IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 14-7987 CA 01 (22)

LIEUTENANT JORGE CASTRO,
et al.,

Plaintiffs/Appellees,

vs.

CITY OF MIAMI, et al.,

Defendants/Appellants

_____/

NOTICE OF APPEAL OF A NON-FINAL ORDER

NOTICE IS GIVEN that Defendants/Appellants, CITY OF MIAMI FIREFIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST & PLAN, and THE BOARD OF TRUSTEES OF THE CITY OF MIAMI FIREFIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST collectively ("Pension Defendants"), appeal to the Third District Court of Appeal, the order of this court rendered on June 22, 2018. The nature of the order is a non-final order pursuant to Fla. R. App. P. 9.130 (a)(3)(C)(xi) holding as a matter of law that Defendants/Appellants were not entitled to sovereign immunity. A copy of the order is attached to this notice.

Respectfully submitted,

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By: /s/ *Robert D. Klausner*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has furnished by electronic mail to the following addressees on this 10th day of July, 2018.

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

JOSE RODRIGUEZ, et al.,

Plaintiffs,

v.

CITY OF MIAMI, et al.,

Defendants.
_____/

CIRCUIT CIVIL DIVISION
CASE NO.: 14-7997-CA-01 (22)

JORGE CASTRO, et al.

Plaintiffs,

v.

CITY OF MIAMI, et al.,

Defendants.
_____/

CIRCUIT COURT CIVIL
Case No.: 14-007987-CA-01 (22)

AMENDED ORDER ON MOTION TO DISMISS[1, 2]

[1] This Order is entered in both captioned cases which "join" Plaintiffs (the "Fifth Amended Complaint" in *Castro* and "Fourth Amended Complaint" in *Rodriguez*), as well as all consolidated tag along cases filed by the firm Pita Weber Del Prado and Associates and co-counsel. A list of Plaintiffs in the tag along complaints subject to this Order is attached as Exhibit "A."

[2] As implicitly suggested in the Third District's opinion dismissing an appeal of this Court's initial Order, *see City of Miami v. Rodriguez*, No. 2017-2801, and expressly suggested by Chief Judge Rothenberg in her dissent to the court's denial of the motion for rehearing and rehearing *en banc* in *Miami Dade County v. Pozos*, 43 Fla. L. Weekly D1287 (Fla. 3d DCA, June 6, 2018), the Court is entering this Amended Order to make clear that it is determining – as a matter of law – that the Pension Defendants are not entitled to sovereign immunity from the breach of express contract claim pled in Count II. Because this Court has found that the applicable ordinances allegedly breached are express contracts between the Pension Defendants and participant Plaintiffs, it inexorably follows that sovereign immunity does not – and cannot – preclude relief. Thus, even *if* the Pension Defendants are governmental actors entitled to assert constitutional immunity at all – an issue the parties dispute but this Court need not decide – they may not do so to avoid express contractual undertakings. Contrary to the Pension Defendants' insistence, the ordinances at issue are "express written" contracts which impose upon the Pension Defendants an "express" obligation to "observe and evaluate the performance of any pension administrator employed by the board"; an express undertaking Plaintiffs allege was breached. This "express" undertaking was not one "improperly inferred" by the Court, and the Pension

I. INTRODUCTION

In its Order of June 15, 2017 the Court discussed the "long and rutted procedural road" travelled by these related cases, and the "simple and singular" allegation made by each Plaintiff. *Rodriguez v. City of Miami, et. al.*, 25 Fla. L. Weekly Supp. 312 (June 15, 2017). As the Court pointed out, Plaintiffs allege they were misled into believing they had to either retire from their employment – or enter what is known as "DROP" (and thus retire for pension purposes and agree to sever employment on a date certain in the future) – in order to protect their accrued retirement benefits from what they believed would be the negative impact of an impending City of Miami Ordinance. *Id.* But for this mistaken "belief" Plaintiffs insist that they would not have entered DROP.

In conformance with the requirements of the Court's June Order, Plaintiffs in *Castro* – each of whom is a current or former City of Miami Police Officer – filed their "Fifth Amended Complaint" asserting claims for: (1) Rescission based on Unilateral Mistake;[3] (2) Breach of Contract; and (3) Breach of the Covenant of Good Faith and Fair Dealing. Plaintiffs in *Rodriguez* – both of whom are current or former

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Defendants' obligation under these written contracts (i.e., the ordinances) is not limited to the "timely payment of benefits *only*." *See* Pension Defendants' Initial Brief, pp. 11, 21. Rather, the Pension Defendants are obligated to perform each and every undertaking imposed upon them by the ordinances – "express written" contracts. And if they breach those express written contracts there is no immunity – plain and simple. *See Brevard County v. Morehead*, 181 So. 3d 1229 (Fla. 5th DCA 2015).

[3] While the claim is labeled "Rescission or Reformation of Contract Based on Unilateral Mistake," Plaintiffs do not seek to reform their agreements to enter DROP. They seek only the remedy of rescission.

City of Miami civilian employees – filed their "Fourth Amended Complaint" asserting the same three substantive claims. Pursuant to the Court's June Order, fifty two (52) other individuals (previously putative class members) also filed tag along complaints in the *Castro* case, similarly alleging that they were misled into believing that if they did not enter DROP before the impending ordinance took effect "they would suffer a reduction in pension benefits and would be worse off." These Plaintiffs, however, do not seek rescission of their DROP election, advancing only claims for: (1) Breach of Contract; and (2) Breach of Covenant of Good Faith and Fair Dealing.[4]

The *Castro* complaint names as Defendants the "City of Miami Firefighters and Police Officers Retirement Trust and Plan"; the Board of Trustees of the City of Miami Firefighters and Police Officers Retirement Trust"; and the City of Miami. The *Rodriguez* complaint is brought against the "City of Miami Civil Employees' and Sanitation Employees' Retirement Trust," "The Board of Trustees of the City of Miami Civil Employees' and Sanitation Employees' Retirement Trust," and "The City of Miami."[5] The Pension Defendants, joined by the City, seek the dismissal of

[4] Municipal retirement plans are not covered by the Employment Retirement Income Security Act of 1974 ("ERISA") (codified at 29 U.S.C. §§ 1001-1461) or any similar legislation enacted at the state level. As a result, disputes arising out of municipal pension relationships are governed by common law.

[5] For purposes of this Order the Retirement Trust and Board Defendants in both cases will be referred to collectively as the "Pension Defendants." The City of Miami will be referred to as the "City." The *Castro* Plaintiffs (as well as the Individuals who have filed tag along complaints in the *Castro* case) will be referred to collectively as the "*Castro* Plaintiffs." The two individuals who filed the *Rodriguez* Complaint will be referred to collectively as the *Rodriguez* Plaintiffs.

all pending complaints with prejudice. Their Omnibus Motion to Dismiss was fully briefed and argued before the Court on October 31, 2017. It is now ripe for disposition.

II. FACTS AS PLED

The material facts pled are again not particularly complicated. Each Plaintiff was eligible to receive retirement benefits in accordance with the terms and conditions of a "Retirement Plan" administered, managed and operated by the Pension Defendants. Both Retirement Plans are created pursuant to, and memorialized within, City Ordinances (§ 40-191, *et. seq*. establishes and governs the police and firefighters' plan, and § 40-241, *et. seq*. establishes and governs the civilian plan). Each Plan employed a pension administrator charged with assisting its Board in the performance of its duties. Both Retirement Plans also offer participants a Deferred Retirement Option Program ("DROP"). Once an employee becomes eligible, he or she may enter DROP and, in exchange for certain guaranteed lump sum and future payments, the employee: (a) commits to retire within a specified time period, and (b) agrees that his or her contributions (and the City's contributions) to the Plan will cease and they will no longer earn creditable service for pension purposes. So upon entering DROP (an election binding once made) the

employee effectively retires for pension purposes and is obligated to cease work on or before a specified future date.[6]

On July 28, 2010 the City declared "financial urgency" and proposed adopting an Ordinance that – according to Plaintiffs – threatened to adversely affect their vested pension benefits. This Ordinance (No. 10-010-91) – which was to become effective September 30, 2010 – was passed on first reading on September 14, 2010, and on second reading on September 27, 2010.[7] Plaintiffs allege that in the months leading up to the Ordinance's effective date "various rumors" concerning its impact on their future pensions were circulated, and it became "common knowledge" that "the only way [an employee] could avoid a substantial diminution of benefits was to retire or enter DROP prior to the Effective Date." *Castro* Complaint, ¶ 21; *Rodriguez* Complaint, ¶ 26. Plaintiffs also allege that: (a) the language of the Ordinance (and of certain disclosure "bulletins" released by the City) was confusing; (b) the Union, the Board and the City "all came out with different and confusing interpretations"; and (c) a state of "confusion, panic and chaos" set in amongst pension participants. *Id.* *See also* Individual Complaints, ¶ 19 ("once the City had declared financial

[6] All monies needed to fund the Retirement Plans and DROP accounts are contributed by the City and its employees.

[7] The City's declaration of "financial urgency" and attempt to modify its "certified bargaining agreement" with the Fraternal Order of Police was met with an unfair labor practice claim that eventually worked its way up to our Supreme Court. *See Headley v. City of Miami*, 215 So. 3d 1 (Fla. 2017).

urgency and the Ordinance passed, the rush to enter the DROP system and the decision to stay or leave the DROP became especially chaotic").[8]

Given this alleged state of confusion and chaos, Plaintiffs "took the opportunity" to schedule meetings with the Board's administrator "well in advance" of the Ordinance's effective date – a procedure they allege was *required* as a condition to enter DROP. The *Castro* Plaintiffs allege that despite the then state of confusion – and "the dramatically high number" of employees "rushing … to study their options" – the Pension Defendants assigned a single assistant – Dania L. Orta – as the "sole person… to conduct these meetings and dispense advice and provide guidance." *See, e.g.*, Individual Complaints ¶ 27; *Castro* Complaint ¶ 26. The *Rodriguez* Plaintiffs similarly allege that they received incorrect counseling and advice from Irma Saldana and Edgar Hernandez, administrators of their Plan. *See Rodriguez* Complaint, ¶¶ 42(c), 43(c). Plaintiffs further allege that their Pension Administrator – Robert Nagle – chose not to participate in these meetings and – to further complicate matters – Ms. Orta had a vacation scheduled during the month of September.

Against this backdrop the *Castro* Plaintiffs allege that Ms. Orta – a non-lawyer – was "of the belief that failure to enter DROP or retire prior to October 1, 2010

[8] As a result of this confusion and misinformation Plaintiffs allege that during the summer of 2010 "over one hundred civilian employees," and "over one hundred senior or high ranking police officers and firefighters," retired or entered DROP. *Rodriguez* Complaint, ¶ 3, *Castro* Complaint, ¶ 3.

would be severely detrimental to plan participants eligible to retire or enter DROP prior to that date," and that at each meeting "she so advised each of the plaintiffs." *Castro* Complaint, ¶ 28. They allege that Ms. Orta provided this "incorrect advice, counsel and guidance" because the Pension Defendants designated her as the sole point person "without sufficient information, … training and supervision." Individual Complaints, ¶ 28. The *Rodriguez* Plaintiffs similarly allege that Ms. Saldana and Mr. Hernandez told them they would receive a "lower pension benefit" if they did not retire or enter DROP by October 1, 2010. *Rodriguez* Complaint, ¶ 43(d).

Aside from claiming that Ms. Orta supplied "incorrect advice, counseling and guidance," the *Castro* Plaintiffs also allege that on September 16, 2010 the Board's counsel – Cypen & Cypen – opined that:

> The Ordinance currently under consideration by the City Commission attempts to reduce retirement benefits for *all* employees who retire on or after October 1, 2010. Clearly, certain provisions of the Ordinance are contrary to law. Accordingly, the Ordinance's benefit reductions cannot be applied to an active member's retirement benefit if the member was eligible for normal retirement prior to the Ordinance's enactment date or the Ordinance's effective date, whichever is later.

Castro Complaint, Exhibit "C." Citing considerable appellate precedent, the Cypen firm advised the Board that: "in Florida, it is well-established that a public employee's rights to benefits under a retirement system cannot be reduced once the public employee becomes eligible for retirement. The public employer cannot

impair the employee's right to receive benefits by amending the requirement [sic] system to reduce benefits." Thus, the *Castro* Plaintiffs allege that as of at least September 16, 2010 the Board knew that the proposed Ordinance could not "be applied prospectively to the plaintiffs and that plaintiffs would have been permitted to continue to earn retirement credits at pre-Ordinance rates." *Castro* Complaint, ¶ 32.

Plaintiffs also allege that two days later (before the effective date of the Ordinance) Mr. Nagle "finally began to study the matter" and expressed "deep concern over the chaos, multiple interpretations, and confusion" leading employees into making "misinformed retirement decisions," describing the situation as "a 'tower of babel'… due to the many interpretations of what is going around." *See* Individual Complaints, ¶ 34. Lamenting that there was "just too much chaos and confusion," he suggested that:

> I think we need a single Board voted and approved version and plan for all to go by or we are going to have an army of people who will feel outraged since I guarantee we will have some who will go the "wrong way" and fell (sic) slighted to say the least" (emphasis added).

Yet according to Plaintiffs the Pension Defendants did nothing to clarify the "chaos and confusion," despite knowing that "doing nothing meant financial and career harm" to those officers "who will go the 'wrong way'", and that the Pension Defendants failed to notify them that Ms. Orta's prior advice, counseling and guidance was "in error."

Taking these allegations as true – as the Court must at this stage – the question is whether they support the elements of the claims pled.[9]

III. RESCISSION BASED ON UNILATERAL MISTAKE[10]

As this Court has written many times before, "[c]ontracts are voluntary undertakings, and contracting parties are free to bargain for – and specify – the terms and conditions of their agreement." *Sky Bell Select L.P. and Sky Bell Asset Management, LLC, vs. National Union Fire Insurance Co. Of Pittsburgh, Pa, and Federal Insurance Co.*, 23 Fla. L. Weekly Supp. 535a (December 17, 2015); *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn*, Inc., 145 So. 3d 989 (Fla. 4th DCA 2014). And when they do it is not the Court's prerogative to "substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." *Int'l Expositions, Inc. v. City of Miami Beach*, 274 So. 2d 29, 30-31 (Fla. 3d DCA 1973). Equally settled is the principle that one who enters into a contract is presumed to know its contents and is bound by its terms and conditions. *Kendall Imports, LLC v. Diaz*, 215 So. 3d 95 (Fla. 3d DCA 2017) (it is

[9] Aside from insisting that Plaintiffs have failed to state a viable cause of action, Defendants also raise other issues such as the claim that: (a) Plaintiffs who entered DROP prior to the first reading of the Ordinance did not do so based upon the threat it posed and thus have no viable claim (Motion, p. 5); (b) "City Bulletins" published and distributed to all employees adequately advised that accrued benefits would not be impaired by the pending Ordinance ("Motion, p. 7); (c) Plaintiffs failed to exhaust administrative remedies (though Defendants do not articulate what administrative remedies these Ordinances provide for – let alone mandate – as a condition to pursue *these* claims); and (d) certain Plaintiffs' claims are time barred (Motion, p. 11-12). The Court finds that these issues cannot be adjudicated at this stage of the proceeding and each may be raised via a motion for summary judgment, if appropriate.

[10] The "contract" Plaintiffs seek to rescind is their election to enter DROP. Because the issue has not been raised the Court assumes – *without* deciding – that this "election" is in fact a new "contract" – as opposed to simply the exercise of a right granted to participants under existing agreements (i.e., the pension plans).

a "well-established principle that one who signs a contract is generally bound by the contract"); *Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344 (Fla. 1977) ("[i]t has long been held in Florida that one is bound by his contract").

Although these precepts are firmly embedded in our common law, like most "rules" they have limited exceptions, and there are instances where a court may relieve a party from a contractual undertaking; one being when the party seeking to avoid the contract establishes the elements of the so-called "unilateral mistake" claim or defense. In *Deprince v. Starboard Cruises*, 23 Fla. L. Weekly Supp. 1022 (11th Jud. Cir., April 7, 2016), this Court addressed this doctrine, pointing out that Florida law requires that a party seeking to avoid a contract on grounds of "unilateral mistake" plead – and eventually prove – *at least* three elements: "[t]he first being that the mistake did not result from an 'inexcusable lack of due care' on the part of the party who made it; the second being that the party seeking enforcement did not change her position in detrimental reliance on the contract such that it would be 'unconscionable to order rescission'; and the third being that the 'mistake' goes to the 'substance of the agreement itself'." *Id.*, citing *Maryland Cas. Co. v. Krasnek*, 174 So. 2d 541,542 (Fla. 1965).[11]

[11] In *DePrince* this Court acknowledged that contrary to the holding in *Krasnek* and earlier panel opinions, the Third District appears to have added a fourth element by imposing a requirement that the party seeking to avoid the contract also prove that the claimed mistake was "induced" by the other party to the agreement. *See, e.g., Lechuga v. Flanigan's Enterprises, Inc.*, 533 So. 2d 856 (Fla. 3d DCA 1988). *DePrince* is currently on appeal and the Court hopes that our appellate court will harmonize its precedent on this issue. For purposes of this case, however, the "inducement" element (assuming there is one) is not Plaintiffs' problem, as they have clearly pled that their mistake was "induced" by the Pension Defendants.

Precedent soundly confirms without doubt that a claim of "unilateral mistake" (either as a cause of action or as a defense to enforcement of a contract) is available *only* in instances where the error claimed to be a "mistake" goes to the "very substance of the agreement." *Garvin v. Tidwell*, 126 So. 3d 1224 (Fla. 4th DCA 2012); *Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283 (11th Cir. 1998) (the mistake must go "to the substance of the agreement"). Precedent also illustrates that a claimed mistake goes "to the substance of the agreement" *only* when it results in an "imbalance in the agreed exchange… so severe that it would be unfair to" enforce the contract. *Donovan v. RRL Corp.*, 26 Cal. 4th 261, 282, 27 P.3d 702 (2001), citing *Restatement (Second) of Contracts*, § 152. *See, e.g., Krasnek*, 174 So. 2d 541, 542 (insurance company mistakenly paid a claim under the erroneous belief that it "carried liability insurance on the vehicle involved" in accident when policy had actually lapsed); *U.S. All. Corp. v. Tobon*, 715 So. 2d 1122 (Fla. 3d DCA 1998) (offer of judgment which intended to resolve all claims but inadvertently omitted defendant driver was an "unfortunate mistake," as it was "inconceivable" that counsel intended to settle leaving that claim pending); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Anderson*, 445 So. 2d 612 (Fla. 3d DCA 1984) (adjuster – due to an "uncanny coincidence" – inspected the wrong but similar vehicle, determined that it was a "total loss," and mistakenly paid full value of the car); *Langbein v. Comerford*,

215 So. 2d 630 (Fla. 4th DCA 1968) (bookkeeping error resulted in plaintiff paying "too much in settlement with defendant" and existence of mistake "not questioned"); *Garvin v. Tidwell*, 126 So. 3d 1224 (Fla. 4th DCA 2012) (mistake related to the value of the subject of the contract – a horse); *DePrince v. Starboard Cruise Services, Inc.*, 163 So. 3d 586 (Fla. 3d DCA 2015) (cruise line agreed to sell 20.64 carat diamond worth at least $2 million for $245,000.00 because it mistakenly quoted per-carat price); *Donovan, supra* (automobile dealer could rescind contract to sell car for significantly less than intended sale price when offer resulted from "typographical and proofreading errors made by local newspaper").

What these authorities teach is that to support a claim of "unilateral mistake" the alleged mistake must "have a material effect on the agreed exchange of performance," *see Restatement (Second) of Contracts* § 153, and relate to an "essential part of the bargain" such that it "essentially destroys the contract." *Hibiscus Associates Ltd. v. Bd. of Trustees of Policemen & Firemen Ret. Sys. of City of Detroit*, 50 F.3d 908, 916 (11th Cir. 1995). To satisfy this exacting standard the party seeking to avoid the contract again "must show that the resulting imbalance in the agreed exchange is so severe that it would be unfair" to require performance. *Restatement (Second) of Contracts* § 152. In contrast, and as our appellate court observed in *Williams, Salomon, Kanner, Damian, Weissler & Brooks v. Harbour Club Villas Condo. Ass'n, Inc.*, 436 So. 2d 233 (Fla. 3d DCA 1983), "[a] mistake as

to a mere inducement or incident to a contract does not provide" a basis for rescission. *Id.* at 235, citing 13 S. Williston, A Treatise on the Law of Contracts § 1544 (3d Ed.1970).

The "mistake" Plaintiffs complain of here has nothing whatsoever to do with the "substance" of the contract whereby they entered DROP, or any term – let alone a material term – of those agreements. *See Williams, supra* ("[a] mistake, whether unilateral or mutual, must go to a material, substantial element of a contract in order to justify rescission"). Plaintiffs admittedly received *exactly* what they bargained for (i.e., a lump sum retirement amount and specified future payments) and provided the precise consideration agreed upon. There is nothing "imbalanced in the agreed exchange" resulting from any mistake. What Plaintiffs allege is not that they were "mistaken" as to the "substance" of their contract, but rather that they were "mistaken" as to the "need" to enter into it. Put simply, they allege that they were impelled to enter DROP by a mistaken belief that they would suffer a collateral consequence (i.e., a future reduction in benefits) if they failed to do so. This species of "mistake" (i.e., "a mere inducement" on a matter incidental to a contract, *Williams supra*) will not support a claim for rescission based on unilateral mistake.

Aside from attempting to persuade the Court that the alleged "mistake" here goes to the "substance of the agreement," Plaintiffs alternatively claim that the remedy of rescission based upon "unilateral mistake" is available here because the

contracts at issue (DROP agreements) are "between the Board of Trustees… and beneficiaries" who were in a fiduciary relationship. Plaintiffs Supplemental Memorandum, pp. 3-4. According to Plaintiffs the "common law of trusts" is "far more willing to permit rescission" of contracts procured by a fiduciary when a beneficiary "did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew." *Brent v. Smathers*, 547 So. 2d 683, 685 (Fla. 3d DCA 1989), citing *Restatement (Second) of Trusts* § 216(2)(b) at 499 (1959).

A fiduciary recommending and/or entering into an agreement with a beneficiary is no doubt obligated to inform the beneficiary of "his rights and of the material facts affecting a transaction which is a deviation from the terms of the trust," and ensure "that the beneficiary is sufficiently informed so that he understands the character of the transaction and is in a position to form an opinion as to its advisability." *Restatement (Second) of Trusts* § 216 (1959). Here, however, the challenged "transaction" (i.e., Plaintiffs' decisions to enter DROP) was not a "deviation from the terms of the trust" at all. Rather, it was an election expressly authorized by the controlling Ordinances. Thus, the Pension Defendants were not recommending and/or entering into any agreement which was contrary to – or a deviation from – their charge.

More importantly, the claim here is not one for breach of fiduciary duty, as this Court's predecessor found that cause of action precluded due to a failure to serve the statutory notice required in order to trigger a waiver of sovereign immunity.[12] The claim asserted here is for common law rescission based upon "unilateral mistake," and no precedent holds – or even suggests – that the elements of *this* cause of action are relaxed when the parties to the contract are in a fiduciary relationship. Nor does any policy support such a modification of these well settled requirements.

IV. BREACH OF CONTRACT/BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

According to Plaintiffs each Retirement Plan "constitutes an enforceable unilateral contract" establishing "minimum levels of performance." *See, e.g., Castro* Complaint, ¶¶ 69-72; *Rodriguez* Complaint, ¶¶ 18, 21; 55; Individual Complaints ¶ 47. Plaintiffs allege that the Pension Defendants breached these "contracts" by: (a) "giving… incorrect advice with respect to the impact of the Ordinance;" (b) "failing to correct the bad advice once discovered;" and (c) "failing to give plaintiffs an opportunity to withdraw, cancel or rescind DROP and retirement applications and agreements…" *See Castro* Complaint, ¶ 73; *Rodriguez* Complaint, ¶57; Individual Complaints, ¶ 48.

[12] In their Supplemental Memorandum Plaintiffs request that the Court revisit this interlocutory ruling. *See, e.g. Margulies v. Levy,* 439 So. 2d 336, 336 (Fla. 3d DCA 1983) ("[i]nterlocutory orders are modifiable by the trial judge at any time before entry of a final judgment"). Plaintiffs may seek such relief via an authorized motion, not by way of a supplemental memorandum of law on a pending motion to dismiss.

Plaintiffs also allege that each contract "gives the Retirement Board and Trust discretion to administer the Retirement Plan including discretion to administer entry into DROP," and that the Pension Defendants breached the covenant of good faith and fair dealing inherent in all contractual relationships by: (a) "giving Plaintiffs incorrect advice with respect to the impact of the Ordinance;" (b) "failing to correct the bad advice once discovered;" and (c) "failing to give Plaintiff the opportunity to withdraw, cancel or rescind DROP and retirement applications and agreements once the errors were discovered." *Castro* Complaint, ¶¶ 77, 78; *Rodriguez* Complaint, ¶¶61, 62; Individual Complaints, ¶ 48.

It is well settled that the "elements of an action for breach of contract are: (1) the existence of a contract; (2) a breach of the contract; and (3) damages resulting from the breach." *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. 2d DCA 2006). It is equally well settled that "Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract." *Ins. Concepts & Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1234 (Fla. 4th DCA 2001). This implied covenant is designed to protect "the reasonable expectations of the contracting parties in light of their express agreement," *Barnes v. Burger King Corp.*, 932 F. Supp. 1420, 1438 (S.D. Fla. 1996), and its application prevents either party from taking action "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Storek & Storek, Inc. v. Citicorp*

Real Estate, Inc., 122 Cal. Rptr. 2d 267, 276 (Ct. App. 2002). But a claim based upon the duty of good faith and fair dealing must relate to the performance of an express contractual undertaking, as this implied covenant "is not an abstract and independent term of a contract which may be asserted as a source of breach." *Hosp. Corp. of Am. v. Florida Med. Ctr., Inc.*, 710 So. 2d 573, 575 (Fla. 4th DCA 1998). Such a claim also may not be in contravention of an express term of the agreement. *Hahamovitch v. Delray Prop. Investments, Inc.*, 165 So. 3d 676 (Fla. 4th DCA 2015).

Here Plaintiffs allege that the same conduct was both a breach of an express term of the contracts pled, as well as a breach of the duty of good faith and fair dealing inherent in those undertakings. The questions raised then are: (a) whether the Ordinances establishing these Retirement Plans are "contracts"; (b) whether the Complaints allege a "breach" of those contracts; and (c) whether the conduct alleged states a claim for breach of the obligation of good faith and fair dealing.

A. <u>Are the Ordinances Establishing the Retirement Plans Contracts?</u>

As indicated earlier, the Retirement Plan at issue in *Castro* is established by City of Miami Ordinance Sec. 40-191, *et. seq.*, and the Retirement Plan at issue in *Rodriguez* is established by City of Miami Ordinance Sec. 40-241, *et. seq.* In *Bishop v. State, Div. of Ret.*, 413 So. 2d 776, 777 (Fla. 1st DCA 1982), the First District held that this type of statutory pension scheme creates a contractual relationship: "[w]e

are of the opinion that the legal relationship between the appellants and the Division of Retirement is that of contract." Similarly, in *City of Riviera Beach v. Bjorklund*, 563 So. 2d 1114 (Fla. 4th DCA 1990), the Fourth District affirmed a liability finding in favor of a former city employee on a claim arising out of the city pension fund "on [a] breach of contract theory." *Id.* at 1115. And in *City Of Hollywood v. Petrosino*, 864 So. 2d 1175 (Fla. 4th DCA 2004), the court cited *Williams v. Cordis Corp.*, 30 F.3d 1429 (11th Cir. 1994) for the proposition that a pension plan is a unilateral contract, and applied Florida's five (5) year contract statute of limitations in order to determine whether plaintiff's claim for declaratory relief was time barred. *See also, Bd. of Trustees of Jacksonville Police & Fire Pension Fund v. Kicklighter*, 106 So. 3d 8 (Fla. 1st DCA 2013) ("[w]e affirm the trial court's determination that a contractual relationship existed between the Pension Fund and *Kicklighter*").[13]

Based upon these binding authorities the Court concludes that the Ordinances establishing the Retirement Plans at issue constitute "contracts" between the Pension Defendants, the City, and participant employees.

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[13] The term "unilateral contract" is an oxymoron, as a "contract" – by definition – requires that two or more parties reach an agreement and "assent to the same thing in the same sense, and their minds must meet as to all the terms." *Webster Lumber Co. v. Lincoln*, 115 So. 498,502 (Fla. 1927). "Without a meeting of the minds, there can be no contract of any kind." *David v. Richman*, 528 So. 2d 25, 27 (Fla. 3d DCA 1988); *State v. Family Bank of Hallandale*, 623 So. 2d 474 (Fla. 1993) (mutual assent is absolute condition precedent to contractual formulations). In this Court's opinion a pension plan – while almost always *drafted* unilaterally – creates rights in those employees who *affirmatively* accept its terms by participating through continued employment and contributing in accordance with the plans requirements. It is therefore a bilateral contract formed when the employee – as a participant – accepts and agrees to be bound by the terms of the plan proposed by the employer.

B. The Alleged Breach

Plaintiffs are unable to cite to – and the Court was unable to locate – any provision of the Ordinances (i.e., the "contracts") that obligate the Pension Defendants to provide general retirement counseling, or advice with respect to matters such as the possible impact future legislation (i.e., the proposed 2010 Ordinance) *might* have on pension benefits. Nor does any term of these Ordinances obligate the Pension Defendants to provide participants with an opportunity to revoke a DROP election. *See, e.g., Fiorentino v. Dep't of Admin., Div. of Ret.*, 463 So. 2d 338 (Fla. 1st DCA 1985) ("Appellant first argues that the School Board or the Division had an affirmative duty to inform her of the right to elect continued membership and the consequences of a withdrawal of accumulated contributions. Section 238.05(3) contains no such affirmative duty").

In the absence of any express provisions imposing these duties, Plaintiffs first direct the Court to a standard of care clause contained within each Ordinance, which provides that:

> **Fiduciary responsibility**. Members of the board of trustees shall be the named fiduciaries of the retirement system. As named fiduciaries, the trustees shall discharge their *duties and responsibilities* solely in the interest of members and beneficiaries of the retirement system.
> (1) For the exclusive purpose of providing benefits to members and their beneficiaries and defraying reasonable expenses of administering the retirement system.
> (2) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like

capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; and

(3) In accordance with ordinances and other applicable law, documents and other instruments governing the retirement system.

See, e.g., Castro Ordinance, § 40.193(c).

There is no doubt that each Ordinance directs the Plan – and its Board – to "discharge their duties and responsibilities" in the best interest of participants, and to do so with the "care, skill, prudence and diligence" that a prudent person acting in a like capacity would exercise. But this provision is obviously implicated if – and only if – the Defendants are discharging a contractually assumed "duty" or "responsibility."

As one might expect, other provisions within these Ordinances do expressly burden the Pension Defendants with a number of "duties" and "responsibilities," including: (a) a duty to hold, manage and safeguard the fund solely in the interest of members; (b) a duty to retain one or more money managers and convey the property of the fund to those managers in accordance with specified criteria; (c) a duty to observe and evaluate the performance of any money manager retained; (d) a duty to require "accurate and detailed" accounts of all investments, receipts, distributions and other transactions; (e) a duty to properly credit all contributions and withdrawals; and (f) a duty to timely pay all earned benefits. *See, e.g., Castro* Ordinance, § 40.193(a)-(e). And if the Plan/Board fails to use due care in the exercise of those express contractual duties and responsibilities action for breach

will undoubtedly lie. *See, e.g., Bishop v. State, Div. of Ret.*, 413 So. 2d 776 (Fla. 1st DCA 1982); *Bd. of Trustees of Jacksonville Police & Fire Pension Fund v. Kicklighter*, 106 So. 3d 8 (Fla. 1st DCA 2013); *City of Riviera Beach v. Bjorklund*, 563 So. 2d 1114, 1115 (Fla. 4th DCA 1990). But again, these Ordinances simply do not impose upon the Pension Defendants any "duty" or "responsibility" to provide retirement counseling, or advice on the impact pending legislation *may* have on pension benefits. Nor do these Ordinances require that the Pension Defendants provide employees with a right to revisit a DROP election. Thus, a failure/refusal to provide such advice, or a failure to permit revocation of a DROP election, would not – standing alone – constitute a contractual breach.

Plaintiffs, however, allege more than a failure to provide counseling on the impact of this impeding Ordinance, or a mere refusal to offer them an opportunity to revoke their DROP election. They allege that the plan administrator – with the acquiescence of the Pension Defendants – decided to counsel Plaintiffs on the possible impact of the impending Ordinance.[14] Plaintiffs then point out that the "contracts" at issue explicitly impose upon the Pension Defendants "… a continuing duty to observe and evaluate the performance of any pension administrator employed by the board." *See* § 40.194(b)(1). And they advance a claim for breach

[14] Either the Pension Defendants (or their agents) decided to provide advice and counsel on this issue because they believed doing so was within the scope of their responsibilities, or because they elected to do so *voluntarily*. For purposes of this Order it makes no difference why they assumed this task. Once they did, the Pension Defendants were contractually obligated to "observe and evaluate" the pension administrator's activities.

of *this* contractual edict by alleging that: (a) the Pension Defendants permitted unqualified administrative assistants "to provide erroneous advice;" (b) "failed to supervise or otherwise be sufficiently involved in making sure [Plaintiffs] were receiving correct information;" and (c) failing to take corrective steps upon becoming aware that the administrators were acting outside the scope of the Ordinances by providing such advice, and doing so negligently. Plaintiffs also have alleged that these breaches resulted in damages. Nothing more is required to state a claim for breach of this particular contract provision.[15]

Despite Plaintiffs having pled a breach of an express contractual provision, Pension Defendants insist that what Plaintiffs here "really" allege are claims for negligent misrepresentation and breach of fiduciary duty – both of which were dismissed by the Court's predecessor due to a failure to comply with Florida Statute § 768.28's notice requirement. While it may be true that such claims *may* have been viable "but for" a failure to provide the required statutory notice, that does not necessarily mean that the same alleged conduct cannot also support a contract based claim. To the contrary, a single act or course of conduct can give rise to tort *and* contract claims – so long as it satisfies the elements of both. *See, e.g., Holbrook v. City of Sarasota*, 58 So. 2d 862 (Fla. 1952) ("[t]he mere fact that breach of a contract

[15] The Court makes clear that it is not, at this stage of the proceedings, deciding precisely what level or frequency of supervision this provision actually requires.

may be a wrong does not compel a party to bring his action in tort. This action is brought in contract even though it may have been brought in tort"). Put another way, claims sounding in "tort" and "contract" are not necessarily mutually exclusive, and the fact that conduct may have been "tortious" does not, *ipso facto*, preclude a contract claim *so long* as the elements of a cause of action for breach are present. In this case Plaintiffs have pled the "elements" of a breach of contract claim.[16]

C. <u>The Duty of Good Faith and Fair Dealing Claim</u>

Because no express term of the contract required that the Pension Defendants render advice on the potential impact future legislation *may* have on vested benefits, or required that the Pension Defendants provide Plaintiff with any opportunity to rescind their DROP election, it inexorably follows that these Defendants – by allegedly rendering such "advice" improperly – or by failing to afford Plaintiffs an opportunity to change their minds – did not breach any duty of good faith and fair dealing related to the performance of an express term of the agreements. *Ins. Concepts & Design, Inc. v. Healthplan Services, Inc.*, 785 So. 2d 1232, 1235 (Fla. 4th DCA 2001) (the duty of good faith must relate to the performance of an *express*

[16] Ironically, in many cases defendants insist that "tort" claims are no more than disguised breach of contract allegations that should be dismissed due to the existence of a contractual remedy. These arguments have resulted in courts adopting the so-called independent tort doctrine – and the related (but now virtually extinct) – economic loss rule. *See, e.g., Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982)* (tenant failed to "prove a tort that was distinguishable from or independent of his breach of contract"); *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013) (economic loss rule limited to products liability cases only). These Defendants claim just the opposite, insisting that the breach of contract claims pled are disguised "tort" claims, and that the conduct alleged, while possibly "tortious," is not a breach of any agreement. The Court disagrees with the Pension Defendants' implicit suggestion that "conduct" must be either a tort *or* breach of contract. The same conduct can be actionable in "tort" and "contract," and Plaintiffs have pled all required elements of a breach of contract claim.

term of the contract); *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1314 (11th Cir. 1998) ("good faith requirement does not exist 'in the air.' Rather, it attaches only to the performance of a specific contractual obligation").

As for the claim that the Pension Defendants breached their duty of good faith and fair dealing in carrying out their obligation to "observe and evaluate" the performance of the pension administrators, the contracts dictate the standard of care required to be used; namely, the "care, skill, prudence and diligence" that would be exercised by a "prudent person acting in a like capacity." Because the contracts specifically address the standard of care that must be employed, a claim based upon an alleged failure to act in "good faith" may not be used to modify (or circumvent) the bargained for standard of care provision. *See, e.g., Hahamovitch, supra.* And in any event, what Plaintiffs allege here is nothing more than a claim that Pension Defendants failed to exercise due care in carrying out their obligation to "observe and evaluate." Either the Pension Defendants met the standard of care mandated by the contracts or they did not. If they met that standard of care there can be no liability for an alleged failure to act in "good faith." If they did not there is liability for breach of the express contract provision. Thus, the "implied" covenant claim adds nothing to the equation.

Finally, and aside from the fact that the "implied" covenant claims advanced here are either untethered to – or preempted by – an any express contract term, to

state a claim for a violation of the duty of good faith and fair dealing a plaintiff must allege a conscious and deliberate act which is intended to frustrate the agreed common purpose of the contract. *See, Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Heidrick & Struggles, Inc.*, 329 F. Supp. 2d 1309 (S.D. Fla. 2004); *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092 (Fla. 1st DCA 1999). In other words, to successfully plead and prove a claim for breach of contract, a plaintiff must demonstrate:

> a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.

Shibata v. Lim, 133 F. Supp. 2d 1311 (M.D. Fla. 2000), citing *Cox, supra.*

Plaintiffs do not allege that the Pension Defendants or their agents intentionally (or even recklessly) misled them. To the contrary, they allege that these administrators were in fact "of the belief that failure to enter DROP or retire prior to October 1, 2010 would be severely detrimental to plan participants eligible to retire or enter DROP prior to that date." *Castro* Complaint, ¶ 28; *Rodriguez* Complaint, ¶ 32. Plaintiffs also allege that these employees' "belief, at least up to September 16, 2010 [the date of the Cypen letter], was shared by the Board and derived from the language of the draft Ordinance." *Castro* Complaint, ¶ 29. Such allegations do not come close to pleading a conscious, deliberate and capricious exercise of

discretion intended to thwart the Plaintiffs' reasonable contract expectations. *Sepe v. City of Safety Harbor*, 761 So. 2d 1182 (Fla. 2d DCA 2000).[17]

V. CONCLUSION

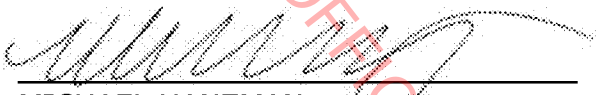
As this Court said earlier, these cases have travelled a "long and rutted procedural road," with no less than ten (10) Complaints being filed in both federal and state courts alleging – or attempting to allege- no less than seventeen (17) causes of action. But when all is said and done Plaintiffs have pled one viable claim (breach of contract) which raises two justiciable issues: Did the Pension Defendants breach their express contractual duty to continuously observe and evaluate the performance of their pension administrators and, if so, did any such breach(es) cause Plaintiffs to suffer compensable damages? It is now time for this five (5) year old case to proceed expeditiously towards a resolution of that claim. *See, e.g., Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963) (citing Justice Story's apothegm that "it is for the public interest and policy to make an end to litigation … so that… suits may not be immortal, while men are mortal…").

For the foregoing reasons, it is hereby **ORDERED**:

[17] On this point the Court notes that even the Cypen firm – upon reviewing the proposed Ordinance – opined that it "attempts to reduce retirement benefits for *all* employees who retire on or after October 1, 2010." *See Castro* Complaint, Exhibit C. Thus, the pension administrator's "belief" that a failure to enter DROP would be "detrimental to plan participants" appears to have been reasonable.

1. Defendants' Motion to Dismiss Count I of the *Castro* and *Rodriguez* Complaints [Rescission based on Unilateral Mistake] is **GRANTED**. This claim is dismissed with prejudice.
2. Defendants' Motion to Dismiss Count II of the *Castro* and *Rodriguez* Complaints and Count I of the *Castro* tag along Complaints [Breach of Contract] is **DENIED**.
3. Defendants' Motion to Dismiss Count III of the *Castro* and *Rodriguez* Complaints, and Count II of the *Castro* tag along Complaints [Breach of Duty of Good Faith and Fair Dealing] is **GRANTED**. This claim is dismissed with prejudice.
4. Defendants shall have twenty (20) days from the date of this Order to file their Answers and Affirmative Defenses, if any.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 06/22/18.



MICHAEL HANZMAN
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or

hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.
Copies furnished to:

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