SANCHEZ, et al. v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, et al.

MOTION FOR SUMMARY JUDGMENT/ADJUDICATION

FILED
Superior Court of California
County of Los Angeles

JUN 15 2017

Sherri R. Carter, Executive Officer/Clerk
By ______, Deputy
V. Jaime

Date of Hearing: **June 8, 2017**
Department: 308
Case No.: BC517444

RULING

The motion for summary judgment is DENIED.

The motion for summary adjudication is GRANTED as to the 1st cause of action for breach of fiduciary duty and 4th "cause of action" for rescission.

The motion for summary adjudication is DENIED as to the 2nd cause of action for breach of contract, 3rd cause of action for breach of the implied covenant of good faith and fair dealing, and 5th cause of action for declaratory and injunctive relief.

The parties' requests for judicial notice are GRANTED.

BACKGROUND

This is a class action filed by Plaintiffs Holly Wedding, Richard M. Lodyga, and Eileen Lodyga (collectively, "Plaintiffs"), individually and on behalf of similarly situated policyholders of Long Term Care ("LTC") insurance issued by Defendant California Public Employees' Retirement System ("CalPERS").

The Corrected First Amended Complaint alleges, *inter alia*, that CalPERS failed to deliver promised benefits and imposed excessive rate increases on premiums (including an 85% rate increase announced in 2013), and that CalPERS and CalPERS Board of Administration Members Rob Feckner, George Diehr, Michael Bilbrey, Richard Costigan, JJ Jelincic, Henry Jones, Priya Mathur, and Bill Slaton ("Board Defendants") breached fiduciary duties to LTC policyholders.

The Corrected First Amended Complaint asserts the following causes of action:

(1) Breach of fiduciary duty
(2) Breach of contract
(3) Breach of the implied covenant of good faith and fair dealing
(4) Rescission
(5) Declaratory and injunctive relief

(6) Professional negligence[1]

By this motion, CalPERS and the Board Defendants (collectively, "CalPERS Defendants") seek summary judgment or, alternatively, summary adjudication of each of the causes of action asserted against them (i.e., 1st through 5th causes of action).

APPLICABLE LAW

CCP §437c subdivision (p)(2) provides:

> For purposes of motions for summary judgment and summary adjudication . . . A defendant . . . has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

DISCUSSION

(1) BREACH OF FIDUCIARY DUTY

In the 1st cause of action for breach of fiduciary duty, Plaintiffs allege that the CalPERS Defendants breached the constitutionally mandated fiduciary duty set forth in Art. XVI, §17 of the California Constitution ("section 17"). See Corrected First Amended Complaint, ¶93. Specifically, Plaintiffs rely upon subsection (c), which provides:

> The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

Plaintiffs allege that the CalPERS Defendants breached their fiduciary duty by:

[1] Plaintiffs asserted this cause of action against Defendants Towers Watson & Co., Towers Perrin, and Tillinghast-Towers Perrin (collectively, "Towers Watson"), the actuaries that initially helped set premiums. Plaintiffs have settled with Towers Watson.

- Failing to provide "complete, timely, and accurate information about the financial stability of the LTC Fund" [¶97]; and

- "[F]ailing to use the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims" by "grossly underpric[ing] premiums, fail[ing] to properly fix premiums based on the 5% inflation protection benefit option, and engag[ing] in an improper and reckless aggressive 44% investment strategy" [¶98].

As a preliminary matter, the Court agrees with the CalPERS Defendants that section 17 does not apply to the administration of the LTC Program, which is not a public pension or retirement system. By the plain language of section 17, the members of the retirement board of a public pension or retirement system have fiduciary duties "with respect to the *system*." See also section 17, subsection (a) ("The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of *the public pension or retirement system*."). As the CalPERS Defendants point out, the LTC Program was not in existence at the time section 17 was enacted or amended, but was established in 1995 as part of the Public Employees' Long-Term Care Act. See Government Code §§21660, *et seq*. In addition, that statutory scheme expressly excludes LTC plans from "the retirement or health benefits programs administered by" CalPERS. See Government Code §21661(k) ("The long-term care insurance plans shall not become part of, or subject to, the retirement or health benefits programs administered by the system.").[2] For these reasons, the Court concludes that section 17 does not impose fiduciary duties with respect to administration of the LTC Program (or any program other than a public pension or retirement system).

But even if section 17 did apply to administration of the LTC Program, as will be explained below, the acts that form the basis of the breach of fiduciary claim are discretionary acts for which the CalPERS Defendants are immune.

As explained in Nasrawi v. Buck Consultants LLC (2014) 231 Cal.App.4th 328:

> A public entity . . . is subject to direct liability only as provided by statute or required by the state or federal Constitution. A public entity is subject to vicarious liability for injuries caused by its employees, but only to the extent those employees themselves are not immune from liability. Public entity employees are immune from liability for injuries caused by their discretionary

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[2] Plaintiffs fail to address Government Code §21661(k), let alone reconcile it with section 17.

> acts or omissions. An act or omission is considered discretionary (and subject to immunity) where it "involve[s] planning and policymaking." Immunity is considered appropriate "for those '*basic policy decisions* [which have] ... been [expressly] committed to coordinate branches of government,' " because "judicial interference" with such decisions "would ... be 'unseemly.' " "[T]o be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place." By contrast, "lower-level, or 'ministerial,' decisions that merely implement a basic policy already formulated" are not entitled to immunity. See Nasrawi, *supra*, 231 Cal.App.4th at 341 (italics in original).

In Nasrawi, the plaintiffs, retired public employees of Stanislaus County and beneficiaries of a public pension trust administered by the Stanislaus County Employees Retirement Association ("Association"), alleged, *inter alia*, that the Association breached its constitutional fiduciary duty imposed by section 17 by failing to sue actuaries for negligent preparation of an actuarial valuation. Id. at 332, 336. The Association demurred, which the trial court sustained without leave to amend on three grounds, including immunity. Id. at 337.

The Court of Appeal concluded that the trial court correctly sustained the demurrer on immunity grounds. Id. at 342-343. The Court of Appeal stated that "[t]he constitutional provision on which plaintiffs rely—*section 17,*--imposes various fiduciary duties *on the board*, not the Association itself," and thus, "the Association's liability, if any, is vicarious liability." Id. at 341 (italics in original). It then determined the question of "whether the board--and hence the Association--is immune from liability." Id. According to the Court of Appeal, the Association's liability "turns on whether [the board's] 'omission was the result of the exercise of the discretion vested in' the board." Id. at 342. In concluding in the affirmative, it explained:[3]

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[3] Contrary to Plaintiffs' characterization of the Court of Appeal's governmental immunity discussion in Nasrawi, such is not "dicta." As noted above, the trial court sustained the demurrer without leave to amend on three grounds—i.e., failure to comply with the Government Claims Act (§810, *et seq.*), governmental immunity, and failure to allege legally cognizable damages. See Nasrawi, *supra*, 231 Cal.App.4th at 337. The Court of Appeal first addressed the Government Claims Act ground, concluding that the plaintiffs were required to satisfy the claims presentation requirement. Id. at 339. The Court of Appeal then addressed the governmental immunity ground, concluding that the Association's discretionary decision to not pursue litigation against the actuaries was immunized under Government Code §820.2, and "[t]herefore, the trial court correctly sustained the Association's demurrer on immunity grounds." Id. at 342–343. Then, in footnote, the Court of Appeal stated: "Because we conclude the trial court correctly sustained the Association's demurrer on Government Claims Act *and immunity grounds*, we need not consider whether plaintiffs alleged legally cognizable damages." Id. at 343 and FN6 (italics supplied). "[I]t is well settled that where two independent reasons are given for a decision, neither one is to be considered mere *dictum*, since there is no more reason for calling one ground the real basis of the

> Section 17 imposes various fiduciary duties on the board. Given the breadth of those duties, section 17 necessarily vests the board with discretion in the manner in which it fulfills those duties. The decision whether to pursue litigation necessarily requires a judgment based on an evaluation of the merits of the potential claim and possible defenses, as well as a cost-benefit analysis of the litigation. "The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of 'discretion' and we conclude that such decisions are immunized under section 820.2.[4]" Id.

As in Nasrawi, the Board Defendants' liability (and CalPERS' vicarious liability) "turns on whether [the board's] 'omission was the result of the exercise of the discretion vested in' the board." See Nasrawi, *supra*, 231 Cal.App.4th at 342. The Board Defendants' omissions pertain to pricing and investment decisions (i.e., "grossly underpric[ing] premiums, fail[ing] to properly fix premiums based on the 5% inflation protection benefit option, and engag[ing] in an improper and reckless aggressive 44% investment strategy"), which require "evaluations, appraisals and choices that are the very essence of discretion." See San Mateo Union High School District. v. County of San Mateo (2013) 213 Cal.App.4th 418, 430.

In San Mateo, the plaintiffs, investors in a pooled investment fund managed and operated by the defendants, San Mateo County and the County Treasurer, asserted claims arising from the defendants' bad investments in Lehman Brothers. See San Mateo, *supra*, 213 Cal.App.4th at 424. The defendants demurred on various grounds, including governmental immunity. Id. The trial court sustained the demurrer without leave to amend, which the Court of Appeal affirmed. Id. In concluding that the defendants were immune, the Court of Appeal reasoned that the County Treasurer (whose actions the County's liability, if any, was based upon) exercised discretion regarding "crucial investment policy decisions that assessed the risks and advantages of competing investment opportunities." Id. at 434. According to the Court of Appeal, "[the County Treasurer's] decisions as a public servant investor bear the hallmarks of discretionary activity which should not be the subject of scrutiny and second-guessing by a coordinate branch of government." Id. This same reasoning applies to the Board Defendants' pricing and investment decisions here.

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decision than the other." See Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council (1992) 4 Cal.4th 422, 431 and FN3.

[4] This statute provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

In opposition, Plaintiffs rely upon Government Code §814, which provides: "Nothing in this part affects liability *based on contract* or *the right to obtain relief other than money or damages* against a public entity or public employee." See Opposition, §§V.A and V.B. But Government Code §814 does not trump the CalPERS Defendants' discretionary acts immunity here.

First, as the CalPERS Defendants correctly contend, Plaintiffs' breach of fiduciary claim is not "based on contract." As explained in Roe v. State of California (2001) 94 Cal.App.4th 64, 69: "Whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the pleading or relief demanded. If based on breach of promise it is contractual; if based on breach of a noncontractual duty it is tortious. If unclear the action will be considered based on contract rather than tort." Here, Plaintiffs' breach of fiduciary claim is not based on a breach of any promise, but on noncontractual duties related to their administration of the LTC Program. Further, the case cited by Plaintiffs, E. H. Morrill Co. v. State (1967) 65 Cal.2d 787, does not assist them. There, the plaintiff, as a general contractor for the construction of a state facility, sued the state for damages for the costs of performing additional subsurface rock excavation. See E. H. Morrill, *supra*, 65 Cal.2d at 789. The complaint alleged that the parties entered into a contract in accordance with plans, specifications and special conditions attached to the written contract. Id. Special Condition 1A-12 provided: "Special Site Conditions. The site is situated on a terminal moraine. The soil is composed of granite boulders, cobbles, pebbles, and granite sand. *Boulders* which may be encountered in the site grading and other excavation work on the site *vary in size from one foot to four feet in diameter. The dispersion of boulders varies from approximately six feet to twelve feet in all directions, including the vertical."* Id. at 789-790 (italics in original). The complaint further alleged that "the Special Condition was false in that it misrepresented the true character of the site, and that the boulders found were substantially larger and more concentrated than represented." Id. at 790. The misrepresentations in E. H. Morrill were set forth in the Special Condition attached to the contract, and were "based on contract" for purposes of Government Code §814 and therefore not subject to Government Code §818.8 immunity. Id. at 793-794. Plaintiffs here have not pointed to a similar liability "based on contract."

Plaintiffs contend that "the fiduciary relationship between CalPERS and the Class arises solely from the contract entered into by the parties." See Opposition, 22:13-14. To get to that conclusion, it is Plaintiffs' position that the statute permitting CalPERS to sell LTC insurance policies on the condition that it acted as a fiduciary,[5] "is incorporated into every LTC insurance contract sold by CalPERS."

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[5] Plaintiffs appear to be referring to Government Code §21664, subdivision (a), which provides: "The Public Employees' Long-term Care Fund is established for the purpose of administering any self-

Id., 22:14-16. But despite Plaintiffs' characterization, their breach of fiduciary claim, at bottom, is based on breach of duties that do not derive from the LTC insurance contracts, and alleges tortious acts in connection with the CalPERS Defendants' administration of the LTC Program. See Corrected First Amended Complaint, ¶¶97-98.

Second, inclusion of a request for injunctive relief does not exempt Plaintiffs' breach of fiduciary claim from immunity. In Schooler v. State of California (2000) 85 Cal.App.4th 1004, the plaintiff argued that Government Code §814 barred immunity under Government Code §831.25 (governmental immunity for injuries caused by natural conditions of adjacent public property) "because he seeks injunctive relief, not money damages." See Schooler, *supra*, 85 Cal.App.4th at 1013. The Court of Appeal rejected that argument, explaining that "[section 814] cannot be applied in such a way as to circumvent either its own underlying legislative policy or that of another section in the Tort Claims Act," and "[a]pplying section 814 as advocated by [the plaintiff] would result in both." Id. According to the Court of Appeal, the policy of section 814 is to bar immunities other than for tort damages, and the policy of section 831.25 is to limit the government's financial burdens with respect to injuries caused by natural conditions of public land. Id. It stated that the injunctive relief sought by the plaintiff—i.e., to require the State to take various measures that imposed financial burdens—is contrary to both policies. Id. at 1014-1015. Here, Plaintiffs' similar argument that Government Code §814 bars the CalPERS Defendants' governmental immunity fails. The injunctive relief Plaintiffs seek is an order enjoining future rate increases, directing a rollback of the 85% rate increase, and reinstating coverage to those who lost or reduced their coverage. See Opposition, 23:12-16. This order would effectively place financial burdens upon CalPERS that section 814 guards against.

The uncertified portion of the breach of fiduciary duty claim (i.e., based on failure to provide "complete, timely, and accurate information about the financial stability of the LTC Fund") fails for an independent reason. In addition to discretionary acts immunity, the CalPERS Defendants are immune under Government Code §§818.8 and 822.2 since this portion of the breach of fiduciary duty claim rests on concealment. See, e.g., Corrected First Amended Complaint, ¶53 (alleging that "[a]t all times, Defendants knew the LTC policies were grossly underpriced and that the premiums would have to be raised"); ¶66 (alleging that

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funded long-term care plan developed by the board and for recovering the administrative costs of the long-term care program from insurance carriers and premiums. Notwithstanding Section 13340, the Public Employees' Long-term Care Fund is continuously appropriated, without regard to fiscal years, to the board to carry out the purposes of this article, consistent with its fiduciary duty. Funding for the board's administrative costs is subject to appropriation by the Legislature and shall be paid out of the Public Employees' Long-term Care Fund."

"CalPERS had knowledge that premiums for the LTC policies would be increased to unaffordable and unexpected levels"); ¶¶73, 77, 81 (alleging that Plaintiffs received promotional materials "tout[ing] the financial stability of [CalPERS'] LTC Program," but "[a]t no time during this period did CalPers disclose to [Plaintiffs] that its LTC policies were underpriced and improperly invested). Section 818.8 provides public entities with absolute immunity from liability for negligent or intentional misrepresentation, and section 822.2 provides a similar immunity to public employees. See Legislative Committee Comments to Government Code §818.8. These immunities include concealment. See Harshbarger v. City of Colton (1988) 197 Cal.App.3d 1335, 1343 ("[T]he immunity provided governmental entities by section 818.8 for misrepresentation applies not only to the first two types of deceit described in Civil Code section 1710 (intentional misrepresentation and negligent misrepresentation) but also to concealment—suppression of fact.").

And as a final note, Plaintiffs erroneously state that "[w]hen evaluating a claim of immunity, 'the rule is liability, immunity is the exception.'" See Opposition, 20:13-15 (citing to Muskopf v. Corning Hosp. Dist. (1961) 55 Cal.2d 211, 219). Muskopf has been superseded by statute (i.e., the Government Claims Act, Government Code §810 *et seq.*) as stated in State Dept. of State Hospitals v. Superior Court (2015) 61 Cal.4th 339. "Under the act, a public entity is *not* liable '[e]xcept as otherwise provided by statute."" See State Dept., *supra*, 61 Cal.4th at 348 (italics supplied); see also Trinkle v. California State Lottery (1999) 71 Cal.App.4th 1198, 1202 ("The statute amounts to a legislative declaration that governmental immunity from suit is the rule and liability the exception.").

For the above reasons, the motion for summary adjudication of the 1st cause of action for breach of fiduciary duty is GRANTED.[6]

(2) BREACH OF CONTRACT

In the 2nd cause of action for breach of contract, Plaintiffs allege that the CalPERS Defendants breached their contractual obligations, "including increasing premiums in violation of the [Evidence of Coverage ("EOC")] and failing to continue to provide the Inflation Protection Benefit without requiring that Plaintiffs and members of the Class pay additional premiums." See Corrected First Amended Complaint, ¶109.

The CalPERS Defendants contend that they are entitled to summary adjudication on this cause of action because: (1) it is time-barred; and (2) it unambiguously permits CalPERS to raise premiums. See Motion, §§III.C.1 and III.C.2.

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[6] The CalPERS Defendants separately discussed the uncertified claim (based on ¶97 of the pleading) and the certified claim (based on ¶98 of the pleading). See Motion, §§III.B.1 to III.B.3.

A. Statute of limitations

The CalPERS Defendants contend that the breach of contract claim is time-barred under the 4-year limitations period set forth in CCP §337.[7] They contend that Plaintiffs' claim accrued in 2003 when CalPERS first raised premiums by 30%. It is the CalPERS Defendants' position that the prior premium increases—i.e., 30% in 2003, 41.7% in 2007, and 5% each in 2010, 2011, 2012, and 2013—were no different than the 85% increase. See CalPERS Defendants' UMF No. 11.

"In ordinary . . . contract actions, the statute of limitations . . . begins to run upon the occurrence of the last element essential to the cause of action." See Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal.3d 176. But as Plaintiffs correctly contend, damages resulting from the "then-unknown premium rate increase [85%], for completely unknown reasons, that would occur at some unspecified future date [2013], which had not yet been determined, announced, or imposed" would have been deemed speculative had Plaintiffs sued based on the first premium increase in 2003. See Opposition, 17:24-17:7. "It is black-letter law that damages which are speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery." See Mozzetti v. City of Brisbane (1977) 67 Cal.App.3d 565, 577.

In addition, Plaintiffs have raised a triable issue as to whether the reasons for implementation of the 85% increase differed from the prior premium increases[8] such that a new limitations period was triggered. See Plaintiffs' Response to CalPERS Defendants' UMF No. 11. For example, Plaintiffs have presented evidence that the 85% increase, unlike the prior premium increases, targeted only LTC1 and LTC2 policies with inflation protection or lifetime benefits. Id.; see also Plaintiffs' Additional Fact No. 107 (citing to

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[7] It is the CalPERS Defendants' position that a shorter limitations period applies to the breach of contract claim to the extent it seeks money damages, but for purposes of the motion, they discuss the longer statute of limitations period. See Motion, FN8.

[8] Alternatively, it is arguable that the CalPERS Defendants did not meet their initial burden of showing that the 85% increase was implemented for the same reasons as the prior premium increases. See CalPERS Defendants' UMF No. 11. The CalPERS Defendants rely upon the following portion from a 2/11/13 letter from Ann Boynton, CalPERS' Deputy Executive Officer for Benefit Programs Policy and Planning, to Plaintiff Eileen Lodyga, which generally provides: "We know that you are counting on CalPERS' Long-Term Care Program to help support you in the future and we are committed to maintaining the financial solvency of the program. Therefore, similar to the private long-term care industry, we have implemented several actions needed to sustain the LTC Program that include: refining the investment mix of the CalPERS LTC Fund, adjusting the LTC Program's expected return on investments, and implementing a series of premium increases."

CalPERS' Agenda Item 5,[9] October 16, 2012). In letters dated 2/11/13 and 3/22/13 sent to these policyholders, CalPERS informed them, *inter alia*, that they were receiving the letters "because" their policies provide lifetime benefits and built-in inflation protection, and that such policies are subject to 5% premium increases in 2013 and 2014 and an 85% premium increase in 2015. See Plaintiffs' Response to CalPERS Defendants' UMF No. 11. In the 3/22/13 letter, CalPERS also offered seven different options that had a corresponding impact on coverage and premium payments:

- If a policyholder maintained lifetime coverage with built-in inflation protection, he/she would be subject to the 2013 and 2014 (5%) and 2015 (85%) increases. [Option 1]

- If a policyholder maintained lifetime coverage with built-in inflation protection and reduced the Daily Benefit Amount, he/she would avoid the 2013 (5%) increase, but would be subject to the 2014 (5%) and 2015 (85%) increases. [Option 2]

- If a policyholder reduced lifetime coverage to a 6- or 3-year benefit period and kept built-in inflation protection, he/she would reduce his/her premium, would avoid the 2013 and 2014 (5%) increases, but would be subject to the 2015 (85%) increase. [Options 3 and 4]

- If a policyholder reduced lifetime coverage to a 10-, 6-, or 3-year benefit period and **dropped** built-in inflation protection, he/she would reduce his/her premium and would **avoid** the 2013 and 2014 (5%) and **2015 (85%)** increases. [Options 5, 6, and 7]

From this evidence, the trier of fact could reasonably infer that the 85% increase on these types of policies was, at least in part, "a result of" the expanding liabilities of inflation protection and/or lifetime benefits. It is plainly evident from the above options that the 85% premium increase was imposed on policyholders who kept the lifetime coverage and/or inflation protection, suggesting that a driving reason for the 85% premium increase was to do away with the inflation protection and/or lifetime benefits.

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[9] Agenda Item 5, under the heading "Executive Summary," states that the recommended actions for the LTC Program (including "[i]mplement[ation] [of] a rate increase of 85 percent for specific LTC1 and LTC2 policies to be levied over a two-year period, beginning in 2015") were designed to achieve certain objectives. One of those objectives was to "ensure the LTC Fund solvency by applying a premium increase effective 2015 to *those plan policies that present a greater liability to the LTC Fund* resulting from initial underwriting, pricing, and claims experience." While the overarching goal was LTC Fund solvency, it could be reasonably inferred that the 85% premium increase was at least partly due to the higher amount of benefits provided to policies with inflation protection or lifetime benefits that were not accounted for at the outset.

As Plaintiffs have raised a triable issue as to whether the reasons for implementation of the 85% increase differed from the prior premium increases,[10] the motion for summary adjudication of the 2nd cause of action for breach of contract based on statute of limitations grounds is DENIED.

B. <u>Merits</u>

In addition, the CalPERS Defendants contend that the breach of contract claim fails on the merits. See Motion, §III.C.2. Specifically, it is their position that the alleged breach is expressly authorized by the contract. Id., 18:21-26. They point to at least three places in the EOC that permit them to raise premiums on a class-wide, issue-age basis, and with at least 60 days written notice:

- "Your premiums will never increase due solely to a change in Your age or health. CalPERS can, however, change Your premiums, but only if We change the premium schedule on an issue-age basis for all similar coverage issued in Your state on the same form as this coverage. We must give You at least 60 days written notice before We change Your premiums." [CalPERS Defendants' UMF No. 15]

- "The premium rates shown in the Schedule of Benefits may be changed on the anniversary of Your Coverage Effective Date and on any premium due date thereafter. Any changes made will be on an issue age basis for all similar coverage issued in Your state on the same form as this coverage, and made by action of the CalPERS Board of Administration, according to criteria they establish." [CalPERS Defendants' UMF No. 16]

- "If premium rates are increased on a class basis, You will have the option of maintaining Your current benefits at the increased premium rate; or electing a decrease in coverage . . . We will give you written notice of any proposed change in Your premium rates at least 60 days in advance of such change." [CalPERS Defendants' UMF No. 17]

However, Plaintiffs have raised a triable issue as to whether the CalPERS Defendants breached these provisions of the EOC by imposing the 85% premium increase on certain LTC1 and LTC2 policyholders, as opposed to all LTC1 and LTC2 policyholders across the board. Rather than increase premiums "on an issue-age basis for all similar *coverage*" as the EOC permits, Plaintiffs claim that CalPERS increased premiums based on the policyholder's

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[10] For this reason, the Court need not address Plaintiffs' "continuous accrual" theory.

benefits.[11] To illustrate, they present evidence that CalPERS increased premiums for LTC1 and LTC2 policyholders with "inflation protection and lifetime without inflation protection," but not 3- or 6-year LTC1 and LTC2 policies without inflation protection. See Plaintiffs' Additional Fact No. 117.

Further, the unambiguous terms of the EOC do not permit rate increases that are the "result of" increasing benefits owed to policyholders who purchased inflation protection.[12] See Opposition, §III.B. Specifically, the EOC, under the heading "BENEFIT: INFLATION PROTECTION," provides:[13]

> **Your Premium Will Not Increase**
>
> **Your** premium rate will not increase as a result of these annual benefit increases.[14]

Plaintiffs have raised a triable issue as to whether the CalPERS Defendants breached this promise to those who purchased inflation protection. As stated above, Plaintiffs have presented evidence from which a trier of fact could reasonably infer that the 85% increase was at least partly "a result of" the annual benefit increases. See Plaintiffs' Response to CalPERS Defendants' UMF No. 11; see also Plaintiffs' Additional Fact No. 107.

(3) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; RESCISSION; DECLARATORY AND INJUNCTIVE RELIEF

The CalPERS Defendants contend that the 3rd cause of action for breach of the implied covenant of good faith and fair dealing fails for multiple reasons. See Motion, §III.D. First, the CalPERS Defendants contend that none of the conduct alleged by Plaintiffs can give rise to a breach of the implied covenant of good

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[11] This distinction by Plaintiffs between "coverage" and "benefits" is a reasonable interpretation. As Plaintiffs point out, throughout, the EOC distinguishes between these two terms. For example, the PERS Comprehensive Plan EOC, in the section entitled "CONDITIONS FOR RECEIVING BENEFITS," "describes important features of Your *coverage* and how You become eligible to receive *benefits*." It enumerates "[t]he *benefits* included in this *coverage*" to be the nursing home benefit, residential care facility benefit, home and community care benefit, respite care benefit, care advisory benefit, the elective inflation protection benefit, the elective benefit increase option, and the return of premium death benefit. See EOC (PTLF – Wedding 000024).

[12] While Plaintiffs contend that the EOC is unambiguous, they nevertheless point to extrinsic evidence. Specifically, Plaintiffs point to the annual letter from CalPERS to policyholders with inflation protection benefits that had an attached Schedule of Benefits reflecting a 5% increase. Each letter from 1996 through 2011 stated that "You will not see any change in premium resulting from this change," whereas the 2012 letter eliminated such language. See Plaintiffs' Additional Fact Nos. 98-99.

[13] See Plaintiffs' Additional Fact No. 43 (emphasis in original).

[14] Those annual benefit increases include 5% increases in the policyholder's nursing home daily maximum, residential care facility daily maximum, home and community care monthly maximum, and unused balance in his/her total coverage amount. See EOC (PTLF – Wedding 000033).

faith and fair dealing because Plaintiffs are not yet entitled to, and have not been denied, payment for benefits under their policies. Id., 22:28-23:12. Alternatively, even if the law permitted a bad faith claim based solely on conduct not involving non-payment of benefits, the CalPERS Defendants contend that that claim is time-barred under the 2-year statute of limitations set forth in CCP §339(1). Id., 23:23-24:3. They contend that all of the alleged conduct occurred more than two years prior to the filing of this action in August 2013. Id., 24:3-9 (citing to CalPERS Defendants' UMF Nos. 4, 24). The CalPERS Defendants also contend there is no bad faith because they were entitled to increase premiums for the reasons they discuss in §III.C.2 (re: breach of contract). Id., 24:10-16. Finally, the CalPERS Defendants contend that, to the extent Plaintiffs have framed their claim as a tort, it is also barred by governmental immunity. Id., 24:17-18.

As to the 4th cause of action for rescission, the CalPERS Defendants argue that: (1) it is merely a remedy and should be dismissed as surplusage; (2) it is based on concealment of "true facts" regarding the stability of the LTC Fund and CalPERS' investment strategies, and is therefore a tort barred by the absolute immunity set forth in Government Code §818.8; and (3) to the extent it is predicated on the Insurance Code, the sections of that code do not apply to CalPERS, which is not an insurance company. Id., §III.F.

As to the 5th cause of action for declaratory and injunctive relief, the CalPERS Defendants contend that this cause of action fails because, as explained above, Plaintiffs have not stated (and cannot state) an underlying claim for relief. Id., §III.F.

In opposition to the motion regarding the 3rd, 4th, and 5th causes of action, Plaintiffs simply respond that the CalPERS Defendants' arguments "are either based on CalPERS prevailing on the arguments discussed above regarding the breach of contract and breach of fiduciary duty claims or are identical to those asserted in its Demurrer to Plaintiffs' First Amended Complaint." See Opposition, 25:8-13. As to the former, Plaintiffs state that CalPERS is not entitled to judgment as a matter of law, and thus, its derivative argument fails. Id., 25:13-14. As to the latter, Plaintiffs state that those arguments should again be rejected for the reasons set forth in Judge Johnson's 5/29/14 order overruling CalPERS' demurrer. Id., 25:14-16.

The reply does not specifically address the 3rd, 4th, and 5th causes of action.

The motion for summary adjudication of the 3rd cause of action for breach of the implied covenant of good faith and fair dealing is DENIED. First, it appears that a bad faith claim can be based on conduct not involving non-payment of benefits. See, e.g., Blue Shield of California Life & Health Ins. Co. v. Superior Court (2011)

192 Cal.App.4th 727, 730 (bad faith claim based on insurer's decision to rescind insured's health insurance policy shortly after she received approval for, and then underwent, gastric bypass surgery); Archdale v. American Int'l Specialty Lines Ins. Co. (2007) 154 Cal.App.4th 449 (bad faith claim based on insurer's failure to accept a reasonable offer to settle a claim against its insured). Second, the CalPERS Defendants' statute of limitations argument appears to be based on the premise that the 85% increase was no different from prior premium increases. However, as discussed above, a triable issue exists as to whether the reasons for implementation of the 85% increase differed from the prior premium increases such that a new limitations period was triggered. See Plaintiffs' Response to CalPERS Defendants' UMF No. 11. Third, while it is true that "if defendants were given the right to do what they did by the express provisions of the contract there can be no breach" of the implied covenant of good faith and fair dealing,[15] as also discussed above, a triable issue exists as to whether the CalPERS Defendants breached the express provisions of the EOC in the first instance. Lastly, the CalPERS Defendants' argument that governmental immunity bars this claim "to the extent Plaintiffs have framed their claim as a tort" does not "completely dispose[] of [the] cause of action" because Plaintiffs appear to be seeking contract and tort remedies. See Corrected First Amended Complaint, ¶¶118-119.

The motion for summary adjudication of the 4th "cause of action" for rescission is GRANTED.[16] First, "[r]escission is *not* a cause of action; it is a remedy." See Nakash v. Superior Court (1987) 196 Cal.App.3d 59, 70 (italics in original). Second, Plaintiffs' rescission claim is barred by the absolute immunity set forth in Government Code §818.8. Similar to the uncertified portion of the breach of fiduciary duty claim (i.e., based on failure to provide "complete, timely, and accurate information about the financial stability of the LTC Fund"), the rescission claim is based on concealment of "true facts"[17] and fails for the same reasons.

The motion for summary adjudication of the 5th cause of action for declaratory and injunctive relief is DENIED. The CalPERS Defendants' sole argument is that this cause of action fails because Plaintiffs have not stated (and cannot state) an underlying claim for relief. In light of the ruling denying the motion for summary adjudication of the 2nd cause of action for breach of contract and 3rd cause of action for breach of the implied covenant of good faith and fair dealing, the motion for summary adjudication of this cause of action necessarily fails.

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15 See Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc. (1992) 2 Cal.4th 342, 374.

16 The CalPERS Defendants' third argument—i.e., that the rescission claim fails "to the extent that it is predicated on the California Insurance Code"—does not reach the entirety of that claim as required by CCP §437c(f)(1).

17 See Corrected First Amended Complaint, ¶124.

PLAINTIFFS' OBJECTIONS

While Plaintiffs are correct that the CalPERS Defendants failed to comply with certain procedural requirements of California Rules of Court, rule 3.1350, "the court's power to deny summary judgment on the basis of failure to comply with California Rules of Court, rule 3.1350 is discretionary, not mandatory." See Truong v. Glasser (2009) 181 Cal.App.4th 102, 118. Plaintiffs' procedural objections on that basis (Nos. 1-15) are OVERRULED.

Plaintiffs' procedural objection No. 16 is OVERRULED. "Some cases follow the 'Golden Rule' of summary judgment and refuse to consider evidence not listed in the moving party's separate statement of undisputed facts on a motion for summary judgment. [¶] [However], [o]ther cases hold that whether to consider evidence omitted from the moving party's separate statement rests in the trial court's sound discretion. The rationale is that CCP §437c(c) requires the court to consider '*all* of the evidence set forth in the papers,' including facts stated in declarations, exhibits, points and authorities or other papers presented to the court on a summary judgment motion." See Weil & Brown, Cal. Practice Guide: Civ. Pro. Before Trial (The Rutter Group 2017) ¶ 10:95.4.

The Court rules on Plaintiffs' evidentiary objections are OVERRULED as to No. 1 and SUSTAINED as to Nos. 2-6.

CALPERS DEFENDANTS' OBJECTIONS

The objections to the Gregor Declaration are OVERRULED in their entirety.

The objections to the Chadick Declaration are OVERRULED as to No. 1 and SUSTAINED as to Nos. 2-22.

The objections to the Hager Declaration are OVERRULED as to No. 1 and SUSTAINED as to Nos. 2-27.