THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

The State of New Hampshire

OBJECTION TO MOTION FOR JUDGMENT ON PLEADINGS

The State of New Hampshire, by and through counsel, submits the following objection to the plaintiffs' motion for partial judgment on the pleadings:

1. The plaintiffs move for judgment on the pleadings on part of their adequacy claim based on this Court's recent ruling in *Contoocook Valley School District v. State*, No. 213-2019-CV-00069.

2. Specifically, the plaintiffs contend that they are entitled to judgment on the pleadings on the portion of their adequacy claim concerning "base adequacy" in light of *ConVal*.

3. The plaintiffs contend that this is so because the Court can take judicial notice of the *ConVal* ruling and, on that basis, enter partial judgment in their favor.

4. The plaintiffs' reliance on judicial notice is misplaced.

5. While the plaintiffs contend that they are asking the Court to take judicial notice of the "decision" in *ConVal*, what they are actually requesting is that the Court take judicial notice of the *factual findings* within that decision and the rulings that flow from those findings. *See* Pls.' Mot. Partial J. Pleadings ¶ 1 ("[T]he Court [in *ConVal*] found that 'the evidence at trial overwhelmingly established that no school could provide the opportunity for an adequate education . . . ."), ¶ 5 (repeatedly referring to "findings" the Court made in *ConVal* and

contending these findings "prove" various parts of the plaintiffs' adequacy claim here); ¶ 8 (contending that the decision in *ConVal* "proves the elements of the declaratory judgment sought by Plaintiffs").

6. Under New Hampshire Rule of Evidence 201, "[a] judicially noticed fact must be one not subject to reasonable dispute[.]" N.H. R. Evid. 201(a).

7. "As a general rule, courts will not judicially notice the records of another cause of action, even if tried in the same court and involving the same parties, to supply facts that have not been formally introduced into evidence." *State v. Cox*, 133 N.H. 261, 266 (1990).

8. While a court may be "permitted to take judicial notice of court records and judicial proceedings under some circumstances, such as to confirm the fact of filing," it "may not do so in order to discern the truth of the facts asserted within that filing." *Jergens v. State Dep't of Rehab. & Corr. Adult Parole Auth.*, 492 F. App'x 567, 569 (6th Cir. 2012) (citations omitted); *see also S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp., Ltd.,* 181 F.3d 410, 426 (3d Cir. 1999) ("[W]e may take judicial notice of another court's opinion—not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.").

9. "This is so because (1) such findings do not constitute facts 'not subject to reasonable dispute' within Rule 201; and (2) were it possible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous." *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998) (cleaned up).

10. The State respectfully but vigorously disputes the factual findings and legal rulings made by the Court in *ConVal*.

11. The defendants in *ConVal* intend to file a motion for partial reconsideration of that decision, which is due on or before December 20.

12. An appeal is virtually certain regardless of how that motion is resolved.

13. It therefore cannot be realistically said that the findings in *ConVal* are "not subject to reasonable dispute." N.H. R. Evid. 201(a).

14. Judicial notice is accordingly not appropriate.

15. Because the plaintiffs rely entirely on judicial notice as grounds for why they are entitled to partial judgment on their adequacy claim, their motion should be denied based on the inapplicability of that doctrine.

16. It nonetheless bears noting that the plaintiffs appear to use judicial notice as a stand in for another doctrine—offensive collateral estoppel.

17. That doctrine plainly does not apply here, and judicial notice cannot be employed in a way that would render the doctrine of collateral estoppel "superfluous." *Taylor*, 162 F.3d at 830.

18. "'Offensive application of collateral estoppel . . . results in determining an issue of fact over the actual or potential objection of a present respondent, by applying the determination in a prior proceeding in which the respondent was also a party." *Bruzga's Case*, 142 N.H. 743, 745 (1998) (cleaned up); *see also* Black's Law Dictionary at 261 (6th ed. 1990) ("Offensive collateral estoppel' is used by [a] plaintiff to prevent relitigation of issues previously lost against another plaintiff by a defendant.").

19. Like all forms of collateral estoppel, offensive collateral estoppel does not apply unless, *inter alia*, "the first action [has] resolved the issue finally on the merits" and "the party to

be estopped [has] had a full and fair opportunity to litigate the issue[.]" *Bruzga's Case*, 142 N.H. at 745 (citation and quotation marks omitted).

20. For collateral estoppel to apply, there must have been "a valid and final judgment" in the prior action. *State v. Cassady*, 140 N.H. 46, 48 (1995).

21. No valid and final judgment has yet entered in *ConVal* pursuant to Superior Court Civil Rule 46(d), which provides:

> In all actions in which a verdict or decree is entered . . . , final judgment shall be entered . . . unless the court has otherwise ordered, or unless a Notice of Appeal has been filed with the Supreme Court pursuant to its Rule 7:
>
> > (1) Where no motion, or an untimely motion, has been filed after verdict or decree, on the 31st day from the date on the court's written notice that the court has made the aforementioned entry . . . ; or
> >
> > (2) Where a timely motion has been filed after verdict or decree, on the 31st day from the date on the court's written notice that the court has taken action on the motion.

22. The Notice of Decision on the *ConVal* order is dated November 20, 2023. Accordingly, the *earliest* a final judgment could enter in *ConVal* under Rule 46(d) is December 21.

23. But the Court in *ConVal* also extended the deadline to move for reconsideration to 30 days, and the defendants intend to file such a motion. Under Rule 46(d)(2), final judgment does not enter while such a motion is pending.

24. And under Rule 46(d), final judgment does not enter if "a Notice of Appeal has been filed with the Supreme Court pursuant to its Rule 7." The defendants also anticipate appealing the Court's decision in *ConVal*.

25. Accordingly, no final judgment has entered in *ConVal*, nor is final judgment likely to enter in the near future.

26. The prerequisites for collateral estoppel are therefore not met here. The plaintiffs cannot use "judicial notice" as an end-run around that doctrine. *See Taylor*, 162 F.3d at 830.

27. Finally, though not determinative of their request for partial judgment on the pleadings, the plaintiffs raise one additional issue in their motion that warrants a response.

28. The plaintiffs suggest that they still intend to proceed to trial on their adequacy claim to the extent it concerns "the sufficiency of differentiated aid funding[.]" Pls.' Mot. Partial J. Pleadings ¶ 6.

29. This request is not central to the plaintiffs' motion or their request for relief, and the State therefore reserves the right to address it more fully when it is directly presented to the Court.

30. The State disputes, however, that any such trial should proceed.

31. Whether a court can disaggregate state education funding into component parts and determine the "adequacy" of each part was at issue in *ConVal*.

32. This issue is likely to be appealed to the New Hampshire Supreme Court.

33. If the Supreme Court concludes that state education funding cannot be disaggregated, then that would make a trial in this case limited to differentiated aid inappropriate.

34. Conversely, if the Supreme Court concludes that state education funding can be disaggregated and then upholds the decision in *ConVal* that RSA 198:40-a, II(a) is unconstitutional, then the Legislature may choose to remedy any constitutional violation in a variety of ways, up to and including repealing RSA 198:40-a and replacing it with an entirely new funding regime.

35. Under either scenario, it would not serve the interests of efficiency or judicial economy to proceed to a trial on the plaintiffs' adequacy claim now.

36. That claim should instead remain stayed pending reconsideration and appeal in *ConVal*, after which the parties and the Court can better assess whether any portion of it remains viable.

WHEREFORE, the State of New Hampshire requests that this Honorable Court:

A. Deny the plaintiffs' motion for partial judgment on the pleadings; and

B. Grant such further relief as the Court deems just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: December 11, 2023

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Certificate of Service

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic-filing system to all parties of record.

Date: December 11, 2023

/s/ *Samuel Garland*
Samuel R.V. Garland.