reluctant and under protest, that McGuigan and his counsel

were acting as potentially appropriate class representatives, with regard to the facts, theories and causes of action that they had litigated (and were still seeking to distinguish from Appellants' separate federal claims).

Nevertheless, we are told in the Appellants' attorney declarations in opposition to the motion to dismiss that then-counsel for Appellants (Peterson) did not agree to the proposed judgment, including the class certification aspects of it and the merits. However, Plaintiff's attorney Conger understood from his previous comments that he did, told the trial court so, and submitted a declaration in this court to that effect. Attorney Nissen for Appellants declares that he did not believe the matter would be finalized December 12, apparently on either the class certification or the settlement approval. However, under all the circumstances, that does not appear to be a reasonable belief on his part, since his law firm colleagues had suggested the procedure for preparing a proposed judgment, in consultation with other counsel, and they had agreed to the court setting the December 12 hearing date to examine the matter and potentially to resolve it.

Whatever communication failures occurred with respect to either the class certification or the settlement approval, they are not attributable to the trial court. The court was not advised through any filing of papers on December 6 of any continuing objections by Appellants to the format and scope of the judgment. Rather, on December 12, the court inquired about the absence of counsel for Appellants, and was told what Plaintiff attorney and the city attorney knew, which was apparently that no further objections were being pursued by Appellants. Under all the circumstances, Appellants have no grounds to complain that Plaintiff's counsel was not an adequate legal

representative of the class, since their objections to the proceedings were taken into account from July 31 through December 6 at least. It is not dispositive that Appellants originally sought to have different representation, in light of their ongoing participation in the non-opt-out class proceedings, which were legitimately structured to protect their interests.

The trial court did not abuse its discretion in adapting the procedures of the rules of court to the circumstances of this case, to provisionally certify the class for purposes of considering the class settlement validity. We next turn to the substantive objections raised on appeal.

V

APPROVAL OF SETTLEMENT AGREEMENT

In its judgment, the court outlined the criteria it used under *Dunk*, *supra*, 48 Cal.App.4th 1794, to conduct its inquiry into the fairness of the proposed class settlement of the action. Appellants first contend that this was premature, and due process violations occurred, because the court should not have entered judgment approving the settlement without specifically designating the December 12 hearing as a "final" fairness hearing under former rule 1859. They particularly complain that the provisional class certification order was made September 6 at an ex parte hearing, without their participation.

Second, Appellants argue that the consideration paid for the settlement was inadequate as a matter of law, because the $100 million from the tobacco securitization money was paid by the City prior to the signing of the formalized settlement agreement.

Throughout those arguments, they also object to the breadth of the scope of the settlement agreement's release in the judgment, as interpreted by the trial court. Appellants seek reversal and remand to determine the actual amount of the City's debt to the pension funds and the rights of objectors.

A. Rule Procedures; Adaptation by Court

We have already outlined above the provisions of former rule 1859, now rule 3.769, supplying the standard procedure for fairness hearings on proposed class settlements. Appellants' major argument in this respect is that the trial court repeatedly characterized the various hearings after October 16 (the original fairness hearing) as status conferences or continuing fairness hearings. They claim that they were essentially blindsided when the December 12 hearing culminated in the signing of the judgment, even though they had participated in proposing and revising that document.

This case presented a number of procedural challenges to the trial court, in accommodating the two sets of objectors. The trial court declined to allow formal intervention by Appellants on October 17, stating that they were already participating as objectors and were well aware of the different sets of litigation ongoing, and they primarily needed to work with other counsel on the release language. At the October 30 hearing, the Qualified Objectors were still arguing that the $100 million tobacco funds were not appropriate consideration for this settlement, and the matter was still being debated about whether the settlement was for a total of $173 million, or now for $73 million with collateral that would protect the class plaintiffs. At the November 13 and 29 hearings, Plaintiff's attorney told the court that he feared that the city attorney might find

a reason to withdraw from the settlement, particularly since there was talk of City bankruptcy in the benefits cases being litigated in another courtroom, and that could jeopardize the collateral.

By the November 29 hearing, the Qualified Objectors had withdrawn most of their opposition to the class settlement, as to the $100 million contribution, at least in part because of various problems they were having in the benefits cases litigation (e.g., threats of bankruptcy by the City that would undermine the settlement collateral). As of November 29, only the Appellants were continuing to pursue opposition arguments, and their attorney Mr. Peterson agreed to the procedure of creating a proposed judgment that would deal with his objections to creating any collateral estoppel effect from this case upon the federal matters. The court then reiterated to counsel that the scope of the release was not intended to cover Appellants' civil rights claims. If settlement approval were not forthcoming, the court stated that cross-motions for summary judgment would be set instead. This apparently lent additional urgency to the matter. Mr. Peterson made comments at that hearing that his experience was that municipal bankruptcy was not a panacea for municipality financial problems, and bankruptcy costs more in the long run. This could reasonably have raised an inference to the trial court that Appellants were interested in avoiding bankruptcy problems, such as by participating in settling the matter promptly, in order to protect the collateral for the $73 million.

The focus of the November 29 hearing turned from continuing attempts to negotiate to modify the settlement agreement's release provision, to negotiating the language of a proposed judgment that would interpret that provision as part of

implementing the settlement. Appellants were still acting in an adversarial manner during the procedures, such that the court was well aware of their objections. (See *Dunk, supra,* 48 Cal.App.4th 1794, 1803, fn. 9 [class action settlements are scrutinized more carefully if there was no adversary certification].) However, the Qualified Objectors were in agreement with the settlement, except on a few remaining points addressed in the judgment. At the November 29 hearing, counsel for Appellants, Plaintiff, and the City agreed to the court's schedule for setting a date for Appellants' objections to be filed on December 6, and the City's objections by December 8, so that the court could examine them before the December 12 hearing that was also scheduled. At the November 29 hearing, Appellants' counsel (Peterson) stated that December 12 "would be a wonderful day for us to hammer this out, and we possibly could be done."

Thus, the nature of Appellants' attorneys' participation in the previous hearings on October 30, November 13 and November 29 could reasonably be interpreted by the trial court as showing they were in the process of withdrawing their objections, as had the Qualified Objectors. That was understood by Plaintiff's counsel who communicated with Mr. Peterson on December 6. Although additional papers were served on Plaintiff and the City by Mr. Nissen December 6, raising two remaining objections (although the deletion of the retiree health benefits concern had already been taken care of), those papers were not filed with the court. The remaining objection dealt with the scope of the release language, with a "working draft" of a judgment that also listed continuing objections. The court was aware that the parties had been unable to negotiate a modification of the settlement agreement itself, and on December 12, it adopted the

City/Plaintiff-drafted proposed judgment that required the trial court to interpret the release provision, as it appeared in the signed agreement of September 6. The Qualified Objectors appeared at the December 12 hearing without further dispute.

Because the judgment recognizes that the parties do not agree on the release language, the court had an adequate basis to issue a judgment that interpreted it, even in the absence of Appellants, because sufficient notice of the procedures had been given and understood by counsel for Appellants, as the record reflects. In any case, immediately afterwards, Appellants appeared to approve of the terms of the judgment by posting its terms in a favorable manner on their professional website, and by bringing a motion for attorney fees as prevailing parties. Appellants never sought relief from default or reconsideration on the grounds of any inadvertent failure of counsel to appear at the hearing. (§ 473.) Their notice of appeal was filed toward the end of the 60-day period allowed, and it appears that they did not decide or communicate to the court or opposing counsel that they were aggrieved by the judgment, until that time.

We conclude, under the circumstances of this case, the trial court did not err nor deny due process to Appellants when it conducted the numerous hearings in sequence, on the interrelated topics of certification and approval of the settlement, and no separately designated "final fairness hearing" was required to be held or noticed. Moreover, if there was a failure to adhere to the prescribed procedures of court rules, any such error was harmless, because Appellants did not incur any undue prejudice from the process used.

B. Amount, Adequacy of Consideration

In section II, *ante*, this court addressed the issue of the timing of the settlement, from the June 8 term sheet signing, to the August and September signing of the formalized agreement, for which approval was sought. In the interim, on June 21, the City paid the $100 million tobacco funds into the pension plans, to correct some of the pension underfunding that occurred before 2006. Appellants now contend that as a matter of contract law, that payment was past consideration, and it cannot be counted as part of the settlement monies, if the operative date of the settlement is September 6. (*Simmons v. California Institute of Technology* (1949) 34 Cal.2d 264, 271-273; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 217, p. 250.) Appellants contend that this was a legal error by the trial court to approve any such consideration, and this should provide sufficient grounds to set aside the settlement approval. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 914.)

In response, Plaintiff and the City take the position that it was only the Qualified Objectors who raised this objection at the trial court, regarding any insufficiency of the past consideration, so that Appellants are precluded from making such a contention on appeal. Based on the entire history of the case, it was not necessary for Appellants to separately join in the Qualified Objectors' theories about past consideration, to raise this issue. Although this argument may be properly addressed in this appeal, it has no merit. First, the settlement process should be viewed as a whole, and according to the term sheet, the tobacco monies were designated as part of this settlement, even though the

same monies had previously been a topic of discussion in other pension litigation. There is sufficient evidence in the record about the City's intent, as expressed by the signing of the term sheet and the declaration of executive assistant city attorney Don McGrath, that this $100 million was part and parcel of the consideration for this settlement on these legal theories brought by Plaintiff. The City did not actually make the payment until after this agreement was reached June 8 with Plaintiff, supporting an inference that there was a connection. The settlement amount is also supported by the documentation in the various actuarial reports, which were brought before the trial court.

As a backup position, Plaintiff argues that if the September 6 date is controlling, then the $73 million "special additional contribution" was a reasonable amount to satisfy a $159 million debt, that had been partially satisfied and reduced by the previous $100 million contribution to the pension plans. (See *Rebney, supra*, 220 Cal.App.3d at p. 1139, cited in *Wershba, supra,* 91 Cal.App.4th 224, 250 [a negotiated settlement can be deemed to be fair and reasonable even if it does not obtain 100 percent of damages sought].) Respondents argue that the extensive evidentiary support provided to the trial court, in the form of the eight reports prepared by accounting and legal firms and other analysts, about the pension underfunding problems, supported a finding that $173 million, or even $73 million, were adequate amounts in settlement, since the reports

variously estimated the debt under Plaintiff's particular theories to be $140 to 159 million.[10]

In the reply brief, Appellants contend that Respondents failed to carry their burden of supporting the settlement. However, on appeal, Appellants are the parties seeking to demonstrate there was error or abuse of discretion when the trial court approved the settlement. An appellate court "will not 'substitute our notions of fairness for those of the [trial court] and the parties to the agreement. [Citations.]' [Citation.] ' "So long as the record . . . is adequate to reach an intelligent and objective opinion of the probabilities of success should the claim be litigated' and 'form an educated estimate of the complexity, expense and likely duration of such litigation, . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise,' it is sufficient." [Citations.]' " (*Dunk, supra*, 48 Cal.App.4th 1794, 1802.)

This record is sufficient to meet the criteria outlined above. When the matter was before the trial court, Respondents had the burden to show the settlement was fair and reasonable. (*Wershba, supra*, 91 Cal.App.4th 224, 245.) Here, the trial court could properly apply " 'a presumption of fairness' " (*ibid.*) since there was evidence showing the following basic set of circumstances was present to justify approval, even though the objections were litigated over a period of months: " '(1) the settlement is reached through

---

10 In *Wershba, supra*, 91 Cal.App.4th 224, 240-241, the court noted that there is no "ironclad requirement" that the trial court must hold an evidentiary hearing to inquire into the prerequisites for class certification. Here, numerous documentary reports were lodged and provided sufficient evidence on the fairness of the settlement.

arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.' [Citation.]" (*Ibid.*) Here, as in *Dunk, supra,* 48 Cal.App.4th 1794, "[t]he record reflects all of these elements were present here. The settlement was the product of extensive and hard-fought adversarial negotiations between the parties. [A] well-respected retired judge[] served as neutral mediator[] during critical stages of the negotiations. The parties engaged in discovery for a number of months both before and during the settlement negotiations." (*Wershba, supra*, at p. 245.) The objections were heard on their merits from August through November, the court had a sufficient basis to proceed, and Appellants did not demonstrate that the consideration for the settlement was inadequate as a matter of fact or law.

C. Scope of the Release Provision

Once the trial court was presented with the negotiated settlement and request for approval of a non-opt-out class, it required that the parties give notice of the provisional class certification and the substance of the settlement. Because the release provision was never successfully renegotiated, the trial court agreed to interpret it as part of the decision on whether to approve the settlement, in order to assess the value of the claims that would be released by all class members. As part of Appellants' attack upon the judgment, they contend the consideration for the settlement was inadequate, and they stood to recover much more in their alternative federal actions; thus, they opposed any interpretation of the release language that would restrict that. This raises indirect challenges to the trial court's findings about the scope of the release.

In the settlement agreement itself, the release provision lists the particular theories that were pursued by Plaintiff in this action, as giving rise to the right to reimbursement of unpaid employer contributions: Specified former city charter and municipal ordinance violations, that led to the failure to provide actuarially sound amounts of funds to the pension system from 1996 to 2006, which impaired the beneficiaries' contractual right to an actuarially sound pension fund. (Previously, the City admitted it had incorrectly agreed in 1996 and 2002 "to a budgeted as opposed to actuarially formed rate . . . .") Declaratory relief and relief in mandamus were to be issued accordingly regarding these claims, labeled "the Pension Underfunding Claims." The release provision then stated that it was not intended to "affect or release any claims the Plaintiff or the Settlement Class may have against SDCERS, its trustees, officers, employees, attorneys, actuaries, investment advisors or agents . . . [or the *Gleason* obligations]."

In the judgment that approved the settlement agreement, the trial court discussed and interpreted those specified "Pension Underfunding Claims" (the theories pled by Plaintiff), in several places. First, the court made a finding that the intent of the parties in the agreement "was to release only those claims **that arise from the facts that were alleged and prosecuted in this lawsuit by plaintiff McGuigan**." (Emphasis added.) The court stated, "the scope of the release is coextensive with the causes of action arising from the facts that were alleged." This meant that "no class member may prosecute the same causes of action (comprised of the primary right of the plaintiffs), or seek any additional damages *on any legal theory based upon* the City's failure to pay the amount annually determined by the SDCERS actuary and approved by the SDCERS board from

1996 to 2006." (Italics added.) No other causes of action were intended to be released by members of the class.

The trial court went on to deal with the remaining objections by Appellants and made a finding that they were allowed to pursue those theories excluded from the release, specifically, the City's alleged failure to fund the "pick-up" portion of the employee retirement contribution, the alleged underfunding of health benefits for retirees, and any conspiracy theories about the retirement system's actuary conspiring with the City to understate the employer contributions to the retirement system. These findings in the judgment next provided that certain additional excluded claims remained, i.e.:

> "(iv) claims not otherwise released or waived by the Settlement Agreement; provided, however, released claims would include damage claims under 42 U.S.C. section 1983 or any state, federal or common law *to the extent that they are based upon the City's failure to pay the amount annually determined by the SDCERS actuary and approved by the SDCERS Board from 1996 to 2006*, and any damages recovered for *a claim under (iii) above would be limited to amounts in excess of the Special Additional Contribution* [$73 million] paid by the City under the Settlement Agreement." (Judgment, para. 11, 2d. subd. (1)(iv), p. 8, hereafter subd. (iv); italics added.)

After making those findings, the court reiterated that "the only claims released under the Settlement Agreement are the claims **that arise out of the facts that were alleged and prosecuted by plaintiff McGuigan**." (Emphasis added.)

Our task is to assess all these findings by the trial court. We first take note that in subdivision (iv) set forth above, the reference to the released claims under 42 United States Code section 1983 is somewhat incomplete, but it may readily be clarified by reading the judgment and findings as a whole. That is, when the court states in

subdivision (iv) that the release does not extend to otherwise remaining claims, it also says: "provided, however, released claims would include damage claims under 42 U.S.C. section 1983 or any state, federal or common law *to the extent that they are based upon the City's failure to pay the amount annually determined by the SDCERS actuary and approved by the SDCERS Board from 1996 to 2006* . . . ." (Italics added.) This sentence should be read as impliedly including the trial court's interpretations as stated otherwise in the judgment, as follows (denoted in bold): " . . . released claims would include damage claims under 42 U.S.C. section 1983 or any state, federal or common law *to the extent that they are based upon* **the facts that were alleged and prosecuted in this lawsuit by plaintiff McGuigan** *[regarding] the City's failure to pay the amount annually determined by the SDCERS actuary and approved by the SDCERS Board from 1996 to 2006* . . . ." Otherwise, it is conceptually possible that other facts might exist to explain why the pension underfunding occurred, giving rise to excluded claims.

The trial court was well aware that Appellants' parallel federal causes of action had different underlying alleged facts and alleged theories of recovery, including damages under 42 United States Code section 1983, stemming from claimed labor law violations, bad faith negotiations and retaliation regarding the Appellants' MOU. (See 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 830 et seq., pp. 253-256 [explaining that a municipality can be sued under section 1983 for monetary, declaratory, or injunctive relief for alleged actions that are unconstitutional in the implementation or execution of the municipality's official policy statements or decisions].) This judgment is sufficiently different in nature, with respect to the pleaded

facts and legal theories on which it is based, from the section 1983 claims, to allow a distinction between them. Also, it awards relief in mandamus and declaratory relief to compel reimbursement, and it does not allow for damages. The trial court's interpretation of the settlement agreement release provision is correct, when all of its elements are read together, as explained above.

We further note that the remaining conspiracy theories (excluded from the release) were nevertheless subject to a further limitation in the portion of the court's ruling quoted above in subdivision (iv): It appears to place a floor on damages of $73 million for any federal conspiracy claims, such that Appellants would have to prove damages greater than that in order to recover anything further on conspiracy. In other words, when and if Appellants pursue their federal conspiracy claims, they cannot do so based on the theory of unlawful budgeting of retirement contributions, which is being resolved by this settlement (vindicating the class members' right, as pled, to an actuarially sound set of employer contributions for this time period). Also, under the trial court's interpretation, Appellants cannot obtain a duplicate recovery on the remaining conspiracy theory, regarding the $73 million "Special Additional Contribution," unless greater amounts of damage than that can be proved. No error has been shown in that interpretation. In any case, Appellants apparently failed to preserve any remaining objections to the content of the release agreement, when they failed to file their December 6 objections with the trial court, and failed to appear at the December 12 hearing.

Moreover, the format of the December 6 objections that were served by Appellants on the City and Plaintiff (but not filed) contained only a defectively composed

"proposed judgment" that listed certain objections by Appellants and then purported to issue mandamus relief accordingly. Even if such a proposed judgment had been submitted, the trial court would not likely have agreed to sign such a judgment, that lists certain remaining objections by only one party.[11]

Under all the circumstances, it was not unreasonable for the trial court and remaining counsel to believe that, in light of the incomplete December 6 papers prepared by Appellants, there were no further objections to the proposed judgment as circulated by the City and Plaintiff. Thus, Appellants have failed to preserve or substantiate their claims of error on this point.

We seek to emphasize that we are deciding only the issues properly brought before us, whether the trial court erred or abused its discretion in provisionally certifying this class of employees affected by the pension underfunding, and then in accepting the settlement of those particular claims being litigated in this action. It is not for this court to issue an advisory ruling on the scope of the collateral estoppel or res judicata effect

---

11 The only remaining objection Appellants pursued, by serving opposing counsel with their December 6 papers, refers first, to certain language that was already included in the judgment regarding the "pick-up portion" of employee contributions and retirement health care benefits. The objection then seeks to exclude from the release certain other claims "arising out of the alleged misuse of surplus or 'waterfall' funds, claims arising out of the alleged underfunding of DROP benefits, claims arising out of the alleged conversion of any pension funds, and/or conspiracy claims relating to any claims not otherwise released or waived by this settlement agreement." All of those items appear to refer to the labor law claims being pursued in federal court pursuant to section 1983, and therefore they fell within the scope of the court's interpretation of the release exclusions. In any case, those objection papers were not available to the trial court, and these particular points are not specifically argued in this appeal by Appellants. There was no error in this respect in the trial court's interpretation of the scope of the release.

this judgment should have in other disputes, including those in the federal courts. We decide only that in this case, the trial court had sufficient support in the record to certify the class and to approve the negotiated settlement and to issue judgment accordingly.

VI

SANCTIONS

A. Plaintiff's Motion for Sanctions for Failure to Lend Record

Under rule 8.276(a)(4), sanctions may be imposed on a party or an attorney for "[c]ommitting any other unreasonable violation of these rules." Here, the violation charged is under rule 8.153(a), providing that within 20 days after the record is filed in the reviewing court, "a party that has not purchased its own copy of the record may request another party, in writing, to lend it that party's copy of the record. The other party must then lend its copy of the record when it serves its brief." Subdivision (b) and (c) govern the timing and costs of this procedure.

After the notice of appeal was filed in this case, the record was designated. While it was being prepared, on May 31, 2007, counsel for Plaintiff requested in writing to borrow a copy of the record from Appellants, but received no reply. The record was filed on July 9, 2007. Counsel for Plaintiff wrote Appellants' counsel again that day to request to borrow the record.

In Appellants' reply to the letter 10 days later, counsel indicated that he would not lend the reporters' transcript portion of the record unless Plaintiff confirmed that written permission had been obtained from the court reporters, pursuant to Government Code

section 69954, subdivision (d), which restricts the private selling or "providing" of purchased transcripts from other persons.

In reply the next day, counsel for Plaintiff wrote Appellants' counsel, stating his position that the rule of court does not require written permission of court reporters for "lending" the record, and case law did not support such a request for written permission, but he promised not to copy the reporters' transcripts before returning them. No reply was received, so Plaintiff attorney e-mailed opposing counsel on August 8, 2007, asking if "no" was his final answer. Opposing counsel said he would get back to him next week, but he did not.

Plaintiff then filed a motion for sanctions on the grounds of Appellants' willful failure to comply with court rules. (Rule 8.153.)[12] In support of the motion, Plaintiff complains that Appellants had previously violated other rules regarding record preparation, by tardy and incomplete designation of the record, from February 19 through March 12, 2007. In order to prepare and support their companion motions to dismiss, both Plaintiff and the City had to file extensive notices of lodgment, since the record was not provided or ready at that time. Plaintiff now contends that his efforts to borrow the additional copy of the record were ignored, and at least the 37-volume clerk's transcript

---

12 Rule 8.153 provides as follows: "(a) Request. Within 20 days after the record is filed in the reviewing court, a party that has not purchased its own copy of the record may request another party, in writing, to lend it that party's copy of the record. The other party must then lend its copy of the record when it serves its brief. [¶] (b) Time to return. The borrowing party must return the copy of the record when it serves its brief or the time to file its brief has expired. [¶] (c) Cost. The borrowing party must bear the cost of sending the copy of the record to and from the borrowing party."

should have been provided. Also, the reason given for not sharing the reporters' transcripts was not supported by the language of the rule of court. Accordingly, Plaintiff seeks an award of $4,000 monetary sanctions, along with delivery of the record (now a moot point).

In opposition to the motion, Appellants claim no timely request was made, and the initial record request was premature. Appellants' reading of the court rule required permission from the court reporters, and after their opening brief was filed, Appellants were willing to lend the record to Plaintiff's counsel upon receipt of payment for shipping, but "due to clerical oversight the record on appeal was not sent nor was a request for payment for shipping sent to Mr. Benes." Next, this motion was filed. The clerk of this court called counsel for Appellants to ask whether the record would be sent. Counsel responded that due to clerical oversight, he had not done so, but he would be willing to do so and also to agree to an extension for time of filing of the Respondent's brief.

In reply, Plaintiff's attorney sent a letter on October 18, 2007, objecting to the delay but giving a federal express account number for shipping. The record was sent October 26, and received October 30. Plaintiff's Respondent's brief was due January 9, 2008, and was filed after another extension on February 7, 2008. Appellants claim this motion for sanctions is moot or not well taken because the record has been received, the original request was premature, Plaintiff did not supply a billing or federal express account number in a timely manner, and Plaintiff could have contacted the court reporter as suggested. Appellants' attorney submits Mr. Nissen's declaration, attaching copies of

several e-mails, and claiming it was only clerical error to fail to supply the record earlier, but Plaintiff's counsel refused to withdraw the motion.

Although rule 8.153 was adopted in 2007, its predecessor rules established this lending and borrowing procedure many years ago. (Former rules 10, 11.) The plain language of the rule has never contained any restriction on the lending of reporters' transcripts, as argued by Appellants, nor does Government Code section 69954, subdivision (d) conflict in any way with this rule. Appellants' counsel could have and should have complied with the request. However, due to the unfortunate series of misunderstandings between counsel, and the even more unfortunate clerical error, we are unwilling to say that this record shows Appellants' counsel's conduct amounted to a willful or unreasonable violation of court rules. The motion is denied.

B. City's Motion for Sanctions

The City seeks sanctions on similar grounds as it raised in its motion to dismiss. Previously in this opinion, we explained that we deferred consideration of the City's motion to dismiss, which we have now denied, and we chose to address the merits of Appellants' arguments. (Pt. III, *ante*.) We could not readily decide, without a full examination of the record and briefing, whether these Appellants are parties who are aggrieved by the judgment, or whether they preserved their objections for appeal. Accordingly, this sanctions motion may now be considered pursuant to the procedures under rule 8. 276(b)(2): "If a party files a motion for sanctions with a motion to dismiss the appeal and the motion to dismiss is not granted, the party may file a new motion for sanctions within 10 days after the appellant's reply brief is due." Opposition and reply

papers were filed, and the sanctions issue was set for hearing with this appeal. (*Ibid*. at subds. (c), (d), (e).)

We first note that the decision to defer consideration of the motion to dismiss was mainly administrative in nature and did not constitute an indication about the merits of the motion. (*Estate of Wunderle* (1947) 30 Cal.2d 274, 279.) However, since we have found it necessary to address the merits of the appeal in some detail, and since the issues presented have some degree of complexity and are important to all of the parties, we decline to find as a matter of law that this the appeal was objectively frivolous on any of the grounds stated in the motion to dismiss. (*Millennium Corporate Solutions v. Peckinpaugh* (2005) 126 Cal.App.4th 352, 360.) Rather, we will consider the objective merit of the arguments raised on appeal in connection with addressing whether the appeal was subjectively frivolous in nature, as being brought for an improper purpose, such as harassment or for delay in enforcement of the judgment. In this analysis, we may properly utilize the subjective and objective standards together, such as considering any substantive lack of merit of the legal positions taken by the appellant. (*Id*. at p. 360, fn. 5.)

To argue this appeal is subjectively improper, the City contends that Appellants must have been seeking only to delay the effect of this judgment, in order "to stave off the City's motion for summary judgment in the duplicative federal case. By keeping this case alive through its frivolous [state] appeal, [Appellants were] able to argue to the federal court that this case lacked any res judicata effect which would bar the [Appellants'] duplicative claims in that case." The City requests judicial notice of certain

filings by Appellants, in April and June, 2007, in their federal case regarding pension underfunding, in which Appellants discuss the effect of this case on those issues. Also, the City requests judicial notice of the filing of Appellants' opening brief in the Ninth Circuit Court of Appeals, dated February 2008, in which they challenge the summary judgment granted in favor of the City defendants by the district court. These judicial notice requests are granted. (Evid. Code, §§ 452, 459.)

In further support of the motion for sanctions, and in response to the opposition, the City submitted supplemental briefing that requests judicial notice of the corrected opening brief filed by Appellants in the same federal case, dated in March 2008. The corrected opening brief contains statements that appear to contradict some statements made by Appellant in their briefing in the case before us, regarding whether the $100 million payment was past consideration or not, and whether it operated to improve the financial security of the pension system.

The City further contends that Appellants have shown a lack of diligence in pursuing this appeal in several respects, such as waiting 58 days to file the notice of appeal, delaying in designating the record and then doing so incompletely, and/or failing to deposit the required costs in a timely manner. Accordingly, the City seeks an award of attorney fees and costs as sanctions, of $109,356.70.

Appellants oppose the motion for sanctions in several ways. First, they deny making any inconsistent statements in the two sets of appellate papers, as they say the statements in the federal appeal briefs address hypothetical situations and can be interpreted in different ways. Further, Appellants contend this motion for sanctions is

merely a repetition of the motions to dismiss and/or strike a new reply argument, all of which this court deferred to the merits panel. Appellants contend that this deferral of consideration of those motions should give rise to an inference that Appellants raised potentially meritorious claims that were not frivolous. (But see *Estate of Wunderle*, *supra*, 30 Cal.2d 274, 279.) Appellants therefore argue their appeal is both objectively and subjectively reasonable, because it addresses legal issues that required substantial analysis in the original set of briefing, and Appellants did not actually make any misrepresentations of the record, with regard to their ongoing and repeated claim that the settlement terms were changed in the December 1 proposed judgment that was circulated.

Appellants therefore request that the motion for sanctions be denied, or any amount of monetary sanctions that is allowed should be reduced due to the City's duplicative briefing. Alternatively, Appellants suggest, without bringing a formal motion, that sanctions should be granted in their favor, because the motion itself was "frivolous." (§ 128.7, subd. (b)(2).)

Although this court did not prejudge the motion to dismiss when deferring it to the merits panel for decision, the fact is that we have denied that motion, due to the nature of the legal questions it argued. Appellants did not lack standing to appeal as aggrieved objecting parties, nor can it be conclusively determined that they waived any objections in such a manner as to forfeit their claims on appeal. Nevertheless, we have concluded that the grounds of appeal they have raised do not provide any support for their contentions that the trial court erred or abused its discretion in approving the settlement and in certifying the class for settlement purposes. Although it is arguable that one of the

motivations for this appeal may well have been to achieve a delay while the federal matters were being resolved, we are unwilling to make any conclusive finding to that effect; the issues presented are complex in nature and have required substantial analysis for resolution at all levels of the process. For these reasons, we deny the City's motion for sanctions and leave the parties where we found them.

DISPOSITION

The motions to dismiss, to strike, and for sanctions are denied; the judgment certifying the class and approving the settlement agreement is affirmed. Each party to bear its own costs.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.