STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS; and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation; *et al.*,

Plaintiffs,

v

Case No. 11-119092-PZ
Hon. Michael Warren

STATE OF MICHIGAN; DEPARTMENT OF EDUCATION; JOHN NIXON; STATE BUDGET DIRECTOR; ANDY DILLON TREASURER OF THE STATE OF MICHIGAN; and MICHAEL P. FLANAGAN, SUPERINTENDENT OF PUBLIC INSTRUCTION,

Defendants.
_____/

OPINION & ORDER REGARDING DEFENDANTS' MOTION FOR DIRECTED VERDICT AND/OR INVOLUNTARY DISMISSAL

At a session of said Court, held in the Court House
in the City of Pontiac, Oakland County, Michigan
on **September 25, 2012**

PRESENT: **HONORABLE MICHAEL WARREN**
Circuit Court Judge
_____/

OPINION

Before the Court is the Defendants' motion for directed verdict and/or involuntary dismissal of the Plaintiffs' Headlee Action which was made following the close of the Plaintiffs' opening statement. At stake is whether the Plaintiffs are entitled to proceed with a declaratory judgment action seeking a declaration that the Legislature has failed to fully fund a mandated activity for which the state has actually appropriated funds when the Plaintiffs concede that they will not establish the specific amount of alleged underfunding? Because the Legislature has funded the mandate in

question, the Plaintiffs have a burden to show the amount of the purported underfunding. Since the Plaintiffs readily concede they will not meet that burden, the motion is granted and case dismissed.

I
Procedural Background

A
Adair I

In a prior action, the Plaintiffs filed suit claiming that recent education statutory reforms violated Const 1963, art 9, § 29 (the "Headlee Amendment") by not fully funding the costs of certain data collection, maintenance and reporting activities and services required to be provided by school districts pursuant to MCL 388.1694a (the "CEPI mandates"). The Plaintiffs claimed that the imposition of the CEPI mandates on local school districts by the Legislature without any funding to pay for them violated the Headlee Amendment's prohibition of unfunded mandates ("POUM") by the state to local units of government, and the Supreme Court agreed. *Adair v State of Michigan*, 486 Mich 468, 480, 488 (2010) (*"Adair I"*). In response, the Legislature appropriated approximately $25.6M to fund the costs of school district compliance with the CEPI mandates. Subsequent to *Adair I*, the Legislature added a new mandate on local school districts by requiring them to report link data on student achievement and performance of their teachers and administrators using CEPI databases (the "Data Link mandates"). MCL 388.1752a. The Legislature appropriated $8,440,000 to fund the Data Link mandates.

B
This Case

In response to the appropriations for the CEPI mandates and the Data Link Mandates (unless referenced individually the CEPI mandates and Teacher Student Data Link together, shall be collectively referenced as the "CEPI/Data Link Mandates"), the Plaintiffs filed this action claiming (among other things) that the appropriations for the CEPI/Data Link Mandates do not fully fund their costs, thereby violating the POUM of the Headlee Amendment.

The Defendants previously filed a motion for summary disposition claiming, in pertinent part, that the Plaintiffs "have not provided evidence to show that the increased activity related to CEPI reporting actually costs the districts more than the funds the Legislature appropriated . . . ." The Defendants made a similar argument with regard to the Data Link Mandates. The Defendants also argued in the course of their briefing that at trial the Plaintiffs would be required to show a specific dollar amount of underfunding. This argument, however, was overshadowed by the more general argument that the Plaintiffs simply failed to show any underfunding at all. Thus, this Court denied those portions of the motion for summary disposition relating to the POUM claim involving the CEPI/Data Link Mandates, finding that, viewing the evidence in the light most favorable to the Plaintiffs, a report by the Plaintiffs' expert more than sufficiently challenged the sufficiency of the appropriation. However, the Court also found that because the Legislature actually appropriated funds to underwrite the CEPI/Data Link Mandates, at trial the Plaintiffs would have a "higher burden" that requires them to produce evidence of specific dollar-amount increases in the costs incurred in order to comply the CEPI/Data Link Mandates (the "Specific Number"). *Adair v State of Michigan,* 486 Mich 468, 480, 488 and n 29 (2010) (*"Adair I"*). Stated another way, the Plaintiffs would be required to show not just that there was underfunding, but the extent of underfunding. Giving the Plaintiffs every benefit of the doubt that Plaintiffs would introduce a Specific Number at trial in light of the less than

timely discovery on this issue, the Court denied the portions of summary disposition addressing this issue (which, in any event, were never presented as a separate, independent argument in the briefing).

At trial, the Plaintiffs' very lengthy opening argument was devoid of any Specific Number. In fact, the Plaintiffs repeatedly argued that they *need not* produce a Specific Number, and also repeatedly argued that they *could not* produce a Specific Number, even with their expert's report.[1] The Plaintiffs vigorously argued that because this is a declaratory action, that they need not quantify the extent of underfunding, but only show that some underfunding existed. The Plaintiffs also argued that showing any level of underfunding (presumably, even a dollar) would meet their "higher burden." Following the conclusion of the Defendants' opening statement, the Defendants moved to dismiss the Plaintiffs' case, arguing that because the Plaintiffs have conceded that they are incapable of producing a Specific Number, they could not meet the higher burden established in *Adair I*. In other words, the Defendants argue that it is not enough just for Plaintiffs to simply argue that the State of Michigan has not fully funded the Underfunded Mandates – instead, the Plaintiffs must introduce evidence of a Specific Number – i.e., some monetary figure that would constitute full funding.

Not expecting that the Plaintiffs would utterly concede that they would not and could not introduce a Specific Figure, thereby placing the issue squarely before it, the Court took this matter under advisement.

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[1] A review of the unofficial transcript reveals the Plaintiffs' clear disavowal of intending to prove a Specific Number:

> There is no way that we have, as the Supreme Court noted in *Adair*, to prove what the state would be required to expend as required by that statute, which was adopted in 1979. There's no way to prove how they would meet these requirements of CEPI using their own resources rather than the schools'. That's why the responsibility, according to the Court, is the state's. That's what they're supposed to do at the point in time of the appropriation is to assess what it would cost the state to provide these services. . . . . They didn't do that here.

Later, Plaintiffs explained that producing a Specific Number would be "an impossible burden for us."

II
Standard of Review

The basis of the Defendants' Motion was referred to alternatively as a motion for a directed verdict and motion for involuntary dismissal. A directed verdict is appropriate only when no factual question exists on which reasonable minds could differ. *Derbabian v Mariner's Pointe Associates Ltd Partnership*, 249 Mich App 695, 702 (2002) (citing *Meagher v Wayne State University*, 222 Mich App 700, 708 [1997]). The test for reviewing a directed verdict motion is whether, viewing the evidence in the light most favorable to the party opposing the motion, reasonable persons could reach a different conclusion; if they could, the case is properly left to the jury to decide. *Hord v Environmental Research Institute*, 463 Mich 399 (2000); *Smith v Jones*, 246 Mich App 270, 273-274 (2001). The evidence "up to the time of the motion" must be viewed "in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Derbabian, supra* at 703. See also *Forge v Smith*, 458 Mich 198, 204 (2000); *Thomas v McGinnis*, 239 Mich App 636, 643-644 (2000). Cf. *Wilkson v Lee*, 463 Mich 388, 307 (2000) (finding that the standards for directed verdict and judgment notwithstanding the verdict are identical and that the court is to "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party"). Accordingly, "the threshold for obtaining a directed verdict is high. Nevertheless . . . it is not meant to be insurmountable." *Hord, supra* at 410. Although generally a motion for a directed verdict occurs following the conclusion of a plaintiff's case in chief, a dismissal is appropriate following the conclusion of an opening statement when it reveals a fatal deficiency in the proofs. Our Supreme Court elaborated in *Geib v Graham*, 300 Mich 534, 536-537 (1942):

> Determination of plaintiff's claim that he was deprived of his day in court is controlled by the principle enunciated by Mr. Justice Cooley in *Spicer v Bonker*, 45 Mich 630, 8 NW 518, 519. In that case a verdict was directed for defendant immediately after plaintiff's counsel had concluded his opening statement. This court said: "But if he observes due care, the circuit judge

> commits no error in taking the course that was adopted here. The plaintiff's opening is in the nature of an offer of proofs, and the circuit judge directs a verdict for the defendant because, assuming the proofs to have been received, they fail to make a case. The trial is thereby shortened, and no wrong is done to any one. The circuit judge has an undoubted right, in any case, to advise the jury to return a verdict for the defendant when the plaintiff gives or offers no evidence to establish any necessary part of this case. *Kelly v Hendrie*, 26 Mich 255.

Although a motion for involuntary dismissal pursuant to MCR 2.504(B) omits any express reference enabling a trial court to dismiss a bench trial following an opening statement, there is no question the rule of law announced in *Geib, Spicer, and Kelly* applies.

III
Viewing the opening statement in the light most favorable to the Plaintiffs, they cannot meet their higher burden

A
Prohibition of Unfunded Mandates

To establish a violation of the POUM provision, a plaintiff must show that the state required a new activity or service *or* an increase in the level of activities or services. *Adair, supra* at 488. It is only when *no* legislative appropriation is made, that the Plaintiffs are excused from this burden. As explained in *Adair I* at n 29:

> [I]f the state did appropriate funds for the new or increased activity or service, the plaintiff would likely have a higher burden in order to show a POUM violation. Under those circumstances, the state would not have violated the POUM provision per se by failing to provide funding.

Although note 29 is arguably only dicta, it is nevertheless highly instructive regarding how our Supreme Court will rule when a legislative appropriation is made.

B
The Plaintiffs have failed to provide sufficient evidence to support their POUM Claims

In the instant case, the Plaintiffs' Second Amended Complaint ("SAC") acknowledges that the Legislature appropriated funds to pay for the CEPI/Data Link Mandates. Consequently, the Plaintiffs have a "higher burden" which requires them to produce evidence of specific dollar-amount increases in the costs incurred in order to comply with the CEPI requirements. *Id.* at n 29 and at 488. Such a ruling is consistent not only with *Adair I,* but with *Adair v State of Michigan,* 470 Mich 105, 111, 119-120 (2004). The Plaintiffs' poignant argument that the general direction of *Adair I* mitigates requiring them to establish the insufficiency of the amount of appropriation overlooks the factual distinction between *Adair I* (no appropriation made) and this case (tens of millions of dollars of appropriations made). Furthermore, once the state establishes an appropriation, the Plaintiffs are equipped to attack whether the amount is sufficient and the extent of any such deficiency. In fact, the Plaintiff's expert's report does attack the methodology used by the state and concludes that the mandate was not fully funded. Unfortunately for their case, the Plaintiffs have failed to do anything else. Instead, they concede that they cannot establish a Specific Number. As such, the case is fatally flawed, and dismissal of the claim is warranted. Cf. *Adair I, supra* at 480 n 29; *Id.* at 508 (Markman, J., dissenting).

To hold otherwise could subject the taxpayers, courts, and parties to a cycle of never ending lawsuits in which the Plaintiffs only seek to prove that appropriations do not amount to full funding, while depriving the courts the ability to declare what a full level of funding would be. This undermines the entire purpose of the Headlee Amendment and the efficient administration of justice.

ORDER

In light of the foregoing Opinion, the Defendants' Motion for Directed Verdict and/or Involuntary Dismissal is GRANTED.

/s/Michael Warren

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HON. MICHAEL WARREN
CIRCUIT COURT JUDGE