STATE OF NORTH CAROLINA COUNTY OF GASTON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 12-CVS-1547
I.BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, ESTATE OF JAMES D. WILSON, BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, and JEAN C. NARRON, and all others similarly situated, Plaintiffs, vs. STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, a corporation, formerly Known as the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation, BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate, JANET COWELL, in her official capacity as Treasurer of the State of North Carolina, and the STATE OF NORTH CAROLINA, Defendants.	**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

Defendants oppose class certification on just two major bases: (1) that a common issue of law or fact among the class members fails to predominate over individual issues and (2) that a conflict of interest exists between the class representatives and members of the class. Both points miss the mark. The overarching legal issue common to all class members is whether each

was entitled to a noncontributory 80/20 health care benefit for the entirety of their retirement. That single question predominates over the individual issues Defendants cite, all of which are secondary and most of which are irrelevant. Defendants' claim that there exists a conflict of interest is similarly baseless.

I. DEFENDANTS DO NOT CONTEST FIVE OF THE SEVEN REQUIREMENTS FOR CLASS CERTIFICATION

At the outset, it is significant to recognize how many of Plaintiffs' positions supporting class certification are uncontested by Defendants. A review of the issues Defendants concede bolsters the case for class certification.

Defendants cite seven requirements for class certification:

1. Named and unnamed members each have an interest in either the same issue of law or fact and that issue predominates over issues affecting only individual class members;

2. Named representatives have established that they will fairly and adequately represent the interests of all members of the class;

3. There is no conflict of interest between the named representatives and members of the class;

4. Named representatives have a genuine personal interest, not a mere technical interest, in the outcome of the case;

5. Class representatives within this jurisdiction will adequately represent members outside the state;

6. Class members are so numerous that it is impractical to bring them all before the court; and

7. Adequate notice has been given to all members of the class.

(Defendant's Brief at p. 2 (hereinafter "Brief") (*citing Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 548, 613 S.E.2d 322, 325-26 (2005)); *See also Faulkenbury v. Teachers' and*

State Employees' Retirement System of North Carolina, 345 N.C. 683, 583 S.E.2d 422 (1997) (*citing Crow v. Citicorp Acceptance Co., Inc.,* 319 N.C. 274, 282-84, 354 S.E.2d 459, 465-66 (1987)).

In their Brief, Defendants have only contested two of these seven criteria. As to the numerosity requirement, there is no dispute that this is a case where 24 living Plaintiffs assert, on behalf of at least 171,267 state retirees, that they vested into the State's healthcare retirement benefits after completing their required service to the State. Neither is there any question about the named Plaintiffs ability to fairly and adequately represent the class or any suggestion that they have a personal interest in the litigation. Similarly, Defendants do not contest that the class representatives will adequately represent out of state class members. Finally, Defendants fail to argue that it would be practical – or even remotely possible – to litigate the claims separately.

Rather, Defendants' first argue that there is no common issue which predominates over individual issues. To support this position, Defendants spend a considerable part of their analysis describing how twenty-one retiree Plaintiffs who were deposed did not testify identically about their respective understandings of their contractual rights. As preposterous as it may sound, in arguing that a "'discrete fact-specific inquiry' would be required for each individual class member" (Brief, p. 7), Defendants are essentially asserting that there are as many as 171,267 different contracts between the State and these retirees. To the contrary, there is only one contract, unilateral in nature, interpreted and administered by the State in the same manner for all class members.

II. IT IS WELL SETTLED THAT STATE EMPLOYEES HAVE AN ENFORCEABLE CONTRACT WITH THE STATE

The applicable judicial decisions firmly establish State employees have enforceable employment contracts with the State. *See Simpson v. N. Carolina Local Gov't Employees' Ret.*

Sys., 88 N.C.App. 218, 223, 363 S.E.2d 90, 93 (1987) *writ allowed*, 321 N.C. 745, 366 S.E.2d 865 (1988) and *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988). In *Simpson*, the court held that a disability retirement formula could not be altered once employees had vested – defined as working for five years with the State. The court reasoned that retirement disability was a part of the employees' deferred compensation and that to deny them that remedy would be contrary to "fundamental fairness." *Id.* at 223-24, 363 S.E.2d at 94.

The principle that State employees have a contractual relationship with the State has been echoed repeatedly by our courts:

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

Contrary to Defendants' contention, they cannot reasonably dispute that the class representatives—and the putative class members—had an employment contract with the State. In fact, the *Bailey* decision refers to that relationship between the employee and the State as "the retirement contract." In both *Simpson* and *Bailey*, as here, "retirement benefits are presently earned but deferred compensation to which employees have a vested contractual right." *Bailey*, 348 N.C. at 141. The single question here is whether the right to an 80/20 noncontributory plan was part of that "retirement contract." That is the predominate issue which is common to the entire class, which smothers Defendants' so-called "individual" issues and which demands class certification. Many of the Defendants' arguments in the Brief go to the merits of the claims raised in the case versus their commonality. At the class certification stage, the Court is not to determine nor weigh the merits of the claims in deciding whether to certify a class. *Beroth Oil Co. v. NCDOT*, 367 N.C. 333, 342, 757 S.E.2d 466 (2014)

III. STATE EMPLOYEES' CONTRACTS WITH THE STATE HAVE FORMED THE BASIS OF NUMEROUS CLASS ACTIONS

Not only do previous cases firmly determine that State employees and retirees have enforceable contractual rights arising from their employment relationship with the State, but the decisions also support that the appropriate manner in which these issues should be resolved is on a class action basis. Of the cases cited above, *Simpson*, *Bailey*, *Faulkenbury*, *Stone* and *Carl* were all adjudicated and resolved as class actions.[1] In addition, class certification has been granted in two very recent cases based on the State's alleged breach of its contract with employees. *Terry v. State*, Order Allowing Motion for Class Certification, August 18, 2015 (14-CVS-12342, Wake N.C. Super. Ct.) (Contractual Right to Step Level Salary Schedule for

[1] *Bolick* was errantly included on a list of class actions previously. The *Bolick* case is important here because it further demonstrates the contractual nature of employees' relationship with the State, but it was not a class action. Another case that originated in Caldwell County, *Taylor v. City of Lenoir*, 148 N.C. App. 269, 558 S.E.2d 242 (2002), involving a class of city employees bringing claims about their membership in the LIGER's retirement system was certified as a class and was the case that should have been referred to in the prior brief.

Magistrates); *Adams v. State*, Order Allowing Motion for Class Certification, March 3, 2015 (14-CVS-15027, Wake N.C. Super. Ct.) (Contractual Right to Step Level Salary Schedule for State Troopers). Thus, the overwhelming weight of North Carolina authority establishes that State employees can enforce their contract rights by way of a class action.

IV. THERE IS NO REASONABLE ALTERNATIVE TO A CLASS ACTION IN THIS CASE

A class action is the preferred procedure to handle a dispute where the members of a class "are so numerous as to make it impracticable to bring them all before the court." N.C. Gen. Stat. § 1A-1, Rule 23(a) (2008). This is done, in part, "to serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987).

Defendants contend that every individual Plaintiff in the class should be required to prosecute a separate case in which there is a personalized inquiry into such matters as communications with representatives of Defendants, conversations with other State employees, and recollection of retiree benefit descriptions in publications and similar points. Defendants apparently believe that this information would support the existence of hundreds or thousands of distinct contracts between the State and its retired employees. Defendants provided a spreadsheet to Plaintiffs in discovery which lists 171,267 retirees that would comprise the class. Defendants thus advance the notion that, to adjudicate their claims and potentially vindicate their rights, it would be necessary for these 171,267 retirees to file separate lawsuits, which potentially could be heard in 100 counties and decided by hundreds or thousands of different judges and juries, thereby inevitably resulting in numerous conflicting results and potentially requiring the State to honor thousands of individualized contracts with innumerably different terms and obligations. This fanciful assertion underscores the infirmity of Defendants' position that

common issues fail to predominate. The class representatives are seeking to have only one predominant legal issue resolved. The notion that individual issues are even relevant, let alone predominant, is more than a wide stretch.

V. COMMON ISSUES PREDOMINATE

A. Defendants' Almost Identical Arguments Have Recently Been Rejected in Two Cases

In the opening class certification brief, Plaintiffs relied in part on *Faulkenbury v. Teachers' & State Emples.' Retirement Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997), in which our Supreme Court held that class certification was proper for a class of State employees. Defendants have sought to distinguish *Faulkenbury* on the basis that the statute in that case appeared to be the sole evidence of the contract, whereas here, the existence of the contract is evidenced not only by statute, but by oral statements and written representations. It is for this reason that Defendants contend that "individual issues of fact predominate," and that "evidentiary showings for each class member would be needed." (Brief, at p. 7). From this starting point, Defendants have looked to differentiate the deposition testimony of the various named Plaintiffs from one another in an attempt to make it appear that common issues do not predominate. Defense counsel recently has attempted this exact same approach in two cases involving contract claims by putative classes of State employees. In the face of the exact same arguments advanced here, the trial court granted class certification in both cases in 2015.

In *Terry v. State of North Carolina*, (14-CVS-12342, Wake N.C. Super. Ct.), Defendants' counsel argued that class certification was improper where a putative class of magistrates disputed the amendment of a salary schedule. (*See*, Exhibit A, Def's Mem. of Law in Opp'n to Class Certification, 1–2). Defendants' counsel unsuccessfully argued that because the State employees had entered into verbal contracts—the content and source of which varied somewhat

among plaintiffs—class certification would be improper. (*Id.* at 13–14). Like the present case, Defendants' counsel urged the court to adopt the position that the magistrate plaintiffs' case was distinguishable from *Faulkenbury* because each contract was formed based on an individualized interaction with supervisory personnel. (*Id.* at 10–11). However, the trial court held that where all plaintiffs contended that the salary schedule was a material term of their employment contract with the State, "[e]ach named Plaintiff and each member of the Class ha[d] a direct compelling interest in the common issues of law and fact, which issues predominate[d] over issues affecting individual members of the class." (*See*, Exhibit B, Order Allowing Mot. For Class Certification, 4-5).

In *Adams v. State of North Carolina*, (14-CVS-15027, Wake Co. Super. Ct.), a putative class of troopers from the North Carolina State Highway Patrol made similar claims. Again, these were not rooted solely in statute, but were based upon various documents and discussions with State employees. (*See*, Exhibit C, Def.'s Mem. of Law in Opp'n to Class Certification, 3). Once again, Defendants' counsel argued that differences in plaintiffs' understandings of the terms and sources of their contracts distinguished the case from *Faulkenbury*, and that individual issues predominated as to the alleged contracts. (*Id.* at 6–18). However, the trial court found that individual issues did not predominate over the common issues, and certified the class because "[e]ach member of the Class ha[d] a direct compelling and genuine personal interest in the common issues of law and fact." (*See*, Exhibit D, Order Allowing Pl.'s Mot. For Class Certification, 4).

The argument for class certification here is even more compelling than in *Terry* or *Adams*. The class representatives here are not suggesting that oral or written representations

form the basis of their contract. Reference to this information simply evidences how the State interpreted and administered the contract and of the overall existence of the same.

Notwithstanding Defendants' efforts to distinguish controlling authority on this issue, Plaintiffs' contentions are entirely consistent with the analysis used in *Bailey* and related cases.

In *Bailey*, there were three different benefit and contribution schemes, five different "mandatory defined" benefit systems, three "optional defined" contribution or benefit plans and three "noncontributory defined" plans. These systems varied in their preconditions for the receipt of retirement benefits. The employment periods required for vesting varied over time. Justice Lake, in evaluating whether there was an enforceable contractual relationship between the State and its retirees, surmised that the following findings of the trial court were important:

> "In the present case, the trial court found as a fact that '[a] reasonable person would have concluded from the totality of circumstances and communications made to plaintiff class members that the tax exemption was a term of the retirement benefits offered in exchange for public service to state and local governments.' A thorough review of the record reveals abundant, competent evidence to support this finding, including inter alia:...communication of the exemption by governmental agents in both written and oral form, use of the exemption as inducement for employment..."

Bailey v. State, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998). It is difficult to imagine that Defendants would not have argued that the difference among class members in *Bailey* should have precluded class certification. Their feeble assertions that *Bailey* should be qualified because it has never been cited in the class action context and that it is incumbent upon the Plaintiffs to establish that the State's communications with the *Bailey* class were not uniform fall flat.

Furthermore, the Court recognized in *Bailey* that even if the evidence "could be viewed as supporting a different finding," the lower court's findings were conclusive. Those findings were made well after class certification in the case. Superior Court Judge Thompson appropriately recognized that the predominant issues which had to be addressed and resolved were the scope and terms of the contract. More importantly, when he considered those issues on

the merits, he affirmed the existence of the alleged terms and the State's violation thereof. The Defendants in the instant case have put the cart before the horse. Their arguments opposing class certification are really directed to the merits of the case, specifically the terms of that contract, which will no doubt be raised at the summary judgment stage. Plaintiffs have satisfied their burden to achieve class certification.

A similar method of analysis was used by the Courts in *Stone* (also a class action) where the Court considered pamphlets and other written materials in addition to the statutes themselves in finding that retirees had a contractual right to an actuarially sound retirement system. *See Stone v. State*, 191 N.C. App. 402, 664 S.E.2d 32 (2008).

In short, Defendants' counsel does nothing more than rehash the arguments that the State has repeatedly made in previous cases. Those positions have been consistently rejected. As previous North Carolina courts have held, the differences in deposition testimony of class representatives relied upon by Defendants are irrelevant to the issue of class certification. Instead, because all Plaintiffs contend that inclusion in a premium-free 80/20 health plan was a material term of their employment contract with the State, each has a direct compelling interest in the common issues of law and fact, and those issues predominate over issues affecting individual members of the class.

B. Plaintiffs Accepted Defendants' Unilateral Contract Offer by their Performance

It is well established in North Carolina that "[a] unilateral contract is formed when one party makes a promise and expressly or impliedly invites the other party to perform some act as a condition for making the promise binding on the promisor." *CIM Ins. Corp. v. Cascade Auto Glass*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 910 (2008) (*citing Gurvin v. Cromartie*, 33 N.C. 174, 179 (1850)); *see also* 17 C.J.S. *Contracts* Sec. 8, pp. 578–79 (1963)) ("A unilateral contract

is one in which there is a promise on one side only, the consideration on the other side being executed . . . It has also been defined as a promise by one party or an offer by him to do a certain thing in the event the other party performs a certain act . . . ."). Thus, such an offer can be accepted by performing the act required by the offeror, as opposed to making a return promise. *CIM Ins. Corp.*, 190 N.C. App. at 812, 660 S.E.2d at 910.

> [W]here one makes a promise conditioned upon the doing of an act by another, and the latter does that act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory.

Erskine v. Chevrolet Motors Co., 185 N.C. 479, 489, 117 S.E. 706, 710 (1923).

North Carolina courts have frequently applied the concept of unilateral contract formation within the context of employment contracts. In *Hamilton v. Memorex Telex Corp.*, the North Carolina Court of Appeals held that an employer's vacation policy—under which "an employee earned the right to a full year's vacation in the next year, subject only to the requirement that he work six months before using the vacation days"—constituted a "unilateral promise to grant an employee vacation in the next year if he worked in the previous one." 118 N.C. App. at 10–11, 454 S.E.2d at 283. The court held that the employer's offer was accepted when employees "met the conditions, *i.e.* working in the previous year and being employed on January of the next year," and upheld the trial court's determination that a contract existed between the parties. *Id.* at 10, 454 S.E.2d at 283. The Court of Appeals reasoning leaves no doubt that a promise of employment benefits in exchange for a certain amount of service constitutes a unilateral offer, which can then be accepted simply by providing the service required. *Id.* at 11, 454 S.E.2d at 283 ("[W]hen 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.").

Not only was *Hamilton* an employment contract case, it was a class action brought by a class of employees who contended they were denied the paid vacation they were promised. Thus, it demonstrates not only that unilateral contracts exist in the employment context, but also that they have been applied in the class action context as well.

The *Hamilton* court followed prior Supreme Court precedent. In *Roberts v. Mills*, in which an employee brought a claim against his employer for failure to pay wages per contract, the Supreme Court of North Carolina held as follows:

> It has become a very general policy with large employers of labor to offer a bonus or additional compensation to employees who shall render continuous and efficient service for a specified period of time. This is not a gratuity or gift, but is an offer on the part of the employer, with whom the offer originates in order to procure efficient and faithful service and continuous employment, and when the employee enters upon the service upon that inducement it becomes a supplementary contract of which he cannot be deprived without sufficient cause.

Roberts v. Mills, 184 N.C. 406, 410, 114 S.E. 530, 532 (1922).

The facts of this case are analogous to *Hamilton* and *Roberts*. Here, Defendants extended an offer to Plaintiffs for the provision of a premium-free 80/20 plan for the duration of their retirement. Under applicable North Carolina law, such a promise plainly constitutes a unilateral offer that was accepted when Plaintiffs continued their employment by meeting the service requirements to vest and thereafter retiring with the State. That Plaintiffs may have inconsistent understandings of how that offer was made is of no consequence when, in fact, such an offer was made and was accepted by Plaintiffs. It is similarly inconsequential that each Plaintiff may not have an identical explanation of the offered benefit, where Defendant made a "promise and expressly or impliedly invite[d] the [Plaintiffs] to perform some act as a condition for making the

promise binding on the promisor," i.e., to work for a given term in exchange for inclusion in the 80/20 premium free plan. *CIM Ins. Corp. v. Cascade Auto Glass*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 910 (2008).

So what is required for a unilateral contract? Simply that an offer was made, and was accepted. We know the facts here – where state workers were offered vested rights in exchange for a certain number of years of service – meets with the concept of a unilateral contract because our courts have specifically stated so with regard to employment benefits offered in exchange for working a certain amount of time. *See Roberts*, 184 N.C. at 410, 114 S.E. at 532. Most fundamentally, the core predominant issue is whether said offer was made. There is no real issue as to acceptance. Every single Plaintiff accepted the offer by providing the requisite service. This is beyond dispute because if they did not do the work, they are not within the definition of the class. There is no predominant individual issue as to breach, because Defendants breached the contract as to all Plaintiffs and putative class members by unilateral and universal legislative action. So, again, the question that remains is whether the offer was made. Did the State offer the retirement health benefit to its workers in exchange for their service?

The question is not whether all of the Plaintiffs first found out about it the same way, or whether twenty-one (21) different people all describe it the same. The question is whether the State made this offer to them. This is clear as well. The State did not offer one plan to one employee and one plan to another. It did not offer five year vesting to one employee and ten year

vesting to another.[2] The plan was what the plan was. It was not tailored to specific individuals nor negotiated between the parties, but was one unilateral offer.[3]

In their opposition brief, the Defendants argue that because different members of the class utilize the State Health Plan at different rates that somehow creates individual issues of fact. This argument is without merit as actual utilization by a class member does not change the terms of the contract nor does it have any bearing on the terms of the health benefits themselves. The Plaintiffs' health care actuary opined in his affidavit that "...everyone enrolled in a specific plan (such as an 80/20 level plan) is subject to the same plan benefit provisions regardless of how much they actually use the plan or how much their health expenses are under that plan." (McCarthy Affid. ¶ 8.) That is a fundamental hallmark of most insurance products – you are entitled to the protections and benefits of the plan or policy, but hope you don't have to use them. Any differences in utilization of class members would at most only represent a difference in the amount of damages owed to class members under a damage calculation method explained by Mr. McCarthy in his report. As stated before, under North Carolina law a difference in damages between class members is not a reason to deny class certification. *Faulkenbury,* 345 N.C. 683, 698, 583 S.E.2d 422, 431-432 (1997)

Factually, we need look no further than the Plaintiffs' depositions. Although the Defendants have exhaustively mined the deposition transcripts in search of disagreement as to the branches of the tree, they can find none as to its trunk. There is absolute unanimity amongst

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[2] State employees who were hired on or after October 1, 2006 are subject to a different vesting schedule based upon their years of service, but those employees are not included within the definition of the class.

[3] Although the fact that all employees were extended the same plan options should be readily apparent, Plaintiffs attach as Exhibit E the Affidavit of L.J. "Mac" McCarthy, Plaintiff's actuarial expert. As can be seen in the report attached to said affidavit, he has engaged in an analysis of the benefits offered to members of the putative class, and has compared the benefits of the 80/20 and 70/30 plans. This analysis would not even be possible had members of the putative class been offered innumerably different plans. Rather, as with all employer sponsored health plans, all employees are entitled to the same benefits. (McCarthy Affid., at ¶¶ 7-8).

the deposed Plaintiffs that they were offered vested rights in an 80/20 premium-free health plan. (Barnes Dep., 48:11-22; Blanton Dep., 20:9-14; Buchanan Dep., 68:4-6 and 75:12-18; Cooper Dep., 86:23-87:7 and 110:25-11:10; Currie Dep., 47:22-25; Davis Dep., 34:10-23; Evans Dep., 29:10-13; Fisher Dep., 59:17-22 and 61:2-5; Futrelle Dep., 105:9-15; Hanes Dep., 39:16-40:2; Hayes Dep., 43:12-19; Jarvis Dep., 46:4-9; Jones Dep., 37:24-28:5; Kaiser Dep., 149:13-19; Lake Dep., 51:14-52:2; Latta Dep., 146:17-23; Libby McAteer Dep., 185:7-14; Porter McAteer Dep., 136:23-137:5; Nobels Dep., 57:7-11 and Savell Dep., 104:11-17).

In fact, perhaps nowhere is the concept of unilateral contract summed up better than by Plaintiff Herbert Cooper:

> I had a contract with North Carolina and, in my opinion, with the health benefits, since I received premium free 80/20 when I started teaching in North Carolina, I received it for 27 years and then had it for nine years into retirement, until 2011, when they decided to change it again. I had a contract with them.
>
> They asked me to perform, and I performed, you know. I taught. I coached, showed up on time, was Department Chair, did everything they requested. Then I retired.

(Cooper Dep., 110:25-111:10).

When reading testimony such as this, one is reminded of the language from *Simpson*, which held that government employees who qualified for disability payments under the retirement system had a contractual right to them:

> ***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 223-24, 363 S.E.2d at 94 (*quoting Insurance Co. v. Johnson, Comm'r of Revenue,* 257 N.C. 367, 126 S.E.2d 92 (1962)) (***emphasis added***).

Every class member was offered the same health plan in exchange for their work, and every one of them did the work. Fundamental fairness dictates that their contracts be honored and that their claims be adjudicated in the only practical method – as a class.

C. The Decisions Relied Upon by Defendants Are Inapposite

In their opposition to class certification, the Defendants cite to several cases, but rely primarily on two North Carolina cases: *Harrison v. Wal-Mart Store, Inc.*, 170 N.C. App. 545, 613 S.E.2d 322 (2005) and *Sanders v. State Personnel Commission*, ___ N.C. App. ___, 762 S.E.2 850 (2014).

In *Harrison*, the Court of Appeals properly held that individual issues predominated. At issue in the case was whether certain Wal-Mart employees were being required to work "off the clock" and/or being deprived of rest and meal breaks. Despite the fact that only some employees were so deprived, the class sought to include ***all*** Wal-Mart employees. *See Harrison*, 170 N.C. App at 550, 613 S.E.2d at 326-327. Affidavits and depositions in the record demonstrated not only that many employees did not suffer the harms about which plaintiffs complained, but also that, depending upon the store at which they worked and the personnel who provided their orientation, there were indeed different contractual terms. *Id.* For this reason, the plaintiffs' case was untenable as a class action from the start.

Unlike in *Harrison*, all of the putative class members here suffered harm. Defendants' reliance on *Harrison* might have been appropriate had the State, for example, only divested public school teachers of their retirement health benefit, but not other types of State employees. In that instance, if the class had been defined in a manner encompassing all State retirees, the class would have sought to include groups of people known not to have suffered the harm in question. Moreover, the other notable distinction between *Harrison* and this case is that the

Walmart employees were told different things by different people in different locations. Defendants spuriously compare the Walmart employees' conflicting deposition testimony in *Harrison* to the differences among the class representatives here in their understanding of the contractual terms. While the class representatives here may have varying understandings and interpretations of the contractual terms, those difference do not rise to the level of predominant individual issues. Nor do they, as in *Harrison*, necessitate "individual inquiry." In *Harrison*, the contractual terms relating to breaks and "off the clock" work were vastly different among members of the putative class. Here, the terms were uniform across the class. It should not be surprising that retirees have different understandings of the contract; it would be striking if they did not.

Moreover, if there was a unilateral offer that was accepted by class members by way of their job performance until they vested, it is irrelevant how they first heard about the benefit in question. The State did not separately negotiate hundreds of thousands of employment contracts with fluid variability as to the health benefits offered. Instead, the State had a health plan, and that health plan was offered to employees, with the understanding that they would receive that benefit upon retirement if they vested. In *Harrison*, Wal-Mart could have reached any number of different agreements with employees with regard to when they were entitled to breaks, whether they were paid, etc. In this case, to the contrary, the health plan was the health plan. As set forth above, the deposed Plaintiffs all agree they were offered 80/20 premium-free coverage for the duration of their retirement.

Finally, it is important to note that the Court of Appeals merely found that the trial court did not abuse its discretion, which is to say that its denial of class certification "was neither manifestly unsupported by reason or so arbitrary that it could not have been the result of a

reasoned decision." *Id.* at 555, 613 S.E.2d at 330. Thus, the opinion serves more to underscore the broad discretion of the trial court, and less to dictate that a trial court ***must*** find in one manner or the other.

Defendants' citation of the *Sanders* case is similarly misguided. As with *Harrison*, the *Sanders* case does not address unilateral contracts. In fact, the case is fundamentally concerned with whether the trial court appropriately granted summary judgment to the defendants on plaintiffs' breach of contract. In *Sanders*, the majority upheld the lower court's summary judgment on the basis that the plaintiffs had failed to produce sufficient evidence to support their claim. The majority gives short shrift to the class certification issue, presumably because it had already upheld dismissal of the case on the merits. The decision does cite *Faulkenbury* for the proposition that the trial court has broad discretion to certify a class, and to conclude that "we discern no abuse of discretion – given the circumstances presented and procedural posture of this case – in the trial court's decision to deny class certification." *Sanders*, 762 S.E.2d at 856. In short, the Court of Appeals did not in any manner address whether common or individual issues predominated as to the liability issues involved with breach of contract.[4]

Other than *Harrison* and *Sanders*, in their opposition the Defendants also briefly cite to several other cases that are either not binding authority for this court or that are entirely irrelevant or distinguishable. For example, other than the federal court case of *Crosby* discussed below, none of the other cases cited by Defendants involve retirement benefits. Nor do any of the cases involve an employee's entitlement to a health insurance plan. None of the cases were

[4] Interestingly, one must turn to the dissent to even discern the trial court's basis for denying class certification. Although the trial court did emphasize the need for excessive individual inquiry, the inquiry it referenced was with regard to the plaintiffs' damages. *Id.*, at 860 (Hunter, R.N., J., dissenting). Clearly, this opinion cannot overrule Supreme Court of North Carolina precedent directly on point, which holds that damages issues are collateral and do not defeat class certification. *Faulkenbury,* 345 N.C. at 698, 583 S.E.2d at 431-432 (1997).

construed under North Carolina's rich line of controlling precedent involving state employment retirement benefits (i.e. the *Simpson, Faulkenbury, Bailey, Stone* line of cases).

The Defendants citation and reliance on *Crosby v. City of Gastonia* is misplaced. *Crosby v. City of Gastonia*, 2008 U.S. Dist. Lexis 109774 (May 1, 2008). For one, as an unpublished federal trial court decision, its non-binding authority. Second, a review of the filings and decisions in *Crosby* establish that the case is easily distinguishable. Defendants cite the judge's order rejecting the magistrate's recommendation to grant certification. The putative class consisted of 59 retired police officers. The judge first determined that the proposed class did not meet the numerosity requirement. Class members were represented by three plaintiffs. However, in a separate suit, 37 of the officers had filed a collective action meaning almost two-thirds of the class were already named party-plaintiffs. On that basis, the judge held that joinder was not impracticable and, thus, class treatment was inappropriate. He then turned to commonality, determining that "they rely on the promises that the defendant gave to each of them individually." But that was far from the end of the case. Two years later the court granted summary judgment on plaintiffs' contract claims on the basis that the language of the original funding legislation specified that benefits would be paid "so long as funds were available." The funds had been extinguished and not replenished, however, resulting in a pyrrhic victory for the plaintiffs. The Fourth Circuit reviewed the district court's summary judgment ruling, noting that it would "assume, as the district court did, that such a contract existed." The Court then upheld the lower court's decision based upon the language that benefits would be paid "so long as funds are available." Therefore, the case was ultimately decided not on the predominance of individual issues, but rather on a contractual provision common to all of the officers barring recovery. This

case has no relevance to disposition of the certification motion here because the facts are so disparate and the *Crosby* class was 3,000 times smaller than this class.

Several of the other cases cited by Defendants actually support class certification in this case. For example, the U.S. Supreme Court's decision in *Tyson Foods* actually upheld class certification, focusing on the use of "representative evidence" to establish a "common policy" in the employment context. *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036, 194 L.Ed. 2d 124 (2016). In another case cited by Defendants, the Southern District of New York actually held that "Plaintiffs' claims for breach of contract will depend on whether valid contracts were formed, and whether defendants breached those contracts." *In re Scotts EZ Seed Litig.*, 304 F.R.D.397,411 (S.D.N.Y. 2015). It added that "[t]hese questions predominate over individual questions, and class certification is therefore appropriate." *Id.* The case did not involve a "form" contract, as implied by Defendants in their Brief.

Other cases cited by the Defendants are irrelevant or completely distinguishable based on the subject matter alone – such as claims based on technical statutory or general tort claims. *Blitz* involved questions of whether some individual recipients of "junk faxes" in a class may have actually authorized the faxing – which was a fundamental and absolute defense to the claims. *Blitz v. Agean, Inc.*, 227 N.C.App. 476, 743 S.E.2d 247 *disc. rev. denied*, 367 N.C. 225, 747 S.E.2d 547 (2013)(Because the class was defined to consist of all persons who received the faxes and because a number of them had authorized the solicitation, the Court rejected class certification because of the need for individualized inquiry). The other cases cited by Defendants are similarly inapplicable: *Madison v. Chalmette Ref, LLC*, 637 F.3d 551, 555 (5th Cir. 2011)(chemical exposure cases by residents where the "'primary issues left to be resolved would turn on location, exposure, dose, susceptibility to illness nature of symptoms, type and

cost of medical treatment, and subsequent impact of illnesses on individuals.'"); *Beroth Oil Co. v. NCDOT*, 367 N.C. 333, 343, 757 S.E.2d 466, 474 (2014)(inverse condemnation case not ripe for certification "because land is unique" and such claims "cannot be applied to the class action in a general, broad-brush manner."); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986)(securities fraud case in which the Fourth Circuit rejected class certification "[b]ecause the extent of knowledge of omitted facts or reliance on misrepresented facts will vary from shareholder..."); *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1171 (11th Cir. 2010)(denied certification of a class of 260 hospitals in six different states involving more than 300 different contracts where court concluded that "the diversity of material terms is overwhelming" and found that individual issues predominated); *Rose v. SLM Fin. Corp.*, 254 F.R.D. 269, 274 (W.D.N.C. 2008)(no class where tort claims revolved around separate interactions and transactions at individual property closings); *Abla v. Brinker Rest. Corp.*, 279 F.R.D. 51, 58 (D. Mass. 2011)(no common issues where plaintiffs were third party beneficiaries to numerous negotiated contracts at numerous restaurant locations for tips); *Basco v. WalMart Stores, Inc.*, 216 F. Supp.2d 592, 602 (E.D.La. 2002)(similar to *Harrison v. Walmart* discussed *supra*).

The differences between the foregoing cases and the present case convincingly reveal how far afield Defendants must travel as they struggle to bolster their opposition to class certification.

VI. CLASS CERTIFICATION IS NOT DEFEATED DUE TO ANY CONFLICT OF INTEREST

Defendants cite only to one case with regard to conflict of interest. Again, it is the *Harrison* case. Although *Harrison* did discuss conflict of interest, it was on facts completely unrelated to those presented here. Contained within the putative class of all hourly Wal-Mart

employees were certain individuals that had supervisory authority over other purported class members. *Harrison*, 10 N.C. App. at 554, 613 S.E.2d at 330. The Court of Appeals held that the trial court was within its discretion to refuse class certification where certain class members were asserting that the wrongs against them were perpetrated by other class members (their supervisors), and where said supervisors would have an incentive to deny that the alleged harms ever occurred. *Id.* That is, some class members were making accusations against others, and those accusations were being denied. That this creates a conflict of interest is plain to see.

There is no such issue here. All class members had a retirement health benefit that was taken away by legislative action. Obviously the facts in *Harrison* were rather different. This is likely why the Defendants cited only to the Court of Appeals' conclusion with no mention of the relevant facts. The conflicts present there were another symptom of the overbreadth of that class, which was the Court of Appeals primary basis for its decision.

The conflicts alleged here are not conflicts at all. Defendants errantly contend that Plaintiffs' theory of the case is that they are entitled to the benefit they were receiving at the time of their retirement. Because the various retirement dates would entitle different Plaintiffs to different co-insurance rates, the argument goes, there is a conflict between class members.

This argument misconstrues Plaintiffs' theory of the case. As can be seen in the Complaint itself, it has always been Plaintiffs' contention that retirees are entitled to an 80/20 premium-free health plan and a partial-premium optional 90/10 health plan. They are requesting nothing more and nothing less. There is no conflict because there is no difference in what the class members are seeking. Defendants are attempting to confuse and conflate the case by putting words and additional claims in the mouths of the Plaintiffs.

Defendants also miss the point with their contention that Plaintiffs who retired prior to July 1, 1991 would be entitled to the 90/10 premium free plan that existed at that time, and would therefore have an incentive to disagree with the remainder of the class as to what benefit they should receive. Prior to the unilateral reduction in benefits by legislative action in 2009 and 2011, all Plaintiffs were entitled to and most were receiving (or at least had the option to receive) a premium-free 80/20 health plan and the optional partial-premium 90/10 health plan. In this case, they are only challenging these most recent unilateral reductions for benefits that they had been receiving for over a decade or more. Hypothetically, even if older Plaintiffs were entitled to a higher level plan, and even if they were requesting the same, at worst the issue could easily be addressed with a sub-class, and would not in any manner raise a conflict of interest as the legal arguments would be the same and the evidence is universal to all the class.

Finally, Defendants' alleged conflicts relate to what plan certain Plaintiffs should receive if they are successful in this case. In other words, they relate to damages. As was the case in *Faulkenbury*, any difference in Plaintiffs' damages are collateral issues which do not defeat class certification. *Faulkenbury,* 345 N.C. at 698, 583 S.E.2d at 431-432 (1997).

VII. THE CLASS DEFINITION IS NOT OVER-INCLUSIVE AND THE CLASS IS EASILY IDENTIFIABLE

In the final section of the Defendants' Brief, the Defendants throw several random and irrelevant issues at the wall to see what might stick. Generally, the Defendants aver that the class will not be easily identifiable. Specifically, the Defendants oddly assert that the Defendants' Spreadsheet that they generated based on the definition of the class contained in the Complaint will not identify the class members. Unless the Defendants are alluding that they may have sabotaged the discovery in this case by creating an incomplete or inaccurate list of class members based on data from the State Health Plan and Retirement System, this should not be an

issue. Similarly, the Defendants complain that the class definition includes "eligible children" based on a specific definition contained in the statutes. They then seemingly admit in their Brief that there are no current eligible children, but then paradoxically contend that the absence of such eligible children makes class identification impractical. If the parties agree that there are no eligible children in existence, then the identification of those non-existent beings is a non-issue. The other issues raised with regard to identification of the class are hypothetical questions looking for a problem and which simply have no practical bearing on the ability to identify the class.

CONCLUSION

For all the foregoing reasons and for the reasons set forth in the original memorandum in support of the motion for class certification, the Court should follow the well-trodden path set forth in cases such as *Simpson, Faulkenbury, Bailey,* and *Stone* and grant the motion for class certification.

This the 10th day of August, 2016.

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

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CERTIFICATE OF SERVICE

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

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