IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

Illinois Collaboration on Youth, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 16 CH 6172
	)	
James Dimas, Secretary of the Illinois Department of Human Services, in his official capacity, et al.,	)	Honorable Rodolfo Garcia
	)	
Defendants.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that the attached **Defendants' Reply in Support of Their Motion to Dismiss Plaintiffs' Third Amended Complaint** was filed with the Clerk of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, at the Richard J. Daley Center, Chicago, Illinois 60602.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the aforementioned document was served upon the above named individuals, at the above address by U.S. Mail, postage prepaid, and via electronic mail delivery, on August 24, 2016.

Amy M. McCarthy

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DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

Defendants, Bruce Rauner, in his official capacity as Governor of the State of Illinois, *et al.*, by their attorney Lisa Madigan, the Illinois Attorney General, submit this Reply in Support of their Motion to Dismiss Plaintiffs' Third Amended Complaint ("TAC").

INTRODUCTION

Plaintiffs' contracts with the State of Illinois are expressly "contingent upon and subject to the availability of funds." Unfortunately, for nearly all of fiscal year 2016 (FY2016), the appropriations required to make payments under Plaintiffs' contracts were caught up in the budget debates between the Governor and General Assembly. As a result, the State did not have an operations budget that funded contracts for social service providers for nearly all of FY2016. While the delay in the passage of legislation authorizing payments to the Plaintiffs has caused them serious hardships, the State's sovereign immunity bars their effort to have this Court intervene and order the State to pay for the services rendered under their State contracts. Instead, under the Illinois Constitution and laws, only the Governor and General Assembly can take action to ensure payment pursuant to the Plaintiffs' contracts. And recently, on June 30, 2016,

the legislature passed and the Governor signed an appropriations bill that authorizes the expenditure of State funds to cover operations for FY2016 and part of FY2017, and includes authorization to pay for some or all of the social services provided by Plaintiffs. See P.A. 99-0524.

In an effort to avoid the State's sovereign immunity, Plaintiffs deny that they are asserting claims against the State "founded" on a contract, and instead argue that they have alleged other legal theories and that the relief they seek — a judgment requiring the payment of State funds to Plaintiffs for their past contractual services — somehow qualifies as prospective injunctive relief rather than a "present claim" against the State. As described below, Plaintiffs' arguments in this regard are unconvincing. Plaintiffs' claims are clearly based on their contracts with various State agencies, and the relief they seek is the payment of State funds for providing the services specified in those contracts.

Plaintiffs also attempt to avoid the clear legal effect of the fact that each of their respective contracts is expressly made subject to appropriations. Plaintiffs offer a variety of arguments why the appropriation contingency in their contracts does not mean what it says or has been rendered inoperative, and that sufficient appropriations should either be deemed to have been enacted (by appropriation bills for which Plaintiffs contest the validity of the Governor's vetoes) or are legally unnecessary. Again, these arguments are unpersuasive.

The Illinois Supreme Court's analysis in *State of Ill. Dep't of Cent. Mgmt. Servs. v. AFSCME, Council 31,* 2016 IL 118422 (rehearing denied May 23, 2016) ("*State (CMS) v. AFSCME*"), is directly controlling here. Plaintiffs' attempt to distinguish that opinion, and instead suggest it supports Plaintiffs' position, is equally unavailing.

In response to Defendants' dispositive arguments, Plaintiffs primarily assert that they are seeking the same kind of preliminary injunctive relief that was entered by the Circuit Court of St. Clair County, and affirmed by the Fifth District in a nonprecedential order, authorizing payment of State employees' wages and salaries without an appropriation. See *AFSCME v. State of Ill.*, St. Clair Co., Case No. 15 CH 475, Jul. 10, 2015 Order, attached as Exhibit 1 to Plaintiffs' August 18, 2016 Combined Memorandum (Pltf. Aug. 18, 2016 Combined Mem.); *AFSCME v. State*, 2015 Il App (5th) 150277-U (Pltf. Aug. 18, 2016 Combined Mem. at p. 1). But Plaintiffs' reliance on that preliminary injunction and order by the Fifth District affirming it — neither of which has precedential effect, and both of which predated the Supreme Court's opinion in *State (CMS) v. AFSCME* — is misplaced and not controlling here.

Plaintiffs further contend that this Court, based on an appeal to "the equities" of the situation, can order the expenditures Plaintiffs request. (Pltf. Aug. 18, 2016 Combined Mem. at p. 3). But the Illinois Constitution vests in the General Assembly the exclusive power — through the appropriation process — to authorize such expenditures. That principle, which is expressed in each of Plaintiffs' contracts, must be given effect here.

Thus, for these reasons and those stated below, as well as those reasons stated in Defendants' Motion to Dismiss and Combined Memorandum of Law, Plaintiffs' Third Amended Complaint should be dismissed.

ARGUMENT

I. This Court lacks subject matter jurisdiction to consider Plaintiffs' claims.

A. This Court lacks jurisdiction over Plaintiffs' claims founded on their contracts.

The relief requested by Plaintiffs in this case seeks to control the actions of the State and subject it to liability. Specifically, Plaintiffs demand immediate payment of the vouchers

submitted for services provided under their contracts in FY2016, regardless of whether there are sufficient appropriated funds; payment for vouchers which are overdue by 90 days or more; and permanent injunctive relief to ensure that Plaintiffs receive full payment of their contracts for FY2016. (TAC at pp. 15, 17). Plaintiffs are clearly seeking payment for the contractual services they rendered in FY2016, and accordingly, such claims are barred by sovereign immunity. See *Currie v. Lao*, 148 Ill. 2d 151, 158 (1992).

As Plaintiffs' claims are primarily founded upon their contracts with the State, they cannot evade sovereign immunity. Even Plaintiffs' contracts unambiguously provide that any claim against the State arising out of the contracts must be filed *exclusively* with the Court of Claims. (See e.g., TAC, Exhibit A, p. 10, Section 4.14; see also Exhibit I).

Accordingly, because this Court lacks subject matter jurisdiction, Plaintiffs' entire action must be dismissed pursuant to Section 2-619(a)(1).

B. The officer suit exception to sovereign immunity is not applicable.

At the outset, Plaintiffs incorrectly assert that Defendants have not specifically denied that they acted unlawfully or *ultra vires*. (Pltf. Aug. 18, 2016 Combined Mem. at pp. 3, 8-10). Contrary to Plaintiffs' assertion, Defendants not only denied such allegations, but affirmatively established that Plaintiffs cannot invoke the officer suit exception to sovereign immunity in this case. (Def. Aug. 11, 2016 Combined Mem. at pp. 10-14). Moreover, because Defendants acted within the scope of their legal discretion, it is immaterial that Defendants do not themselves "seek a ruling that in conducting business in this way, they acted within lawful authority." (Pltf. Aug. 18, 2016 Combined Mem. at p. 8).

Again, Plaintiffs unsuccessfully attempt to turn their ordinary breach of contract claim into a constitutional claim. There is also no merit to Plaintiffs' contention that Defendants'

actions are fraudulent and unconscionable, or that such actions would suffice to convert a "present claim" for recovery based on past acts, barred by sovereign immunity, into a claim for prospective injunctive relief against *ultra vires* acts. *First*, the Governor had the express constitutional authority to veto the June 25, 2015 and June 10, 2016 appropriations bills, which arguably would have provided full funding for Plaintiffs' FY2016 contracts. (TAC ¶¶ 37, 62). ILL. CONST. art. IV, § 9. *Second*, Defendants did not act unlawfully in failing to terminate Plaintiffs' contracts or to process vouchers for Plaintiffs' services without a budget for FY2016. Again, the Illinois Constitution (ILL. CONST. art. VIII, §2(b)), the State Comptroller Act (15 ILCS 405/9(c)), and the plain language of Plaintiffs' contracts (TAC, Exhibit I) expressly provide that these contracts are contingent upon sufficient, appropriated State funds. Thus, it would have been unlawful for Defendants to *authorize* payment for Plaintiffs' services under their contracts without an enacted, sufficient appropriation. Plaintiffs' reliance on *Smith v. Jones*, 113 Ill. 2d 126 (1986) (Pltf. Aug. 18, 2016 Combined Mem.) is misplaced, for that case does not hold, as Plaintiffs suggest, that fraudulent conduct by State officials (which Defendants deny occurred here) is by itself enough to avoid the State's sovereign immunity, regardless of the relief sought. Even if there were any merit to Plaintiffs' claim that Defendants acted in an *ultra vires* manner, thus triggering the officer suit exception, such a claim would not support the remedy Plaintiffs ultimately seek in this case. Again, Plaintiffs seek court-ordered payments for the past services they performed in FY2016. Plaintiffs cannot construe their breach of contract claim as one for declaratory and injunctive relief.

Plaintiffs additionally allege that Defendants are acting in a quasi-judicial capacity to determine which contractual claims will be honored, and that such conduct amounts to a constitutional violation. (TAC ¶¶ 119-128). But there is no merit to Plaintiffs' claim that they are

seeking prospective relief, *i.e.*, "an injunction to control how individual funding decisions will be made in the coming weeks and months" and an order "to ensure that all the plaintiff agencies are treated equally and fairly in the funding decisions to be made." (Pltf. Aug. 18, 2016 Combined Mem. at p. 13). In their current prayer for relief, Plaintiffs demand immediate payment in full for all of the services they provided, regardless of appropriations; payment of the vouchers submitted for services rendered in FY2016; payment for vouchers which are overdue by 90 days or more; and permanent injunctive relief to ensure that Plaintiffs receive full payment of their contracts for FY2016. (TAC at pp. 15, 17). Simply stated, Plaintiffs are not seeking prospective injunctive relief. Rather, Plaintiffs seek retroactive monetary relief for past services rendered in FY2016.

Even if Plaintiffs truly seek prospective injunctive relief regarding the future processing of vouchers, the payment of State funds is an executive function statutorily designated to the Comptroller and the Treasurer. See 15 ILCS 405/1 *et seq.* and 15 ILCS 505/0.01 *et seq.* Defendants are still in the process of determining how to disburse the appropriated State funds in light of the recent June 30, 2016 enactment of P.A. 99-0524. The simple fact that Defendants are advising their vendors, including Plaintiffs, that P.A. 99-0524 does not constitute a balanced State budget (see Exhibit 3 to Ptf. Aug. 18, 2016 Combined Mem.) does not make Defendants' conduct unconstitutional. As the payment of vouchers submitted in FY2016 is an ongoing, fluid situation, it is unknown how much money will be paid to each Plaintiff and when each payment will be made. But certainly, P.A. 99-0524 now authorizes Defendants to begin payment on Plaintiffs' contracts. See P.A. 99-0524, articles 74, 997, and 998. And any disagreement as to the amount of payment owed and/or the timing of such payment must be raised in the Court of Claims, as expressly provided in Plaintiffs' contracts and in accordance with Illinois law.

Therefore, because Plaintiffs' attempt to invoke the officer suit exception fails, this case must be dismissed pursuant to sovereign immunity.

II. Defendants cannot be ordered to pay Plaintiffs for services under their contracts without a sufficient appropriation.

A. Plaintiffs' requested relief is barred by the Illinois Constitution and State Comptroller Act.

Plaintiffs suggest that this Court has authority to order Defendants to make full payment on their contracts. Such an order, however, is contrary to the Appropriations Clause of the Illinois Constitution (ILL. CONST. art. VIII, §2(b)) and the State Comptroller Act (15 ILCS 405/1, *et seq.*).

As an initial matter, Plaintiffs' claims implicate the separation of powers among the different branches of government. See *AFSCME v. Netsch*, 216 Ill. App. 3d 566, 568 (4th Dist. 1991) ("any attempt by the comptroller to issue the funds in the absence of an appropriation bill signed into law by the governor would create obvious problems under the separation-of-powers doctrine"). "The power to appropriate for the expenditure of public funds is vested exclusively in the General Assembly; no other branch of government holds such power." *State (CMS) v. AFSCME*, 2016 IL 118422, ¶ 42. Yet in this case, Plaintiffs contend that executive-branch officials could, and did, create a legally enforceable obligation for the expenditure of State funds without a corresponding appropriation by the legislature. Plaintiffs further contend that this Court, based on an appeal to "the equities" of the situation, can now order such expenditures. (Pltf. Aug. 18, 2016 Combined Mem. at p. 3). Neither contention is sound, for the Illinois Constitution vests in the General Assembly the exclusive power — through the appropriation process — to authorize such expenditures. That principle, which is expressed in each of Plaintiffs' contracts, must be given effect here.

In support of their position, Plaintiffs rely on the preliminary injunction granted by the Circuit Court of St. Clair County and subsequently affirmed in an unpublished Fifth District appellate decision. See *AFSCME v. State*, 2015 IL App (5th) 150277-U. In *AFSCME v. State*, the plaintiff unions filed suit in the Circuit Court of St. Clair County, alleging that their members were contractually entitled to be paid the salaries specified in their collective bargaining agreements, despite the lack of appropriations for those payments, and that the failure to pay these salaries constituted an unconstitutional impairment of contract. *Id.* at ¶ 4. The circuit court entered a temporary restraining order (TRO) requiring the Comptroller to pay the normal salaries of all State employees, not just union members. *Id.* at ¶ 12. The Fifth District affirmed, holding that the circuit court did not abuse its discretion in granting the TRO. *Id.* at ¶¶ 38-39. However, neither the circuit court's order nor the appellate court's order has any precedential effect, and the latter may not even be cited as precedent. *Price ex rel. Massey v. Hickory Point Bank & Trust*, 362 Ill. App. 3d 1211, 1220-21 (4th Dist. 2006); *In re Donald R.*, 343 Ill. App. 3d 237, 244 (3d Dist. 2003). Moreover, the Fifth District relied on the appellate court opinion in *State (CMS) v. AFSCME,* 2014 IL App (1st) 130262. *Id.* at ¶ 28 ("at least one recent decision strongly supports the arguments advanced by the unions in this case"). But that appellate decision was subsequently reversed by the Illinois Supreme Court in *State (CMS) v. AFSCME*, which rejected the very impairment of contract theory advanced by Plaintiffs here. 2016 IL 118422 (rehearing denied May 23, 2016). Thus, Plaintiffs cannot rely on the TRO entered in the Circuit Court of St. Clair County to justify the relief requested in the instant suit.

The Illinois Supreme Court's holding in *State (CMS) v. AFSCME* is controlling here. In that case, the Court reversed the lower courts and vacated an arbitration award directing the State to pay a wage increase to State employees covered by a multiyear collective bargaining

agreement. 2016 IL 118422, ¶¶ 1-2. The Court held that the arbitration award violated Illinois public policy, as reflected in the Appropriations Clause of the Illinois Constitution, ILL. CONST. art. VIII, §2(b), and Section 21 of the Illinois Public Labor Relations Act, 5 ILCS 315/21. *Id.* at ¶ 2. Although the Governor's proposed budget to the General Assembly provided full funding under the collective bargaining agreement, the budget that was actually passed by the General Assembly did not contain sufficient appropriations to implement the wage increases set forth in that agreement. *Id.*at ¶¶ 8-9. The Illinois Supreme Court recognized that the failure to enact sufficient appropriations to pay wage increases specified in a CBA was not an unconstitutional impairment of that agreement where the agreement was, by statute, contingent on appropriations. *Id.* at ¶ 52.

Similarly, in this case, although there were proposed appropriations bills authorizing payment for the majority of Plaintiffs' contracts, if not all of them, those contracts were all explicitly subject to enacted appropriations, and the lack of appropriations for all of the services specified in those contracts cannot "impair" them. The appropriations authorized by P.A. 99-0524 and enacted on June 30, 2016 may not ultimately provide for full funding of all of Plaintiffs' contracts. Although that shortfall will cause hardship, an order compelling Defendants to make full payment on Plaintiffs' contracts without a sufficient, enacted appropriation is contrary to Illinois law.

Plaintiffs mistakenly assert that the Illinois Supreme Court in *State (CMS) v. AFSCME* did not address the Appropriations Clause of the Illinois Constitution, ILL. CONST. art. VIII, §2(b), and even implicitly endorsed the legal theory they advocate here. (Pltf. Aug. 18, 2016 Combined Mem. at p. 2-6, 9-10). That is an inaccurate reading of the Court's opinion. Plaintiffs suggest that the Court relied solely on a statutory disclaimer provision in Section 21 of the Public

Labor Relations Act. However, the Court unequivocally held that the arbitration award violated public policy, as expressed in both Section 21 of the Public Labor Relations Act *and* the Appropriations Clause. *Id.* at ¶ 2.

Although Plaintiffs' contracts do not involve collective bargaining agreements subject to Section 21 of the Public Labor Relations Act, there are other statutory provisions which expressly provide that these agreements are subject to *sufficient* appropriated State funds. In particular, the State Comptroller Act, 15 ILCS 405/1, *et seq.*, bars the expenditure of public funds without a corresponding appropriation. See 15 ILCS 405/9(c) ("If [the Comptroller] determines that unencumbered appropriations or other obligational or expenditure authority are not available from which to incur the obligation or make the expenditure, the Comptroller shall refuse to draw a warrant"). Without a sufficient appropriation, this Court simply cannot grant Plaintiffs' requested relief.

B. Plaintiffs' contracts expressly provide that they are contingent upon sufficient appropriations.

Besides the Appropriations Clause of the Illinois Constitution (ILL. CONST. art. VIII, §2(b)) and the State Comptroller Act (15 ILCS 405/9(c)), the plain language of Plaintiffs' contracts also precludes the relief requested in this case. One way for the State to make a contract contingent on appropriation, or to reaffirm such a contingency imposed by statute or the Constitution, is to make that contingency explicit in the contract. But even if there is no such express contingency, under general contract law principles, "statutes and laws in existence at the time a contract is executed are considered part of the contract," and "[i]t is presumed that parties contract with knowledge of the existing law." *State (CMS) v. AFSCME,* 2016 IL 118422, ¶ 53 (citations and internal quotation marks omitted). Thus, at a bare minimum, Plaintiffs should have been aware that the Appropriations Clause of the Illinois Constitution and the State Comptroller

Act bar the expenditure of State funds absent an appropriation. And here, the contracts themselves expressly place Plaintiffs on notice of this contingency, *i.e.*, the contracts indisputably state that they are contingent upon and subject to the availability of sufficient funds. (TAC, Exhibit I).

Plaintiffs argue that the initial language in their contracts explicitly making them subject to appropriation adds nothing to the contracts' additional language stating that if appropriations are not enacted, the relevant agencies may terminate the contracts. But these provisions are cumulative, not inconsistent, and Plaintiffs' reading would reduce the first provision to mere surplusage. In addition, for purposes of the instant motion, Defendants are not trying to excuse their contractual obligations or otherwise exclude liability for the services rendered by Plaintiffs in FY2016, as Plaintiffs claim, but are relying on the plain and express terms of Plaintiffs' contracts which indicate that they are subject to sufficient appropriations. And Defendants' decision to not exercise their discretion under the contracts to terminate or suspend Plaintiffs' services does not operate to nullify the express appropriation contingency in these contracts, which conforms to the Illinois Constitution and applicable statutory law.

Therefore, any order compelling Defendants to make full payment on Plaintiffs' contracts in the absence of sufficient, appropriated State funds is contrary to the express terms of Plaintiffs' contracts.

III. Plaintiffs have not alleged a constitutional impairment of contract claim.

Plaintiffs' claim that the Governor's June 25, 2015 and June 10, 2016 vetoes, as well as the enactment of P.A. 99-0524, constitutionally impaired their contracts is also legally unfounded. As previously stated, it is entirely within the Governor's express constitutional

authority to veto appropriations bills. ILL. CONST. art. IV, § 9. Thus, the Governor's exercise of this constitutional power cannot be construed as an unconstitutional impairment of contract.

Nor is the enactment of the partial budget a constitutional impairment of contract. To the contrary, the enactment of the June 30, 2016 partial budget (P.A. 99-0524) now provides Defendants with spending authority. See P.A. 99-0524, articles 74, 997, and 998. Although Plaintiffs state that the enacted appropriation is insufficient in that it does not provide full payment for the contractual services rendered in FY2016, such a claim does not amount to one for an unconstitutional impairment of contract. See *State (CMS) v. AFSCME*, 2016 IL 118422, ¶ 52 (holding that the wage increases in a collective bargaining agreement were always contingent on legislative funding, and, therefore, the "failure of that contingency to occur cannot 'impair'" the parties' agreement).

Even if, despite the appropriation contingency in Plaintiffs' contracts, they had a contractual right to payment in excess of actual appropriations by the General Assembly (which Defendants do not concede), a Contracts Clause violation does not arise from a governmental body's failure to perform its contractual obligations, for it "would be absurd to turn every breach of contract by a state or municipality into a violation" of the constitution. *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996); see also *Council 31, AFSCME v. Quinn*, 680 F.3d 875, 885-86 (7th Cir. 2012) (rejecting argument that legislature unconstitutionally impairs the obligations of a contract when it fails to appropriate funds sufficient for the State to meet its alleged contractual obligations to its employees). As discussed above, any potential breach of contract claim should be brought in the Court of Claims, as expressly provided in Plaintiffs' contracts and consistent with Illinois law.

There is also no merit to Plaintiffs' contention that the enactment of the partial budget (P.A. 99-0524) makes full payment of their contracts less secure, if not impossible. The mere fact that some of the Defendant agency heads, such as the Director of the Department on Aging, have advised Plaintiffs of the obvious, unfortunate situation that the partial budget did not provide full funding for their contracts does not automatically imply that the enactment of this appropriation bill impairs or otherwise eliminates the possibility of a legal remedy for non-payment in the Court of Claims.

IV. Plaintiffs cannot allege constitutional violations of their right to due process and equal protection.

As Plaintiffs stand on their arguments regarding the merits of their due process and equal protection claims, (Pltf. Aug. 18, 2016 Combined Mem. a p. 10), Defendants hereby incorporate and adopt those arguments warranting the dismissal of said claims raised in the underlying Motion to Dismiss and Combined Memorandum of Law in Support.

CONCLUSION

Wherefore, for the foregoing reasons as well as those stated in Defendants' Motion to Dismiss and Combined Memorandum of Law in Support, Defendants respectfully request that this Honorable Court grant their Motion to Dismiss Plaintiffs' Third Amended Complaint pursuant to Section 2-619.1 of the Illinois Code of Civil Procedure.

Respectfully Submitted,

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