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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON,

Plaintiffs,

v.

CITY OF OAKLAND; and DOES 1-50, inclusive,

Defendants.

CASE NO. RG16821376

ASSIGNED FOR ALL PURPOSES TO JUDGE PAUL D. HERBERT
DEPARTMENT 20

PDH

~~[PROPOSED]~~ JUDGMENT OF DISMISSAL WITH PREJUDICE

PDH

The Demurrer of Defendant City of Oakland to the Second Amended Complaint of Plaintiffs Robert Zolly, Ray McFadden and Stephen Clayton came on regularly for hearing before this Court on March 1, 2018. On May 29, 2018, this Court entered its Order sustaining the Demurrer in part without leave to amend, and in part with leave to amend by June 29, 2018. A true and correct copy of the Order is attached hereto as Exhibit A.

Pursuant to this Court's May 29, 2018 Order sustaining Defendant's Demurrer, and the time for amendment having expired on June 29, 2018 with Plaintiffs having informed the Court on July 5, 2018 that Plaintiffs decline to amend their complaint and will take judgment against them,

IT IS HEREBY ORDERED AND ADJUDGED that this action shall be and hereby is dismissed with prejudice, that judgment be entered in favor of Defendant City of Oakland and against Plaintiffs, and that Defendant City of Oakland shall recover its costs pursuant to a timely filed Memorandum of Costs.

IT IS SO ORDERED.

Dated: July 19, 2018

Paul D. Herbert

HONORABLE PAUL D. HERBERT
Judge of the Superior Court

EXHIBIT A

[redacted]
20666193

FILED
ALAMEDA COUNTY
MAY 29 2018
CLERK OF THE SUPERIOR COURT
BY: _____ Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON, Plaintiffs, vs. CITY OF OAKLAND; and DOES 1-50, inclusive, Defendants.	Case No. RG16 821376 **ORDER SUSTAINING DEMURRER IN PART WITHOUT LEAVE TO AMEND AND IN PART WITH LEAVE TO AMEND**

The Demurrer of Defendant City of Oakland (the "City") to Plaintiffs' Second Amended Complaint ("SAC"), filed on September 29, 2017, came on regularly for hearing on March 1, 2018, in Department 20 of the court, the Judge Paul D. Herbert presiding. The City appeared by counsel Cedric C. Chao and Celso Ortiz. Plaintiffs Robert Zolly, Ray McFadden and Stephen Clayton ("Plaintiffs") appeared by counsel Andrew M. Zacks and James Kraus.

The court has considered all of the papers filed on behalf of the parties, and the arguments of counsel at the hearing, and good cause appearing, HEREBY ORDERS that

the City's demurrer to the sole cause of action for declaratory relief on the ground that it fails to state facts constituting a cause of action against City is SUSTAINED, pursuant to C.C.P. § 430.10(e), WITH LEAVE TO AMEND to seek declaratory relief as to the asserted invalidity of the franchise fee solely as to the part of the franchise fee ostensibly to fund Oakland's AB 939 obligation, but only to the extent Plaintiffs can legitimately allege in a Third Amended Complaint that the $3,240,000 portion of the franchise fee earmarked as an "AB 939" fee in fact was increased as of July 1, 2016 or thereafter. As discussed below, since the other aspect of the declaratory relief cause of action is barred as a matter of law, the court denies leave to amend as to the portion of the cause of action other than as to the challenge to the part of the franchise fee ostensibly to fund Oakland's AB 939 obligation that was automatically increased as of July 1, 2016 or thereafter.

First, the court agrees with the City's position that nothing in the language or legislative history of Proposition 218, or the appellate cases interpreting it, prohibit California cities' charging of franchise fees for the use of a city's property assets. In this instance, based on the allegations within plaintiffs' successive pleadings,[1] the franchise fees were negotiated between the respective contracting parties, with the contractual obligation to pay those fees resting directly upon the franchisees, rather than as part of a negotiated pass-through to the taxpayers. (*See, e.g., County of Contra Costa v. American Toll Bridge Co.* (1937) 10 Cal.2d. 359, 363; *County of Tulare v. City of Dinuba* (1922) 188 Cal. 664, 670.) Indeed, the franchisees remain responsible to pay the franchise fees to the City regardless of whether or not their customers utilize their waste collection and recycling services. Here, the agreement between the City and WMAC acknowledges that

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[1] See Complaint at ¶¶ 20-121; FAC at ¶ 21 (incorporating the prior allegations by reference); and SAC at ¶¶ 15-35. The court hereby takes judicial notice of Plaintiffs' allegations within its earlier pleadings. (*Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151.) (Evid. Code § 452(d).)

consumers may decline collection services at the consumer's discretion: "Customers may voluntarily subscribe to and cancel such Collection Services from CONTRACTOR, provided Customer otherwise obtains a permit to self-haul waste in compliance with the CITY'S self-haul permit provisions.[2] Hence, unlike the stipulated facts in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, the franchise fees here are not being imposed by the City on its residents.

The possibility that some portion of the franchise fee may later be used by the franchisee as a cost factor in setting rates to its customers is not material to the legality of the franchise fees where, as here, there is no direct pass-through of the fees to the customers. (*Cf. Jacks, supra*, 3 Cal.5th at pp. 270-271.) This is a key distinction between the facts alleged in this case and the stipulated facts underlying our Supreme Court's recent decision in the *Jacks* case. As City observes, the imposition of the franchise fee in the instant case differs fundamentally from that in *Jacks* because the surcharge in *Jacks* was (a) itemized as a "separate charge" on consumer electricity bills; (b) mandatorily collected by the franchisee, SCE; and (c) remitted by SCE, dollar for dollar, to the City of Santa Barbara, pursuant to the agreement with the city. (*Jacks, supra*, 3 Cal.5th at pp. 270-271 [agreement stated that SCE "shall collect" the surcharge from customers, that SCE was "obligat[ed] ... to levy, collect and deliver to City" the surcharge, and that this was "required by Santa Barbara Ordinance 5135."])

By contrast, Plaintiffs do not include similar allegations that the agreements in this case require a similarly direct "pass-through" of the franchise fee to the ratepayers, alleging only that the high franchise fees are passed along indirectly to ratepayers through higher rates that the franchisees decide to charge. (See SAC, ¶¶ 36 and 57.) Based on

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[2] See MM&O Collection Services Contract between the City and WMAC, dated July 1, 2015, p. 2, attached as Exhibit D to the City's Request for Judicial Notice. The court hereby takes judicial notice of same. (Evid. Code § 452 (b) and (c).)

the allegations and matters of judicial notice (including relevant terms of the waste and recycling agreements, attached as Exhibits D and E to the City's Request for Judicial Notice), it appears that, as private entities, the franchisees in the instant case are at liberty to set their rates as they determine are appropriate to cover their costs of doing business and to provide a reasonable rate of return to their investors with the full understanding that each of their individual customers likewise remains at liberty to decline their services if any customer determines that the rates being charged are excessive. (*Cf. Southern Cal. Gas Co. v. Public Utilities Comm'n* (1979) 23 Cal.3d 470, 474.)

Thus, the court determines that Plaintiffs have not alleged circumstances sufficient to bring the franchise fees in the instant case within the narrow exception, recognized in *Jacks*, to the general principle, also set forth in *Jacks*, that "[h]istorically, franchise fees have not been considered taxes" and that "[n]othing in Proposition 218 reflects an intent to change the historical characterization of franchise fees, or to limit the authority of government to sell or lease its property and spend the compensation received for whatever purposes it chooses." (*Jacks, supra*, 3 Cal.5th at p. 262, citing Cal. Const., arts. XIII A, § 3, subd. (b)(4), XIII C.) To conclude otherwise would subject municipalities to potential taxpayer-challenge lawsuits over every franchise agreement into which they enter regardless of whether the fees are imposed on the franchisee rather than the consumer and regardless of how small the amount of the franchise fees negotiated by the parties may be. Such an outcome is beyond the facts of the Jacks decision and, therefore, is also beyond its holding. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) If our Supreme Court intended such a sweeping and burdensome change in the long-established precedents governing taxpayer challenges to franchise agreements negotiated by municipalities, it will need to say so directly in a case alleging facts equivalent to those alleged by Plaintiffs herein. This court declines to interpret the holding of the *Jacks*

decision beyond its atypical facts. Hence, Plaintiffs' reliance on the analytical framework stated in the Jacks decision is misplaced.

The City's demurrer to the declaratory relief cause of action on the ground that the challenge to the "AB 939" fees is barred by the statute of limitations is SUSTAINED IN PART AND OVERRULED IN PART. Plaintiffs have conceded that their challenge to the original enactment of Ordinance No. 13272 ("the AB 939 Ordinance") is time-barred because they failed to challenge the fee within 120 days of when it was enacted. (Gov. Code §§ 60016 and 60022.) Thus, to the extent the declaratory relief cause of action seeks to separately challenge the $3,240,000 fee adopted on December 9, 2014, but not imposed until July 1, 2015, any such challenge to the initial fee is untimely as a matter of law.

Recognizing this, Plaintiffs allege in the SAC that "[w]hile Government Code § 66022 creates a 120-day limitations period for challenges," it has an exception for automatic adjustments, so "this challenge is timely as to all future increases from the date of the filing of the original complaint." (SAC, ¶ 44.) Plaintiffs also allege "the AB-939 fee automatically adjusts annually according to the ordinance." (Id.) The AB 939 Ordinance expressly provides for increases that may occur annually each July 1, with the earliest such potential increase beginning July 1, 2016, subject to certain limitations based on WMAC's gross receipts. (AB 939 Ordinance, §3.) Consequently, all members of the public (including Plaintiffs) were on notice that the first such increase could potentially come into effect on July 1, 2016.

Government Code section 66022 states, in pertinent part: "If an ordinance, resolution, or motion provides for an automatic adjustment in a fee or service charge, and the automatic adjustment results in an increase in the amount of a fee or service charge,

any action or proceeding to attack, review, set aside, void, or annul the increase shall be commenced within 120 days of the effective date of the increase."

Here, the record establishes Plaintiffs initiated their challenge to the AB 939 Ordinance on June 29, 2016, one day before the first potential increase in the fee could possibly have taken effect. Thus, a potential challenge to any increase that became effective on July 1, 2016 or thereafter would not be time-barred. The court is not persuaded by City's argument that Plaintiffs' challenge to such "automatic adjustments" is also time-barred because Plaintiffs had notice of such automatic adjustments at the time the ordinance was passed. (Opp. Memo., pp. 16-17, and cases cited therein.) This argument cannot be reconciled with the explicit language of section 66022(a) (quoted above) stating that where an automatic adjustment results in an increase in the fee, "any action or proceeding to attack ... the increase shall be commenced within 120 days of the effective date of the increase." None of City's cited cases address this language, as distinguished from the preceding sentence of section 66022 that applies in other instances. (*See, e.g., Regents of University of California v. City and County of San Francisco* (2004) 115 Cal.App.4th 1109, 1115.)

Nevertheless, the SAC fails to include any allegations that an increase in the AB 939 fee actually became effective on July 1, 2016 or thereafter. Absent such allegations, the SAC again fails to state a viable cause of action arising from the AB 939 Ordinance. Accordingly, the court grants Plaintiffs LEAVE TO AMEND to file and serve a Third Amended Complaint by June 29, 2018, only to the extent Plaintiffs can legitimately allege that the AB 939 fee, in fact, was increased as of July 1, 2016 or thereafter, and (to the extent the challenged is based on Proposition 218) that it was imposed for property-related services. Since all other claims asserted in the SAC are barred as a matter of law,

the court denies leave to amend to seek declaratory relief as to any other fees challenged in the cause of action.

The City's Request for Judicial Notice, filed on September 29, 2017, is GRANTED, but the court does not take judicial notice of the truth of matters asserted in the attached exhibits. (Evid. Code §452, subdivisions (b) and (c).)

Plaintiffs' Request for Judicial Notice, filed on December 1, 2017, is DENIED as to Exhibits A and B, which the court does not find material to the demurrer. The request is GRANTED as to Exhibit C.

The clerk is directed to serve copies of this order, with proof of service, to counsel and self-represented parties of record by mail, which shall satisfy the purposes of notice of entry of order under C.C.P. § 1019.5(a).

IT IS SO ORDERED.

Date: 05/29/2018

Paul D. Herbert
Judge of the Superior Court

I, Dawn Bierman, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is DLA Piper LLP (US), 555 Mission Street, Suite 2400, San Francisco, California 94105-2933. On July 17, 2018, I served a copy of the within document(s):

[PROPOSED] JUDGMENT OF DISMISSAL WITH PREJUDICE

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

☐ by causing a messenger to personally deliver the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Andrew M. Zacks, Esq. (az@zfplaw.com) James B. Kraus, Esq. (james@zfplaw.com) Zacks, Freedman & Patterson, PC 235 Montgomery Street, Suite 400 San Francisco, CA 94104 Telephone: (415) 956-8100 Facsimile: (415) 288-9755	Attorneys for Plaintiffs ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 17, 2018, at San Francisco, California.

Dawn Bierman

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG16821376
Case name: Robert Zolly, Ray McFadden, and Stephen Clayton VS City of Oakland; and Does 1-50 inclusive

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document, **ORDER SUSTAINING DEMURRER IN PART WITHOUR LEAVE TO AMEND AND IN PART WITH LEAVE TO AMEND** was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on May 29, 2018.

Chad Finke, Executive Officer/Clerk of the Superior Court

By: _____
Maya Walker
Deputy Clerk

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Superior Court of California, County of Alameda
Department 20, Administration Building

Case Number: **RG16821376**

Case Name: **ZOLLY vs. CITY OF OAKLAND**

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct. I am the clerk of the above-named court and not a party to this cause. A copy of the foregoing document, **JUDGMENT OF DISMISSAL WITH PREJUDICE**, was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

Executed on July 19, 2018

Executive Officer/Clerk of the Superior Court

By _____
Pilipino Tungohan, Deputy Clerk

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