STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21-CVS-4063
ROBERT WRIGHT, MARK MICHALEC, and SCOTT SHIPMAN, individually and on behalf of all others similarly situated, Plaintiffs, v. CITY OF CHARLOTTE, Defendant.	**DEFENDANT CITY OF CHARLOTTE'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, the City of Charlotte ("the City"), by and through undersigned counsel, respectfully moves the Court to enter judgment in its favor on all claims brought by Plaintiffs in this action. In support of this Motion, the City shows unto the Court the following:

1. On or around March 16, 2021, Plaintiffs commenced this action by filing the Complaint and alleging two claims for relief—one primary and one in the alternative. On June 18, 2021, the City filed and served its Answer to the Complaint. On August 31, 2021, Plaintiffs filed an amendment to their Complaint adding two alternative claims for relief. These pleadings are collectively referred to herein as the "Amended Complaint." On September 24, 2021, the City filed and served its Answer to the Amended Complaint. This Motion is now properly before the Court.[1]

[1] As the Court had only recently been appointed to preside over this matter by the Chief Justice and the proceedings were otherwise also early on, the City consented to the Plaintiffs' proposed amendment with the caveat that counsel reserved the right to make the motion at bar as to all claims, rather than have the present motion on the first two claims and then opposing a motion to amend on futility grounds. The analysis would have followed the same legal standard, just fractured across two cross-motions, and the issues are presented to the Court in a single motion under this approach.

2. This lawsuit involves the alleged insolvency of a private non-party entity, the Charlotte-Mecklenburg Police Voluntary Pledge Fund ("Pledge Fund"). *See e.g.*, Amended Complaint Exhibit E, pp. 3-4 at ¶ 6.

3. The Pledge Fund was an "effort[] of employees of the Charlotte-Mecklenburg Police Department to provide ***each other*** with a mutual benefit upon retirement... Over the years the program was operated on a ***voluntary basis***..." *Id.*, p. 1. (Emphasis added.)

4. "In the early 1960s, ***officers*** in the then-Charlotte Police Department established a Fund in which active officers would make a nominal weekly contribution. Monies would be kept in the Fund and on retirement or death, a member would receive a set sum multiplied by the number of officers contributing to the Fund." *Id.* (Emphasis added.)

5. On January 17, 1966, the Charlotte City Council authorized payroll deductions for the Pledge Fund. Amended Complaint ¶ 12 and Exhibit A.

6. Plaintiffs are individuals who voluntarily joined the Pledge Fund and who seek to represent a putative class who also voluntarily joined the Pledge Fund.

SUMMARY OF ARGUMENT

7. Plaintiffs' purported claims in their pleadings are (i) breach of fiduciary duty; (ii) negligent misrepresentation; (iii) a claim styled as an "equitable claim for money had and received – money wrongfully deducted"; and (iv) negligence.

8. The entry of judgment on the pleadings in favor of the City is appropriate because, when viewed in light of applicable law, the facts alleged in the Amended Complaint and the attachments thereto fail to state a claim upon which relief can be granted.

9. As to the First Claim for Relief, a claim for breach of fiduciary duty, the City is entitled to judgment on the pleadings because: (i) the claim sounds in an ERISA violation and the

City is exempt from ERISA; (ii) under state law, there is no fiduciary relationship formed between employer and employee; and (iii) the statutory authority allowing cities to invest "funds" is inapposite to this case, does not create a private right of action, and does not create a fiduciary duty between the City and its employees.

10. As to the "Alternative Second Claim for Relief," a claim for negligent misrepresentation, the City is entitled to judgment on the pleadings because (i) Plaintiffs did not reasonably rely on the representations they attributed to the City; and (ii) attachments to the Amended Complaint contradict Plaintiffs' allegations that "relevant information" was not "made available" to them.

11. Plaintiffs shift gears of liability between the claims in the original Complaint and the claims added by the amendment thereto—grasping the difficulties with their contentions related to the City's alleged liability for the Pledge Fund's problems. They shift to alleging that the payroll authorization made by the City Council in 1966 resulted in the deductions the Plaintiffs themselves authorized to be *ultra vires*. This faulty premise does not enjoy either factual or legal support.

12. As to the "Alternative Third Claim for Relief," a claim for "equitable claim for money had and received – money wrongfully deducted," the City is entitled to judgment on the pleadings because (i) the alleged *ultra vires* act is not beyond the statutory power of the City; (ii) to the extent it is relevant to the inquiry at all, the payroll deduction authorization is not impermissibly vague so as to warrant the voiding of decades of payroll deductions in hindsight; and (iii) assuming *arguendo* that the deductions were *ultra vires*, Plaintiffs are charged with knowledge of the limits of the City's authority as a matter of law and thus cannot assert equity as a basis for recovery for the funds they authorized to be deducted.

13. As to the "Alternative Fourth Claim for Relief," a claim for negligence related to the same alleged *ultra vires* conduct, the City is entitled to judgment on the pleadings because (i) Plaintiffs' pleadings disclose that the City Council properly authorized the payroll deductions complained of at bar; and (ii) Plaintiffs have not pled facts consistent with an actionable legal duty.

14. Accordingly, the Court should enter judgment on the pleadings as to the City and dismiss this matter in its entirety.

LEGAL STANDARD

15. In a motion for judgment on the pleadings, the Court assesses the Complaint as it would in a motion filed under Rule 12(b)(6), by accepting the allegations alleged in the Complaint as true. *See*, *Fisher v. Town of Nags Head*, 220 N.C. App. 478, 725 S.E.2d 99, 102 (2012).

16. "A mere assertion of a grievance is insufficient to state a claim upon which relief can be granted. Some degree of factual particularity is required. The statement of a claim for relief must 'satisfy the requirements of the substantive law which gives rise to the pleadings.'" *Alamance County v. N.C. Department of Human Resources*, 58 N.C. App. 748, 750, 294 S.E.2d 377, 378 (1982) (internal citations omitted).

17. While confined to the pleadings, the Court may also consider "inferences reasonably to be drawn from such facts and matters of which the court may take judicial notice." *Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 878-79 (1970); *see also*, *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 367, 344 S.E.2d 302, 306 (1986) (Noting prior proceedings of the Court are appropriately judicially noticed).

18. For instance, prior to the filing of the action at bar, other members of the Pledge Fund—*i.e.*, members of the putative class—filed a receivership action against the Pledge Fund at

Graue et al. v. The Charlotte-Mecklenburg Voluntary Police Pledge Fund, 19-CVS-13137 (Meck. Co.) (hereinafter "the Graue Action").

19. Plaintiffs attached the Complaint of the Graue Action as Exhibit E to the Amended Complaint at bar and the Report of the Receiver in the Graue Action as Exhibit F. Accordingly, these documents and any documents attached to the Amended Complaint are properly before the Court on a Motion for Judgment on the Pleadings.

20. "The trial court may reject allegations that are contradicted by documents attached to the Complaint." *Schlieper v. Johnson*, 195 N.C. App. 257, 265, 672 S.E.2d 548, 553 (2009).

LEGAL AUTHORITIES AND DISCUSSION

I. First Claim for Relief: Plaintiffs have not stated a claim for breach of fiduciary duty against the City.

21. "To establish a claim for breach of a fiduciary duty, claimants are required to produce evidence that (1) defendants owed them a fiduciary duty of care; (2) defendants violated their fiduciary duty; and (3) this breach of duty was a proximate cause of injury to plaintiffs." *French Broad Place, LLC v. Asheville Sav. Bank, S.S.B.*, 259 N.C. App. 769, 787, 816 S.E.2d 886, 899 (N.C. Ct. App. 2018) (internal quotations and citations omitted).

A. *Plaintiffs are not owed a fiduciary duty by the City.*

22. Plaintiffs shroud their fiduciary duty claim in the vernacular of an alleged fiduciary relationship created by the Employee Retirement Income Security Act of 1973 ("ERISA")—*e.g.*, "[b]y sponsoring, soliciting, enrolling participants, administering...the Pledge Fund, Defendant City of Charlotte...owed the participants in its voluntary employee benefit, a fiduciary duty..." Amended Complaint ¶ 23.

23. As a political subdivision of the State of North Carolina, however, the City is exempt from ERISA's regulatory scheme. *See*, 29 U.S.C. §§ 1002(32), 1003(b)(1); *see also*,

Amended Complaint ¶ 5 ("...Defendant Charlotte is a municipal corporation created by the General Assembly of North Carolina.") Accordingly, ERISA does not recognize a fiduciary duty in favor of Plaintiffs in this case.

24. Turning back then to state law, "[a] [fiduciary] relationship has been broadly defined by this Court as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence... in which there is confidence reposed on one side, and resulting domination and influence on the other." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (internal quotations and citations omitted).

25. "However, the broad parameters accorded the term have been specifically limited in the context of employment situations." *Id.*

26. "Under our case law, it has been stated that the relation of employer and employee is not one of those regarded as confidential; nor is it one from which a presumption of fraud or undue influence will arise." *Hiatt v. Burlington Industries, Inc.*, 55 N.C. App. 523, 529, 286 S.E.2d 566, 569 (1982), *disc. review denied*, 305 N.C. 395, 290 S.E.2d 365 (1982).

27. State law, therefore, does not recognize a fiduciary duty in favor of Plaintiffs in this case. As such, the City does not owe a fiduciary duty to Plaintiffs as a matter of either federal or state law. Thus, on this basis alone, the First Claim for Relief should be dismissed.

B. *Plaintiffs' vague inference about a "fiduciary duty" to invest and account for the payroll deductions is contradicted by attachments to the pleadings and relevant statutory authority.*

28. As indicated above, Plaintiffs attached as Exhibits E and F the Complaint and Report of Receiver to the Graue Action in the Amended Complaint at bar.

29. The Graue Action was commenced by other members of the Pledge Fund who, accordingly, are putative class members. *See*, Amended Complaint Exhibit E, pp. 2-3 at ¶¶ 1-5. The Graue Action was not filed against the City of Charlotte but rather the Pledge Fund as a private entity. *See, id.*, pp. 5-6 at ¶ 6 ("[T]he Police Pledge Fund exists under North Carolina law as an unincorporated nonprofit association, organization, or cooperative organization that operates for the mutual benefit of its members within the meaning of N.C.G.S. § 59B-2.").

30. The Report of Receiver refers to the "[t]he sole asset of the Fund" being "a checking account with Wells Fargo Bank." *See*, Amended Complaint Exhibit F, p. 2. A copy of a statement from the Pledge Fund's bank account is attached to the Report of Receiver (and thus, also attached to the Amended Complaint at bar) as Exhibit B. *See*, Amended Complaint Exhibit F at Sub-Exhibit B.

31. The Verified Complaint in the Graue Action explains that "[o]n August 24, 2015, the City of Charlotte began providing to Sergeant Burke a check each pay period representing the amount withdrawn from Police Pledge Fund members. Sergeant Burke deposited these checks issued by the City of Charlotte into the Wells Fargo bank account for the Pledge Fund." *See*, Amended Complaint Exhibit E, p. 6 at ¶ 21.

32. Almost three years later, "[o]n February 23, 2018, Sergeant Burke sought volunteers from among the members of the Police Pledge Fund to address the operations of the [Pledge Fund]." *Id.*, p. 6 at ¶ 22.

33. Yet in spite of these facts alleged in the Amended Complaint by fellow putative class members, Plaintiffs urge—without any factual allegations to support them—that the Pledge Fund's bank account was simply "a separate fund into which funds were paid when needed to be disbursed," but that "the City of Charlotte bears a fiduciary duty to establish that all funds

withdrawn from participants weekly pay were in fact transferred from the City of Charlotte operating account to the to [sic] Volunteer Fund and should be required to undertake such accounting." Amended Complaint ¶ 31.

34. Plaintiffs do not make any factual allegations that the payroll deductions in question failed to reach their destination in the Pledge Fund. Such a claim would sound in fraud, which must be specifically pled under N.C. R. Civ. P. 9(b) in a way that has not been satisfied here.

35. Indeed, as identified above, Plaintiffs' own attachments to the Amended Complaint directly contradict this conclusory allegation. *See also*, Amended Complaint Exhibit F, p. 2 ("I have also been provided with a check register reflecting deposits and checks written on the Wells Fargo account for the period from January 21, 2016 to May 21, 2019. A copy of this register is attached as Exhibit D.") This register purports to show deposits of the Pledge Fund for January 21, 2016 through May 21, 2019.

36. Plaintiffs attempt to draw upon N.C. Gen. Stat. § 159-30 as a source of this alleged duty. G.S. § 159-30 authorizes and limits investment of funds by local governments to "deposit at interest or invest all or part of the cash balance of any fund."

37. "Fund" is defined in the Chapter as "a fiscal and accounting entity with a self-balancing set of accounts recording cash and other resources, together with all related liabilities and residual equities or balances, and changes therein, for the purpose of carrying on specific activities or attaining certain objectives in accordance with special regulations, restrictions, or limitations." N.C. Gen. Stat. § 159-7(8).

38. The Pledge Fund is thus not a "fund" for purposes of Chapter 159—as described above, the Graue Action establishes that the Pledge Fund is a separate entity.[2]

39. The plain text purpose of G.S. § 159-30 is to limit risky investments by local governments such that "[t]he investment program shall be so managed that investments and deposits can be converted into cash when needed." G.S. § 159-30(a).

40. No private right of action is created by G.S. § 159-30. G.S. § 159-30 was added to the General Statutes by Session Law 1971-780 and amended multiple times thereafter. In forty years, no court decision available from the West database has ever applied G.S. § 159-30, let alone one that finds that a fiduciary duty is created by the statute in favor of a subset of municipal employees.

41. In sum, there is no requirement to invest "funds" under G.S. § 159-30, nor is it clear what misconduct Plaintiffs are vaguely alleging by inference, but to the extent there are any allegations of fraud, such allegations must be specifically pled in accordance with Rule 9(b) of the North Carolina Rules of Civil Procedure.

42. Rather, as Exhibits E and F demonstrate, Plaintiffs' dispute is properly with **the Pledge Fund**, of which they are members, for allegedly failing to invest the deposited funds.

43. Plaintiffs can cite to no pertinent authority where an employer allowing employees to authorize a payroll deduction to an employee-run entity (*e.g.*, a union or charitable organization) creates a fiduciary duty for the City to insure its employees' deductions to this entity.

44. Plaintiffs would have the City, by virtue of allowing its employees to authorize a payroll deduction, take responsibility for the finances of an entity of which they and the putative

[2] As referenced in the Legal Standard section *supra*, this Court can also, for purposes of this Motion, take judicial notice of its own proceedings. The Court in the Graue Action granted a motion for summary judgment against the Pledge Fund, establishing it as a private entity.

class are all members. The paperwork allegedly presented to the Plaintiffs and attached to the Amended Complaint at Exhibit D makes it clear that there are bylaws to this entity and that there is a treasurer. Just as the City does not insure payroll deductions to charitable organizations (*see*, Amended Complaint ¶ 22), the City does not insure payroll deductions to the Pledge Fund.

45. Based on any of the foregoing contentions, the First Claim for Relief should be dismissed.

II. Second Claim for Relief: Plaintiffs have failed to state a claim for negligent misrepresentation.

46. Plaintiffs allege as an "Alternative Second Claim for Relief" a purported claim of "Negligent Misrepresentation and/or Omission." Amended Complaint, p. 12.

47. "The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988).

48. "The tort of negligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating the information... However, a party cannot be liable for concealing a fact of which it was unaware." *Ausley v. Bishop*, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999) (internal quotations and citations omitted).

A. ***Plaintiffs did not reasonably rely on representations made by the City.***

49. "A party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement." *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 369, 760 S.E.2d 263, 267 (2014).

50. "Reliance is not reasonable if a plaintiff fails to make any independent investigation..." *State Props., LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002).

51. "[W]hen the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Hudson-Cole Development Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999).

52. "[W]here the facts are insufficient as a matter of law to constitute reasonable reliance on the part of the complaining party, the complaint is properly dismissed [for failure to state a claim]." *Id.*

53. Plaintiffs fail to allege facts which, if assumed to be true, would establish they were "denied the opportunity to investigate" or alternatively, "that [they] could not have learned the true facts by exercise of reasonable diligence." *Id.*

54. Rather, Plaintiffs only allege that "[a]t no time was such relevant information made available to named plaintiffs or any class member." Amended Complaint ¶ 37.

55. In fact, Plaintiffs allege that if they had access to "the relevant information...if logically analyzed... would have led to the inescapable conclusion that the Pledge Fund was not sustainable and would ultimately fail and that the representations made to prospective Pledge Fund Participants fundamental [sic] were false." *Id.*

56. That the supposed "relevant information" was not "made available" to Plaintiffs is not the legal standard for negligent misrepresentation, as cited above. Accordingly, Plaintiffs have not stated a claim for negligent misrepresentation and, thus, the "Alternative Second Claim for Relief" should be dismissed.

B. ***Attachments to the Amended Complaint contradict Plaintiffs' conclusory allegation that "relevant information" was not "made available" to them.***

57. Moreover, Plaintiffs do not allege what information was known by the city employees making the alleged misrepresentations at the time they made the statements. *See*, Amended Complaint ¶ 15. Only with the benefit of hindsight do they label the city employees' alleged representations as false.

58. Indeed, the attachments to the Amended Complaint establish that Plaintiffs and the putative class had the opportunity to investigate and exercise reasonable diligence to learn about the financial state of the Pledge Fund.

i. *The Enrollment Forms (Exhibit D)*

59. The Amended Complaint attaches what it calls "The Enrollment Forms" at Exhibit D "to provide the legal authorization upon which City officials could and did deduct Five Dollars ($5.00) from each participant's weekly pay." Amended Complaint ¶¶ 19-20 and Exhibit D. Plaintiffs do not allege what information was also not available to Plaintiffs by virtue of The Enrollment Forms attached as Exhibit D.

60. The very mechanics of the Pledge Fund which Plaintiffs allege in the Amended Complaint would lead "to the inescapable conclusion" that it was not viable are contained in Exhibit D to the Amended Complaint. Each Pledge Fund member who experiences a qualifying separation from the Charlotte-Mecklenburg Police Department ("CMPD") gets $10.00 for each Pledge Fund member at the time of their separation from CMPD. Therefore, if membership

decreases over time, then what the Plaintiffs characterize as the "inescapable conclusion" is that the payout from the Pledge Fund decreases to its members over time such that they will pay in more than they are paid out.

61. In other words, by the plain text of the documents contained in Exhibit D, Pledge Fund members always could have put more into the Pledge Fund than they were paid by the Pledge Fund.[3]

62. The documents in Exhibit D directed Plaintiffs to other external sources of information, such as the Treasurer of the Pledge Fund or the Bylaws of the Pledge Fund.

ii. *The Treasurer and the Pledge Fund Bank Account (Exs. E-F)*

63. The Verified Complaint in the Graue Action (Ex. E to the Amended Complaint) and the Report of Receiver (Ex. F to the Amended Complaint) establish that Plaintiffs and the putative class members had direct access to the finances of the Pledge Fund:

a. "Sgt. [Michael] Burke is a member of the Police Pledge Fund and has paid into the fund throughout his law enforcement career." Amended Complaint Exhibit E, p. 3 at ¶ 5. Sergeant Burke verified the Graue Action Complaint. *Id.* at "Verification of Complaint" bearing Sgt. Burke's Signature (June 18, 2019).

b. "On August 15, 2015, a retiring member of the CMPD approached Sergeant Burke in 2015 to serve as the signatory for the Police Pledge Fund's Wells Fargo Account. Sergeant Burke agreed to act as the signatory." Amended Complaint Exhibit E, p. 6 at ¶ 20.

c. "On August 24, 2015, the City of Charlotte began providing to Sergeant Burke a check each pay period representing the amount withdrawn from

[3] The Complaint also alleges that the putative class are comprised of Pledge Fund members who "will not receive their promised return from their participation in the Pledge Fund." Amended Complaint ¶ 8. These are speculative damages. Firstly, the City did not "terminate[]" the Pledge Fund; members of the putative class asked the Court to appoint a receiver to do so. Secondly, two of the three Plaintiffs and most of the putative class have not yet had a qualifying separation event such to trigger payment out of the Pledge Fund. Neither Plaintiffs' own factual allegations in the Complaint nor the documents attached to the Complaint as Exhibit D represent that Plaintiffs would receive a so-called "promised return."

Police Pledge Fund members. Sergeant Burke deposited these checks issued by the City of Charlotte into the Wells Fargo bank account for the Police Pledge Fund." *Id.* at ¶ 21.

d. "As Sergeant Burke was acting as the signatory for the Police Pledge Fund, he discovered that no Board of Trustees existed and that, other than the bank records, there were no records of the Police Pledge Fund's activities or operations..." *Id.* at ¶ 22.

e. The Report of Receiver includes one of those "bank records" of the Pledge Fund (Amended Complaint Exhibit F, Sub-Exhibit B); and

f. The Report of Receiver includes a putative ledger of the Pledge Fund's Wells Fargo bank account dating from 2016-2019 (Amended Complaint Exhibit F Sub-Exhibit D).

64. As a Pledge Fund member, Sergeant Burke is a member of the putative class. *See* Amended Complaint ¶ 8.

65. Plaintiffs or, for that matter, *any* of the putative class members could have been standing in the shoes of Sgt. Burke. Any of them could have been approached by the "retiring member of the CMPD... to serve as the signatory of the Police Pledge Fund's Wells Fargo Account." *See* Amended Complaint Exhibit E, p. 6 at ¶ 20

66. The signatory had access to the Police Pledge Fund's Wells Fargo account statements. Thus, had Plaintiffs merely made inquiry as to the identity of the Treasurer or Bylaws referenced in the documents attached to the Amended Complaint as Exhibit D, any of them could have thus learned from the Pledge Fund signatory about the financial condition of the Pledge Fund.

67. Plaintiffs' position at the time they are alleged to have authorized the Pledge Fund deduction is similar to the position of the plaintiff in *Rountree v. Chowan County*, 252 N.C. App. 155, 796 S.E.2d 827 (2017) when he accepted employment which subsequently alienated his retirement benefits from prior municipal employment.

68. Based only on their own pleadings, Plaintiffs had access to the information necessary "to perform [their] own investigation to determine whether the proposed terms of [the Pledge Fund] were suitable." *Rountree,* 252 N.C. App. at 162.

69. Accordingly, the City did not have a legal duty to provide Plaintiffs with accurate information about the Pledge Fund or, even if it did, the City did not *breach* said duty as a matter of law because it provided Plaintiffs with the very information Plaintiffs claim would have led to the "inescapable conclusion" that the Pledge Fund was not viable.

70. Thus, under any of the above rationales, the "Alternative Second Claim for Relief" should be dismissed.

III. Third Claim for Relief: Plaintiffs do not state a claim in equity that the City acted *ultra vires* in making the payroll deductions.

71. In the Amended Complaint, Plaintiffs add two "alternative" claims for relief revolving around what Plaintiffs now contend were the Charlotte City Council's 1966 ineffective authorization of payroll deductions for the Pledge Fund. The first of these, the "Alternative Third Claim for Relief" is captioned as "equitable claim for money had and received – money wrongfully deducted." *See* Amended Complaint, ¶¶ 40-49.

72. Plaintiffs allege that the 1966 authorization of the payroll deductions were "[l]acking requisite specificity," and thus "cannot be the basis for any Pledge Fund deductions and to the extent deductions were taken pursuant to [C]omplaint Exhibit A, all such deductions were ultra vires being without authority and the funds so deducted must be returned to the Pledge Fund participants from whose salary the deductions were taken." Amended Complaint ¶ 44.

73. Plaintiffs then add that the April 8, 1969 Charlotte City Council minutes "clarifies in specific terms exactly what was approved in 1966 subsequent to the January 17, 1966 City Council meeting." *Id.* ¶ 45. Plaintiff contends that the City Manager's comment that "in 1966

Charlotte City Council approved a Volunteer Pledge Fund for the Police Department permitting payroll deduction of $5.00 each when there is a death of a member of the department with the money going to the beneficiary." *Id.* ¶ 45 (emphasis in original).

74. Thus, Plaintiffs contend, "[a]ll deductions for the purpose of providing anything other than a death benefit for a member from 1966 through the Pledge Fund deductions were terminated were contrary to and in violation of the 1966 authorization... and must be returned to the participant from whose compensation the ***authorized*** deductions were taken." *Id.* ¶ 49 (emphasis added).

A. *Plaintiffs do not allege an ultra vires act by the City.*

75. "An act... is only *ultra vires* if it is beyond the power of the city... The term *ultra vires* is used to designate the acts of corporations beyond the scope of their powers as defined by their charters or acts of incorporation... an act that is otherwise within the statutory powers of a governmental entity is not *ultra vires* simply because it is undertaken by a... municipal employee who acts outside the terms of his employment." *Lee v. Wake County*, 165 N.C. App. 154, 159, 598 S.E.2d 427, 431 (2004), *disc. review denied*, 359 N.C. 190, 607 S.E.2d 275 (2004).

76. Plaintiffs do not allege that the Charlotte City Council's 1966 payroll authorization was beyond the City's statutory powers to authorize.

77. Plaintiffs do not even allege that, once the Pledge Fund allegedly expanded its payout qualifications to retirement, that the City was beyond its statutory powers to take the "authorized payroll deductions." Amended Complaint ¶ 49.

78. In Plaintiffs' Motion for Summary Judgment on this claim, the sole case cited therein, *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999), this otherwise inapposite case supports the City on this point of law.

79. In *Smith Chapel*, the court concluded that "the City's [stormwater utility] ordinance and the fees charged thereunder are invalid as a matter of law because they are operated and conducted in a manner that exceeds the authority granted to the City through N.C.G.S. §§ 160A-311 and -314(a1)." 350 N.C. at 815.

80. Accordingly, Plaintiffs have not alleged that any payroll deductions for the Pledge Fund were *ultra vires* and thus this claim for relief should be dismissed.

B. *The payroll deduction authorization at bar is not vague.*

81. Plaintiffs' premise for their *ultra vires* claim is straining to interpret said authorization as "lacking requisite specificity" (Amended Complaint ¶ 43)—*i.e.,* a vagueness argument.

82. "A statute or ordinance is presumed to have meaning and will be upheld if its meaning is ascertainable with reasonable certainty by proper construction..." *State v. Dorsett*, 3 N.C. App. 331, 335, 164 S.E.2d 607, 610 (1968).

83. Cases examining ordinances for vagueness are often through the lens of their constitutionality, which does not appear to be at issue here. However, the analysis is instructive as "[a]t the threshold of our consideration of the questions here presented we note the well-recognized rule that where a statute or ordinance is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality." *Smith v. Keator*, 285 N.C. 530, 535, 206 S.E.2d 203, 206 (1974), *appeal dismissed*, 419 U.S. 1043 (1974).

84. The authorization is clearly for the Pledge Fund.

a. The title reads: "PAYROLL DEDUCTION OF FUND FOR VOLUNTEER POLICE PLEDGE FUND, AUTHORIZED." Amended Complaint Exhibit A. *See also e.g.*, *Smith Chapel Baptist Church*, 350 N.C. at 812 (the title of

a legislative act "should be considered in ascertaining the intent of the [legislative body].")

b. "Councilman Thrower moved approval of the use of payroll deductions for the Volunteer Police Pledge Fund, subject to the details being worked out satisfactorily. The motion was seconded by Councilman Short and carried unanimously." Amended Complaint Exhibit A.

85. Plaintiffs claim that the phrase "subject to the details being worked out satisfactorily" means that the City only approved payroll deduction based on how Plaintiffs allege the Pledge Fund worked in 1966. Plaintiffs then argue that a comment by the City Manager three years later, in 1969—not a vote by the City Council—is evidence that the Council approved a payroll deduction exclusively for a death payout from the Pledge Fund.

86. The plain language of the 1966 authorization says otherwise. There is no indication in the 1966 authorization that "subject to the details being worked out satisfactorily" meant that the vote was "subject to the details" of the Pledge Fund *payout* "being worked out" or that the Pledge Fund had to operate into perpetuity as it did in 1966 for the authorization to be valid.

87. Rather, for decades, the General Assembly has authorized city councils to properly delegate routine authority to the city manager, and through the city manager, to city staff to work out details. *See*, e.g., N.C. Gen. Stat. § 160-293(b)(2) (1969) (recodified at N.C. Gen. Stat. § 160A-148(b)(2)) ("[The City Manager] shall direct and supervise the administration of all departments, offices, and agencies of the city, subject to the ***general direction*** and control of the Council, except as otherwise provided by law." (emphasis added)).

88. The valid construction of "subject to the details being worked out satisfactorily" is that the City Manager was given discretion as authorized by then-G.S. § 160-293 (and current G.S. § 160A-148) in directing and supervising the mechanics of the Council authorization—*i.e.*, the

mechanics of the payroll deduction itself—not what the Pledge Fund allegedly allowed for payouts at the time and certainly not with the intent of freezing in time the authorization.

89. The valid construction of the authorization is ***not***, however, to invalidate over fifty years of payroll deductions otherwise authorized by the complaining employees based off of a subordinate clause in a sentence from fifty-five years ago.

90. The payroll deduction authorized in 1966 was not *ultra vires* then, nor did it become *ultra vires* later by virtue of an alleged vagueness in the authorization. Accordingly, the third claim for relief should be dismissed.

C. *Even assuming arguendo the deductions were ultra vires, Plaintiffs are not entitled to recovery of the amounts deducted.*

91. Even assuming *arguendo* that that fifty-five years of authorized deductions were *ultra vires* over a subordinate clause in the recordation of the unanimous vote of the City Council, which the City denies, Plaintiffs and the putative class are *still* not entitled to a refund now that they are dissatisfied with their authorization.

92. "[T]he law holds those dealing with a City to a knowledge of the extent of the power and of any restrictions imposed [by the General Assembly]. Persons dealing with a municipal corporation are charged with notice of all limitations upon the authority of its officers representing them..." *L & S Leasing, Inc. v. City of Winston-Salem*, 122 N.C. App. 619, 622, 471 S.E.2d 118, 120 (1996), *quoting*, *Moody v. Transylvania County*, 271 N.C. 384, 389, 156 S.E.2d 716, 720 (1967).

93. Exhibit D of the Amended Complaint contains the payroll deduction forms in which the Plaintiffs and their putative class allegedly signed. They do not describe the Pledge Fund as paying out only upon death.

94. Accordingly, if the payroll deductions were *ultra vires*, Plaintiffs' authorization of the payroll deduction was done so with notice that the deduction was *ultra vires*. Accordingly, just as the plaintiffs in *L & S Leasing* and *Moody* were not entitled to "rely upon an [equitable] estoppel defense against the city..." neither can the Plaintiffs *sub judice* rely on an equitable remedy to recover the funds they authorized to be deducted in the first place. Thus, for this additional reason, the "Alternative Third Claim for Relief" should be dismissed.

IV. Fourth Claim for Relief: Plaintiffs' negligence claim in the "Alternative Fourth Claim for Relief" also does not state a cognizable claim for relief.

95. Shifting from equity, Plaintiffs return to the law of negligence for their fourth and final claim for relief.

96. Plaintiffs assert that "[t]he City of Charlotte had an affirmative duty to its employees to deduct from the compensation of its employees only items specifically approved by the City Council of the City of Charlotte." Amended Complaint, ¶ 51.

97. "The elements of a cause of action based on negligence are: a duty, breach of that duty, a causal connection between the conduct and the injury and actual loss." *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996).

A. *Plaintiffs' pleadings disclose that the City Council properly authorized Pledge Fund payroll deductions.*

98. For the reasons described in the immediately preceding section of this Motion, and as the pertinent exhibits to the Amended Complaint demonstrate, the City Council *did* authorize the "payroll deductions of fund for [the] Volunteer Police Pledge Fund." Amended Complaint at Exhibit A.

99. Thus, there has been no breach of any duty which might apply. As such, the Alternative Fourth Claim for Relief should be dismissed.

B. ***Plaintiffs have not pled facts consistent with an actionable legal duty.***

100. Moreover, there is no jurisprudential authority to support the legal duty the Amended Complaint seeks to impose upon the City.

101. "A duty is defined as an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Davis*, 121 N.C. App. at 112.

102. "No legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006), *rehearing denied*, 360 N.C. 546, 635 S.E.2d 58 (2006).

103. Reasonable foreseeability does not require omniscience. Rather, foreseeability "requires only reasonable prevision. A defendant is not required to foresee events which are merely possible..." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984).

104. The injuries alleged in the Amended Complaint are not a foreseeable result of the payroll deductions being (allegedly) unauthorized by the City Council, which is the focus of the Alternative Fourth Claim for Relief.

105. Accordingly, Plaintiffs have failed to plead an actionable negligence claim and, thus, the Alternative Fourth Claim for Relief should be dismissed.

In sum, Plaintiffs' Amended Complaint, particularly when viewed in light of the various attachments thereto, fails entirely to state a claim upon which relief can be granted against the City of Charlotte. In support of this Motion, the City relies on the pleadings in this case, including the

attachments thereto, and a memorandum which may be submitted as directed by the Court, and any arguments made by counsel in the hearing thereupon.

WHEREFORE, the Defendant City of Charlotte respectfully requests the following relief from this Honorable Court:

1. That the Court grant Defendant City of Charlotte's Motion for Judgment on the Pleadings;

2. That Plaintiffs have and recover nothing from the Defendant;

3. That Plaintiffs' Amended Complaint, which includes their Complaint and any subsequent pleadings and all claims putatively made therein, be dismissed with prejudice; and

4. For any such other relief in favor of the Defendant which the Court may deem just and proper.

Respectfully submitted, this the 28th day of September, 2021.

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CERTIFICATE OF SERVICE

This is to certify that on this date I served the foregoing **DEFENDANT CITY OF CHARLOTTE'S MOTION FOR JUDGMENT ON THE PLEADINGS** via email and by depositing a copy thereof in the United States mail, postage prepaid, upon the following:

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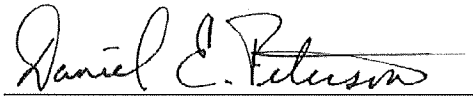
This 28th day of September, 2021.



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