

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, 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.

**MOTION TO DISMISS**

**N.C.G.S. § 1A-1, RULE 12(b)(1),  
(2) and (6)**

NOW COME the Defendants and, pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), (2) and (6), move to dismiss the Complaint. In support of this motion, the Defendants show the following:

1. The Court lacks jurisdiction over the Defendants or over the subject matter of all causes of action because as discussed below, there is no contract between the Plaintiffs and the Defendants and therefore the Defendants have not waived sovereign immunity.
2. The Court lacks jurisdiction over the subject matter of all causes of action because the Plaintiffs have failed to exhaust administrative remedies under the Administrative Procedure Act, N.C.G.S. § 150B-1 *et seq.*
3. The Complaint fails to state a claim upon which relief can be granted for the following reasons:
  - a. (i) The First and Second Causes of Action (Breach of Contract regarding 80/20 and 90/10 Plans, respectively) are premised on the notion that a contract existed and exists between the Plaintiffs and Defendants based on either statutory provisions, non-statutory representations by the Defendants, *e.g.*, issuance of Handbooks, or both. As a matter of law, no such contract existed or exists.
  - (ii) Alternatively, if any such contract did or does exist, the contract did not and does not, as a matter of law, provide the rights the Plaintiffs allege; the Defendants retained authority to and did lawfully amend the contract by amending or removing the terms regarding which the Plaintiffs now seek relief; and/or any relevant contracts between the Plaintiffs and Defendants were for a limited duration, have expired, and have been replaced by new contracts that lack the terms regarding which the Plaintiffs now seek relief. Therefore, no contract existed and/or no breach occurred.

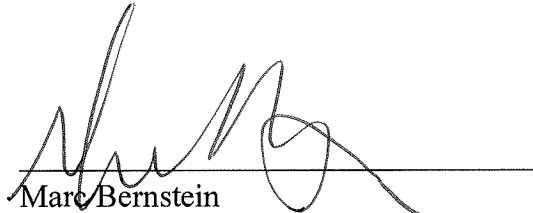
- b. The Third Cause of Action (Unconstitutional Impairment of Contract) requires the existence of a contract and a breach. As stated above, there is no contract and no breach.
- c. The Third, Fourth and Fifth Causes of Action (Unconstitutional Impairment of Contracts, Violation of Due Process and Equal Protection, respectively) are constitutional claims and the Plaintiffs may seek and are seeking to vindicate the same constitutional rights alleged in those causes of action by an adequate action under state law (*i.e.*, breach of contract).
- d. The Fourth Cause of Action (Violation of Due Process) fails to allege any property of which the Plaintiffs may have been deprived without the Due Process of law because no contract exists (or, alternatively, because if one does exist it does not include the terms the Plaintiffs allege and/or has been lawfully amended or superseded by subsequent contracts).
- e. The Fifth Cause of Action (Equal Protection) fails to allege any treatment that is dissimilar from the treatment of any other similarly situated persons that amounts to a deprivation of the equal protection of the law.
- f. To the extent that the Third and Fifth Causes of Action (Unconstitutional Impairment of Contracts and Equal Protection, respectively) are based generally on the “acts complained of” in the Complaint, which includes “acts” dating to 1981, and are not specifically premised on the 2009 Law and the 2011 Law, they are barred by the statute of limitations.

- g. The Sixth Cause of Action (Writ of Mandamus or alternatively Preliminary and Permanent Injunction/Specific Performance) is in the nature of a remedy, not an independent cause of action.
- h. The Sixth Cause of Action (Writ of Mandamus or alternatively Preliminary and Permanent Injunction/Specific Performance) requires that in order to establish a right to a writ of mandamus, a preliminary or permanent injunction, or specific performance, the Plaintiffs would have to prevail on the merits (or in the case of a preliminary injunction, demonstrate a likelihood of success on the merits) of one of their substantive causes of action (First through Fifth), which, as discussed above, they cannot do.
- i. The Seventh Cause of Action (Declaratory Judgment) is in the nature of a remedy, not an independent cause of action.
- j. The Seventh Cause of Action (Declaratory Judgment) requires that in order to establish a right to a declaratory judgment the Plaintiffs would have to prevail on the merits of one of their substantive causes of action (First through Fifth), which, as discussed above, they cannot do.
- k. The Eighth Cause of Action (Constructive or Resulting Trust/Common Fund) is in the nature of a remedy, not an independent cause of action.
- l. The Eighth Cause of Action (Constructive or Resulting Trust/Common Fund) requires that in order to establish a right to a constructive or resulting trust or a common fund, the Plaintiffs would have to prevail on the merits of one of their substantive causes of action (First through Fifth), which, as discussed above, they cannot do.

WHEREFORE, the Defendants pray unto the Court for the following relief:

1. That the Complaint be dismissed.
2. That each party bear its own costs and fees.
3. Such further relief as this Court deems just and proper.

Respectfully submitted, this 29th day of June, 2012.

A handwritten signature in black ink, appearing to read 'Marc Bernstein', is written over a horizontal line. The signature is fluid and cursive.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing **DEFENDANTS' MOTION TO DISMISS** has been served on the following counsel for the parties by first-class USPS mail, postage pre-paid and by electronic mail at the following addresses:

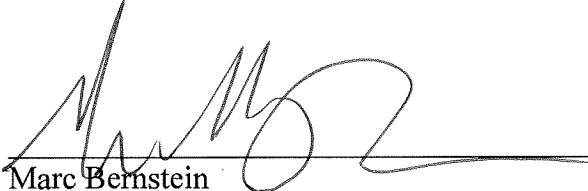
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DATE: June 29, 2012

  
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Marc Bernstein  
Special Deputy Attorney General