STATE OF NORTH CAROLINA

COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12-CVS-1547

I.BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, ESTATE OF JAMES D. WILSON, BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, and JEAN C. NARRON, and all others similarly situated, Plaintiffs, vs. STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, a corporation, formerly Known as the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation, BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate, JANET COWELL, in her official capacity as Treasurer of the State of North Carolina, and the STATE OF NORTH CAROLINA, Defendants.	**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO CERTIFY CLASS**

I. INTRODUCTION

The bases for Plaintiffs' Motion for Class Certification are simple, straightforward and compelling. The State of North Carolina entered into a contract with its employees who were hired prior to October 1, 2006 to provide noncontributory 80/20 health insurance benefits upon and during retirement. In 2011 the North Carolina legislature enacted a law which required

eligible current and future retirees to pay a premium for the heretofore noncontributory 80/20 health benefits or receive a reduction of benefits in the form of a less valuable 70/30 benefit plan. This law unconstitutionally impaired the contract and the State breached its promise to provide noncontributory benefits to the eligible retirees/class members. The State's action resulted in hundreds of thousands of retirees/class members suffering a reduction of their vested retirement benefits, by paying more for their health insurance benefits in the form of either increased premiums or increased out of pocket medical expenses. The contract and its breach by the State are issues common to all members of the putative class, who by admission of the Defendants number in excess of 150,000. (Defendants' Responses to Plaintiffs' First Set of Request for Admission, No. 69, served 5/22/2014 [hereinafter, "Defendants' 1st Admissions"]). The common issues vastly predominate over any individual issues. For these and the other reasons set forth below, this case satisfies all the requirements for class certification.

II. FACTUAL BACKGROUND

There is no dispute that all of the Plaintiffs are retirees who retired from employment with the State of North Carolina or a state agency and have contributed at least five (5) years of contributory service to the State of North Carolina. (Complaint/Answer ¶¶ 1-26). The State of North Carolina uniformly offered all Plaintiffs 80/20 non-contributory health coverage or 90/10 health coverage with the payment of a partial premium, if they served the state for at least 5 years prior to retirement (hereinafter referred to as the "Retiree Health Benefit" or "RHB"). Session Law 1981-1398 (the "1981 Law"); Session Law 1987-857 (the "1987 Law"); (Complaint/Answer ¶ 44, 46, 48, 52-55; Defendants' 1st Admissions Nos. 24-25; See Deposition Testimony in Appendix of 30(b)(6) Deposition of Defendant State Retirement System representative Thomas Gene Causey, taken 01/27/2016, Deposition Exhibit 58, and pp. 166:7 –

166:20). The promise of the Retiree Health Benefit was consistently made in statute and in plan booklets issued to Plaintiffs, among other sources, which were uniformly distributed to all employees or retirees. (Complaint/Answer ¶¶ 48, 50, 64). Accordingly, and upon acceptance by performance by the putative class members, the representations made by the State of North Carolina created a unilateral contract. (Complaint ¶¶ 45, 49; *See also*: Defendants' First Admissions Nos. 40-43, 47, 48, 69; and Defendants' Supplemental Amended Responses to Plaintiff's First Set of Requests for Admission, served November 11, 2014, No. 45 ["Defendants' 1st Amended Admissions"]). Each of the Plaintiffs completed their obligations under the contract. (Complaint/Answer ¶¶ 1-26; Defendants' 1st Admissions Nos. 24-28).

There are 26 named plaintiffs in this case that would serve as representatives of the putative class. (Complaint/Answer ¶ 1-26). They include a former Chief Justice of the Supreme Court of North Carolina, a former Judge of the North Carolina Court of Appeals, classroom teachers, college-level administrators and instructors, special agents from the State Bureau of Investigation, a school superintendent, a school principal, administrative staff, and high level employees from various departments of State government. (Complaint/Answer ¶ 1-26). Between them, their service spans from 1949 to 2011, and covers more than a dozen counties of North Carolina. (Complaint/Answer ¶ 1-26). The putative class they represent is expected to consist of in excess of 150,000 retired North Carolinians. (Defendants' 1st Admissions, No. 69). Defendants do not contest the magnitude of affected individuals, and in fact have stated in pleadings that "[t]he total affected population would be about 450,000" when unretired but vested employees are included. (Defendants' Conditional Petition for Writ of Certiorari to Review Opinion of the Court of Appeals [hereinafter the "D's Pet. For Cert."], at p. 7).

Whereas many putative class actions are filed with a single named plaintiff, several Plaintiffs are named here, and together they constitute a representative sample of the putative class in terms of geography, type and level of employment, and dates of service. Nonetheless, all of Plaintiff claims arise from the same course of conduct by Defendants. All Plaintiffs allege that their contract arose from the same course of action by Defendants, including, in large part, legislation, mass communication and other action directed at Plaintiffs as a group. Moreover, Plaintiffs allege that the breach of said contract arose from the same actions taken against Plaintiffs as a group, including specifically legislation which deprived Plaintiffs of their previously vested Retiree Health Benefit. (*See*, Defendants' First Admissions, Nos. 29-30, 67-68).

In 2009, the State of North Carolina enacted legislation which eliminated the 90/10 optional health coverage benefit. Session Law 2009-16. (Complaint/Answer ¶ 55; see, Defendants' First Admissions, No. 68). As a result, Plaintiffs David B. Barnes, and Blair J. Carpenter, and other similarly situated persons lost their option to participate in the 90/10 plan. (Complaint/Answer ¶ 56; [Proposed] "Stipulations of Fact (Enrollments of Named Plaintiff Class Representatives in PPO 70/30 Basic and NC Smartchoice Plus Plans)"). In 2011, the State of North Carolina enacted legislation which required retirees to pay premiums to keep the 80/20 benefit or receive a lesser 70/30 benefit. (Complaint/Answer ¶¶ 58-59; see Session Law 2011-85 and 2011-96). Both the 2009 legislation and the 2011 legislation applied to all retirees, including those that had vested, in breach of the contract between Plaintiffs and the State of North Carolina. (*Id., see also*, Complaint ¶ 62). Plaintiffs have been damaged by receiving a less valuable 70/30 health insurance benefit or being forced to pay premium payments for benefits that were previously guaranteed with no premium. (Complaint/Answer ¶¶ 66-67; see also

Deposition Testimony Excerpts in Appendix admitting to the less valuable or less rich nature of the 70/30 plan compared to the 80/20 and 90/10 plans).

Substantial written and deposition discovery have been conducted in this matter, including depositions of the 24 living named Plaintiffs, key witnesses for the State, certain named defendants, the State Health Plan's actuaries, and former retirement counselors. In total, 38 depositions have been taken and hundreds of thousands of pages of documents have been exchanged. A significant amount of discovery has already been completed that identifies the class. Specifically, Plaintiffs requested by interrogatory and Defendants produced a spreadsheet in the summer of 2012 containing the identities and relevant biographical and contact information for the members of the class (who also happen to all be members of the Defendant Retirement System and of the Defendant State Health Plan)(hereinafter said spreadsheet referred to as the "Defendants' Spreadsheet"). The Defendants' Spreadsheet discloses the full names of 171,267 class members, their addresses, their birth date, hire date, retirement date, plan selections at the time, and, if available, phone numbers and email addresses. While this list will need to be supplemented to reflect any changes or the addition of new class members who have retired since the list was made, the Defendants' Spreadsheet is evidence that a class exists and can be and has already been identified for class administration purposes.

III. PROCEDURAL HISTORY

This case was filed on 20 April 2012 in the Superior Court of Gaston County. On 23 July 2012, the Defendants filed a Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6). On 23 May 2013, this Court entered an Order denying in whole the Motion to Dismiss. On 26 September 2013, Defendants filed a Petition for Discretionary Review (prior to a determination by the Court of Appeals) to the Supreme Court of North Carolina asking it to

bypass the Court of Appeals and hear the appeal of their Motion to Dismiss in the first instance. Defendants' Petition was denied in conference on 18 December 2013. On 17 June 2014, the Court of Appeals affirmed this trial court's order as to Defendants' Rule 12(b)(2) Motion to Dismiss and dismissed as interlocutory Defendants' Rules 12(b)(1) and 12(b)(6) Motions. *Lake et al. v. State Health Plan, et al.*, 234 N.C. App. 368, 760 S.E2d 268 (2014). The Court of Appeals issued its mandate on 7 July 2014.

Defendants filed their second Petition for Discretionary Review on 23 July 2014 (hereinafter the "PDR") along with a Conditional Petition for a Writ of Certiorari. On 18 December 2014, the Supreme Court dismissed Defendants' PDR, denied Defendants' Motion to consider the PDR timely filed, and denied Defendants' Conditional Petition for Certiorari.

The parties have engaged in fact and expert discovery as described in the factual background above. As of the date of this brief, there remains some potential expert discovery to complete and some factual data is still outstanding from Blue Cross and Blue Shield of North Carolina pursuant to a subpoena and a Rule 30(b)(6) Deposition Notice.

On 19 May 2016, the Court set a hearing on class certification for 2 September 2016, and a hearing on summary judgment for 31 October 2016.

IV. ARGUMENT

A. General Legal Standards for Class Certification

The statutory basis governing class actions in North Carolina is embodied in one sentence: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. Gen Stat. § 1A-1, Rule 23 (a) (2008). Our courts have, since the enactment of this rule, expansively defined those words. Indeed, North Carolina courts have long and consistently recognized that:

> Our Rule 23 should receive a liberal construction, and it should not be loaded down with arbitrary and technical restrictions.... The rule has as its objective 'the efficient resolution of the claims or liabilities of many individuals in a single action' and the 'elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief.'

Crow v. Citicorp Acceptance Co., Inc., 319 N.C. 274, 354 S.E.2d 459 (1987). Furthermore, "[t]he trial court has broad discretion in determining whether a case should proceed as a class action." *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina,* 345 N.C. 683, 583 S.E.2d 422 (1997). The trial court is not limited to consideration of matters that are expressly set forth in Rule 23. *Crow v. Citicorp Acceptance Co., Inc.,* 319 N.C. 274, 354 S.E.2d 459 (1987). The fact that there may be differing amounts of damages owed to class members is not particularly relevant to the certification of the class and does not defeat certification. *Faulkenbury*, 345 N.C. 683, 698, 483 S.E.2d 422, 431-32 (1997).

> Finally, the defendants argue that the members of the potential class will receive recoveries in different amounts. For this reason, say the defendants, the class members' claims must be examined to determine what offsetting advantages cancel out disadvantages, what difference in benefits might exist, and whether the change in benefits changes the central understanding of the parties. All these are collateral issues in this case. The predominate issue is how much the parties'

> retirement benefits were reduced by an unconstitutional change in the law. This issue defines the class.

Id. In addition, differing evidentiary presentations or differing recounts of the common issue among the class also does not negate a class certification. For example, in *Bailey v. State,* the Court certified a class of vested retirees where oral representations were made to specific class members and where certain documentation differed among the class as to whether there was a contract with the State. *Bailey v. State,* 348 N.C. 130, 500 S.E.2d 54 (1998); *See also Faulkenbury, supra* (explaining collateral issues versus common issues). In other words, the evidence or understanding of the contract among class members may (and often will) differ, but the guiding principal is whether a class certification is "likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Crow*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987). In short, not all issues of fact or law need to be common for a class to be certified – the common issues just need to predominate over the individual ones.

B. Plaintiffs Satisfy the Applicable Standards

In their Complaint, Plaintiffs define the class as follows:

> All retired persons who vested in the State Health Plan prior to September 1, 2011, and their surviving spouses and eligible children whose health insurance retirement benefits have been or will be impaired by Session Laws 2011-96, 2011-85, 2009-16 and 2008-168 or any other statute, Session Law, Bill, or other law, rule, regulation, or plan document, and if such persons are now deceased or will be deceased prior to the conclusion of this lawsuit, all of their living beneficiaries entitled to receive any damages as set forth herein or retirement health benefits under any health retirement benefit plan, or their estates, as applicable.

(Complaint, ¶ 32) Vesting in the Retiree Health Benefit occurred on the later of: five years after their date of hire or January 1, 1988 for retirees who retired after January 1, 1988 and on the date of retirement for retirees (and their qualifying surviving spouses) who retired before January 1,

1988. (Plaintiffs' 1st Amendment to Responses to Defendants' First Set of Interrogatories, # 1(iii))

In *Crow*, the North Carolina Supreme Court clarified the definition of a "class" as "when each of the members has an interest in either the same issue of law or fact, and that issue predominates over issues affecting only individual class members." The Court further elaborated on other criteria necessary to certify a class:

> The named representatives also must establish that they will fairly and adequately represent the interests of all members of the class. This prerequisite is a requirement of due process. *See Hansberry v. Lee,* 311 U.S. 32, 45, 61 S. Ct. 115, 119, 85 L.Ed. 22, 209 (1940) (discussing F.R.Civ.P. 23). It is also specifically imposed by our Rule 23, N.C.G.S. § 1A-1, Rule 23(a) (1983).
>
> The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected. *See Thompson v. Humphrey,* 179 N.C. 44, 58, 101 S.E. 738, 746 (1919) (decided without reference to the then prevailing class action statute, N.C. Consolidated Statutes, § 457 (1919) (repealed 1933) (originally enacted in N.C.Code, Ch. 10, § 185 (1883)). The named parties also must have a genuine personal interest, not a mere technical interest, in the outcome of the action. *English*, 41 N.C.App. at 7, 254 S.E.2d at 230, *citing Hughes v. Teaster*, 203 N.C. 651, 166 S.E. 745 (1932).
>
> Parties seeking to utilize Rule 23 also must establish that the class members are so numerous that it is impractical to bring them all before the court. N.C.G.S. § 1A-1, Rule 23(a) (1983).
>
> Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results.

Crow v. Citicorp Acceptance Co., Inc., 319 N.C. 274, 354 S.E.2d 459 (1987). The Defendants have not denied that this case meets the definition and satisfies the factors for class certification. (Defendants' 1st Admissions, Nos. 65-77 [neither admitting nor denying the various factors to be weighed for class certification]). The Plaintiffs meet these standards as further discussed below.

i. Certification is Appropriate Because a Class Exists.

The first prerequisite for certification of a class action is whether a class exists. *See Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 354 S.E.2d 459 (1987); *Blitz v. Agean, Inc.*, 197 N.C. App 296, 302, 677 S.E.2d 1, 5 (2009). "[A] 'class' exists...when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Agean*, 197 N.C. App. at 302, 677 S.E.2d at 5. This initial step is often called the "commonality and typicality" prong of the test. *Id.* In essence, this element requires that individual issues predominate over common ones in terms of being the focus of the litigants' efforts. *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 550-53, 613 S.E.2d 322, 327-28 (2005).

Upholding this Court's denial of Defendants' Motion to Dismiss, the Court of Appeals in this case recognized that Plaintiffs had sufficiently alleged the existence of a contract. *Lake v. State Health Plan*, 234 N.C. App. 368, 760 S.E.2d 268 (2014). Accordingly, at this point, the Court must decide whether the contract and breach adequately alleged by Plaintiffs represent common issues which predominate over any individual issues. The Court at this stage is not faced with determining whether there is a contract, but rather whether -- if the alleged contract is established by law and/or the evidence -- the obligation is a common issue which predominates over any and all others. *See Beroth Oil Co. v. N.C.D.O.T.*, 367 N.C. 333, 342, 757 S.E.2d 466 (2014). In other words, the Court is not to consider the merits of the case at the class certification stage. *Id.*

There exist several legal or factual issues common to all putative class members. (See, Complaint/Answer ¶ 33) Each is related to the contract between the State and the class

members. These common issues predominate over any individual distinctions that may exist among the individual retirees:

1. Whether class members hired by the State of North Carolina prior to October 1, 2006 were vested in the Retiree Health Benefit upon the completion of at least five years of creditable service for those who retired after January 1, 1988 or upon retirement for those retirees (and qualifying surviving spouses) who retired prior to January 1, 1988.

2. Whether class members hired by the State of North Carolina before October 1, 2006, upon the completion of at least five years of creditable service for those who retired after January 1, 1988 or upon retirement for those retirees (and qualifying surviving spouses) who retired prior to January 1, 1988, had a contract with the State of North Carolina for the continued provision of non-contributory 80/20 health insurance benefits during their retirement.

3. Whether class members hired by the State of North Carolina before October 1, 2006, upon the completion of at least five years of creditable service for those who retired after January 1, 1988 or upon retirement for those retirees (and qualifying surviving spouses) who retired prior to January 1, 1988, had a contract with the State of North Carolina for the availability of a partially contributory 90/10 health insurance benefit during their retirement.

4. Whether Defendants breached and/or impaired this contract with the class members by unilaterally reducing and/or terminating the vested Retiree Health Benefits through specific legislative actions in 2009 and 2011.

5. Whether the Defendants breached or impaired the rights of the class members by reducing their pension payments to pay for additional health insurance premiums for the State Health Plan where such health insurance coverage was previously promised and provided to retirees on a non-contributory (premium-free) basis.

6. Whether the Defendants' actions as aforesaid violated the class members' constitutionally protected rights to due process and/or equal protection under the law.

Fortunately, North Carolina has extensive case authority which supports the use of class actions in cases remarkably similar to this where employees or retirees of the State are seeking reinstatement of contractual retirement or employment based benefits. North Carolina Courts have granted class certification in the following cases involving governmental employment benefits and contracts:

- *Simpson v. North Carolina Local Gov't Employees' Ret. Sys.,* 88 N.C. App. 218, 363 S.E.2d 90 (1987) (Contractual Right to Retirement Disability);
- *Bailey v. State,* 348 N.C. 130, 500 S.E.2d 54 (1998) (Contractual Right to Tax Exemptions for Post-Retirement Benefits);
- *Faulkenberry v. Teachers' and State Employees' Retirement System of North Carolina,* 345 N.C. 683, 583 S.E.2d 422 (1997) (Contractual Right to Retirement Disability);
- *Bolick v. County of Caldwell,* 182 N.C.App. 95, 641 S.E.2d 386 (2007) (Contractual Right to Severance);
- *Stone v. State*, 191 N.C. App. 402, 664 S.E.2d 32 (2008) (Contractual Right to the Actuarial Soundness of the State Retirement System);
- *Carl v. State*, 192 N.C. App. 544, 665 S.E.2d 787, (2008), *cert. denied*, 363 N.C. 123, 672 S.E.2d 684; 2009 NCBC LEXIS 36 (06-CVS-13617, Wake N.C. Super. Ct. 2009) (Contractual Right to Level Premiums for Long Term Care Insurance Offered through the State Health Plan to both Retirees and Current Employees);

- *Terry v. State*, Order Allowing Motion for Class Certification, August 18, 2015 (14-CVS-12342, Wake N.C. Super. Ct.) (Contractual Right to Step Level Salary Schedule for Magistrates);
- *Adams v. State*, Order Allowing Motion for Class Certification, March 3, 2015 (14-CVS-15027, Wake N.C. Super. Ct.) (Contractual Right to Step Level Salary Schedule for State Troopers).

The Retiree Health Benefits at issue in this case are part and parcel of the overall retirement benefits offered by the State as an employer and are similarly governed by this same case precedent. In fact, the facts and issues in this case are more common among class members than in some of the preceding class action retirement benefit cases. For instance, *Faulkenbury* involved challenges to both the State Employee's Retirement System and the Local Governmental Employee's Retirement System. 345 N.C. 683, 583 S.E.2d 422. This case does not involve a separate retirement system, as all Plaintiffs and class members are members of the State Retirement System. Further, cases like *Simpson*, *Faulkenbury*, and *Bailey* involved formulas based on individual salaries and service records to calculate pension, tax refund, and disability payments. In contrast, the elements to be vested in the contract in this case only requires five years of contributory service and enrollment in the State Health Plan at retirement, and all vested retirees receive the same benefit, a premium-free 80/20 health plan and an option for a 90/10 health plan with a partial premium. Much like other cases that dealt with retirement benefits, all Plaintiffs received or had access to the statutes, pamphlets, handbooks and other materials that were distributed to, or available to all Plaintiffs and that provide evidence of the Retiree Health Benefit. *See e.g. Faulkenbury*; *Bailey*; *Bolick*; *Stone*. Those documents are merely evidence of the unilateral contract between the State and the Plaintiffs – just the same as

the Court construed the same types of documents in *Faulkenbury*, *Bailey, Bolick,* and *Stone.* In fact, the "Your Retirement" Handbooks published by the Retirement System were used in several of those cases and are very pertinent evidence in this case. (*See* sample "Your Retirement" Handbooks in Appendix)

Plaintiffs present claims here that are substantially similar to those brought in previous cases regarding retirement benefits that were certified as class actions. Plaintiffs' claims are common. Much like in *Faulkenbury*, "Each of the parties had a claim based on what he or she contends is underpayment of retirement benefits. This claim predominates over issues affecting only individual class members in this case. This establishes a class." *Faulkenbury,* 345 N.C. 683, 698, 483 S.E.2d 422, 431 (1997).

ii. The Putative Class is Sufficiently Numerous and is Identifiable.

Defendants admit that the putative class includes over 170,000 individuals, and do not appear to dispute the scope of this case's impact. (See Defendants' Spreadsheet; Defendants' Petition for Discretionary Review, filed July 23, 2014, pp 11-12). Attempting to litigate over 170,000 separate claims would be an enormous burden on the State's judicial system. Even worse, 170,000 separate cases could result in 170,000 potentially inconsistent verdicts on the same issue and could put the State Health Plan in the position of having to offer numerous health plans to differing groups or individual retirees based on the outcome of individual cases. Furthermore, the class is easily identifiable as the class as it existed in the summer of 2012 has already been identified in detail in the Defendants' Spreadsheet. Said database already includes most of the information necessary to properly administer the class and proceed in the litigation on a class-wide basis.

iii. The Class Representatives Adequately Represent the Interests of the Entire Class and Will Continue to Do So.

There should be no question that the class representatives and their counsel have adequately represented all the putative class members, and will continue to do so. Each of the living class representatives has been subjected to and completed depositions. Each has cooperated in the production of documents and in providing information necessary to respond to discovery. Several class representatives participated in two mediation sessions conducted by Judge McCullough, many attended this court's hearing on the 12(b) motions, and some even attended oral arguments at the Court of Appeals. The class representatives have remained engaged and committed to this case since it was filed over four years ago.

Moreover, as set forth in the Factual Background above, the Plaintiffs fairly represent the class as a whole in terms of geography, type and level of employment, and dates of service. Finally, the Plaintiffs are represented by law firms with extensive experience in class actions and other complex litigation.

There exist no conflicts of interest between the class representatives and the absent members. During the exhaustive discovery, appellate, and pleading process, no actual or latent conflicts of interest have been raised by any party – Plaintiffs or Defendants. All of the class representatives and all of the class share a fundamental and basic desire to protect their Retiree Health Benefits from unilateral reduction or termination.

iv. The Case Should Proceed as a Class Action Because That Option is Far Superior to Other Alternatives.

The proposed class numbers in excess of 170,000 retirees. The damages to each member vary based on which plan they chose (i.e. 70/30 or 80/20) and their age at that time, but essentially none have incurred losses that would justify the substantial expenses that would be

required to pursue an individual lawsuit. The damage for each class member is determinable from objective calculation methods that have been performed by the parties and by expert actuaries retained by the parties. As stated in *Faulkenbury*, a difference in recovery or damages among class members does not defeat a class certification motion. *Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 431-32 (1997). On the other hand, if individual claims could practically be pursued, such litigation would place a tremendous and unnecessary burden on the courts and the retirees. As noted in *Crow*, class actions should be permitted where they are "most likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results" *Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 354 S.E.2d 459 (1987). "If the prerequisites to a class action are established on remand, the decision whether a class action is superior to other available methods for the adjudication of this controversy continues to be a matter left to the trial court's discretion" *Id.*

In short, the class device is not only the far superior method to resolve the retirees' claims, it is the only one.

CONCLUSION

For all of the reasons stated above, Plaintiffs respectfully request the Court to certify Plaintiffs' claims as a class action and grant the Motion for Class Certification.

This the 31st day of May, 2016.

GRAY, LAYTON, KERSH, SOLOMON, FURR & SMITH, P.A.

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CERTIFICATE OF SERVICE

This is to certify that on this date I served a copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO CERTIFY CLASS** on counsel for Defendants by email and by depositing a copy thereof in the United States mail, postage prepaid, and addressed as follows:

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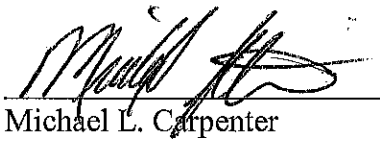

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