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.	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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NOW COME Plaintiffs**,** by and through the undersigned legal counsel, and respond to the Defendants' Motion to Dismiss dated June 29, 2012 and Defendants' Brief in Support of Motion to Dismiss filed on January 9, 2013 seeking to dismiss the Complaint, and in opposition to said Motion, show the Court the following:

INTRODUCTION AND SUMMARY OF ARGUMENT

In an effort to maintain consistency and to ensure that all issues are properly addressed, Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss utilizes the same basic outline presented by Defendants' in their Brief in Support of Motion to Dismiss. Some arguments are necessarily duplicative in order to maintain this format. As a general introduction and overview, the Defendants' arguments in support of their Motion to Dismiss can best be summarized as attempting to re-litigate previously well-settled case law determined by this state's Courts. These Courts have consistently held that retirement benefits earned over time – but only paid at a future date – are considered deferred compensation that the State of North Carolina is contractually obligated to honor. *See e.g. Simpson v. North Carolina Local Government Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987) *aff'd per curiam* 323 N.C. 362 (1988); *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997); *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998); *Stone v. State*, 191 N.C.App. 402, 664 S.E.2d 32 (2008), *appeal dismissed and review denied* 363 N.C. 381 (2009). In their Brief in Support of the Motion to Dismiss, Defendants minimize and misconstrue this long line of authority.

In the present case, the State of North Carolina induced Plaintiffs to work a specific period of time in order to receive retirement health benefits. Those benefits were locked at the level of those existing on the date of vesting. Such inducement was a contractual offer to receive deferred compensation in exchange for work service. Upon meeting the eligibility criteria of working a certain period of time, Plaintiffs' rights to receive retirement health benefits vested. As has been determined by this state's Courts, the State of North Carolina cannot unilaterally modify the Plaintiffs' vested benefits. *See e.g. Simpson v. North Carolina Local Government*

Employees' Retirement System, 88 N.C. App. 218, 363 S.E.2d 90 (1987) *aff'd per curiam* 323 N.C. 362 (1988); *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997); *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998); *Stone v. State*, 191 N.C.App. 402, 664 S.E.2d 32 (2008), *appeal dismissed and review denied* 363 N.C. 381 (2009).

The right to amend clause cited by the Defendants merely allows the state to amend the statutes themselves and the terms for receiving the benefits for those not yet vested, not the contracts that have already been entered into between the state and the already vested retirees. *See e.g. Id.* The statutes themselves are not the contract, but merely the enabling legislation for the contracts. The right to amend clause is inapplicable to the contractual terms of those retirees who have already vested in the benefits, as the terms of the contractual rights are locked-in at the time of vesting and not subject to further amendment. Previous right to amend arguments based on similar retirement statutes have been summarily dismissed as inapplicable. *See e.g. Simpson, Faulkenbury*. The state may have the right to amend and reduce the benefits prospectively for those who have not already satisfied the contractual eligibility requirements and vested in the benefit. However such issues are not brought before this Court as all Plaintiffs have fulfilled the eligibility requirements and vested in such benefits. The state cannot reduce the Plaintiffs' benefits because they have completed their performance under the contract and vested in the benefits. To follow Defendants' argument to its logical conclusion, would allow the state to amend or repeal a contract at any time, even after Plaintiffs have fully performed. The right to amend clause therefore neither detracts from the contractual nature of the benefits nor allows the Defendants to unilaterally reduce the benefits for the Plaintiffs. Defendants' arguments ignore North Carolina law, and seek to re-write the controlling authorities.

FACTS DEEMED TO BE TRUE

The following salient allegations are deemed to be true for the purpose of Defendants' Rule 12 motion:

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 ¶ 1-26). The State of North Carolina offered Plaintiffs 80/20 non-contributory health coverage or 90/10 partially contributory health coverage if they served the state for at least five (5) years prior to retirement. (Complaint ¶ 45-55) (hereinafter referred to as the "Retiree Health Benefit"). Plaintiffs accepted employment and remained employed with the State of North Carolina in reliance on this promise of retirement benefits, including provision of the Retiree Health Benefit. (Complaint ¶ 42). Such promises were made in statute and in plan booklets issued to Plaintiffs. (Complaint ¶ 48, 50, 64, 65). Accordingly, the representations made by the State of North Carolina created a contract. (Complaint ¶ 45, 49). Each of the Plaintiffs completed their obligations under the contract. (Complaint ¶ 1-26).

In 2009, the State of North Carolina eliminated the 90/10 optional health coverage benefit. (Complaint ¶ 55). As a result, Plaintiffs David B. Barnes, Everette M. Latta, Robert C. Hayes Jr., and other similarly situated persons lost their option to participate in the 90/10 plan. (Complaint ¶ 56). In 2011, the State of North Carolina required retirees to pay premiums to keep the 80/20 benefit or receive a lesser 70/30 benefit. (Complaint ¶ 58). Both the 2009 law and the 2011 law applied to all retirees, including those that had already vested. (Complaint ¶ 62). Plaintiffs have been damaged by receiving a less valuable 70/30 benefit or being forced to pay premium payments for benefits that were previously guaranteed with no premium. (Complaint ¶ 66-67).

STANDARD OF REVIEW

A. 12(b)(6) Standard

> In analyzing the sufficiency of a complaint to withstand a motion to dismiss for failure to state a claim, the complaint must be liberally construed and should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

23A N.C. Index 4th Pleadings § 82; *See Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 165-166 (1970); *Zenobile v. McKecuen*, 144 N.C. App. 104, 110, 548 S.E.2d 756, 760 (2001); *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 524, 430 S.E.2d 476, 480 (1993). In other words, if the words used in a pleading are "susceptible of that interpretation, the pleading is sufficient." *Vincent v. Powell*, 215 N.C. 336, 1 S.E.2d 826, 827 (1939).

> A motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure tests the legal sufficiency of the complaint. *See* N.C. Gen.Stat. § 1A-1, Rule 12(b)(6) (2001); *Fuller v. Easley*, 145 N.C.App. 391, 397-98, 553 S.E.2d 43, 48 (2001). **When ruling on a motion to dismiss, "the trial court must take the complaint's allegation[s] as true** and determine whether they 'are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Id. (quoting Taylor v. Taylor*, 143 N.C.App.664, 668, 547 S.E.2d 161, 164 (2001)). The ultimate issue on a motion to dismiss is not " 'whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' " *Johnson v. Bollinger*, 86 N.C.App. 1, 4, 356 S.E.2d 378, 381 (1987)(quoting *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C.App. 678, 681, 340 S.E.2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986)). Thus, a claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Garvin v. City of Fayetteville*, 102 N.C.App. 121, 123, 401 S.E.2d 133, 134-35 (1991).

Boyce & Isley, PLLC v. Cooper, 153 N.C.App. 25, 25, 568 S.E.2d 893, 897 (2002) (emphasis added).

B. Elements of Each Cause of Action

Plaintiffs have alleged causes of action for breach of contract, impairment of contract, violations of due process, and violations of equal protection. They seek monetary damages as well as declaratory and permanent injunctive relief.

"The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment." *Nationwide Mut. Insurance Co. v. Roberts,* 261 N.C. 285, 288, 134 S.E.2d 654, 657 (1964) (citation omitted).

In a breach of contract action, a complainant must plead the " '(1) existence of a valid contract, and (2) breach of the terms of that contract.' " *Toomer v. Garrett*, 155 N.C.App. 462, 481, 574 S.E.2d 76, 91 (2002) (citation omitted), *disc. review denied, appeal dismissed,*357 N.C. 66, 579 S.E.2d 576 (2003).

To determine whether there is an impairment of contract, a court must "ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d 54, 60 (1998) (*citing U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977)). To determine if there has been a violation of Due Process, a Court must determine "(1) whether the plaintiff has a liberty or property interest that is entitled to procedural due process protection; and (2) if so, what process is due." 16B Am. Jur.2d Constitutional Law § 957. Causes of action for deprivation of equal protection based on age

classifications are determined under the rational basis test. *State v. Elam*, 302 N.C. 157, 162, 273 S.E.2d 661, 665 (1981).

LEGAL ARGUMENT

I. The Complaint States Valid Claims for Relief, as the Retiree Health Benefit is a Vested Contractual Obligation Owed to Plaintiffs

A. The Retiree Health Benefit is a Vested and Contractually Promised Employment Benefit

1. A Long Line of North Carolina Cases Mandate that the Retiree Health Benefit be Treated as a Contract with the Retirees

There is a longline of well-established North Carolina case law that mandates that a retirement benefit of a public employee must be treated as a contract and protected from unilateral retraction or impairment if the employee vested into the contract at issue. In their Brief in Support of Motion to Dismiss, the Defendants fail to address in any detail this long line of authority from our state's Supreme Court.[1] An understanding of the holdings in these cases is necessary for a ruling on the case at bar.

In *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942), the North Carolina Supreme Court found that payments to retired teachers were deferred compensation and not a mere gratuity. The Court opined that to hold otherwise would make the retirement plan unconstitutional under the exclusive emoluments clause of the state constitution. N.C. Constitution, Art. I, Sec. 7. *Id*.; *See also Leete v. County of Warren*, 341 N.C. 116, 121, 462 S.E.2d 476, 479 (1995).

[1] For example, in § I.A. the Defendants spend 8 pages strenuously arguing that the Retiree Health Benefit is not contractual in nature, but fail to mention any of the dispositive holdings on this exact issue from *Faulkenbury*, *Bailey*, *Simpson*, etc. They only briefly mention *Faulkenbury* in passing for another premise without discussing the actual holding of the case, which is the premise being argued in that brief section. Defendants later only cite to *Bailey* and numerous other cases directly on-point in a footnote on page 19 and without any real discussion of the dispositive holdings or distinguishment of those holdings.

In *Simpson v. North Carolina Local Government Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987) *aff'd per curiam* 323 N.C. 362 (1988), the Court of Appeals was confronted with an employee challenge to unilateral retirement payment reductions made to the Local Governmental Employees' Retirement Plan after said employee had reached the mandated eligibility criteria of 5 years of creditable service. The *Simpson* Court, in a matter of apparent first impression, held that retirement benefits are contractual in nature and cannot be changed once the employee vests into the benefit plan by meeting the eligibility criteria:

> After having carefully considered both relevant North Carolina case law and the relative merits and weaknesses of the four approaches reviewed above, we have decided to hold that the relationship between plaintiffs and the Retirement System is one of contract. Our Supreme Court held in *Bridges v. Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942) that the retirement benefits received by state employees from the retirement fund there challenged were payments of salary for services rendered. Twenty years later, in *Insurance Co. v. Johnson, Comm'r of Revenue,* 257 N.C. 367, 126 S.E.2d 92 (1962), our Supreme Court stated: "A pension paid a governmental employee ... is a deferred portion of the compensation earned for services rendered." If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the compensation is the contract. Fundamental fairness also dictates this result. A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. *Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.*

Simpson, 88 N.C. App at 223-224, 363 S.E.2d at 93-94 (emphasis added). The Court in *Simpson* recognized that retirement benefits are deferred compensation for work done for an employees' loyalty and service for a prescribed eligibility period. *Id*. In finding the benefits to be contractual deferred compensation, the Court expressly rejected the defendants' contentions that the retirement benefits were merely gratuitous. *Id*.

In *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997), the North Carolina Supreme Court held that disability retirement benefits were part of a vested contract between the state and its employees and could not be changed once earned. *Faulkenbury*, 345 N.C. at 690, 483 S.E.2d at 427 (1997). Building on *Simpson*, the Supreme Court stated:

> The Court of Appeals held and we affirmed in *Simpson v. N.C. Local Gov't Employees' Retirement Sys.*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988), a case almost on all fours with this case, that the relation between the employees and the governmental units was contractual. *Simpson* governs this case. At the time the plaintiffs' rights to pensions became vested, the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action.
>
> The defendants argue *Simpson* is wrong and should be overruled. They say this is so because the statutes upon which the plaintiffs rely are not promises, but only state a policy which the General Assembly may change. We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract.

Id. at 690, 483 S.E.2d at 427. Like in *Faulkenbury*, the Defendants in this case now want to overturn the legal precedent established in *Simpson* and present the same arguments to this Court that were soundly rejected by the State Supreme Court. As they did in *Faulkenbury*, Defendants here argue that benefits "are not promised, but only state a policy which the General Assembly may change." That argument failed in *Faulkenbury* and must be similarly rejected here.

In *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), Plaintiffs (through a class action against the same Defendants as are present in this current case) challenged legislation that had placed a $4,000.00 cap on the state-tax-exempt status of retirement payments from several differing mandatory, optional, and supplementary retirement programs. *Bailey*, 348 N.C. at 138,

500 S.E.2d at 58. The Supreme Court in *Bailey* again found that retirement benefits are contractual and cannot be changed once vested. *Id*. The *Bailey* Court summed up the varying retirement programs with the same simple concept previously employed:

> Each of these systems contains certain preconditions to the receipt of benefits. The primary one is the requirement that employees work a predetermined amount of time in public service before they are eligible for retirement benefits. After employment for the set number of years, an employee is deemed to have "vested" in the retirement system. Thereafter, the employee generally is guaranteed a percentage payment at retirement based upon years of service.

Id. The right that was found to be vested in *Bailey* was not even a direct part of the retirement benefits themselves, but was the tax-exempt status retirement payments that had theretofore been accorded. In *Bailey*, the Court quoted an earlier Supreme Court case holding that expectational interests in vested rights are protected from unilateral amendment:

> "The general principle is established in American jurisprudence that a legislative grant under which rights have vested amounts to a contract...." " *[A] legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State* within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations; *rights may accrue under a statute or even be conferred by it, of such character as to be regarded as contractual, and such rights cannot be defeated by subsequent legislation*. When such a right has arisen, the repeal of the statute does not affect the right or an action for its enforcement."

Id. at 145, 500 S.E.2d at 62; *Ogelsby*, 268 N.C. at 273-74, 150 S.E.2d at (quoting 16 Am.Jur.2d 790 *Constitutional Law* § 442 (1966)) (*emphasis in original*). *See also Wells v. Consolidated Judicial Retirement System of North Carolina*, 136 N.C.App. 671, 526 S.E.2d 671 (2000) (acknowledging and applying the contractual vesting standards established by *Simpson* to judicial retirement benefits). The Court in *Bailey* noted the varying types of evidence of the contractual relationship and the inclusion of the tax exemption as a term of that relationship, namely:

> creation of various statutory tax exemptions by the legislature, the location of those provisions alongside the other statutorily created benefit terms instead of within the general income tax code, the frequency of governmental contract making, communication of the exemption by governmental agents in both written and oral form, use of the exemption as inducement for employment, mandatory participation, reduction of periodic wages by contribution amount (evidencing compensation), loss of interest for those not vesting, establishment of a set time period for vesting, and the reliance of employees upon retirement compensation in exchange for their services. Thus, it is clear the tax exemption was a term or condition of benefits of the Retirement Systems to which [the] plaintiffs have a contractual right.

Bailey, 348 N.C. at 146, 500 S.E.2d at 63.

In the recent case of *Stone v. State*, 191 N.C.App. 402, 410-15, 664 S.E.2d 32, 38-40 (2008*), appeal dismissed and review denied* 363 N.C. 381 (2009), the North Carolina Court of Appeals held that vested retirees under the state retirement plan were entitled to have the retirement benefits and plan administered in an actuarially sound manner and that a subsequent change in the administration of the funding that violated this provision created an unconstitutional impairment of the vested retiree's contract rights. In *Stone*, the case was designated as a 2.1 case, certified as a class action, the state's initial Motion to Dismiss was denied, and ultimately, the case was decided at summary judgment in favor of the Plaintiffs. *Id*. The Court in *Stone* used as determinative evidence of the vested right, *inter alia*, the various statutory provisions of Chapter 135, language used in a pamphlet issued to employees in 1975, and language used in a pamphlet from 1996. *Id*.

At least one North Carolina trial court has already determined that retirement health benefits very similar to the Retiree Health Benefit are contractual and protected from unilateral reduction. In *Robinson, et al., v. Lincoln County*, 10-CVS-112 (Lincoln County Superior Court), Superior Court Judge Beverly Beal granted summary judgment on the issue of liability in favor of the plaintiff-retirees where Lincoln County had passed ordinances and then promulgated

policies and memorandums that offered Lincoln County employees non-contributory health insurance during their retirement so long as said employees worked for the County for at least 20 years. (*See* Appendix for Transcript of Summary Judgment Hearing). The insurance policy that had been in place at the time of the Robinson retirees' vesting was a 90/10 health insurance plan. In 2009, the County (by ordinance) unilaterally reduced the benefit to an 80/20 plan and forced the plaintiffs to pay approximately 10% of the premiums. Judge Beal ruled from the bench that the 90/10 non-contributory benefit must be reinstated and that the County would be liable to reimburse the plaintiffs for the already-paid premiums. (Id.).

While a statute, ordinance, or policy handbook may provide written terms of contract for benefits between a public employer-employee, such written terms are not required by law and our state's Courts have enforced payment of benefit plans based on oral promises made to public employees. *See Pritchard v. Elizabeth City*, 81 N.C.App. 543, 552-553, 344 S.E.2d 821, 826-827 (1986)(reversing summary judgment for firefighters that were owed retracted vacation time under a vacation leave policy that was mentioned in an ordinance but carried out through oral promises made by the fire chief). This is particularly true where the "benefit program would assist in recruiting city employees and would become part of their contracts" and where "the firefighters are not seeking to prevent the city from changing the benefits to be earned in the future; they seek to recover for benefits allegedly already conferred on them by virtue of the ordinance and their contracts for services previously rendered." *Id*. at 552-553. The Court in *Pritchard* points out that the ordinance itself is not the actual contract, because

> Although the 1972 ordinance fixed the terms of the vacation leave benefit program, it did not, in itself, form a contract with the employees. *See* 4 McQuillin, *supra*, Sec. 12.177c. Once employment was offered and accepted under the compensation plan set out in the ordinance, however, its provisions become part of the contract.

Id at 552. *See also Bolick v. County of Caldwell*, 182 N.C. App. 95, 100-01, 641 S.E.2d 386, 390 (2007)(citing *Pritchard* and holding that a personnel policy could supply the terms of a contractual right to a severance package that had been offered to employees). In fact, in *Bailey*, the Court relied primarily on representations contained in retirement plan handbooks, pamphlets, correspondence, and oral representations made to the Plaintiffs in finding that the tax-exempt status of the retirement payments was a term of the vested plan that was understood and relied upon by the Plaintiffs. *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63. The statutory language itself does not preclude nor set to the exclusion of others the terms of the contract between the employee and the State.

In order to analyze whether a term was part of the contract, the Court must look beyond the statute, and therefore resolution of such an analysis is not possible at the 12(b)(6) phase of the litigation as additional evidence may come in the form of correspondence, plan handbooks, oral representations, and the impressions of the Plaintiffs themselves. *See e.g. Bailey, Pritchard, Robinson v. Lincoln County, and compare with e.g.* Complaint, ¶¶ 41-43, 48; *See also* § I.D. *supra* for further discussion. Because there will be evidence not presently before the Court that could determine the existence and terms of the contract/obligation, the Court should not dismiss the claims at the 12(b)(6) phase, as such additional evidence is only adducible at summary judgment.

In sum, the vested-contractual rights theory of deferred compensation has been extended by North Carolina courts to cover not only retirement pension benefits (*Simpson*), but retirement disability (*Faulkenbury*), severance (*Bolick*), tax-exemptions for post-retirement benefits (*Bailey*), vacation policies (*Pritchard*), and retirement health insurance (*Robinson*). The Retiree

Health Benefit clearly belongs among those benefits that our Courts have already held concomitant with a contractually vested benefit.

Instead of discussing and citing the legal analysis of our own state's Courts in the foregoing cases decided under the same retirement benefit scheme as the case at bar (Chapter 135), the Defendants attempt to cherry-pick language from distinguishable and inapplicable federal cases. For example, although the case of *National R. Passenger Corp. v. Atchison, T. & S. F. R. Co.*, 470 U.S. 451 (1985) was cited throughout the Defendants' brief, the contractual relationship in that case was between a non-governmental corporation (Amtrak) and several private railroads in a dispute over railroad passes for employees of the Plaintiff railroads. The Court held that there was no contract between the United States and the private railroads, finding that the non-payments at issue were between the non-governmental corporation and the private railroads. *Id.* Unlike the statutory and factual situation in *Simpson*, *Faulkenbury*, and *Bailey*, there was no consideration provided by the private railroads to the government and no element of deferred compensation. *Id.*

More generally, interpretation by ***federal*** courts of contract law that applies to alleged contractual rights arising out of ***federal*** statutes cannot displace and overrule the precedence of our own state Supreme Court on matters pertaining to ***state*** statutes and contractual relationships between the ***state*** and ***state*** employees. Tellingly, the Defendants do not cite to any dispositive North Carolina precedent for the extension of the apparent federal standard to North Carolina contract law.[2] The *Faulkenbury* Court rejected this same type of argument (made by the state

[2] A Keycite search reveals that no North Carolina court has cited the *National R. Passenger Corp* case. In fact, the *Dodge v. Bd. of Educ*. case relied upon by *National R. Passenger Corp.*, was cited only once by a North Carolina Court – which actually refused to apply the holding and distinguished the case to the apparent chagrin of the city-employer-defendant. *See Pritchard v. Elizabeth City*, 81 N.C.App. 543, 552-553, 344 S.E.2d 821, 826 - 827 (1986)(reversing summary judgment for firefighters that are owed retracted vacation time under a vacation leave policy that was mentioned in an ordinance but carried out through oral promises made by the fire chief).

almost 20 years ago) and recited the correct standard in North Carolina for reviewing a public retirement contract:

> The defendants argue that there is nothing in the statutes that shows the General Assembly intended to offer the benefits as a part of a contract, and without such an intent, there can be no contract. We believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions.

Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N. Carolina, 345 N.C. 683, 691, 483 S.E.2d 422, 427 (1997). Simply put, North Carolina Courts, including those in *Simpson, Faulkenbury*, and *Bailey* expressly disavowed the federal standard the Defendants now apparently seek to have this Court embrace.

North Carolina has a long-established legal precedent that retirement benefits offered to state employees constitute a contract with employees once they vest in the benefit. Furthermore, once vested, these benefits cannot be retracted or reduced. The Retiree Health Benefit is just such a contractually vested benefit and the analysis and holdings of *Simpson, Bailey, Faulkenbury, Stone*, etc. are applicable to this case. Therefore, the Retiree Health Benefit is protected from retraction or reduction for those Plaintiffs who have vested therein.

2. The Language of Chapter 135 and the Contractual Promises Made to the Plaintiffs Expressed an Intent to Offer the Retiree Health Benefit and to be Bound by Contract to that Promise

Notwithstanding the already long-established line of cases holding that retirement benefits are contractual, the Defendants argue that there was never an intent by the state to offer a benefit or to be bound by the employee-retiree's acceptance of that offer. This argument is contrary not only to the previously cited cases, but also to the statutes applicable to the Retiree Health Benefit and the many promises made to the Plaintiffs.

First, since the initial codification of the Retiree Health Benefit, there has existed an undertaking clause that evinces the state's intent to obligate itself through contract to provide said benefits. N.C.G.S. § 135-40 (1982)("Undertaking") *now codified as revised at* N.C.G.S. § 135-48.2 (2013) ("Undertaking"). The original undertaking clause states that the "The State of North Carolina undertakes to make available a Comprehensive Major Medical Plan (hereinafter called the 'Plan') to employees, retired employees, and certain of their dependents which will pay benefits in accordance with the terms hereof." N.C.G.S. § 135-40 (1982)("Undertaking")[3]. Black's Law Dictionary defines "undertaking" thusly:

> **undertaking,***n.* (14c) **1.**A promise, pledge, or engagement.**2.** A bail bond.

Black's Law Dictionary (9th Ed., 2009), UNDERTAKING. The work "undertake" is defined by Black's as

> **undertake,***vb.* (13c) **1.** To take on an obligation or task <he has undertaken to chair the committee on legal aid for the homeless>. **2.** To give a formal promise; guarantee <the merchant undertook that the goods were waterproof>. **3.** To act as surety for (another); to make oneself responsible for (a person, fact, or the like) <her husband undertook her appearance in court>.

Black's Law Dictionary (9th Ed., 2009), UNDERTAKE. The General Assembly purposely used the words "undertakes" and "undertaking" to describe the Retiree Health Benefit and in doing so demonstrated an intent to take on an obligation and give a formal promise and guarantee. The pension portion of the retirement plan discussed and held contractual by *Simpson, Faulkenbury,*

[3]Recodified at N.C.G.S. § 135-48.2 ("Undertaking")(2013)("The State of North Carolina undertakes to make available a State Health Plan (hereinafter called the "Plan") exclusively for the benefit of eligible employees, eligible retired employees, and certain of their eligible dependents, which will pay benefits in accordance with the terms of this Article.")

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Bailey, and *Stone* did not contain such unequivocal undertaking language and did not have express mention of the initiation of any contracts between retirees and the state. Thus, the Retiree Health Benefit's own statutory terms more strongly support the contractual nature of the benefit than even the terms already held synonymous with a contract in *Simpson, Faulkenbury, Bailey, Stone,* etc.

Second, the Plaintiffs were offered the terms of the Retiree Health Benefit in exchange for and as an inducement for their employment for the state and as part of their overall compensation package. (*See* Complaint, ¶¶ 41-43). The promise of benefits was made through various methods, including by statute, through plan booklets/handbooks, and by representations. (*See* Complaint, ¶¶ 48, 49, 63). As stated in *Bailey, Pritchard,* and *Stone,* the Court must look to all the evidence to determine the existence of a contract with the state, including plan booklets, oral and written representations, and the statute itself.

Third, the legislature's own understanding of the Retiree Health Benefit, as expressed through legislative history, demonstrates an intent to be obligated to the Plaintiffs and other retirees. While there was no express mention of a contract or a vesting requirement in any of the statutes involved in *Simpson*, *Faulkenbury*, or *Bailey*, the words "vesting" and "obligation" were actually expressly mentioned by the legislature in changes made to the Retiree Health Benefit. In 2006, the General Assembly enacted Session Law 2006-174 that increased the eligibility requirements for non-contributory retirement health insurance for new hires from five (5) years to twenty (20) years. The short title for Session Law 2006-174 was "State Health Plan / 20 Year ***Vesting***." Senate Bill 837, Session Law 2006-174 (emphasis added). The title of an act is an indication of legislative intent. *Dickson v. Rucho,* No. 201PA12 (Jan. 25, 2013, N.C.) (Slip Op.). An Actuarial Note commissioned by the General Assembly to investigate a change in the vesting

requirements in 2005 leading to the eventual change in 2006 had this to say about the Retiree Health Benefit:

> Thus, current non-contributory premiums paid on behalf of current retirees, and future retirees who were employed before October 1, 2005, and whom retire with between 5 to 10-years of retirement service credit, ***will continue to be a State obligation for some time until these retirees exit the Plan.***

Fiscal Note SFN0837v1, General Assembly, Legislative Actuarial Note, Session 2005, dated July 14, 2005 (emphasis added)[4]. This Legislative Note listed the short title of the Session Law as "State Health Plan / 10-Year ***Vesting***." *Id*. A second edition of the Legislative Actuarial Note was promulgated using a 20-year vesting requirement that was the final basis of SL 2006-174 with a short title of "State Health Plan / 20-Year ***Vesting***" and similarly stated

> In, addition ***the bill requires its application to be prospective*** to employees first hired on or after October 1, 2006 and members of the General Assembly first taking office on and after January 1, 2007. Thus, current non-contributory premiums paid on behalf of current retirees, and future retirees who were employed before October 1, 2006, and whom retire with less than 20 years of retirement service credit, ***will continue to be a State obligation for some time until these retirees exit the Plan.***

Fiscal Note SAH0837v2, General Assembly, Legislative Actuarial Note, 2nd Edition, Session 2005, dated June 30, 2006 (*emphasis added*)[5]. The final version of the Session Law passed in 2006 increased the vesting from the initially proposed ten (10) years to twenty (20) years, but imposed that new requirement only on newly hired employees concomitant with the state's obligation to provide the vested non-contributory coverage to those already vested retirees. Not only does this Session Law and the its underlying legislative history indicate an acknowledgement of vesting and intent by the state to change such vesting, but the express grandfathering of prior retirees/vested employees and the statement of the continuing "State

[4] *Available at:* http://ncleg.net/Sessions/2005/FiscalNotes/Senate/PDF/SFN0837v1.pdf
[5] *Also available at:* http://ncleg.net/Sessions/2005/FiscalNotes/Senate/PDF/SAH0837v2.pdf

obligation" further indicates an acknowledgement of the vested and unalterable status of the Retiree Health Benefit for those who met the previous vesting requirements. "Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 414 (1990).

Had the Retiree Health Benefit truly been nothing more than a gratuitous and fully terminable benefit, then why would the state need to grandfather already vested employees, and why would the state have an "obligation" "until these [grandfathered] retirees exit the Plan"? If the benefit was a gratuity or fully terminable/amendable, then the state would neither have an "obligation" nor need to wait for the retirees to "exit the Plan." The Defendants' arguments are contrary to well-established law of *Simpson*, *Faulkenbury*, and *Bailey*, the language of the statutes, the nature of the relationship between the Plaintiffs and the Defendants, and also contrary to the state's own expressed intentions and understanding of the benefit.

Therefore, because the statutes and the legislative history evince an intent to contract, and because all the evidence pertaining to the terms and existence of a contract is not yet before the Court at the 12(b)(6) phase, the Court should not dismiss the Complaint.

3. Other Jurisdictions Have Similarly Held Public Retirement Health Benefits to be Protected from Unilateral Termination or Amendment

Other jurisdictions have found that retirement health benefits are contractual and protected from substantive unilateral change. Although not necessary given in-state precedence, these cases provide persuasive authority for the claims made by the Plaintiffs.

In *Township of Tinicum v. Fife*, 505 A.2d 1116 (Pa. Commw., 1986), *further appeal denied* 533 A.2d 1343 (Pa., 1988), the Court found that retirement medical insurance benefits of township police officers were deferred compensation that created vested contractual rights to

those benefits that could not later be retracted. Similarly to North Carolina, "[i]n Pennsylvania, the nature of retirement provisions for public employees is that of deferred compensation for services actually rendered in the past, thus reflecting contractual rights." *Tinicum Tp. v. Fife*, 505 A.2d at 1119 *citing Commonwealth ex rel. Zimmerman v. Officers and Employees Retirement Board*, 503 Pa. 219, 469 A.2d 141 (1983); *Wright v. Allegheny County Retirement Board*, 390 Pa. 75, 134 A.2d 231 (1957)

California Courts have likewise found retirement health insurance benefits to be similar to pension benefits and therefore protected from post-vesting changes. *Thorning v. Hollister Sch. Dist.*, 15 Cal. Rptr. 2d 91 (Cal. App. 4th, 1992) *citing California League of City Employee Associations v. Palos Verdes Library District*, 87 Cal.App.3d 135 (Cal.App., 1978). Citing and quoting *California League*, the *Thorning* Court noted that "The court found it significant that the three benefits were included in the district's official declaration of policy pertaining to employment, that they 'were important to the employees, had been an inducement to remain employed with the district, and were a form of compensation which had been earned by remaining in employment.'" *Thorning*, 15 Cal.Rptr.2d at 95 (citations omitted).

The Alaska Supreme Court also found that retirement health insurance benefits are protected from subsequent change in the same way that general pension benefits are protected. *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882 (S.Ct. Alaska, 2003). In *Duncan*, the Court held that health insurance benefits are part of the overall "retirement benefit package that becomes part of the contract of employment when the public employee is hired, including health insurance benefits." *Id*. at 888.

While, admittedly, the decisions in Pennsylvania, California, and Alaska are only persuasive authority, considering these authorities in addition to that of North Carolina's own

courts indicates a prevailing legal view that retirement health benefits are contractual and protected from unilateral substantive reduction.

4. General Employment and Wage Payment Precedence Deems the Retiree Health Benefits a Matter of Protected Deferred Compensation

General employment and wage and hour law is instructive and yields the same result as the legal analysis under the *Simpson, Faulkenbury,* and *Bailey* line of cases. For example, under the Wage and Hour Act[6], an employer cannot retract vacation time offered to employees if the vacation policy specifically grants an employee certain vacation time based on time previously worked. *Hamilton v. Memorex Telex Corp.*, 118 N.C.App. 1, 454 S.E.2d 278 (1995) *review denied* 340 N.C. 260 (1995). Although not directly payable in wages, the vacation time is considered a benefit that is earned by an employee's fulfilling of the required normally time-based requirements.

> [T]he Wage and Hour Act requires an employer to notify the employee in advance of the wages and benefits which he will earn and the conditions which must be met to earn them, and to pay those wages and benefits due when the employee has actually performed the work required to earn them.
>
> *Narron v. Hardee's Food Systems, Inc.,* 75 N.C.App. 579, 583, 331 S.E.2d 205, 208, *disc. review denied,* 314 N.C. 542, 335 S.E.2d 316 (1985). However, once the employee has earned the wages and benefits under this statutory scheme the employer may not rescind them, except that certain benefits, including vacation pay, may be made subject to forfeiture so long as the employer notifies the employee of the conditions of such a forfeiture prior to the time he earns such benefits. *Id.*

Hamilton v. Memorex Telex Corp., 118 N.C.App. at 10, 454 S.E.2d at 282 (1995). Like the vacation plans in *Hamilton* and *Narron*, the Retiree Health Benefit allowed employees to accrue benefits that are used in the future based on the work done at the present. Once the employees

[6] The Wage and Hour Act does not apply to governmental employers, but some of the underlying case law and principles are similar and therefore instructive.

earned those benefits, the employer cannot rescind them unless a specific method of forfeiture is outlined in writing to the employee prior to the employee's reliance on the benefit. *Id*.

> As our Supreme Court established in *Roberts v. Mays Mills,* 184 N.C. 406, 114 S.E. 530 (1922), When an employer represents to an employee that he will receive a benefit after working a certain period of time, the employee may accept by entering or maintaining employment, and the employer cannot thereafter disavow the promise once the employee has started to work in reliance thereon. It matters not that the benefit is earned in the present but to be enjoyed in the future.

Hamilton v. Memorex Telex Corp., 118 N.C.App. at 11, 454 S.E.2d at 283 (1995); *See also Chew v. Leonard*, 228 N.C. 181, 44 S.E.2d 869 (1947). An employer may change or terminate a benefit policy, but only as to benefits that have not already been earned through the employee's compliance with the original policy. *See Hamilton; Roberts; Chew*. Because the Plaintiffs all earned the Retiree Health Benefit by working for 5 years and retiring with the state as required by the policy in place at the time they completed these requirements, the state, like any private employer in this state, cannot now rescind or refuse to pay for the benefits.

5. The Plaintiffs are Vested in the Retiree Health Benefit

In their brief, the Defendants argue that because there was no express mention of vesting, there are no vested rights. This argument is contrary to long-established case law in this state.

The terms, types, and level of benefits owed to a vested-employee are dictated by the terms and status of the policy at the time those employees complete the requisite qualifications and vest in the benefit. *Simpson*, 88 N.C. App. 218, 363 S.E.2d 90. "Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." *Id* at 224, 363 S.E.2d at 94. In *Simpson*, the Court found that retired government employees had vested contractual rights in the retirement benefits offered under Chapter 128 (the Local Government Retirement System). *Simpson,* 88 N.C.App. 218, 363 S.E.2d

90. The main statutory benefits eligibility section at issue in *Simpson* had no express mention of "vesting" yet the *Simpson* court still held that the benefits were vested. *See* N.C.G.S. § 128-27(a)(1986).

In *Faulkenbury*, the state Supreme Court further expounded on *Simpson* by finding that

> pursuant to the plaintiffs' contracts, they were promised that if they worked for five years, they would receive certain benefits if they became disabled. The plaintiffs fulfilled this condition. At that time, the plaintiffs' rights to benefits in case they were disabled became vested. The defendants could not then reduce the benefits.

Faulkenbury, 345 N.C. at 692, 483 S.E.2d at 428. The *Faulkenbury* Court explained that even if the exact amount or value of the benefit is not known at the time of vesting, the employees still had a valid contractual expectation to those benefits. *Id* at 692-693, 483 S.E.2d at 428. ("The plaintiffs expected to receive what they were promised at the time of vesting. They may not have known the exact amount, but this was their expectation. The contract was substantially impaired when the promised amount was taken from them.").

Following from *Simpson*, this same principal of vesting was recognized by the State Supreme Court in both *Fauklenbury* and *Bailey* although the retirement statutes at issue in those cases had no express mention of a "vesting" requirement. In fact, the current state retirement eligibility statutes (which were at issue in *Faulkenbury* and *Bailey*) still do not expressly have a "vesting" section although there is no doubt that the concept of vesting under those statutes has long been recognized. *See* N.C.G.S. § 135-5 and § 135-57 ("Consolidated Judicial Retirement Act"). Nor does there appear anywhere in Chapter 135 any express mention of how an employee vests into benefits. *See* generally Chapter 135 of the North Carolina General Statutes. The vesting is presumed by law from the language of the statutes and the nature of the bargain between the employee and the state.

Since *Simpson, Faulklenbury*, and *Bailey*, the principal of vesting has been utilized and used in numerous cases to define the standing and scope of an employee's legal rights pertaining to public employee retirement benefits. In *Miracle v. N.C. Local Gov't Employees Retirement System*, 124 N.C.App. 285, 477 S.E.2d 204 (1996), the Court of Appeals, citing *Faulkenbury*, reversed summary judgment in favor of the Defendant and found that the employee had vested rights in retirement benefits where he had completed the necessary 10 years of creditable service. Similarly, in *Hogan v. City of Winston-Salem*, 121 N.C.App. 414, 466 S.E.2d 303 (1996), the Court found an unconstitutional impairment of contract where the City amended the police department's disability retirement plan after the officer had attained 5 years of creditable service.

In contrast, in *Schimmeck v. City of Winston-Salem*, 130 N.C.App. 471, 502 S.E.2d 909 (1998), the Court dismissed an almost identical case based on the same plan where the city police officer had NOT attained the 5 years of creditable service for the City's disability plan prior to the challenged revision. In the more recent case of *Whisnant v. Teachers and State Employees Retirement System of North Carolina*, 191 N.C.App. 233, 662 S.E.2d 573 (2008), the Court dismissed a case where the Plaintiff had not satisfied the 5 years of employment required for vesting prior to the revision to the benefit statute that was being challenged. In none of the foregoing cases was there an express "vesting" requirement. The vesting arose solely from the fact that an employee had to complete a set number of years of service to be eligible for the benefit.

The present case is similar to all of the previously stated authority. The Retiree Health Benefit was amended in 1987 to require 5 years of creditable service to be eligible for non-contributory health benefits during retirement:[7]

> Sec. 9. G.S. 135-40.1(17) reads as rewritten:
> "(17) Retired Employee (Retiree). – ~~Retired teachers and State employees~~ Retired teachers, State employees, and members of the General Assembly who are receiving monthly retirement benefits from any retirement system supported in whole or in part by ~~contribution~~ contributions of the State of North Carolina, so long as the retiree is enrolled. On and after January 1, 1988, a retired employee or retiree must have completed at least five years of contributory retirement service with an employing unit prior to retirement from any State-supported retirement system in order to be eligible for group benefits under this Part as a retired employee or retiree."

Session Law 1987-857 *codified at* N.C.G.S. § 135-40.1(17)(1987) *now codified at* N.C.G.S. § 135-48.40(a)(2013). The same time period and similar language were used in the statutes cited by *Simpson, Faulkenbury,* and *Bailey*. The Courts in all these cases construed this language and held it concomitant with a vesting provision.

As stated in § I.A.2 *supra*, while there was no express mention of a vesting requirement in any of the statutes involved in *Simpson*, *Faulkenbury*, and *Bailey*, vesting was actually expressly mentioned by the legislature in changes made to the Retiree Health Benefit. The legislature named the bill that increased the vesting period from 5 to 20 years as "State Health Plan / 20 Year ***Vesting***." Session Law 2006-174 (S.B. 837) (emphasis added). Fiscal notes that accompanied this bill specify that the non-contributory coverage provided to retirees with at least 5 years of service "will continue to be a State ***obligation*** for some time ***until*** these ***retirees exit the Plan***." Fiscal Note SAH0837v2, General Assembly, Legislative Actuarial Note, 2nd Edition, Session 2005, dated June 30, 2006 (*emphasis added*); Fiscal Note SFN0837v1, General

[7]In 2006, the eligibility requirement was increased from 5 to 20 years of creditable service for employees hired on or after October 1, 2006. S.L. 2006-174. This lawsuit does not include any Plaintiffs or putative class members who were hired under the 2006 change to a 20 year vesting requirement. *See e.g.* Complaint.

Assembly, Legislative Actuarial Note, Session 2005, dated July 14, 2005 (emphasis added). In addition, the express grandfathering of retirees for service eligibility purposes based on when they were hired indicates that state's acknowledgment of a vested right. If the state had believed the Retiree Health Benefit to be a mere gratuity that can be reduced or terminated at any time (as the Defendants now argue in their brief), there would have been no need to exempt already vested employees from the new vesting requirements.

The Defendants admit that all the Plaintiffs had reached the 5 year eligibility prior to the challenged amendment to the Retiree Health Benefit. The language of the statutes, the expectations of the Plaintiffs (and other retirees), the expressed legislative intent, and the legal precedence of *Simpson, Faulkenbury, Bailey*, etc. all demonstrate that the Plaintiffs are vested in the Retiree Health Benefit and that once vested, the state could not modify or rescind those benefits.

B. The Retirement Health Benefit is Part of a Contractual Pension Benefit Plan

In order to avoid and limit the effect of the established authority of *Simpson, Faulkenbury, Bailey,* etc., the Defendants attempt to distinguish the Retiree Health Benefit from a cash pension benefit. This argument is without merit, because the Retiree Health Benefit is part and parcel of the larger retirement plan for state employees.

First, eligibility to receive the Retiree Health Benefit is based upon eligibility and participation in the state's overall pension retirement plan. Under N.C.G.S. §135-48.1(18), a person must be receiving pension payments from the state retirement system in order to even be eligible to receive the Retiree Health Benefit. This requirement has existed since initial codification of the Benefit. N.C.G.S. §135-40.1(17)(1982) and §135-40.2(a)(2)(1982).

Second, as discussed in § I.A. *supra*, the Retiree Health Benefit is a form of deferred compensation – no different from the retirement benefits that the North Carolina Supreme Court

found to be contractual in *Simpson*, *Faulkenbury*, *Bailey*, etc. Because participation in the Retiree Health Benefit cannot occur until a retiree is already retired and receiving pension payments (per N.C.G.S. § 135-48.1(18)), the Benefit is obviously deferred until retirement. Similarly, an employee puts in years of service for the promise of receiving certain guaranteed health care benefits during retirement. Once retired, a state employee has completed his service to the state in exchange for the future retirement benefits promised during his employment. It would be both unfair and unlawful to allow any promisor (whether the state or otherwise) to unilaterally change the bargain after the performance has been completed.

Third, the 5-year eligibility requirement is expressly defined and predicated on "creditable service" as that term is used in the overall retirement plan statutes. Creditable service is defined for purposes of both the retirement pension payments, retirement disability benefits, and the health insurance plan at N.C.G.S. § 135-1(8). *See also* N.C.G.S. § 135-4("Creditable service")(providing methods for calculating creditable service and limitations, exemptions for the accrual of such service).

Fourth, the term "retiree" as stated throughout the statutes pertaining to the Retiree Health Benefit is dependent upon and interconnected with the retirement pension plan. Under the Health Plan statutes, a retiree for purposes of eligibility in the non-contributory coverage is defined as follows:

> (18) Retired employee (retiree).--Retired teachers, State employees, and members of the General Assembly who are receiving monthly retirement benefits from any retirement system supported in whole or in part by contributions of the State of North Carolina, so long as the retiree is enrolled.

N.C.G.S. § 135-48.1(2012). The Retiree Health Benefit is so completely dependent upon and bound-up with the overall retirement system that the distinction the Defendants are attempting to

make between the Retiree Health Benefit and the pension portion of the retirement system is completely inappropriate.

Fifth, contrary to what the Defendants argue in their brief, it does not matter whether participation in a retirement based benefit is mandatory or voluntary. In fact, the Court in *Simpson* actually exposes the fallacy of Defendants' argument when it stated that

> Courts have generally been more likely to find vested contractual rights arising out of voluntary plans than out of mandatory ones and, further, have generally shown themselves more solicitous of employees who have already retired than of those who have not. *See*Annot.,52 A.L.R.2d, *supra,* at 441-43.

Simpson, 88 N.C. App. at 222, 363 S.E.2d at 93. In addition, in *Bailey*, several of the benefit plans at issue were voluntary, while others were mandatory. *Bailey*, 348 N.C. at 136-139, 500 S.E.2d at 57-59. The Court made no distinction based on the voluntary versus mandatory nature of a particular plan and found that all the plans were supported vested contractual benefits that were protected from later legislative renunciation. *Id.* Therefore, Defendants' argument as to the voluntary nature of the benefit is misguided.

Sixth, the statutes that define and establish the Retiree Health Benefit are found in the same Chapter of the General Statutes as the state pension plan – Chapter 135. As stated above, this is due at least in part to the completely dependent and interrelated nature of the Retiree Health Benefit to the retirement system and pension benefits themselves. The Retiree Health Benefit is included within the definition of the overarching Retirement System. N.C.G.S. § 135-2 ("A Retirement System is hereby established … for the purpose of providing retirement allowances and **other benefits under the provisions of this Chapter** for teachers and State employees of the State of North Carolina.").

Seventh, several other jurisdictions that have considered this distinction between pension and retirement health benefits have ultimately decided that retirement health benefits are part of

an overall retirement benefit and should not be treated any different than cash pension payments. For example, the Oklahoma Supreme Court defined 'retirement' benefits to include not only monthly pension payments, but also to include health insurance coverage. *McMinn v. City of Oklahoma City*, 952 P.2d 517, 521 (Okla., 1997). In *McMinn*, the Court noted that

> In the business world retirement benefits may include a great deal more than a monthly pension payment. These benefits can encompass, e.g., life and health insurance for both the retiree and their spouses and dependents. M. Canan and W. Mitchell, *Employee Fringe and Welfare Benefit Plans, §§ 10.4 and 10.7* (1997 ed.) ... Retirement benefits include pensions, but can also include much more, such as insurance coverage and profit sharing. *Incorporated Village of Lynbrook v. New York State Public Employment Relations Bd.*, 64 A.D.2d 902, 408 N.Y.S.2d 106, 107 (1978), (hospital insurance for the families of deceased retirees is a retirement benefit).

McMinn, 952 P.2d at 521 (rejecting the City's argument to limit the term retirement to only include pension payments); *See also City of Mason City v. Public Employment Relations Bd.*, 316 N.W.2d 851, 852 (S.Ct. Iowa, 1982)(Iowa Supreme Court holding that retirement health insurance benefits are part of the overall retirement system); *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882 (S.Ct. Alaska, 2003)(holding health insurance benefits part of overall retirement benefit package employees were offered upon hiring).

Eighth, the Retiree Health Benefit is similar to the retirement pension benefits as both utilize a trust fund to pay for the benefits and both must be managed in an actuarially sound manner. Under N.C.G.S. § 135-7(f), a special trust fund is established for the sole benefit of retirees under the Retiree Health Benefit:

> (f) Retiree Health Benefit Fund.--The Retiree Health Benefit Fund is established as a fund in which accumulated contributions from employers and any earnings on those contributions shall be used to provide health benefits to retired and disabled employees and their applicable beneficiaries as provided by this Chapter. The Retiree Health Benefit Fund shall be administered in accordance with the provisions of subsection (a) of this section. Employer contributions to the Fund are irrevocable. The assets of the Fund are dedicated to providing health benefits

> to retired and disabled employees and their applicable beneficiaries as provided by this Chapter and are not subject to the claims of creditors of the employers making contributions to the Fund. However, Fund assets may be used for reasonable expenses to administer the Fund, including costs to conduct required actuarial valuations of State-supported retired employees' health benefits under other post-employment benefit accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation.

N.C.G.S. § 135-7(f) (2013). As stated in § 135-7(f), contributions made to the fund are irrevocable and must be used for the sole benefit of providing Retiree Health Benefits. *Id*. Like the pension benefits, the Retiree Health Benefit is supported in part by contributions from the retiree's employers. Not incidentally, the Retiree Health Benefit Fund is also administered in the same manner and by the same trustees as the retirement pension benefit trust funds. Under N.C.G.S. § 135-48.2, there is established a "Committee on Actuarial Valuation of Retired Employees' Health Benefits" whose role is to conduct "required actuarial valuations of State supported retired employees' health benefits." The Court in *Stone v. State* analyzed similar language in Chapter 135 relating to trust funds and actuarial evaluations and held that retirees had contractually vested rights in the retirement pension benefits.[8]

Ninth, the Retiree Health Benefit is analogous to the pension plan in the same way as disability retirement is analogous to the pension plan. The Court in *Faulkenbury* did not hesitate in extending the same case-theory of *Simpson* as it regarded pension benefits to disability benefits. It did not matter to the Court in *Faulkenbury* that the disability benefits were not directly funded by long-term employee contributions to a retirement fund, but could yield 40 or more years of disability payments based on nothing more than 5 years of employment. Therefore, employee contribution is not dispositive of whether the benefit is contractual or not.

[8] The *Stone* Court also looked to Art. V, Sec. 6 (2) of the State Constitution (which prohibits the use or diversion of retirement funds for any purpose other than providing retirement benefits) to support their holding that the legislature had overstepped its bounds in making revisions to Chapter 135.

In an attempt to distinguish the Retiree Health Benefit from retirement benefits addressed in prior case law, the Defendants argue that to hold that retirees vest in the benefits offered at the time of their vesting would create "different suites of coverage" for retirees based on their time of vesting. Defendants further posit that the statutes do not "suggest such an unwieldy design." In making this argument, the Defendants have ignored the very retirement pension statutes they attempt to distinguish. Under Chapter 128 (Local Government Retirement), which *Simpson* held created vested contractual rights, there are over 20 subsections of the statute dedicated to subsets (or "suites" in the Defendants parlance) of available benefits offered based on when certain employees became eligible and vested in the benefits. *See* N.C.G.S. § 128-27 (specifically subsections (b) through (b21) and (d) through (d4)). The state retirement plan under Chapter 135 is similarly replete with "suites" of coverage that are provided. *See* N.C.G.S. § 135-5 (specifically subsections (b) through (b20) and (d) through (d4)). The Courts in *Simpson*, *Faulkenbury*, and *Bailey* did not refuse to find a contractually vested benefit in light of such varying "suites" of benefit coverage.

In short, Defendants' mischaracterize the Retiree Health Benefits as dissimilar from the retirement plan itself as the Retiree Health Benefit is inextricably bound-up with the State's retirement benefits and is of the same nature and purpose as the retirement pension benefits held contractual in *Simpson*, *Faulkenbury, Bailey*, *etc*. There are no factual or legal reasons why the Retiree Health Benefit should be treated any different from the retirement provisions that the Courts of this state have previously protected from unilateral dismemberment. Moreover, even if the Retiree Health Benefit is distinguishable from a contractual pension plan, the Defendants have advanced no valid arguments for why this benefit should be treated different from those previously discussed in *Simpson*, *Faulkenbury, Bailey*, etc. In short, the Retiree Health Benefit

shares far more in common with the retirement benefits at issue in the long line of cases following *Simpson* than it has differences. Accordingly, there is no basis to depart from the well-settled North Carolina precedent that the Retiree Health Benefit is a contractual benefit plan.

C. The Retiree Health Benefit was Designed as a Deferred Compensation Plan and is Supported by the Exchange of Employment to the State for the Promised Benefits

The Defendants' argument that retirement health benefits do not consist of a mutual exchange, promise, or consideration is unsupportable. The North Carolina Supreme Court has specifically addressed whether consideration exists in retirement benefits on two previous occasions. In both cases, the Court determined that retirement benefits are supported by consideration and, as a matter of contract, enforceable against the state. Defendants' position to the contrary is without merit and seeks to re-litigate previous North Carolina Supreme Court decisions.

Public employee retirement benefits are not gratuitous or lacking consideration when such benefits are given in exchange for required work. Under North Carolina law, public employee benefits that are earned over time, but only paid at a future date are considered deferred compensation. *See e.g. Simpson.* Stated otherwise, the retirement benefits are earned through years of service, but payment is deferred to a later date.

In *Faulkenbury*, the North Carolina Supreme Court addressed the question of whether consideration exists in vested retirement benefits and, specifically, retirement disability benefits. In *Faulkenbury* just as in the present case, the State of North Carolina argued that retirement benefits were gratuities devoid of consideration. The North Carolina Supreme Court disagreed and held that service rendered by employees in exchange for receipt of a future retirement benefit was deferred compensation and, as such, supported by consideration and sufficient to

form a binding contract. *See also Simpson.* This same issue was again argued by the state in *Bailey*, where the Supreme Court again reiterated the exchange of consideration between the state as employer and the retirees as employees. *Bailey,* 348 N.C. at 150-51, 500 S.E.2d at 65-66 ("A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished.")

In the law of contracts, the aforementioned expectation, along with wages and other benefits is, at its purest form, "consideration," in exchange of services an employee renders. The state's argument – that consideration is lacking, and, therefore, that retirement benefits are gratuitous – runs counter to provisions in the North Carolina Constitution. The North Carolina Constitution prohibits the state from providing payment to any person any money whatsoever except in return for public services. Article I, Section 32 of the North Carolina Constitution states: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." In several earlier cases, the North Carolina Supreme Court had expressly held that pension payments, as deferred compensation, are not in violation of Article I, section 32. *See Harrill v. Teachers' and State Employees' Retirement System*, 271 N.C. 357, 156 S.E.2d 702 (1967); *Bridges*, 221 N.C. 472, 20 S.E.2d 825. The Court's reasoning, was that retirement income benefits are not gifts or gratuities but rather a form of deferred compensation for which employer and employee have bargained and to which both have agreed. Payment of those benefits does not violate the exclusive emoluments clause of the State Constitution so long as they are in consideration of past employment to the state.

In support of its argument that the state did not offer any promises or consideration, the state offers up the fact that Plaintiffs' worked beyond the required vesting period to receive

retirement health benefits. The state is effectively asking the Court to determine that when an employee works beyond the vesting time period there is no inducement or consideration sufficient to support the contract. The Defendants argue that continued service beyond the vesting date somehow renders the contract null and void, or more fundamentally, that in order to receive contractual rights the employee must retire at the time of vesting to receive the deferred compensation. Both of these legal theories ignore the holdings in *Faulkenberry* and *Bailey*, which clearly state that consideration is measured at the time of vesting. This holding is best expressed by the *Faulkenberry* Court as follows:

> "the relation between the employees and the governmental units was contractual. … **At the time the plaintiffs' rights to pensions became vested**, the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action."

Faulkenbury, 345 N.C. at 692, 483 S.E.2d at 427. As the *Faulkenbury* Court explained "The plaintiffs expected to receive what they were promised at the time of vesting. They may not have known the exact amount, but this was their expectation. The contract was substantially impaired when the promised amount was taken from them." *Id*. At 692-93, 483 S.e.2d at 428. Because the exchanged consideration is measured at the time the benefits vest, it is inconsequential that the Plaintiffs continued to work for the state after vesting occurred.

Finally, the state argues that the 90/10 plan was not in place when the last Plaintiff vested in 1995 and, therefore, there is no consideration in terms of continued service thereafter in order to vest in the 1995 plan. This argument is contrary to the Defendants' previous contentions that working after vesting cannot give rise to additional benefits. The fact is that the Plaintiffs, who continued working while the 90/10 plan was introduced, did so under the consideration that the 90/10 plan would be part of the contract upon retirement. Additional benefits can be added but

not taken from the consideration in a contract. Once again, the Plaintiffs cannot be punished for working beyond the time of vesting, which in the case of the 90/10 plan introduction, was added to previously vested Plaintiffs.

The North Carolina Supreme Court's analysis in both *Bailey* and *Faulkenbury* should apply to the Plaintiffs' case, because the analysis of consideration is not restricted to the type of deferred compensation promised, but rather whether Plaintiffs were, like those employees in *Bailey* and *Faulkenbury*, promised deferred compensation in exchange for employment services. These questions being answered in the affirmative, the Plaintiffs claims are supported by consideration and the Defendants' argument that there was no consideration or promise fails.

D. Statements in Benefit Booklets Can Create Contracts and/or Form the Terms and Expectations for the Contracts

The Defendants' argument that Retirement Health Plan benefit booklets are not terms of the contract formed between the State of North Carolina and Plaintiffs ignores our state's controlling case authority. The Defendants set forth two bases for their argument: (1) Benefit booklets are by their nature statements made by government agents and are void as a matter of law, because the General assembly did not grant the agents with such authority; and (2) that North Carolina law does not allow for employment manuals or polices to become part of the employment contract (Defendants' Brief, p. 27).

1. Statements Made By Government Agents about the Retirement Health Benefit Plan are Binding on Defendants

In *Bailey*, the North Carolina Supreme Court specifically held that when a statute confers the ability to provide vested retirement benefits, the terms of the contract arise in various ways, including but not limited to plans in place at the time of vesting, oral representations made by government officials, and written representations, including those contained in plan handbooks

and similar documents. Such materials were written by or under the direction and control of North Carolina government agents. *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63. The terms of the statute itself, as in this case, enable the benefit, but the entire contract includes terms in benefit booklets and elsewhere, including via oral representations. *See Pritchard*, 81 N.C.App. 543, 552-553, 344 S.E.2d 821, 826-827 (1986)(reversing summary judgment for firefighters that are owed retracted vacation time under a vacation leave policy that was mentioned in an ordinance but carried out through oral promises made by the fire chief); *Bolick v. County of Caldwell*, 182 N.C. App. 95, 100-01, 641 S.E.2d 386, 390 (2007)(holding that a formal ordinance was not required to bind the county and that a personnel policy could supply the terms of a contractual right to a severance package that had been offered to employees).

According to *Bailey*, a term or condition of benefits to which the Plaintiffs have a contractual right extends beyond the statutory law that serves as the basis for the contract itself. *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63. In *Bailey*, the State of North Carolina argued that statements made by government officials in communicating benefits to prospective and employed workers were *ultra vires*, and as such, not part of the contract. The *Bailey* court disagreed, stating that when the terms are based on a statute that confers benefits, the statements made in furtherance of conferring the statutory enablement are themselves included in the terms of the contract. In fact, the *Bailey* court looked at plans outside of the statute that conferred the retirement benefit. The terms of the contract are established by what a reasonable person would have concluded from the totality of circumstances and communications made to plaintiff class members and become a part of the retirement benefits offered in exchange for public service. *See Bailey*, 348 N.C. at 146, 500 S.E.2d at 63.

Similar to *Bailey*, the Court in *Stone* found statements in two retirement benefit pamphlets to be compelling evidence that the terms (and expectations) of the vested benefit included that the retirement plan be administered in an actuarially sound manner. *Stone v. State*, 191 N.C.App. 402, 664 S.E.2d 32 (using language from Chapter 135, from a 1975 pamphlet and a 1996 pamphlet to determine the terms of the contract between the retirees and the state).

2. North Carolina Law Allows Statements in Benefit Booklets to be Considered Contractual Terms of Employment Benefits

Defendants also argue in their Brief in Support of Motion to Dismiss that employment manuals or policies "do not become part of the employment contract unless expressly included in it." (Defendants' Brief, p. 27). The Defendants cite a North Carolina Court of Appeals decision, *Walker v. Westinghouse Electric Corporation*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985) as the basis for their argument. However, as previously discussed herein, the employment relationship between a government employer and its employees is different than that of and a non-government employment relationship. The Plaintiffs' employment relationship was with a government unit, and the analysis in *Bailey, Stone*, *Simpson,* and *Prichard* applies

That being said, the Defendants' application of private employer case law still misses the mark. In *Roberts v. May Mills,* this state's Supreme Court held that a basic contract of employment may be also supplemented by additional agreements. 184 N.C. 406, 114 S.E. 530 (1922). In *Roberts*, a private employer was required to pay a Christmas bonus that was communicated to employees through a notice posted at the work facility. The Supreme Court expressly stated that the private employer's condition of requiring its employees to work until the end of the year, followed by their completion of such term of service established a term of contract the private employer was required to honor. *Id.* The posting of the notice was an offer to employees akin to the statements made in our Plaintiffs' benefit booklets. The employee in

Roberts accepted the offer and continued to work for a required period of time, just as the Plaintiffs here completed their vesting requirements. Statements made in employee benefit books are evidence of the terms of the benefit offered to the employee and our Supreme Court has expressly held on several occasions that such statements are binding upon the government employer.

E. Sovereign Immunity Does Not Bar any of the Plaintiffs' Claims

None of the Plaintiffs' claims are barred by the doctrine of sovereign immunity. At the initial pleading and 12(b) stage, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the state of sovereign immunity. *See Lynn v. Overlook Dev.*, 98 N.C.App. 75, 79, 389 S.E.2d 609, 612 (1990), *rev'd in part on other grounds*, 328 N.C. 689, 403 S.E.2d 469 (1991). A lack of specificity in this regard is not, however, fatal in the early stages of the proceedings. *Id.* In other words, as long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the state has waived the defense of sovereign immunity is not necessary. *Id.; see also Fabrikant v. Currituck County*, 174 N.C.App. 30, 38, 621 S.E.2d 19, 25 (2005). It is well established that sovereign immunity cannot bar claims under the state or federal Constitutions. *See e.g. Sanders v. State Personnel Com'n*, 183 N.C.App. 15, 18, 644 S.E.2d 10, 12 (2007)(reversing a grant of dismissal based upon sovereign immunity that was based upon the premise that the Plaintiff had an adequate state remedy); *Peverall v. County of Alamance*,154 N.C.App. 426, 431, 573 S.E.2d 517, 520 (2002)(citing *Simpson* and *Faulkenbury* and holding that unconstitutional impairment of contract claim and breach of contract claims for retirement disability benefits are not barred by sovereign immunity). Similarly, contractual claims are not barred by sovereign immunity. *Smith v. State*, 289 N.C. 303 (1976); *Peverall*, 154 N.C.App. at 431, 573 S.E.2d at 520. Nor are

claims for declaratory judgment subject to a sovereign immunity defense as those claims pertain to either Constitutional or contractual rights between the state and its citizens/employees. *See Charlotte-Mecklenburg Hosp. Authority v. North Carolina Indus. Com'n*, 336 N.C. 200, 207, 443 S.E.2d 716, 721 (1994). Because all of the Plaintiffs' claims arise under either contractual or Constitutional causes of action and/or are remedial based upon those claims (*See* Complaint), the Court cannot dismiss the Complaint or any of its claims due to the alleged defense of sovereign immunity.

II. There is No Right to Reduce Benefits for Those Who Have Already Vested

Defendants argue that even if there is a contract, the state may make any changes to contractual health benefits, because it has effectively reserved its right to amend those benefit obligations. Plaintiffs do not contest that the state has effectively reserved its right to amend the ***statutes*** dealing with retiree health benefits for non-vested employees, as the case law presented in Defendants' brief has adequately demonstrated. However, the "right to amend" clause's effective reservation ends there, and Defendants have produced no case law that would indicate that the state may revoke, reduce, or impair vested rights. In fact, the Courts in both *Simpson* and *Faulkenbury* addressed the issue of a "right to amend" clause, and dispensed with it summarily.[9] Instead, North Carolina case law is clear that once vested, the legislature may not change the terms of the contract. *See Simpson, Faulkenbury, Bailey*, etc.

Defendants' argument is premised on the understanding that the terms of the contract are contained wholly in the enabling statute. (*See* Defendants Brief § I.D). None of the pertinent cases, however, have signified that the terms of contract are controlled exclusively by statute.

[9]While *Faulkenbury* distinguishes the supposed limited scope of the "right to amend" clause at issue in that case, *Simpson* made no such distinction, and appeared to only consider the "right to amend" clause as a broad matter (leaving out the limiting language). *Simpson* 88 N.C. App. at 223, 363 S.E.2d at 92; *Faulkenbury*, 345 N.C. at 691, 483 S.E.2d at 427. Both cases quickly dispensed with the "right to amend" clause in those cases, and these cases present the only authority that directly addresses a "right to amend" clause dealing with retirement benefits.

Rather, policy booklets, and even oral representations, can constitute terms of the contract so long as they were authorized by statute and were therefore not *ultra vires*. *See e.g. Bailey* at 146; *Pritchard* at 552-553. In reliance on the assumption that the terms of the contract are expressed wholly in the statute, Defendants contend that the "right to amend" clause is inexorably a term of the contract and controls any changes, even to those who vested. The distinction is an important one, because the right to amend clause is not a contractual term, but rather a reservation of the legislature to alter, amend, or repeal the enabling statute, not the contracts. The contract itself is a more nebulous creature; its terms include representations made to employees in employee handbooks or in oral representations and upon which Plaintiffs relied in accepting and retaining employment with the state.

Notwithstanding the legislature's right to alter, amend, or repeal the enabling statute, other parts of Chapter 135 ensured that even upon the destruction of the entire retirement system vested members would be entitled to their benefits. N.C.G.S. § 135-18.6 (2013) states that

> In the event of the termination or partial termination of the Retirement System or in the event of complete discontinuance of contributions under the Retirement System, **the rights of all affected members to benefits accrued to the date of such termination, partial termination, or discontinuance**, to the extent funded as of such date, or the amounts credited to the members' accounts, **shall be nonforfeitable and fully vested**.

Id. (emphasis added); N.C.G.S. § 135-12 (2013) (". . . and **other benefits** granted under the provisions of this Chapter, are hereby made **obligations** of the pension accumulation fund."). "Retirement System shall mean the Teachers' and State Employees' Retirement System of North Carolina as defined in G.S. 135-2." N.C.G.S. § 135-1 (2013). "A Retirement System is hereby established and placed under the management of the Board of Trustees for the purpose of providing retirement allowances and **other benefits under the provisions of this Chapter** for teachers and State employees of the State of North Carolina." N.C.G.S. § 135-2 (2013)

(emphasis added). The State Health Plan is included in Chapter 135 and the provision of § 135-18.6 is therefore applicable to the State Health Plan, which is an "other benefit" provided by Chapter 135. For this reason, even under the plain language of the statute, the benefits earned by Plaintiffs by their service is fully vested and cannot be eliminated by even the total termination of the entire retirement system.

Defendants, in support of their proposition that a "right to amend" clause allows the legislature to take away previously vested rights, cite various federal cases relating to the Contract Clause and several North Carolina cases addressing the state's reservation of a right to amend. However, none of these cases apply to vested rights, and in fact, many of them specifically carve out an exception for "rights which have become vested."

Defendants' primary authority relies on a line of cases regarding incorporation charters. These cases are of limited utility for the case at bar, because they do not address North Carolina contract law (only the Impairment of Contracts in governmental charters between the United States and private corporations), and they are generally limited in scope to operational agreements and not to individual contracts. In fact, some of the authority cited by Defendants actually expressly hold that the government's right to amend does not extend to vested rights. For example, the Defendants cite to *Greenwood v. Freight Co.*, 105 U.S. 13 (1882),[10] which relied upon the earlier holding of *Union Pac. R. Co. v. United States*, 99 U.S. 700 (1878). In *Union Pac. R. Co.*, the U.S. Supreme Court first noted the exceptional circumstances of the contract, stating that "[t]his corporation is a creature of the United States. It is a private

[10] The *Greenwood* case also makes a point that a right to amend does not extend to contracts made by a corporation prior to an amendment. *Greenwood v. Freight Co.*, 105 U.S. 13, 17 (1882) ("Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power.").

corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control so far as its business affects the public interests." *Id.* at 719. On the issue of the reservation of a right to amend, while finding the government could reserve the power to amend certain provisions, the Court held "[t]hat this power has a limit, no one can doubt. All agree that it cannot be used to take away property *already acquired* under the operation of the charter, or to *deprive the corporation of the fruits* actually reduced to possession of contracts lawfully made." *Id.* at 720 (*emphasis added*). The Court, explaining the limitation of the "right to amend" reservation held "[i]n so doing it cannot undo what has already been done, and *it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future,* and may direct what preparation shall be made for the due performance of contracts already entered into." *Id.* at 721 (emphasis added); *See also Looker v. Maynard*, 179 U.S. 46, 52 (1900)("The effect of such a [right to amend] provision, . . . is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, *or any right vested* under the grant.").

Similarly, Defendants have cited a series of North Carolina cases that rely heavily on the charter line of cases. For instance, Defendants refer to *Elizabeth City Water & Power Co. v. Elizabeth City* for the proposition that the state can reserve a right to amend. 188 N.C. 278, 124 S.E. 611 (1924). Like the federal charter line of cases, this decision deals with a corporate charter for a water and power company in Elizabeth City. In *Elizabeth City Water & Power*, the state granted an incorporation charter, and at issue was a right to amend reserved in the North Carolina Constitution, Art. VIII, Sec. 1, which deals with granting of charters and states that all corporate charters may be altered from time to time. There is no such constitutional right,

however, to amend for employee or retiree retirement benefits.[11] In *Elizabeth City Water & Power,* the Court elaborated that "Notwithstanding a constitutional provision of this character, the power of the Legislature cannot be unlimited and arbitrary. Where, under a power in a charter, ***rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested*** under a legitimate exercise of the powers granted." *Elizabeth City Water & Power Co,* 124 S.E. at 615 (1924) (*emphasis added*).

The remaining cases cited by Defendants in support of their right to amend argument are inapplicable to the case at bar. Defendants cite a Vermont federal District Court case regarding employment classification. That opinion is readily distinguishable from the controlling North Carolina line of authority. *Conway v. Sorrel*, 894 F. Supp. 794 (D. Vt. 1995). *Conway* relied on the federal standard of statutory contract formation and, furthermore, revealed one of Plaintiff's prime distinctions in this case. *Id.* at 797. Unlike the Plaintiff in *Conway*, Plaintiffs here are not arguing that the statutes create an employment contract.[12] Rather, Plaintiffs are simply requesting that they be compensated for benefits already earned. Had Plaintiffs been fired before they reached their 5 year vesting, then they would not have vested into the benefits.[13] In *Cantwell v. State*, where the state had enacted an exemption to jury service for those who served a fire company for 5 years, the North Carolina Supreme Court said "It has been generally held that the right of exemption from jury service is not a vested right, but a mere gratuity which may be withdrawn at the pleasure of the Legislature." *State v. Cantwell*, 142 N.C. 604, 55 S.E. 820, 821 (1906) (quoting 17 A. & E. Encyc. (2d Ed.) 1177). Both of these cases are dissimilar to this

[11] In contrast, the State is prohibited from misappropriating retirement funds for any other purpose. N.C. Const. Art. V, Sec. 6(2).
[12] Plaintiffs acknowledged that they worked as employees at will as is the law in the State of North Carolina.
[13] Indeed Chapter 135 provides that employees terminated for any reason may continue under the Health Plan for a limited time and, thereafter, will lose their benefits in the State Health Plan. N.C. Gen. Stat § 135-48.44(d).

one. While they dealt with issues that were clearly not "vested rights," the contract between the state and the Plaintiffs clearly envisions a vesting regime. *See* § I.A.5 *supra*.

The other cases cited by Plaintiffs present facts very much unlike the circumstances here. *Stagg v. Spray Water Power & Land Co.*, 171 N.C. 583, 89 S.E. 47 (1916) (concerning with revocation of a corporate charter); *Spearman v. United Mut. Burial Ass'n*, 225 N.C. 185, 33 S.E. 2d 895 (1945) (dealing with the rules and bylaws of a burial association created by government charter); *Adair v. Orrell's Mut. Burial Ass'n*, 284 N.C. 534, 201 S.E.2d 905 (1974) (same); *State ex rel. Utilities Comm'n v. Va. Elec. & Power*, 285 N.C. 398, 206 S.E.2d 283 (1974) (related to changes to electric utility rates by the Utility Commission); *Waste Indus. USA, Inc. v. State*, __ N.C. App. __, 725 S.E.2d 875, 890 (N.C. Ct. App. 2012) *review denied*, 731 S.E.2d 686 (N.C. 2012) and *appeal dismissed*, 731 S.E.2d 420 (N.C. 2012) (pertaining to denial of a permit to build a landfill when the Plaintiff had a franchise agreement with the county subject to legislative changes that "did not grant a right to build or operate a landfill, but rather simply made it possible for plaintiffs to apply to the State for a permit"). In each of these cases, the Plaintiffs did not complete their contractual obligations before the contract was amended, altered, or repealed. None of them deal with employment benefits, and should be read to suggest that the legislature's "right to amend" in this case should render the retirees' contract ineffective. To the contrary, a number of the North Carolina cases expressly stated that a contract may exist despite the legislature's right to amend. *Waste Indus. USA*, 725 S.E.2d at 890; *State ex. rel. Utilities Comm'n*, 285 N.C. at 405-406, 206 S.E.2d at 290; *Adair*, 284 N.C. at 538, 201 S.E.2d at 908. All of them deal with entities which are either "created for public purposes, and its property is to a large extent devoted to public uses" or are given certain rights to complete a public purpose,

such as building a landfill, and are therefore "subject to legislative control so far as its business affects the public interests." *Union Pac. R. Co.*, 99 U.S. at 719.

In contrast, the issue of a right to amend clause in a retirement benefit statute has been adjudicated by the Courts in this state. In *Simpson*, and *Faulkenbury*, the Court considered the defendants' argument that a right to amend clause contained in the retirement statutes showed that there was no contract because of the existence of said clause, or alternatively, that the clause allowed the government-employer to unilaterally reduce the retirement benefits. This argument was not persuasive to the Courts in *Simpson* or *Faulkenbury*, and this Court should not be persuaded by the same argument. None of the Defendants' cases deal with government employer-employee retirement benefits, which were previously addressed by the North Carolina courts in which the state offers a direct benefit to employees in exchange for a length of employment.

In the case at hand, Plaintiffs *completed* a stated consideration (working for 5 years with the state) and were promised, along with pension payments, certain levels of retiree health benefits in exchange for their service. (*See* Complaint ¶¶ 40-49). The agreement between Plaintiffs and Defendants do not concern a grant of rights for public purposes to create a corporate body, or build a landfill, or operate a railroad, or provide utilities. While it is undeniable that the Plaintiffs served the public in the carrying out their employment, the nature of the contract between Plaintiffs and Defendants was a private contract between parties for services rendered, those services actually being rendered.

To follow Defendants' argument to its logical conclusion, would allow the state to amend or repeal a contract at any time, even after Plaintiffs have fully performed. To accept either of Defendants' arguments would either legally or practically create a gratuity from the state to

individual private citizens after their service to the state had been completed. But such a gratuity, without the consideration of past public service, has been found to be unconstitutional under the prohibition against exclusive emoluments of N.C Const. Art. 1, Sec. 32; *Leete v. County of Warren*, 341 N.C. 116, 121, 462 S.E.2d 476, 479 (1995). The North Carolina Supreme Court in *Leete* held that when a retiring County Manger had received all compensation due him under the terms of his employment with the county, any additional compensation, in this case severance pay, would be compensation beyond that due for services rendered and, thus, a constitutionally impermissible gratuity. *Id.* However, "[s]alary, pension, insurance and similar benefits received by public employees are generally not unconstitutional exclusive emoluments and privileges. They constitute compensation in consideration of services rendered."*Id*.; *See also Bridges*, 20 S.E.2d at 832 ("if payment from the [pension] fund is in the nature of salary or compensation for services rendered, it is at least not offensive to [the Exclusive Emoluments Clause of the North Carolina Constitution]").[14] The Court has a duty to construe a statute or statutory scheme, if possible, in a Constitutional fashion and avoid an interpretation that would make the statute unconstitutional. *Piedmont Triad Regional Water Authority v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "A well-recognized rule in this state is that, where a statute is susceptible to two interpretations-one constitutional and one unconstitutional-the Court should adopt the interpretation resulting in a finding of constitutionality." *State v. Narron*, 193 N.C.App. 76, 78, 666 S.E.2d 860, 862 (2008) (*citing In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978)). The only constitutional (and only correct) interpretation of the Retiree Health Benefit is as a contractually vested deferred compensation benefit.

[14] While Plaintiffs do not believe that the Retiree Health Benefit as it concerns retirees is an exclusive emolument in violation of the Art. 1, Sec. 32, Plaintiffs do assert that to find that the Retiree Health Benefit is not a contract for deferred compensation may effectively create a gratuity that is in violation of the Exclusive Emoluments Clause.

The right to amend clause reserves the right of the state to change the terms of the contract before the Plaintiffs have already fully performed and become vested. Each of the Plaintiffs here has completed 5 years of service to the state and has continued on into retirement in reliance of the fact that the state would uphold its end of the bargain. Now, when it is the state's turn to perform its obligations, Defendants argue they do not have to. Under Defendants' proposed theory, Plaintiffs agreed to 5 years of service in exchange for a promise that is unenforceable, creating an unconstitutional gratuity. Therefore, the "right to amend" clause has no effect on Plaintiffs' already vested rights.

III. PLAINTIFFS HAD NO DUTY TO EXHAUST ADMINISTRATIVE REMEDIES AND THIS COURT HAS JURISDICTION OVER ALL CLAIMS ASSERTED IN THE COMPLAINT

Plaintiffs had no duty to exhaust administrative remedies, because they challenge no state agency decision; an administrative review would be futile; and, Defendants concede that the Superior Court has original jurisdiction over constitutional issues. The Defendants' Motion to Dismiss for failure to exhaust administrative remedies should be denied.

A. Plaintiffs Challenge No Agency Decision.

Plaintiffs' claims are not subject to the Administrative Procedure Act ("APA"), as administered by the Office of Administrative Hearings ("OAH"), as none of the Plaintiffs are parties "aggrieved by a decision of a state agency." *See* N.C.G.S. § 150B-23 (2013); *but see,* Defendants' Brief at p. 35, *contra*. Instead, Plaintiffs seek adjudication of their contractual and constitutional rights for violations committed by the State of North Carolina acting through its legislature, and seek declaratory and injunctive relief against the Defendant-Executive Agencies charged with the responsibility of administering the constitutionally challenged legislation. The definitions of terms under the APA make it clear that Plaintiffs' claims are not subject to administrative review:

> (1a) "Agency" means an agency or an officer in the **executive branch** of the government of this State
>
> (2) "Contested case" means an administrative proceeding pursuant to this Chapter **to resolve a dispute between an agency and another person** that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include … declaratory rulings… .
>
> (6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment **by an administrative decision.**

N.C.G.S. § 150B-2 (2013) (emphasis added). Plaintiffs' claims of unconstitutional or actionable wrongs, however, are not levied at "the executive branch" and, therefore, do not fall under the purview of the APA. The dispute here is not between an [executive] agency and another person, but between individuals and the class of aggrieved persons they seek to represent. Plaintiffs here seek a declaration of their contractual and constitutional rights to the Retiree Health Benefits promised by the legislature on behalf of the State of North Carolina as an employer, not by any executive agency. As the North Carolina Supreme Court has explained:

> The provisions of the APA clearly indicate that "the Administrative Procedure Act shall apply to every agency of the **executive** branch"
>
> * * *
>
> The term "agency" as used throughout **the Act "does <u>not</u> include any agency in the legislative …branch of the State government**...." N.C.G.S. § 150B-2(1) (1987).

Vass v. *Bd. of Trustees*, 324 N.C. 402, 406 nt. 2, 409, 379 S.E.2d 26, 28 nt. 2 (1988) (emphasis added). Consequently, Plaintiffs have no "contested case" and are not challenging any administrative, decision, ruling, or action of an executive agency, as the proximate cause of Plaintiffs' injury or damage.

Moreover, it is not the ministerial "actions," but rather the discretionary "decisions," of executive agencies that are subject to administrative review under the APA. Unconstitutional

actions of the executive agencies may be enjoined by the Judicial Branch of state government without any need for administrative review, as there are no administrative "remedies" available to invalidate legislation: only our Courts have such authority. Defendants have simply confused the violation of Plaintiffs' "rights" with that of their "remedies." The respondent agencies are not being charged with having made a decision that an Administrative Law Judge ("ALJ") could reverse; only with implementing a legislative decision that is void or voidable upon a determination of a breach or impairment of contract. In order to afford any meaningful relief, however, the Court must necessarily enjoin those parties who execute the laws, once the constitutionality or validity of such laws are determined by the Courts. Plaintiffs' claims are not subject to the APA, and they had no duty to exhaust administrative remedies, because there were none.

B. Futility

Even if Plaintiffs' non-constitutional claims were subject to the APA, there was no duty to exhaust administrative remedies in this case, because the presentation of this dispute for any administrative ruling (or final agency decision) would be futile. First, as previously stated, there is no agency decision to challenge here, and seeking an administrative ruling would be pointless. It has long been recognized that,

> "exhaustion of [administrative] remedies is not required when the only remedies available from the agency are shown to be inadequate." 5 Jacob A. Stein et al., Administrative Law § 49.02[1] (1992); *Honig v. Doe*, 484 U.S. 305, 327, 108 S.Ct. 592, 606, 98 L.Ed.2d 686, 709 (1988) (bypass of administrative process permitted "where exhaustion would be futile or inadequate"); *see also Orange County v. North Carolina Dept. of Transp.*, 46 N.C.App. 350, 376-77, 265 S.E.2d 890, 907-08 (1980). …The remedy is considered inadequate unless it is "calculated to give relief more or less commensurate with the claim." L. Jaffe, Judicial Control of Administrative Action, at 426 (1965). For example, if a party seeks monetary damages and the agency is powerless to grant such relief, the administrative remedy is inadequate. *See Stein* at § 49.02 [1].

Huang v. N. Carolina State Univ., 107 N.C. App. 710, 715, 421 S.E.2d 812, 815-16 (1992). Here, Plaintiffs not only seek monetary damages for breach of contract, but also seek declaratory relief for the unconstitutional impairment of those contracts, while the Agency-Defendants would be "powerless to grant such relief." *Id.* Having no dispute with an agency decision subject to the APA, and seeking legal and equitable relief beyond the power of the Agency-Defendants to grant, Plaintiffs here were

> free to file their claims directly in the superior court without exhausting administrative remedies because administrative action could not grant [them] the relief to which [they are] allegedly entitled.

See Huang, 107 N.C. App. at 712, 421 S.E.2d at 814 (1992). An ALJ has no jurisdiction to declare an act of the State Legislature to be unconstitutional; the only acts of the Defendant-Agencies related to Plaintiffs claims were ministerial. The executive agencies were not the decision makers in this case, and are included as Defendants only to effectuate the remedies afforded to the Plaintiff-class – no relief could be afforded under the APA for the breach or constitutional impairment of contract alleged here. To the extent that an Agency's actions are implicated in the enforcement of the challenged legislation, there exists no mechanism by which the OAH, an ALJ or the APA can provide meaningful judicial review of this case or controversy. Given the alleged invalidity/unconstitutionality of contracts not made by the agencies, but by the state itself, the APA recognizes the Plaintiffs' rights to judicial review:

> Nothing in this Chapter shall prevent any party or person aggrieved from invoking any judicial remedy available to the party or person aggrieved under the law to test the validity of any administrative action not made reviewable under this Article.

N.C.G.S. § 150B-43 (2013). Moreover, "[e]xcept as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3); *as quoted in*, *State v. Mangino*, 200 N.C.App. 430, 432, 683 S.E.2d

779, 780 - 781 (2009).

A contested case seeking administrative review of any decision or act of the executive agency-Defendants would be futile for Plaintiffs in this case and no administrative procedure could provide adequate relief. Consequently, Plaintiffs had no duty to seek, let alone to exhaust administrative remedies.

C. The Superior Court has Jurisdiction Over Constitutional Claims

> § 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights
>
> (a) The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed is
>
> (1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;
>
> (2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation;
>
> (3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or
>
> (4) The enforcement or declaration of any claim of constitutional right.

N.C.G.S. § 7A-245 (2013); *see, Gilbert v. North Carolina State Bar*, 363 N.C. 70, 74, 678 S.E.2d 602, 604 (2009).

The Defendants' argument for dismissal based on the alleged failure to exhaust administrative remedies also fails based upon Defendants' own admissions: "OAH cannot rule on the constitutionality of a statute." *See* Defendants' Brief, p. 35, nt. 9, *citing, e.g., North Buncombe Ass 'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 28-31, 394 S.E.2d 462, 465-67, *appeal dismissed and disc. review denied,* 327 N.C. 484, 397 S.E.2d 215 (1990). Unlike *Vass* and *Rhodes*, however, relied upon by Defendants, here the Plaintiffs do not challenge an "agency's findings, inferences, conclusions, or decisions" as being …[i]n violation of

constitutional provisions." *Cf., Vass v. Board of Trustees of Teachers' and State Employees' Comprehensive Major Medical Plan, 108 N.C.App. 251, 423 S.E.2d 796 (1992); North Buncombe Ass 'n of Concerned Citizens v. Rhodes,* 100 N.C. App. at 30-31, 394 S.E.2d at 466 (1990); *Vass,* 324 N.C. at 406 nt. 2, 379 S.E.2d at 28 nt. 2. There is no agency's denial of a claim for medical expenses, but rather a breach or impairment of contract by an act of the legislature that constitutes the decision challenged and caused the violation of Plaintiffs' rights, and thus there is no way for the APA to provide a remedy in this case. Unlike the OAH, however, the Superior Court clearly does have jurisdiction to "reverse or modify the decision if it is "... [i]n violation of constitutional provisions". *See* Defendants' Brief, p. 35 nt. 9, *citing,* N.C.G.S. § 150B-51(b).

Because the Plaintiffs could not have pressed certain of their claims before an ALJ, they cannot be precluded from presenting those claims to Superior Court in the first instance, based upon Defendants' argument of some "failure to exhaust administrative remedies" that admittedly do not exist in this case for the violation of the North Carolina Constitution by the legislative branch of government. Defendants' attempted requirement to complete an administrative agency review before asserting any constitutional claims is both futile and contrary to the provisions of the APA. Moreover, the Defendants argument is outweighed by Defendants' glaring admission that "OAB cannot rule on the constitutionality of a statute" and "…constitutional issues … can …be raised in Superior Court… ." (Defendants' Brief, p. 35, nt. 9).

In *Rhodes,* the Plaintiffs were complaining about a decision of the agency being sued. In the present case, Plaintiffs have included the executive agencies responsible for executing the legislature's mandates that are claimed to constitute a breach or constitutional impairment of contract. The executive agencies are necessary parties to afford meaningful relief by way of

injunction, once the breach or impairment of contract has been proven. It is not the decisions of the respondent agencies, but rather that of the North Carolina Legislature that is challenged by Plaintiffs here. The legislative branch and its agencies are not subject to the APA and, therefore, the Defendants' argument must fail; this Court has jurisdiction over Plaintiffs' civil and constitutional claims for relief against the defendant-executive agencies, and the Motion to Dismiss should be denied.

IV. The Defendants' Arguments Regarding Dismissal of the Constitutional Claims is Misplaced Because Defendants' Cited Authority Does Not Apply to Federal Constitutional Claims and the State Constitutional Claims Would be Prematurely Dismissed under Rule 12(b)(6).

The Plaintiffs' various constitutional claims under the State and Federal Constitutions are not barred due to the existence of another claim for relief. First, the Defendants' arguments and citations to the *Corum* line of cases are not instructive, as these cases did not apply to claims under the Federal Constitution. *See* e*.g., Corum v. Univ. of N.C.,* 330 N.C. 761, 413 S.E.2d 276, *cert. denied* 506 U.S. 985 (1992). The Plaintiffs' Constitutional Claims for unconstitutional impairment of contract, violation of due process, and violation of equal protection all arise out of both the State and Federal Constitutions.[15] *Corum* and the line of cases that followed *Corum* never held – nor could they under the Supremacy Clause – that an adequate state remedy forecloses claims under the Federal Constitution. *See e.g., Corum v. Univ. of N.C.,* 330 N.C. 761, 413 S.E.2d 276, *cert. denied* 506 U.S. 985 (1992), *and, Copper v. Denlinger,* 363 N.C. 784, 688

[15]Plaintiffs claim an unconstitutional impairment of contract under both the State and Federal Constitutions. The "due process" claims under the United States Constitution are also synonymous with the "law of the land" claims under the North Carolina Constitution. *See e.g., Johnston v. State*, 735 S.E.2d 859, 870 (N.C.App., 2012), *quoting, State v. Ballance*, 229 N.C. 764, 768–69, 51 S.E.2d 731, 734 (1949) (internal quotation marks omitted). *See also Rhyne v. K–Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) ("Our Law of the Land Clause was "copied in substance from Magna Charta by the framers of the [North Carolina] Constitution of 1776" and is synonymous with "due process of law, a phrase appearing in the Federal Constitution and the organic law of many states.") A claim stated under the "law of the land" provisions of the state constitution is, therefore, equally stated under the federal constitution's counterparts. *Cf. generally, Lorbacher v. Housing Authority of City of Raleigh*, 127 N.C.App. 663, 675, 493 S.E.2d 74, 81 (1997).

S.E.2d 426 (2010) (neither holding that the State Court should dismiss claims under the Federal Constitution just because there could be an adequate state remedy). Moreover, there is no authority restricting a Plaintiff from bringing claims under both the Federal Constitution (or a statute such as § 1983 arising from Federal Constitutional Rights) and simultaneously either a state tort, contract, or Constitutional claim. In fact, in *Corum*, the Court upheld the Plaintiff's right to simultaneously pursue claims for Federal Constitutional violations under § 1983 for both injunctive and monetary relief and the State Constitutional Claim for monetary damages. Because the *Corum* line of cases does not apply to claims under the Federal Constitution, the Court cannot properly dismiss those claims.

Second, it would be premature at this stage of the case to dismiss any of the State Constitutional Claims. Under *Craig v. New Hanover County Board of Education*, 363 N.C. 334 (2009), the Court held that once the Court dismissed a Plaintiffs' perceived adequate state remedy, the Plaintiff could still pursue a State Constitutional Claim. This remains true even if the type of remedy sought under both the perceived adequate state claim and the State Constitutional claim are the same. *Id*. c*iting Midgett v. North Carolina State Highway Commission*, 260 N.C. 241, 132 S.E.2d 599 (1963), *overruled on other grounds by Lea Co. v. North Carolina Board of Transportation*, 308 N.C. 603, 616, 304 S.E.2d 164, 174 (1983). The holding in *Craig* "simply ensures that an adequate remedy must provide the possibility of relief under the circumstances." *Craig* at 340. Hypothetically, if the Defendants are correct that there is no contract between the State and the Plaintiffs and therefore sovereign immunity applies, the Plaintiffs' claims for Constitutional violations would still be viable and would then be the only remedy for relief and such claims would be protected from dismissal under *Corum* and *Craig*.

In the cases of both *Faulkenbury* and *Bailey*, the Plaintiffs filed and were allowed to pursue their Constitutional Claims alongside their more contractually based claims. Those Plaintiffs were ultimately allowed only one recovery, but were allowed to pursue the causes of action in tandem. *See*, *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997); *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998).

V. THE PLAINTIFFS' DUE PROCESS CAUSES OF ACTION STATE A COGNIZABLE CLAIM FOR RELIEF

Defendants' argument about the Due Process clause essentially relies on their previous arguments that Plaintiffs hold no vested rights in the Retiree Health Benefit. Plaintiffs, of course, contend that there is a vested right in health benefits created by contract and as a result of their service to the state. *See* §§ I and II. Because the state breached and infringed upon a valid contract, Due Process applies. *Bailey v. State*, 348 N.C. 130, 154, 500 S.E.2d 54, 68 (1998) (*quoting Lynch v. United States*, 292 U.S. 571 at 579 (1934))("[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."). Therefore, Plaintiffs must be afforded Due Process for the state's wrongful modification of their vested property rights. *Id.*

Assuming arguendo that no contract between the Plaintiffs and the state existed, it is well-settled that property rights in certain government benefits can arise absent a contract. For example, in the landmark case of *Goldberg v. Kelly*, the United States Supreme Court held that welfare benefits could not be reduced without affording Due Process even though they were a government entitlement and the recipients need do nothing to receive them other than be eligible. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (*quoting* Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965)) ("Such sources of

security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.") The reasoning of the Court was that the benefits were of such importance to the recipients that they constituted a property right and should be afforded Due Process.[16] Defendants here have proposed that the health benefits provided are simply a gratuity offered to certain individuals who meet certain "eligibility requirements" much like other government entitlements such as welfare. While it has been demonstrated, and held repeatedly in North Carolina courts, that retirement benefits are not a gratuity, but rather deferred compensation, Due Process would apply to benefits denominated "gratuities" when they are a source of security offered from the state.

With the rising costs of health care, many of the Plaintiffs, and those similarly situated, rely on the subject health benefits. All of the Plaintiffs are at an age where paying for health insurance, and health care, becomes increasingly expensive, and therefore, the benefits they earned are incredibly important. While the Defendants' contend that the changes made in the health plan were minor or insignificant, for those that cannot afford the 80/20 plan payments, an increased co-insurance could and will be a very significant cost.

The Plaintiffs have adequately stated a claim for violation of due process under the Federal and North Carolina Constitutions and therefore the Defendants' Motion to Dismiss should be denied.

[16] Defendants have not argued that Plaintiffs were afforded the appropriate amount of Due Process, which is the second level of inquiry after it is determined that the governmental action affects a life, liberty or property right. Therefore, Plaintiffs will not address that particular argument, although the Complaint states a claim for Plaintiffs' due process violations under both prongs of the Due Process inquiry.

VI. PLAINTIFFS HAVE ALLEGED DISSIMILAR TREATMENT FROM A SIMILARLY SITUATED CLASS AND STATE A CLAIM FOR VIOLATION OF THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

Plaintiffs' seek protection of their contractual rights to receive retiree health benefits from the State of North Carolina equal to the contractual benefits paid to other similarly situated persons without breach or impairment thereof (*i.e.*, state employees that vested before and after enactment of the 1987 Law, who received all of their Health Benefits from 1991 until their death or voluntary discontinuance of benefits, prior to September 1, 2011; employees in the private sector who contracted for and received guaranteed health benefits upon retirement, but whose employers did not have the North Carolina Legislature to re-write their agreement, in breach or impairment of their contractual rights [*see, e.g., Roberts v. Mays Mills,* 184 N.C. 406, 114 S.E. 530 (1922)]; and, all other persons or entities who contracted with the State of North Carolina without any breach or impairment of their contract(s).) The Plaintiffs (and the putative classes or subclasses sought to be represented in this action) received unequal treatment from the Defendants following statutory breaches or impairment of their contractual relationship, while others received full benefits from Defendants and/or other third parties (prior to or without the Legislatures breach and impairment). In essence, Plaintiffs assert the state's inability to unilaterally change its contract with the Plaintiffs without denying the Plaintiffs equal protection of the law. The State cannot unilaterally change the terms of its contractual obligations to Plaintiffs without treating them differently from the class of employees, persons or entities who received full contractual benefits from the State of North Carolina.

Defendants cite two cases from the North Carolina Court of Appeals in support of their "equal protection" argument: *Lea v. Grier,* 156 N.C.App. 503, 509, 577 S.E.2d 411, 416 (2003), and *Twin City Apartments, Inc. v. Landrum,* 45 N.C.App. 490, 494-495, 263 S.E.2d 323, 326

(1980). Notably, Defendants neglected to call the Court's attention to the following excerpts from those cases:

> "Arbitrary and capricious acts by [the] government are [ ] prohibited under the Equal Protection Clauses of the United States and the North Carolina Constitutions." Dobrowolska v. Wall, 138 N.C.App. 1, 14, 530 S.E.2d 590, 599 (2000); see also U.S. Const. amend. XIV, § 1; N.C. Const. art.1, § 19. The equal protection "principle requires that all persons similarly situated be treated alike." Wall, 138 N.C.App. at 14, 530 S.E.2d at 599 (citing Richardson v. N.C. Dept. of Correction, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996)).

Lea, 156 N.C.App. at, 509, 577 S.E.2d at 416. This explains the basis for a claim of unequal protection, and demonstrates why the Legislature's "arbitrary and capricious acts" in breaching/impairing Plaintiffs' contracts constitute a violation of the constitutional right to equal protection under the law. Defendant's other authority merely confirms that a litigant may not raise issues (even constitutional matters) on behalf of others, unless that person has standing as a member of the class claimed to have been unequally treated:

> A person who is not included in the class against which there has been a discrimination cannot take advantage of the discrimination by pleading that the proceeding constitutes a violation of the equal protection guaranteed by the Fourteenth Amendment of the Constitution of the United States, and by Section 17, Article I, of the Constitution of North Carolina.
>
> State v. Sims, 213 N.C. 590, 591, 197 S.E. 176, 177 (1938). Defendant has not exhibited that she is a member of the allegedly injured classes. In fact, in defendant's appellate brief the statement is made that, " . . . defendant falls only within the class of the general public at large . . . ." Defendant has no standing to attack the statutes on the basis of denial of equal protection.

Twin City Apartments, Inc. v. Landrum, 45 N.C.App. 490, 494-495, 263 S.E.2d 323, 326 (1980). In the present case, contrary to Defendants' cited authority, Plaintiffs are all members of the class of persons against whom the North Carolina Legislature discriminated in attempting to change the terms of their contract with the state.

The Defendants' argument that "A party cannot sustain an equal protection claim if it has not been disadvantaged by any classification" (Defendants' Brief at p. 45) is a correct reading of the equal protection laws in the State of North Carolina. However, the state's position fails because the Plaintiffs have shown that they were "treated differently" from others "similarly situated" and that the Defendant State of North Carolina has arbitrarily and capriciously breached and/or impaired its contract with Plaintiffs and the class of persons that Plaintiffs seek to represent. As alleged in the Complaint, Plaintiffs are all State of North Carolina retirees who vested in Retiree Health Benefit. (Complaint, Introduction p. 2 and ¶¶ 1-26). This classification alone must be afforded equal protection to those whose contractual benefits were not breached or impaired. If Plaintiffs are not allowed the same constitutional protections afforded others prior to the Legislated breaches/impairments, they will be denied equal protection of the law in comparison to such other persons, in violation of the state and federal constitutions. Plaintiffs have stated a claim for violation of the "equal protection" clause under both the state and federal constitutions and Defendants' motion to dismiss on said grounds should be denied.

VII. THE PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

Defendants, in arguing that part of the action is barred by the statute of limitations, have conceded that the changes which occurred in 2009 or later are not barred by the statute of limitations, which particularly includes passage and implementation of S. L. 2009-16, S. L. 2011-85, and S. L. 2011-96. (Defendants' Brief, p. 46). Furthermore, Plaintiff's Third Cause of Action (Impairment of Contract) and Fourth Cause of Action (Equal Protection) are not barred by the Statute of Limitations under the continuing harms doctrine. Under the continuing harms doctrine "a statute of limitations does not begin to run until the violative act ceases. A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an

original violation." *Williams v. Blue Cross Blue Shield of N. Carolina*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (internal citations omitted). Moreover, an impairment of contract and unequal treatment (in violation of the state and federal Constitutions) continues with every denial of benefits or imposition of premiums. Constitutional rights, like the Constitutions themselves, are the supreme law of the land and do not expire, nor does the redress for the violations of constitutional rights. Even if the remedy or damages permitted to be recovered could be limited, the Plaintiffs' rights to a declaration of the law remains ripe for determination. Plaintiffs' causes of action are not barred by the statute of limitations.

VIII. PLAINTIFFS' SIXTH, AND EIGHTH CAUSES OF ACTION ARE NOT INDEPENDENT CLAIMS SUBJECT TO DISMISSAL, BUT RATHER PROVIDE THE "RELIEF" TO BE "GRANTED" ON THE STATED CLAIMS FOR BREACH OF CONTRACT AND CONSTITUTIONAL IMPAIRMENT OF CONTRACT; PLAINTIFFS HAVE STATED A CLAIM FOR DECLARATORY RELIEF UNDER THE SEVENTH CAUSE OF ACTION.

Plaintiffs do not contest that their plea for a Writ of Mandamus, an Injunction, or Specific Performance, (Sixth Cause of Action) cannot survive absent a finding of breach or impairment of contract, or some other substantive wrong (such as a violation of Plaintiffs' Constitutional rights to due process/law of the land). (Cf., Defendants' Brief at p. 48, *citing, e.g.*, *Bailey*, 348 N.C. at 162, 500 S.E.2d at 72 (affirming imposition of a common fund to award attorneys' fees only after "[t]he defendants' liability" for unconstitutional impairment of contract "ha[d]been proven.")). If Plaintiffs have failed to state (or ultimately cannot prove) a substantive claim upon which such relief can be granted, then those claims for relief will necessarily abate. But merely saying that Plaintiffs' underlying substantive claims are not properly stated does not render the claims for extraordinary relief unavailing. *See* §§ I and IV-VI, *supra*. More importantly, the corollary is

also true: If Plaintiffs have stated causes of action for breach of contract or violation of some constitutional right, then Plaintiffs' Sixth Cause of Action must survive.

Defendants seem confused as to whether or not Plaintiff's claim for a Constructive or Resulting Trust/Common Fund (Eighth Cause of Action) is tied to the underlying substantive claims for breach/impairment of contract. (*Compare* Defendants' Brief at p. 47, *citing, Sharp* v. *Sharp,* 133 N.C. App. 125, 131,514 S.E.2d 312,316 (Timmons-Goodson, J., dissenting) ["the issue of constructive trust is not a cause of action which is to be severed from other actions, but rather is a request for equitable relief'], *rev'd for reasons stated in dissent,* 351 N.C. 37, 519 S.E.2d 523 *(1999); with* Defendants' Brief at p. 48-49 ["Other remedies, … not requiring the Plaintiffs to prevail on their common law or constitutional causes of action, require at least some wrongful conduct by the Defendants."]). For example, "a constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing." *Wilson* v. *Crab Orchard Dev. Co.,* 276 N.C. 198, 211, 171 S.E.2d 873,882 (1970)." For the same reasons applicable to the Sixth Cause of Action, if Plaintiffs have properly alleged that the State of North Carolina has breached some contractual or constitutional duty or committed some other wrongdoing, then the Eighth Cause of Action should survive as well.

As to Plaintiffs' Seventh Cause of Action for Declaratory Judgment, Defendants concede that "[a]n action under the Declaratory Judgment Act is certainly available, under the proper circumstances to determine the validity or construction of a contract or statute." Further, Defendants' acknowledge that "[i]n the case *sub judice,* the Plaintiffs seek declarations regarding the validity of certain statutes." (*See* Defendants' Brief at p. 50, citing, Complaint ¶¶ 93-95).

Plaintiffs allege that in consideration for serving as government employees for the length of time required by the state to vest in the Retiree Health Benefit, the state contractually agreed to provide the promised benefits. Plaintiffs further allege that North Carolina, through its legislature, unlawfully modified those vested contractual rights in breach of contract and in violation of the Plaintiffs' rights under the North Carolina Constitution. These factual allegations are deemed to be true, for the purposes of Defendants' Motion to Dismiss, and establish a real case or controversy stating a cause of action under the Declaratory Judgment. Act. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970), (as cited in Defendants' Brief, p. 9); *See also, Gaston Bd. of Realtors, Inc. v. Harrison,* 311 N.C. 230, 316 S.E.2d 59 (1984).

Plaintiffs disagree that "if the Plaintiffs' claims fail under …other theories, they must fail under the Declaratory Judgment Act as well." The express language of the Act itself is to the contrary:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.

N.C.G.S. § 1-253 (2013); s*ee also Gaston Bd. of Realtors,* 311 N.C. 230, 316 S.E.2d 59 ("Courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute.").

Defendants then reverse field, citing *Green* v. *Inter-Ocean Casualty Co.,* 203 N.C. 767, 167 S.B. 38 (1932) for the contrary proposition that Declaratory Relief is unavailable because Plaintiffs have stated other viable claims for relief. (*See* Defendants' Brief at p. 50). This argument wildly misses the mark as well. In *Green*, the plaintiff sought to rely on the Declaratory Judgment Act as a springboard for future damages after the completion of trial, the

rendering of a jury verdict and the entry of judgment. The North Carolina Supreme Court denied the belatedly requested relief under the Act holding on appeal that it was:

> …quite obvious from the complaint that this is an action to recover under an insurance policy, that the alleged cause of action had already accrued, and that the plaintiff had not contemplated a proceeding under the Declaratory Judgment Act.

Green v. *Inter-Ocean Casualty Co.*, 203 N.C. at 774, 167 S.E. at 42. The case is of no help as to whether these Plaintiffs' Complaint states a claim upon which declaratory relief can be granted, as the Plaintiff in *Green* had not even cited the Act in his complaint. Moreover, as our Supreme Court has reasoned:

> We have recognized that "a petition for declaratory judgment is a particularly appropriate means for determining the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of the important public interests involved." Id. Accordingly, we hold that the trial court properly denied the Morgan defendants' motion to dismiss the declaratory judgment action.

Stephenson v. Bartlett, 358 N.C. 219, 227, 595 S.E.2d 112, 117 (2004). Plaintiffs have stated a claim for Declaratory Relief in their Seventh Cause of Action, and Defendants' motion should be denied as the Complaint adequately discloses an actual controversy between the parties as to the Plaintiffs' rights to the Retiree Health Benefit and the appropriateness of the legislature's unilateral annulment of those rights.

CONCLUSION

North Carolina law is clear and supported by numerous Supreme Court decisions; Retiree Health Benefits are a vested contractual benefit owed to the Plaintiffs as deferred compensation that cannot now be unilaterally diminished. The 'right to amend clause' does not apply to the vested contracts between the state and the Plaintiffs. The Plaintiffs' Complaint adequately states a claim for relief under the 12(b)(6) standard, the claims are not barred by sovereign immunity or

failure to exhaust administrative remedies, and therefore the Defendants' Motion to Dismiss should be denied.

This 25th day of February 2013.

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

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CERTIFICATE OF SERVICE

Certified that on the 25th day of February 2013, I have served a copy of the foregoing **Plaintiffs' Brief in Opposition to Motion to Dismiss** upon counsel for Defendants by placing said copies in postage pre-paid first class envelopes, addressed as follows, which are the last known addresses, and by depositing said envelopes and their contents in the United States mail:

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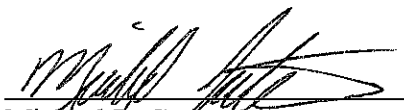

Michael L. Carpenter

Appendix to Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss

STATE OF NORTH CAROLINA **IN THE GENERAL COURT OF JUSTICE**
SUPERIOR COURT DIVISION

COUNTY OF LINCOLN **10 CVS 112**

EMILY ROBINSON, BILL AVERY, et al.,
vs.
LINCOLN COUNTY, NORTH CAROLINA,
Defendant.

HEARING

The above-captioned case coming on for hearing at the February 14, 2011 Civil Session of the Superior Court of Lincoln County, Lincolnton, North Carolina, before the Honorable Beverly T. Beal, Superior Court Judge presiding, the following proceedings were had, to wit:

APPEARANCES

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DATE REQUEST RECEIVED: 2/2/2012 DATE DELIVERED: 2/18/2012

Colleen Mosier, CVR
704.953.2771

This is verbatim transcript of the hearing in the matter of Emily Robinson, et al. versus Lincoln County, taking place in the Lincoln County Courthouse, Lincolnton, North Carolina, on the 14th day of February, 2011, beginning at 9:28 A.M.

* * * * * * * *

THE COURT: Counsel, I'm going to ask you to announce your appearances for the record, please.

MR. CARPENTER: Michael Carpenter for the Plaintiffs, along with Chris Welchel from my firm.

MR. TAYLOR: Jeffrey Taylor, for Lincoln County. Your Honor, for the record, we have a cross-motion for summary judgment also.

THE COURT: Yes.

MR. CARPENTER: And the issues, they're so intertwined, a decision on one will amount to a decision on the other.

THE COURT: All right. Who wants to go first?

MR. CARPENTER: I prefer to go first, since I filed the first motion.

MR. TAYLOR: No objection.

MR. CARPENTER: Your Honor, if you've read the brief, and I'm glad to hear you say that, it will help to streamline the process a little bit because you understand or remember a little bit about what this case is about. Before I get any further, I'd also like to introduce, I think we've got about eleven of the Plaintiffs, who are actually here to observe the proceedings today. They're seated along

the back pew here, and the back two pews in the far corner.

This is a case about retired Lincoln County employees. These are all government employees who worked for Lincoln County. Most of them worked for a rather long time.

In 1995, the Board of Commissioners passed a -- what's called a policy, and the policy directed that government employees, Lincoln County government employees, would receive a particular benefit if they satisfied certain qualifications. The benefit was that they would receive, essentially, health insurance after they retired if they met the qualifying conditions. And there was a time limit, they had to be, you know, full-time or part-time, up to a certain level, serve so many years. It was a typical ten-year-type qualification.

All of these employees served their time and qualified under that policy. The policy in 1995 is attached to the brief, I believe as Exhibit A. It contains basically sort of an outline of what the hospitalization policy would be, it's called "Hospitalization Policy," but in effect it's just a health insurance policy.

At the time it was passed in 1995,

there was no condition in that policy stating what the particular coverage level would be, in terms of whether it would be, you know, 80/20 PPO, a 90/10 PPO, whether it would be an HMO type policy. But Lincoln County had, up until 2009, had the same type of coverage. They may have switched providers a couple of times, from one insurance company to the next. They had from 1995 to 2009 the exact same type of coverage for health/medical benefits. Those benefits were a 90/10 PPO.

Under the original 1995 policy, and that's Exhibit B to our brief, is a memorandum that was circulated. It was drafted by the county manager, it was circulated, I believe, to the Board of Commissioners as well as to -- as well as to some employees, or I understand it was circulated within the departments in Lincoln County.

If you look at that document, Exhibit B to our brief, which is also -- and I'll take a step back for a second. These two documents are authenticated. We sent a request for admissions that the Defendant answered, and admitted the authenticity of both Exhibit A and Exhibit B to our brief, which is the policy. So, we're on the same page in terms of what the 1995 policy is; we're on the same page. This

memo is what it is. So, these are both properly in evidence.

The 1995 policy, down at three bullet points, one of the bullet points down here in the parentheses section says full-time employees would have benefits paid, one hundred percent. That's talking about basically insurance premiums for this policy once they retired. Well, that was the practice for many years.

In fact, the first named Plaintiff in this case, Emily Robinson, was the personnel, sort of like the personnel manager for the County. They didn't have at that time, I don't think, an HR director. She worked with the county manager, and essentially she was in charge of human resources and benefits. She wasn't the -- I guess what you would say the top decision maker, but she was more or less the person doing all the heavy lifting, all of their paperwork.

We have an affidavit from here that we've submitted which sort of goes into detail, explaining that this was the policy, this memo was sent, and that --

THE COURT: Where is the affidavit?

MR. CARPENTER: It was filed on

February 11th.

THE COURT: I do like to see that these things are actually physically in the file, so I'm looking for that.

MR. CARPENTER: I've got a file-stamped copy of it, so it's probably downstairs somewhere if it's not in your court file.

THE COURT: I'm back to the Plaintiff's first set of request for admissions. Were the request for admissions -- was there a response to those?

MR. CARPENTER: There was, Your Honor. I'm going to get to that. I'll hand up the responses now, because they're definitely a significant portion of the --

THE COURT: I don't see these matters in the court file. I have the notice of hearing and I have the Defendant's Motion for Summary Judgment, and the -- and the Plaintiff's motion. And the next item I have is the report of the mediator, dated 12/13/2010, so they're not physically in the file.

MR. CARPENTER: There should be, and I believe there's also an affidavit in the Defendant's file on their own behalf. It should be in the file as well, so I don't know why there's -- I assume that one was filed. I know for a fact that the affidavit of

Emily Robinson was filed, because I've got a file-stamped copy of it in my file.

THE COURT: Madame Clerk, can you check and see if those affidavits are filed? All right. Go ahead, sir; I'm sorry to interrupt you.

MR. CARPENTER: That's all right. I want to make sure everything is in order in the file. In her affidavit she states that she was basically sort of administering the benefits at issue, including this health insurance benefit for retired employees. And she states, she goes on to say that she understood the policy to be that one hundred percent of insurance premium would be paid for retired employees, which is consistent with the memorandum from the county manager, which has been admitted and is attached to the brief, and that was the actual practice.

She goes on to say that that was the actual practice, that it was the practice of the County to pay one hundred percent of the insurance premiums. And I don't think the county actually disputes any of these points in terms of what was happening up until 2009.

The issue is, and the good news is that there really -- I don't think there's any factual disputes at all in this case. It's relatively clean,

it's relatively to the point when it comes to all the facts. We stated out quite a few of the facts in the request for admissions; quite a few of them were admitted. And I'll briefly go through the fact section, and sort of summarily go through and sort of explain what those different facts are that have been admitted.

The County has admitted that all the employees at issue essentially fulfill the qualifications for this particular benefit, being continuation of their health insurance policy. They admit that all these employees are vested under the 1995 policy, and they admit the policy is what it is. The policy is attached as Exhibit A as the actual policy.

So, we're talking about the same document, we're talking about the same people, the people are all qualified in that they have all vested. The County also admitted in their request for admissions that generally once vested you cannot change a benefit, and that's their sort of way that they put their response, generally once it's -- it's admitted generally that once a benefit is offered and an employee is vested in it that that benefit cannot be changed, and that's really what is at the heart of

this case, and that's where we get into the law.

There are several authorities in North Carolina regarding government employee benefits, and it's really the same as private employee benefits, but we found and tried to summarize the public or government side, because that is obviously more relevant in this case and it would be privately -- if it was privately it would be under the Wage and Hour Act, and there would be a few other additional provisions that would come into play. But it's a government employee, government employer, so there are quite a few cases from the North Carolina Court of Appeals and from the Supreme Court, in fact, that talk about benefits.

They all talk about retirement benefits, and that's what this was. These employees weren't entitled to this continuation coverage until after they retired, because they would receive regular health insurance while they were employed with the County, and then upon retirement they would receive a continuation of this coverage until they reached the age of sixty-five, and then as policy states, and as County admits, they would go on Medicare and be entitled to a Medicare supplement that the county would pay for.

The issue in this case, and here's where the rub comes, in 2009, July of 2009, the Board of Commissioners had a meeting and they changed the policy, they changed the terms. The terms are actually -- it's not attached here. It may be somewhere else in the record, but in the 2009, they admit that the terms were changed, the benefit was changed. It went from a 90/10 PPO insurance policy to an 80/20 policy, so the benefits were reduced from the employee, the retired employee's perspective.

In addition, they ceased paying a hundred percent of the insurance premiums and they started paying only about ninety percent. So, the employees, retired employees included, were entitled or had to pay ten percent of their own insurance premium, and that was a major change not only in policy but in practice. The practice had been a hundred percent and in fact policy had been a hundred percent, as the memo from the county manager and as the policy itself seems to indicate.

In North Carolina, once you vest under a particular benefit that benefit cannot be taken away from you. That sort of puts it in summary. And the key issue in this, and I understand I don't think that's in contest; I think the County agrees that

these are vested benefits. The question is, and I think it's a question of law, is what vest, what terms vest. We're not seeking to force the county to go back to the exact same policy they had with the previous provider. We just want to ensure that they get the exact same benefits that they had when they vested, which is what North Carolina law provides for.

There are several cases; there's a Faulkenberry case from the North Carolina Supreme Court. That involved the Teachers and State Employees Retirement System. There's also the Simpson case, which involved North Carolina local government employees retirement system. Both of those cases can sort of be summed up by saying what I just said, and that's that once you vest those benefits cannot be taken away, and the vesting occurs when you reach and satisfy all the qualifications.

The County admits that these folks have reached and satisfied all the qualifications. So, once they met those qualifications the terms of the benefits are essentially locked in. That's what vesting is; that's when the vesting occurs.

So, when these particular employees vested, which occurred between 1995 and 2009, at different times because they are different, you know,

they had different tenures, they had different situations. Some of them vested, you know, rather recently. Some of them vested back before 2000, I believe. The result is the same, and that's that once they vest they vested under that 1995 policy and they're entitled to all the rights under that 1995 policy as a matter of contract. And that's also what the case that we've cited in our brief, the state -- it's a contractual right. It's a contractual right that cannot be taken away, cannot be impaired by subsequent changes or legislation by either the state or the county or any other government entity, because it's a binding contract.

And the terms, as they existed when all these folks vested, was one hundred percent paid premium under a 90/10 PPO plan, and then once they hit sixty-five, they would be entitled to a Medicare supplement. I understand that the sixty-five Medicare supplement part is not contested at all, and that's still being provided. The problem here is they've reduced the premium payment, what they're paying in premiums from about ten percent, and they're also -- they've reduced the coverage. Under North Carolina law and various opinions from the North Carolina Supreme Court and otherwise, you can't do that. Once

those benefits vest those are the terms, the terms are locked in, you can't change it sometime later.

And the reason for that is -- it's sort of a -- these folks were working with the county, working on this tenure, assuming that they would have these benefits when they retired. Just like anyone else who retires, they're working towards a retirement plan. You know, they're retired, they can't go back. They're too old, they have medical issues and what not, but they were relying on the terms of this 1995 policy, and as it was interpreted in that memorandum.

These people put their years in, they put their time in. They deserve whatever they vested in, and they're all vested in the time period where they should get one hundred percent of the premiums paid and a 90/10 PPO policy.

I would be happy to go into a little more detail on a couple of these other points, but I expect Mr. Taylor is going to address a few other things, and I'd like an opportunity to respond to it. But that's sort of our argument in a nutshell.

THE COURT: Thank you, sir. Let me tell you, I now have in front of me the affidavit of George A. Wood, and the affidavit of Emily Robinson, which you've already mentioned. So, I have those in

front of me now to consider and both of them have been stamped as filed, so they are part of the court records.

All right. Mr. Taylor?

MR. TAYLOR: Thank you, Your Honor. Your Honor, let me just start off here by trying to sort of crystallize what it is we're in debate about. Obviously, Mr. Carpenter has correctly stated that we do, both sides do agree about a lot of the details of this, both on the facts and the law.

There's a question here that arises from the record as to what the benefit was. You'll see the word "benefit" in the policies, in the various versions, without necessarily an explanation of what the benefit is, whether it is 80/20, 90/10, full payment of premiums and so forth.

THE COURT: Excuse me just a second. I want to clarify something now so I won't interrupt you later. Both of you are using the term "policy." Now, you're talking about the county's policy?

MR. TAYLOR: Yes, sir.

THE COURT: Normally when I hear the word "policy" I think of the policy of insurance, but we're not talking about what it says, we're talking about what the county's policy was in regard to two

things, and both of these refer to retired employees?

MR. TAYLOR: That's correct.

THE COURT: And one thing is what portion of the premium the County would pay for providing health insurance to retired employees, and the second thing is what would be the policy, the policy of insurance provision in regard to the portion to be paid by the company, the insuring company, and what portion would be paid by the employee, or retired employee.

MR. TAYLOR: Correct.

THE COURT: So, henceforth unless you say "policy of insurance" or "insurance policy," I'm going to think the County's policy, okay? Thank you. Go ahead, sir.

MR. TAYLOR: All right, Your Honor. And I'm glad you mentioned that, because that gives me a point, just to make a point, that we are talking about county policy here as opposed to county ordinance. And that's one of the distinctions I'll address a little bit later, about the case precedence that Mr. Carpenter has addressed. I think the majority if not all of his case precedence involved legislative enactments that amended prior legislative enactments in the form of, in the state cases at

least, general statutes, benefits that were provided by general statute and then later amended or appealed by general statute.

And so here, the distinction is that the analogy would be a county ordinance, and we don't have a county ordinance. We just have the county policy, never have had a county ordinance that addresses this issue.

If I may, I'd like to hand up copies of the statues I'm going to cite in just a moment. If I may approach, Your Honor?

THE COURT: Yes, sir.

MR. TAYLOR: Just to give you a little bit of background as to the history, Section 153A-92(b) of the General Statutes provides that, and I quote, "A county may purchase life insurance or health insurance, or both, for the benefit of all or any class of county officers and employees as part of their compensation. A county may provide other fringe benefits for county officers and employees." That's the end of that quote.

153A-93(b), which is the next statute, provides, quote, "A county which is providing health insurance under G.S. 153A-92(b) --"

THE COURT: Let me ask you to slow down

just a little bit, just to be sure that I can hear you and so she can record it.

MR. TAYLOR: I apologize. I have a tendency to talk too fast. G.S. 153A-93(d) provides, quote, "A county which is providing health insurance under G.S. 153A-93(d) may provide health insurance for all or any class of the former officers and employees of the county. Such health insurance may be paid entirely by the county, partly by the county and former officer or employee, or entirely by the former officer or employee at the option of the county." And that's the basis for any county government's provision of health insurance benefits for either it's current employees or retired employees or both.

And since about the 1970's at least, Lincoln County has operated under the county manager system of local government, which is established in Article 5, part II, of Chapter 153A, specifically sections 81 through 84 of 153A, and I've handed up the Section 153A-82, which addresses the powers and duties of the manager.

Pursuant to this county manager system of government, the Board of Commissioners makes policy for the county and the county manager carries it out subject to the general instruction and control of the

Board.

Now, having laid that foundation, the background of the health insurance benefit here in Lincoln County is this. At it's regular meeting held on September 6th of 1983, the Lincoln County Board of Commissioners adopted a resolution that was entitled, quote, "A resolution authorizing the county to provide health insurance for former officers and employees who are receiving benefits under a retirement system in which the County is participating." That's the end of that quote. There's a copy of this resolution, Your Honor, attached to the affidavit of Mr. Wood, as Exhibit A.

If I may just quote briefly from the resolution, I won't read the whole thing, but the critical parts of the resolution say, "Now therefore be it resolved by the Board of Commissioners, the Board of County Commissioners of Lincoln County, as follows: Section 1 of the health insurance shall be provided to its former officers and employees who are receiving benefits under a retirement system in which the County is participating."

Section 2, "The health insurance shall be provided on the same basis as is provided to regularly employed officers and employees of the

County." And the rest of it is just about the adoption date and so forth.

Now, that resolution was adopted September 6th of 1983, and I would note at this point, Your Honor, it did not address any specific dollar amount to be paid by the county for such insurance, it didn't address any specific percentage of the premium to be paid by the County for such insurance, and it didn't address any specific type of policy or level of coverage of insurance to be provided such as 90/10, 80/20, and so forth.

Now, Mr. Carpenter said in 1995 the Lincoln County Board of Commissioners adopted the policy that he referred to earlier, and there's also -- I believe it's an exhibit in his affidavit, and it's also Exhibit B to Mr. Wood's affidavit, no dispute about the contents of the copy of the policy or anything like that. We just both happened to rely on it and both said it in different places.

At that time, the purpose of the revised policy was to make clear that the length of time of the benefit was twenty years, and as Mr. Carpenter said, we don't contend there's a vesting issue with regard to any of these Plaintiffs because they all had at least twenty years of service. So,

the question is what were they vested in, not were they vested.

The revised 1995 policy states that the County, and again I quote, "Shall continue individual hospital insurance to its employees upon retirement." That's in Section 2.0 of the first sentence there on the first page. Again, nowhere does this 1995 policy state either any specific dollar amount to be paid by the County, any specific percentage of premium to be paid by the County, or any specific type of coverage, such as a 90/10 or an 80/20 or any of those types of insurance policies. And in fact, in certain places Section 5.3 and 5.4, I believe, this 1995 policy refers to the, quote, "Regular group plan which applies that the retiree coverage will be congruent with that as provided to regular employees."

Now, it's also important to note at this point that the 1985 policy does not say it repeals or supercedes any previously adopted policy of the Lincoln County Board of Commissioners, so it must be read in conjunction with and in light of the 1983 enactment. And also at that point if the Board had intended that the County pay a hundred percent of the health insurance premiums of it's retired employees in perpetuity, all it had to do was say so, but the Board

did not.

Mr. Carpenter has cited a 1997 memo, that was about two years after this resolution -- excuse me -- this policy was adopted, from then county manager Rick French to them Board of Commissioners chairman Lewis McConnell, as evidence that the amount to be paid by the County was a hundred percent of that 1995 policy. But a careful reading of that memo indicates that when he makes the reference to one hundred percent he's illustrating the difference between the percentage of the benefit that full-time employees would receive versus the proration that would be made for part-time employees. In other words, whatever the benefit is the County would pay a hundred percent for it's full-time employees and if it was somebody who was a fifty percent, part-time employee, the County would pay fifty percent of the benefit and so forth.

So, the question still is, a hundred percent of what? Again, the 1997 memo, just like the 1983 and 2005 policies enacted by the Board, still makes no reference to any specific dollar amount being paid by the County, any specific percentage of premiums to be paid by the County, or any specific type or level of coverage in insurance policy.

And I would just note as a sidelight here about this memo, that it kind of purports to be the manager telling the Board what the policy is rather than the other way around, which I think is not the way it's supposed to be under the county manager system of government, but having said that I'll move on.

Now, in 2009, the current county manager, George Wood, as he describes in his affidavit, undertook an analysis of the cost of health insurance for current and retired employees and proposed the changes that are at issue in this case, from the one hundred percent premium being paid by the County to the roughly 91/9 split, with current or retired employees paying nine percent of the coverage cost.

As the Court knows, just from common knowledge in the news every day these days, employee benefits is a major concern of government, both at the local, state and national levels at this time, as health care costs continue to rise and budgets get crunched with the economy and so forth, and I think that's what Mr. Wood was doing here, taking a look at what the hard realities were about trying to continue to fund this coverage.

At all times relevant to this action, Lincoln County contends that the retired employees had received what the original 1983 policy promised, and that is that the health insurance shall be provided on the same basis as it was provided to regularly employed officers and employees of the County. That was the policy then, it was the policy in 1995, and it's still policy now.

As I said earlier, most if not all of the cases cited by Plaintiff's counsel involve legislative amendments or repeals of prior legislative enactments and that's just not the case here. And as the UNC School of Government has noted, this particular situation is a case of first impression in North Carolina. The Court said there are no reported cases on the issue of a local government making changes to the health insurance benefits of its retired employees.

The Bailey and Faulkenberry cases address state-level retirement benefits, taxation of those benefits, those kinds of things, but there are no cases that I'm aware of, that I've been able to locate, that address the issue of changes in the premium payment provision, if any, or the coverage amount, or anything like that with respect to a health

insurance benefit for retired employees of local government. The precedent that you take from these other cases is to some extent an extension; you just extrapolate all these other cases.

I will just point out as a side note on this that a couple of these Plaintiffs, -- Mr. Carpenter put in his brief that the Plaintiffs were asking that their coverage, if the Court rules in their favor, be reimbursed at the amount that they paid for all these months since the policy took effect in July of '09, and just for the record I would like to note not all of these Plaintiffs have been retired during this whole time. Mr. Fredell just retired recently, and I believe also Mr. Stanley, so there would need to be some consideration taken to that.

That's kind of the main points of my argument. I'd like an opportunity to respond if Mr. Carpenter comes up with anything that we haven't heard yet on his rebuttal.

THE COURT: Well, let me clarify something. You said, you mentioned two employees that you said retired recently.

MR. TAYLOR: Yes, sir, within the duration of this litigation, and I believe within the past two months or so.

THE COURT: Well, were they vested?

MR. TAYLOR: Yes. Vesting is not an issue with them, but they were working --

THE COURT: After the change in the policy?

MR. TAYLOR: I apologize, Your Honor. I just -- I see where you're going with that, and I'm just realizing what you may have been addressing. I was putting it all in the realm of retirement, and that -- so, I'll withdraw that point. I think I understand where that's headed.

THE COURT: I'm not quite sure myself, but I see something there that's a --

MR. TAYLOR: Well, I think it would be -- if the Court is inclined to grant their motion, it probably would not matter if they had not been retired because they did pay a portion of the health insurance. Well, actually, they were current employees at that time and we're talking about retirement benefits. Yeah, I'll stick with what I said at first; they should not be entitled to the payment made until they actually retired.

THE COURT: All right.

MR. TAYLOR: Because that is the benefit that we're talking about. There is not a

contention that the insurance policy cannot be changed for current employees, and these two were current employees until, I believe, November or December.

THE COURT: That's an interesting point. I'll hear from Mr. Carpenter; go ahead.

MR. CARPENTER: Just to address that point first, those two employees did not pay or did not -- they wouldn't be entitled to the difference between what we contend the County should have paid and what they actually paid. We contend they should have paid one hundred percent during that time --

THE COURT: A hundred percent of the premium?

MR. CARPENTER: Right. So it's only a calculation issue. It really doesn't have anything to do with whether they're entitled to the benefit going forward and whether they're entitled to any funds because they would be entitled to still what premium they paid since the time that they retired. It would just be a calculation issue; we'd have to calculate them differently than all the rest because all the rest have been retired before July 2009 when the policy changed and when the premium payment terms changed. So, for everyone else, they're going to have basically the same amount of premium that we're

requesting in damages back. But for those two employees, theirs would be different. They would have a different -- they would have different damages. It's something that we could easily calculate. I don't know that there would be any -- it's just a matter of math.

THE COURT: All right. Other responses you wish to make, Mr. Carpenter?

MR. CARPENTER: Just a couple things. One, regarding the 1983 policy versus the 1995 policy, the 1983 policy does have a provision in it, it's very short, and you'll see, I mean, you've got a copy of it. That section 2 that says something along the lines of that benefit will be provided on the same basis as is provided to regularly employed officers and employees --

THE COURT: Hold on just a second, now. We're looking at the 1983 -- which one?

MR. CARPENTER: The 1983 policy. I think it's attached to the George Wood affidavit.

MR. TAYLOR: It is, Your Honor. It's Exhibit A to the Wood affidavit.

THE COURT: Yes, sir. Go ahead.

MR. CARPENTER: There's a -- go down there, there's a little section 2 that says something

along the lines of the insurance will be provided on the same basis as is provided to regularly employed officers and employees. I think an important point is the 1995 policy does not contain any provision like this at all. That is a distinctive change, or at least I see it as a distinctive change from the 1983 policy to the 1995 policy.

The '83 policy contained that term, the '95 policy did not. The '95 policy essentially replaced the '83 policy in almost every regard. It essentially just went over the top of it, changed some of the qualifications, some of the tenure issues, and also fleshed out -- you can see the '83 policy is really short. It's like, you know, six lines. The 1995, they expounded it to explain it a little better to everyone involved, including how part-time employees were going to be compensated for this benefit. They wouldn't get the same amount as full-time employees.

I think that's an important point too, everywhere, and it's stated in the affidavit of Emily Robinson, the practice was to pay a hundred percent of the premium. And the practice is important too, not only because that's what all the employees understood, but that's the heart of the contract. In North

Carolina, employment contracts don't have to be all in writing and they don't all have to be basically passed, saying a particular person, a policy, can be part of the contract, and the practice can be part of the contract.

So, if the practice has been to pay one hundred percent of the premiums, then that becomes part of the contract. The contract includes practice and policy, and that's something that's stated in the affidavit.

I don't think that the County denies that up until 2009 their practice was to pay one hundred percent of the premiums. Under the case law we've cited, practice has something to do with it. A couple cases, I believe it was the Bolick case, which actually was a local government issue, Bolick versus --

THE COURT: Caldwell County.

MR. CARPENTER: Yeah, Caldwell County. That case actually was a local government case, and I think it addressed somewhere in there the practice, what was understood. And furthermore, in Faulkenberry, and this was a North Carolina Supreme Court case, Faulkenberry court -- and this is a quote from that case, "Plaintiff expected to receive what

they were promised at the time of vesting. They may not have known the exact amount, but this was their expectation. The contract was substantially impaired when the promised amount was taken from them."

And what this reflects is that sometimes all the numbers, all the terms aren't necessarily set out in one document, partly because retirement benefits, the numbers fluctuate based on time, interest, et cetera. But under North Carolina law what they understood to be the benefit is a part of the benefit. That's widely understood, what the practice is is part of the benefit. The practice, it's undisputed, is that it's a hundred percent premium paid.

The benefit was also coverage at the 90/10 level, not the 80/20 level. And I believe, and I'll agree with Mr. Taylor, I've not found any cases that address that in terms of health care coverage, whether it's locked at 90/10 or 80/20. But all the cases seem to suggest that it's no different than a retirement or pension plan, because retirement or pension plans can be based on a numerical calculation or some sort of level of coverage. And the disability retirement benefits, especially, are similar to that, where they're based on some mathematical calculation.

And the courts have found in those cases that the mathematical calculation that was in effect at the time that they vested is what has to be continued. They can't change that mathematical calculation sometime later on. That is the benefit, that is what must be continued until, I guess in this case, until these employees reach sixty-five and then they're all on Medicare supplement plan.

Also, I'll point out one more issue, and it was in the —- I believe it's in the memorandum. It might actually be in the policy itself. There are references, and I'll agree with Mr. Taylor, it doesn't say anywhere in here that the premium is to be paid at a hundred percent. That was the practice; it's not in the policy in that same way. But there are references in here to 5.7, and I'm looking at Exhibit A to our brief, which is the actual '95 policy, 5.7(d) talks about the entire premium was paid monthly by the 25th of each month.

I think the difference in the memo from the manager -- and it's true, in the policy it talks about what kind of employees, they don't receive as much of the premium being paid, but I think it's clear that full-time employees would receive one hundred percent. I think that's what he's referring to in the

memo. More importantly, that was practice, and again, practice is part of the benefit and part of the contract between the County and the employees.

As a point of remedy, I guess, what we're asking for, Your Honor, is for the damages, being the ten percent premium that's not been paid, that these employees had to pay from 2009 until the current date, which is about -- for each Plaintiff it's an amount of $1,132.00. We've got that calculated. That's for each Plaintiff, up through today, and that the Court order that the policy and the coverage level be reinstated by specific performance/writ of mandamus, that the Court order that the County has to continue this coverage at the promised level, being the 90/10 PPO, and a hundred percent premium being paid going forward, and then compensate them in damages for this amount that they have paid, basically until we got into court today in order to have the Court determine their rights.

That's the remedy level. I don't think there's any issue either of what remedies are available or not available, but I can address that further if that's an issue.

THE COURT: Mr. Taylor, do you wish to be heard?

MR. TAYLOR: Yes, briefly, Your Honor. Mr. Carpenter made a reference to what all the employees understood, and I believe that's -- should the Court deny both these motions and let this case go to trial, I think that's an important fact that may have to be determined at trial, what they understood and what the source of their understanding was.

There's a statement in Ms. Robinson's affidavit, which is interesting worded in the passive voice, "all county employees were informed." And so, I question that. Secondly, the reference that Mr. Carpenter made to Section 5.7(d) of the 1995 policy, the sentence that refers to the entire premium being paid by the 25th of each month, if the Court reads that whole section, the context of that is that the policy provides the benefit to employees who have twenty or more years of service with the County.

The policy also provides that employees who have fifteen but less than twenty years with the County can purchase the coverage, can stay on the policy and continue their -- excuse me; I'll go back to Your Honor's terminology -- purchase their insurance policy and pay their premium, and can stay on the insurance policy but it's at their expense. And that reference to the entire premium being paid by

the 25th of each month is referring to what the fifteen to nineteen year retirees would have to pay. So, that's really not -- it has no application to what we're talking about in this lawsuit, because we're talking about people who have twenty or more years and those employees are addressed in earlier sections of the policy.

THE COURT: All right. Thank you, counsel. Counsel, I'd like to get this done today, and I need some time to read. I haven't seen the affidavits yet; I want to study them carefully. I think there's some points here that are really pertinent.

Here's what I'm going to do. First of all, let me check -- you know, I mentioned earlier that I had a lot of family in this county, and I've looked at the names of the Plaintiffs and I do not recognize any of these names as being related to me. Robinson, Avery, Beam, Bridges, Campbell, Canipe, Crouse, Fredell, Goins, Houck, Martin -- although my Aunt Mary was married to a man named Martin -- Ronnie Matthews and Larry Stanley.

And some of those folks are here, and I just need to ask, do any of you all think you're related to me? I didn't think so. I don't recognize

any names at all, so I don't see that there's any conflict here, all right?

In regard to Lincoln County, I don't have any relatives serving on the Lincoln County Board of County Commissioners. So, I don't see any conflicts.

What I'd like to do, I have another matter here, Mr. Woody's matter, I'd like to take up, and then we're going to recess at about 12:30. I'd like to see if you all can come back at 1:30, and let me do the research during that hour.

You've done a very good job of presenting your cases, your positions, and I'd like to just double check a few things before we come down to a final conclusion. This is very important, and I think I've got a pretty good hold on it.

How about that, 1:30? Madame Court Reporter, will that be all right with you? Sheriff, will that be okay? All right. We'll see you all at or about 1:30.

(WHEREUPON, the Court addressed other matters unrelated to this case and resumed the hearing at 1:50 P.M.)

THE COURT: I'm going to turn my attention now to the case of Emily Robinson and others

versus Lincoln County. Ladies and gentlemen, this is a matter that does not require a jury to be involved, all right? So, if you can listen, if you wish to listen, or you can not pay attention; I don't particularly care. But it does not violate any rules for you to hear what's going on, because it would not be a matter that would come before you.

Now, in this matter, counsel, I've heard from you and I want the record to reflect the items that I've considered in making a decision on the cross motions for summary judgment.

I've considered the contents of the pleadings and they are contained in the court file. I've considered the brief that was sent to me by the Plaintiffs' counsel. I have considered the case that's referred to; I have considered the affidavit of Emily Robinson. I have considered the responses to Plaintiffs' first set of request for admissions, the affidavit of George A. Wood, citations to statutes 153A-82 and 153A-92, and 158A-93. And I find that having reviewed these things there is no genuine issue of any material fact, and a summary judgment would be appropriate.

Now, in doing that, I want to point out a couple of things that I do see so that you'll be

aware of some of my reasoning here. In reviewing the affidavit of Mr. Wood, attached to it were copies of two items. One, as I understood it to be, the original resolution adopted by the county commissioners, I believe it was in 1995. And that was what we might say would be the original county policy in regard to the rights of retired employees, and it says here that this is a resolution authorizing the County to provide health insurance for four officers and employees who are receiving benefits under the retirement system in which the County is participating.

If it -- it recites that whereas 153A-93 authorizes the County to provide health insurance, and the next -- that's a part of that paragraph. Next paragraph, whereas the cost of such health insurance may be paid fully by the County.

Now, that is consistent with the provisions of that statute, which in part says that a county which is providing health insurance may provide health insurance for all or any class of employees. Such health insurance may be paid entirely by the County, partly by the County and former officer and employee, or entirely by the former officer or employee.

Now, I take those two and construe them together to the effect that at the time that the Board did this they are setting out a policy that, since they could, they only mentioned may be paid fully, that they had intention to pay fully at the time they said it. And I don't find any genuine issue of material fact, and I emphasize the term "genuine issue."

We have the affidavit of Ms. Robinson in regard to what her understanding was, and I find that there's no genuine issue. And I consider this all to be contractual in nature, and it appears to me that as a matter of law the Plaintiffs are entitled to judgment in regard to the enforceability of the one hundred percent of the premium, and the percentage of payment, which I think is recited as 90/10, and the employee would pay ten percent of the cost of care and ninety percent would be provided by the insuring company as what was contractually provided for, and I find that that is what was intended and what is binding upon the County for these employees.

Now, I have -- we talked earlier about calculation, so what we're talking about is past due and prospective rights and benefits, aren't we?

MR. TAYLOR: Yes, sir.

MR. CARPENTER: Yes.

THE COURT: Those due can be reduced to a calculation.

MR. CARPENTER: That's correct.

THE COURT: So, I need a calculation. Now, I can't grant summary judgment on that at this time, because I don't think that unless you can point me to some calculations that have already been made that I can go to. I mean, I need numbers.

MR. CARPENTER: Your Honor, we did lay forth calculations in the back of the brief. With the exception of those two employees who were retired, it's a calculation of $1,132.32 per Plaintiff, through, I believe, through today, from July '09 until the date of this hearing, Your Honor.

THE COURT: All right. Well, that's in your brief?

MR. CARPENTER: It's in the brief. We can --

THE COURT: It needs to be substantiated in something more than the brief, is what I'm trying to say.

MR. CARPENTER: Okay.

THE COURT: So, the document -- documenting that, and allowing -- so I guess you could

say technically I'm granting partial summary judgment.

MR. CARPENTER: On liability?

THE COURT: Yes. And I will consider summary judgment, and Mr. Taylor and his client need to have a chance to be able to look at what you proposed, need to be able to contest it if they think it's not correct, that sort of thing, or they may consent to it. I don't know what they might do. But I find that you're entitled to liability, that we have a contractual relationship.

I heard your argument about making a difference between ordinance and the mere resolution. That was part of your argument, wasn't it, Mr. Taylor?

MR. TAYLOR: That's correct.

THE COURT: But I don't believe that the case law supports the concept that -- you must have an ordinance. I think that these rise as a set of terms and conditions of obligations contractually, which -- in fact, I think the Bolick case says that oral representations made to an employee can rise to the level of an obligation. And this goes a step farther than that.

I believe that we have what needs to be said in terms of a binding contract. So, I will grant your motion for summary judgment. I would ask you to

prepare it, and I would like you to go ahead and prepare it, and send it to me with the concept of partial summary judgment right now so that I have that. And then we will go a step farther in such form as we need to do so.

I'll be glad to hear this if need be at a subsequent hearing in Lincoln County. I'll be here for the rest of this month, assuming I don't get pneumonia before that and just continue it, instead of having to find another judge and re-educate another judge.

Mr. Taylor, anything in regards to this?

MR. TAYLOR: Well, Your Honor, one of the concerns that the County has about this from a long-term perspective is the specific type of coverage that may be available in the future. A 90/10 policy, which was changed to 80/20, may still be available as of today; I don't have any information on that one way or the other.

But ten years from now, or some other time within the lifetime of these Plaintiffs, it might not be and we believe that -- I don't really have a good suggestion to make to the Court, but we believe that should be addressed somehow to provide

flexibility for the County to meet it's obligations within the confines of what's available in the marketplace.

THE COURT: You said 80/20. Did you mean 90/10, or did I misunderstand something?

MR. TAYLOR: I think I said both. I was just referring to the two, the two different policies, whichever one they -- the 80/20 may not be available in years to come, with the changes in health care.

THE COURT: Well, that sequence of events may be covered by another concept of law that doesn't apply now. I hesitate to try to suggest to you what concepts of law might apply. Contracts sometimes are unenforceable for other reasons, but right now nothing else appearing, it would appear that they're obligated to do this. But there may be something else that arises.

Now, of course, as I said, liability having been established, we go prospectively with the summary judgment. It should set out as hereby ordered, that's sort of a mandatory injunction kind of language I think, is how it looks to me. But I would just -- Mr. Taylor, for his review --

Mr. Taylor, I won't sign that for

probably about five days, to give you a chance to raise some point about the form of the judgment that you want to set.

I certainly would not want to be re-arguing the case, and you can understand that. But I certainly would want you to say hold on, I don't think that's what the judge said, or that there's something about the form that you disagree with. All right?

MR. TAYLOR: All right, sir.

THE COURT: All right. Counsel, my card is here. If both sides would like to have my card with my email address on it, email it in Word format. WordPerfect doesn't work. Sometimes I can't even open a Word, but my assistant usually can, but we'll work that out over time. PDF doesn't work too good for me, because if I -- I sometimes want a word or phrase changed, and I don't like PDF for that reason.

Isn't it amazing how we talk about these things, PDF and VOC, and RPF? I didn't know what it meant until my grandchildren told me. My grandson knows more than I do.

All right. Thank you all very much. That will conclude this matter.

MR. CARPENTER: Thank you, Your Honor.

(WHEREUPON, the matter was concluded)

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STATE OF NORTH CAROLINA **IN THE GENERAL COURT OF JUSTICE**
SUPERIOR COURT DIVISION
COUNTY OF LINCOLN **11 CRS 112**

Emily Robinson, et al.,	)	
	)	
vs.	)	
	)	**CERTIFICATE OF DELIVERY**
	)	
Lincoln County, North Carolina,	)	
	)	
Defendant.	)	
	)	

THIS IS TO CERTIFY that this is the transcript of the hearing in the above-reference matter, commencing at the February 14, 2011 Civil Session of Superior Court for the County of Lincoln, North Carolina, before the Honorable Beverly T. Beal, Superior Court Judge Presiding, and is a true and accurate transcription of the proceedings taken by me and transcribed by me.

THIS ALSO CERTIFIES that the undersigned Court Reporter received a request for transcript on or about February 2, 2012, and the aforementioned transcript was delivered via electronic mail to Ms. Kris Glasco, Gray, Layton, Kersh, Solomon, Furr & Smith, P.A., on February 19, 2012.

THIS, the 19th day of February, 2012.

Colleen Mosier, CVR