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, THE 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.	**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Plaintiff Class (currently consisting of 222,000 members) are retired employees of the State of North Carolina and/or members of the State's retirement system. As part of their overall retirement benefit package, and in addition to their entitlement to payments under the State's pension plan, the Plaintiff Class are entitled to receive a premium-free 80/20 health benefit for life (hereinafter the "Retiree Health Benefit" or "RHB"). The Defendants' own documents and testimony prove that they offered the Retiree Health Benefit as a lifetime contractual benefit "earned" through a defined period of employment service. In construing the Retiree Health Benefit, the Defendants used words evidencing an intent to contract, such as "earned", "vested", "contract", "deferred compensation", "liability", "obligation", and "duty to provide". The Defendants' own documents and testimony under oath admit the existence of Plaintiff Class members' vesting into a Retiree Health Benefit and the Defendants referred to and treated the Plaintiffs as vested. All members of the Plaintiff Class are vested with the required creditable service in the retirement system.

Under North Carolina law, the Retiree Health Benefit is a unilateral contract for deferred compensation and the Plaintiff Class is therefore entitled to the benefits in place at the time of their vesting. The evidence at bar shows that all members of the Plaintiff Class vested into at least a premium-free 80/20 retirement health benefit. That benefit had been offered for decades

as a premium-free option until the State unilaterally imposed premiums for the same beginning in September of 2011. Since September 1, 2011, the Defendants forced the Plaintiff Class to either: (1) pay premiums for the Retiree Health Benefit in yearly amounts ranging from $120.00 per year up to $1,250.40 per year or, (2) to elect an admittedly inferior health plan in the form of a 70/30 "Basic" plan that resulted in Plaintiffs incurring additional and excess out-of-pocket expenses for their medical care thereunder. The payment of excess premiums was primarily accomplished by way of withholding funds from retirees' pension checks.

The Retiree Health Benefit is identical to similar deferred compensation benefits that North Carolina Courts have held to be protected from future diminution, such as pension, disability, severance, and tenure. All such cases share a fundamental core of three elements: (1) a public employer-employee relationship, (2) a set eligibility period that employees must meet by providing services to the public employer to obtain the promised employment benefit, and (3) that the employment benefit will be enjoyed at a future time after the eligibility criteria have been met. Pursuant to such long-established legal precedent, the Plaintiff Class is entitled to monetary damages for the breach and impairment of their contract and to equitable and declaratory relief from this Court ordering the Defendants to abide by their own stated "obligation" to provide the Retiree Health Benefit in the future.

II. THE PARTIES

A. Class Representatives and the Class

Twenty-six (26) named plaintiffs filed this lawsuit on behalf of all retired teachers and state employees who contributed 6% of every paycheck, worked long enough to vest in the North Carolina Teachers And State Employees' Retirement System prior to September 1, 2011, who enrolled in the State Health Plan upon their retirement, and received a pension check, along with

healthcare insurance coverage from their former employer, the State of North Carolina ("Defendants," "the State," or "the Employer"). *See* Complaint ¶¶ 1–26. The class representatives include a former Chief Justice of the Supreme Court of North Carolina, a former Judge of the North Carolina Court of Appeals, classroom teachers, college-level administrators and instructors, special agents from the State Bureau of Investigation, a school superintendent, a school principal, administrative staff, and other employees from various departments of State government. *See id.* Between them, their service spans from 1949 to 2011, and covers more than a dozen counties of North Carolina. *See id.*

The Plaintiff Class consists of approximately 221,000 members of the Retirement System who were based on the latest enrollment data from the State, all of whom receive retirement benefits in the form of monthly pension amounts and State Health Plan benefits from their former Employer, the State of North Carolina.

B. The Retirement System

The Teachers' and State Employees' Retirement System of North Carolina (the "Retirement System") was created under Chapter 135 of the North Carolina General Statutes "for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter [including health benefits as of 1971] for teachers and State employees of the State of North Carolina." N.C.G.S. § 135-2 (2016). The Board of Trustees acts as the trustee of the funds of the Retirement System with the State Treasurer serving as the chair, and is responsible for the general administration and operation of the System. *Id.* The Retirement System holds the authority to administer, deliver, withhold deductions, and issue pension checks as part of the retirees' post-employment, deferred compensation. *See* Complaint ¶ 28; Answer ¶ 28; *Faulkenbury v.*

Teachers' & State Emps.' Ret. Sys., 108 N.C. App. 357, 373, 424 S.E.2d 420, 428 (1993) (citing N.C.G.S. §§ 135-2, 135-6, 135-7(a)) (other citations omitted).

C. State Health Plan

The "State Health Plan for Teachers and State Employees" ("State Health Plan" or "SHP") actually has two meanings under the North Carolina General Statutes: "Depending on the context, the term may refer to the entity created [by the State] or to the health benefit plans offered by the entity." N.C.G.S. § 135-48.1 (14) (2016). The statute by which the State Health Plan was created states in pertinent part:

> 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. The Plan shall have all the powers and privileges of a corporation and shall be known as the State Health Plan for Teachers and State Employees. The State Treasurer, Executive Administrator, and Board of Trustees shall carry out their duties and responsibilities as fiduciaries for the Plan.

N.C.G.S. § 135-45 (2010) (later amended and recodified at § 135-48.2).

Thus, as an entity, the State Health Plan provides and administers health care coverage for current and retired state employees and eligible dependents. Effective January 1, 2012, the State Health Plan became a division of the Department of State Treasurer.

D. The Deponents and Witnesses

Through the course of discovery in this case, in addition to the named Plaintiffs, depositions of the following witnesses and representatives associated with the Defendants were taken. Joann Tart ("Tart"), Glenn Wall ("Wall"), Karen Jarvis ("Jarvis") and Kathy Spruill ("Spruill") are all former Benefits Counselors for the Retirement System. Mona Moon ("Moon") is the Executive Director of the North Carolina State Health Plan and served as the State Health

Plan's 30(b)(6) deponent. Lotta Crabtree ("Crabtree") is the Deputy Director for the State Health Plan. Mark Trogdon ("Trogdon") is the Director of the Fiscal Research Division of the North Carolina General Assembly. David Vanderweide ("Vanderweide") is a pension actuarial analyst with the Fiscal Research Division of the North Carolina General Assembly. Janet Cowell ("Cowell") is the elected North Carolina State Treasurer, a named Defendant, and is a member of the Council of State. Thomas Causey ("Causey") is the Deputy Director of Operations of and served as the 30(b)(6) deponent for the Retirement System. Ken Vieira ("Vieira") and Kirsten Schatten ("Schatten") are actuaries for Segal Consulting (they were formerly with Aon Consulting), who serve as actuaries to the State Health Plan. Susan Murray ("Murray") was the 30(b)(6) deponent for Blue Cross Blue Shield of North Carolina.

III. STANDARD OF REVIEW

A. Rule 56 Standard

"Summary judgment is properly granted when the forecast of evidence 'reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.'" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). "Once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth 'specific facts showing that there is a genuine issue for trial.'" *Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 196, 517 S.E.2d 178, 183 (1999) (quoting *Ruff v. Reeves Brothers, Inc.*, 122 N.C. App. 221, 224-25, 468 S.E.2d 592, 595 (1996)). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson*, 352 N.C. at

83, 530 S.E.2d at 835. "An issue is only material if 'the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.'" *Crowder Constr.*, 134 N.C. App. at 196, 517 S.E.2d at 184 (quoting *Ruff*, 122 N.C. App. at 225, 468 S.E.2d at 595).

B. Elements of Breach of Contract - Unilateral Contract

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).

"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) (emphasis added).

This doctrine is most frequently applied in the employment context, where the offeree accepts by working for a certain amount of time, because the offer is that a certain benefit will be conferred in exchange for that duration of service. *See, e.g.*, *Roberts v. Mills*, 184 N.C. 406, 410, 114 S.E. 530, 532 (1922) (bonus pay); *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 454 S.E.2d 278 (1995) (vacation pay); and *Brooks v. Carolina Tel. & Tel. Co.*, 56 N.C. App. 801, 290 S.E.2d 370 (1982) (vacation pay and severance).

As demonstrated above, the defining characteristic of a unilateral contract is that the offeree accepts the offer by performance, not by making a return promise. Hence, Plaintiffs have no burden to prove mutuality. It is not material to demonstrate that there was a bargained for exchange in which both sides mutually agreed on the terms of a contract. Instead, the offer itself makes a benefit (such as health insurance) contingent upon a qualifying act (such as service for five years). Therefore, all that is required to prove such a contract is that such an offer was made, and that the qualifying act was performed. Here, the class is defined in a manner such that no one is included if they did not perform. Therefore, the only issue truly before the Court is the evidence of the offer itself.

C. Elements of Impairment of Contract

The "Contract Clause" of the United States Constitution provides in relevant part that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10. To determine whether a contractual right has been unconstitutionally impaired, North Carolina courts follow the three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977). *See Bailey v. State*, 348 N.C. 130, 140, 500 S.E.2d 54, 60 (1998). "The U.S. Trust test requires a court to 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." *Id.* at 141, 500 S.E.2d at 60 (citing *U.S. Trust*, 431 U.S. 1).

"When examining whether a contract has been unconstitutionally impaired, the 'inquiry must be whether the state law has . . . operated as a substantial impairment of a contractual relationship.'" *Id.* at 151, 500 S.E.2d at 66 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244–45 (1978)). In analyzing whether the impairment was reasonable and necessary to serve an important public purpose, courts are not bound by the "rationale put forward by the legislature to justify its actions," particularly where the state is impairing *its own* contractual obligations. *Id.* at 151–52, 500 S.E.2d at 66 (quoting *U.S. Trust*, 431 U.S. at 25–26) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. . . . If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

D. Elements of Other Constitutional Claims

The North Carolina Constitution's "Law of the Land" Clause states that "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art I, § 19. Section 1 of the Fourteenth Amendment of the United States Constitution similarly provides in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. XIV, § 1. North Carolina Courts have held that the Law of the Land Clause affords due process and uncompensated takings protections at least equal to those found in the aforementioned provisions of the Fourteenth Amendment. *See Bailey*

v. State, 348 N.C. 130, 155, 500 S.E.2d 54, 68 (1998) (quoting *Long v. City of Charlotte*, 306 N.C. 187, 195–96, 293 S.E.2d 101, 107–08 (1982)) (stating that the fundamental right to just compensation for a taking by the State "is considered in North Carolina as an integral part of 'the law of the land' within the meaning of Article I, Section 19 of our State Constitution"); *Clayton v. Branson*, 170 N.C. App. 438, 613 S.E.2d 259 (2005) (quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004)) ("The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution.").

"The fundamental right to just compensation . . . imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken." *Bailey*, 348 N.C. at 155, 500 S.E.2d at 68 (quoting *Long*, 306 N.C. at 195–96, 293 S.E.2d at 107–08). Therefore, where the State takes a property right from an individual without just compensation, there is an impermissible taking in violation of the United States Constitution and the North Carolina Constitution. *See id.* at 155, 500 S.E.2d at 68–69 (quoting *Long*, 306 N.C. at 203, 293 S.E.2d at 111) ("The test of liability is whether . . . the [State's] acts amount to a partial taking of private property. If so, just compensation must be paid.").

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests . . . ." *Johnston v. State*, 224 N.C. App. 282, 305, 735 S.E.2d 859, 875 (2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)) (internal quotation marks omitted). "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 308, 750 S.E.2d 46, 49 (2013) (quoting *Peace v. Emp't Sec. Comm'n of N.C.*, 349 N.C. 315, 322,

507 S.E.2d 272, 278 (1998) (internal quotation marks omitted). "[T]he opportunity to be heard must be 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Peace*, 349 N.C. at 322, 507 S.E.2d at 278). Thus, in evaluating a whether a due process violation has occurred, North Carolina courts (1) "decide whether the State has interfered with a liberty or property interest and (2) determine if the State used a constitutionally sufficient procedure to interfere with the liberty or property interest" (i.e., whether there was adequate notice and opportunity to be heard). *Id.* at 308, 750 S.E.2d at 48 (citing *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 48 (2010)

North Carolina courts have held that contractual rights constitute property protected against uncompensated undertakings and which trigger procedural due process. *See, e.g., N.C. Ass'n of Educators, Inc. v. State*, ___ N.C. App. ___, 776 S.E.2d 1, 47 (2015) (citing *Bailey*, 348 N.C. at 154–55, 500 S.E.2d at 68–69) (stating that a vested employment benefit "confers a contractual right, which is also a property right, the uncompensated impairment of which by subsequent legislation can constitute a taking in violation of the Law of the Land Clause"); *Bailey*, 348 N.C. at 154, 500 S.E.2d at 68 (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.").

E. Damages and Remedies Standards

"As a general rule, the injured party in a breach of contract action is awarded damages which attempt to place the party, insofar as possible, in the position he would have been in had the contract been performed." *Weber, Hodges & Godwin Commer. Real Estate Servs., LLC v. Cook*, 186 N.C. App. 288, 291, 650 S.E.2d 834, 837 (2007) (quoting *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 571, 500 S.E.2d 752, 757 (1998)) (internal quotation marks omitted). "[T]he

injured party has a right to damages based on his expectation interest as measured by . . . the loss in the value to him of the other party's performance caused by its failure or deficiency." *Id.* (quoting *First Union Nat'l Bank v. Naylor*, 102 N.C. App. 719, 725, 404 S.E.2d 161, 164 (1991)) (internal quotations omitted).

"The remedy of specific performance is available to 'compel a party to do precisely what he ought to have done without being coerced by the court.'" *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981)) (quoting *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E. 2d 44, 53 (1952)). "The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Id.* (citing 71 Am. Jur. 2d "Specific Performance," § 207 (1973)).

A writ of mandamus is a court order to a person, such as a public official, "commanding the performance of a specified legal duty imposed by law." *Graham County Bd. of Elections v. Graham County Bd. of Comm'rs*, 212 N.C. App. 313, 322, 712 S.E.2d 372, 379 (2011) (quoting *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971)) (internal quotation marks omitted). A writ of mandamus is warranted when the following elements are present:

(1) The party seeking relief has a clear legal right to the act requested;

(2) The defendant has a legal duty to perform the act requested;

(3) The duty is clear and not reasonably debatable;

(4) The performance of the duty-bound act is ministerial in nature, not involving the exercise of discretion;

(5) The defendant has neglected or refused to perform the act requested, and the time for performance as expired; and

(6) The party seeking relief has no alternative legal remedy.

See id. (quoting *In re T.H.T.*, 362 N.C. 446, 453-54, 665 S.E.2d 54, 59 (2008)).

IV. LEGAL ARGUMENT

The Retiree Health Benefits at issue in this case are no different than the disability, pension, severance, tenure, and other public employment benefits that North Carolina courts have been almost unanimously held to be protected from unilateral diminution and reduction once the public employee completes his performance thereunder and vests into the benefits. The evidence in this case shows without a doubt that the Plaintiff Class vested into the Retiree Health Benefits as they all completed the required performance through employment service. The evidence also shows that the Plaintiff Class vested into at least a premium-free 80/20 Health Benefit. The evidence also shows that the Defendants treated the Retiree Health Benefit as a lifetime contractual benefit, using words of contract. There is no genuine issue of material fact that the State breached the contract with the Plaintiff Class and impaired their rights to the vested Retiree Health Benefit when they began charging the Plaintiff Class for coverage under the 80/20 plan. In addition, the Defendants impaired the contract and violated the Plaintiff Class's Constitutional Rights in making the unilateral reductions to the vested contractual benefits. The Plaintiff Class is entitled to relief from this Court to rectify these issues.

A. There is a Long Line of North Carolina Precedent Protecting Public Employee Compensation and Benefits from Retroactive Diminution

North Carolina's Courts have a long history of treating the relationship between governmental employers and employees as fundamentally contractual in nature. Consistent with universal precepts of general contract law our courts have consistently found that a governmental employer cannot unilaterally make retroactive reductions to an employee's earned compensation and benefits when the employee has already performed their part of the bargain.

In one of the first cases to address the nature of the relationship between governmental employees and employer, the North Carolina Supreme Court in *Bridges v. City of Charlotte,* 221 N.C. 472, 20 S.E.2d 825 (1942), 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). Based on the same fundamental principles, the North Carolina Supreme Court held in the groundbreaking case of *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), that a State employee's claims for breach of his contract by early termination were contractual in nature, that sovereign immunity did not apply to contract claims against the State, and that consequently "[t]he State will occupy the same position as any other litigant" in litigation on such breach of contract claims. *Id*. at 320, 222 S.E.2d at 424.

About a decade later the North Carolina Supreme Court further rooted the application of contract law to public employment relationships when it affirmed *per curiam* the Court of Appeals detailed opinion 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). In that case, 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 223–24, 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. *See id*. In finding the benefits to be contractual deferred compensation, the Court expressly rejected the defendants' contentions that the retirement benefits were merely gratuitous. *See id*.

One year before the decision in *Simpson*, the Court of Appeals had already set the legal framework for the recognition of contractual rights in the public employment context. *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 552–53, 344 S.E.2d 821, 826–27 (1986), *review denied*, 318 N.C. 417, 349 S.E.2d 598 (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). In holding that municipal firefighters were owed vacation time already earned by employment service, the *Pritchard* Court noted that contractual recognition was particularly appropriate because 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.* 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, 344 S.E.2d at 826–27; *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).

A decade later, the North Carolina Supreme Court again addressed the same premise in *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997). In *Faulkenbury*, the 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. Building on *Simpson*, the 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 (emphasis added).

Following closely on the heels of *Faulkenbury*, in *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), retired state employees 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. In an opinion written by then Chief Justice (now lead Plaintiff) Lake, the North Carolina Supreme Court in *Bailey* again found that retirement benefits are contractual and cannot be changed once vested. *See 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 (emphasis added); s*ee 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 terms of the employment contracts between the State and its employees go beyond the payment or non-payment of monetary benefits and compensation. For example, in *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[1]. *See id*.

[1] The 1996 "Your Retirement" pamphlet referred to in *Stone* is one of the same pamphlets at issue in this case.

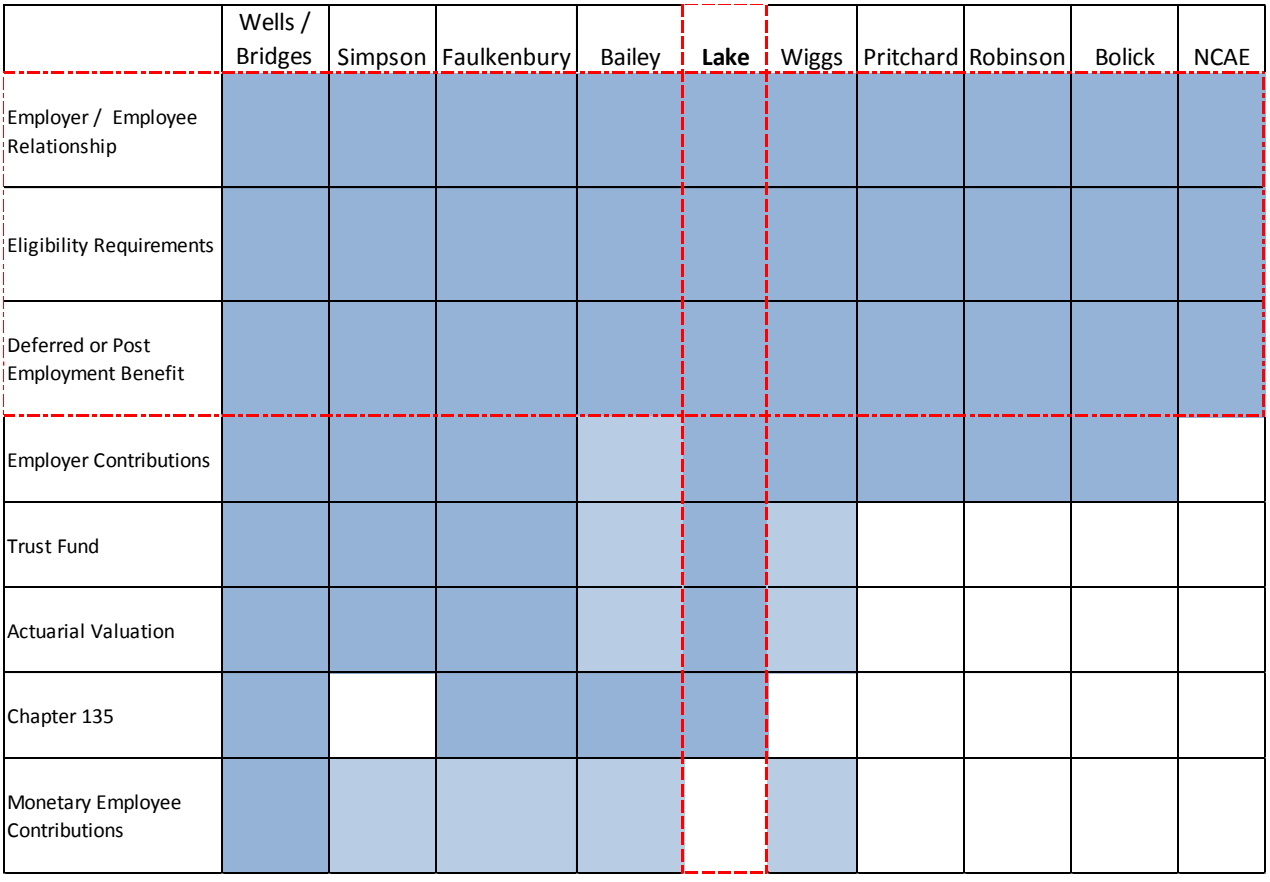
In the most recent case in this line of authority, in 2016 the North Carolina Supreme Court held that non-monetary teacher tenure protections were a vested employment benefit and protected from retroactive elimination. *See North Carolina Assoc. of Educators, Inc. v. State of North Carolina*, ____N.C. ___, 786 S.E.2d 255 (2016) ("*NCAE*"). The Court in *NCAE* found that while the statute alone (in that case the Career Status Law codified at N.C.G.S. § 115C-325) did not create a contractual vested right, the existence of the statute in the context of the existing employment contracts between the teachers and the State made the tenure protections contained in the statute a part of the existing contractual employment relationship. *See Id* at 263–64. Specifically, the Court stated that "laws which subsist at the time and place of the making of a contract … enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Id.* at 264. On that basis, the *NCAE* Court concluded that after the teachers' rights had vested, "the General Assembly no longer could take away that vested right retroactively in a way that would substantially impair it." *Id*. The Court in *NCAE* also made a point to reiterate the holdings in *Bailey* and *Faulkenbury* by explicitly stating that the retirement benefits were protected as vested contractual rights because "those benefits had been presently earned and became vested as the plaintiffs performed, even though payment of those benefits was deferred until a later time." *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 to Plaintiffs' Response to Motion to Dismiss [Hearing Transcript]. 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. *See Id.*

The fact that there may be no comprehensive express contract between the State and an employee does not change the analysis nor diminish the inherent contractual protections. *See Archer v. Rockingham County*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 793 (2001), *review denied*, 355 N.C. 210; 559 S.E.2d 796 (2002)(action for compensatory time and overtime pay for county EMS employees on fluctuating workweek schedule). In *Archer*, the Court stated "[w]e agree with plaintiffs' assertion that the employment arrangement between the County and plaintiffs was contractual in nature, although the contract was implied…. We do not limit *Smith* to written contracts; its reasoning is equally sound when applied to implied oral contracts." *Id.* at 557, 548 S.E.2d at 793. "The existence of the relation of employer and employee . . . is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied." *Id.* at 557, 548 S.E.2d at 793 (quoting *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934)). In fact, the Court of Appeals has already held in this case that the relationship between the Plaintiffs and the State was contractual in nature, being the product of the employment relationship between the parties. *See Lake v. State Health Plan*, 234 N.C. App. 368, 760 S.E.2d 268 (2014), *disc. review and cert denied*, 367 N.C. 806, 766 S.E.2d 840 (N.C. 2014).

By comparing and contrasting this line of cases, several patterns begin to emerge. Most of the cases involve the same elements and issues. There are eight different elements that appear to be shared amongst the majority of the cases: (1) an employer-employee relationship; (2) having eligibility requirements to receive the benefit; (3) being a deferred or post-employment benefit; (4) existence of employer contributions; (5) existence of a trust fund tied to the administration of the benefit; (6) using actuarial valuation in measuring and administering the benefit; (7) being contained in Chapter 135 of the General Statutes; and (8) the existence of monetary employee contributions towards the benefit. The below chart indicates these eight elements and how they are shared or different among the major public employment cases discussed herein.



[A blue block indicates the existence of the element with lighter blue being less prominent in the case]

The Retiree Health Benefits share 7 out of the 8 elements from the line of cases – far more than in many cases where the benefits were held contractual, such as *NCAE*, *Wiggs*, *Pritchard*, *Robinson*, and *Bolick*.

Even more importantly, all of these cases share a core of three fundamental elements: (1) a public employer-employee relationship, (2) a set eligibility period that employees must meet by providing services to the public employer to obtain the promised employment benefit, and (3) that the employment benefit will be enjoyed at a future time after the eligibility criteria have been met. The retirement health benefits at issue in this case fulfill each of these fundamental elements. The Class Members were all engaged in a public employer-employee relationship. There was an eligibility period to obtain the retirement health benefits. Lastly, that benefit was earned by working for the State to enjoy the health benefits in retirement after all eligibility criteria have already been met. Just as in *Bailey*, *Faulkenbury*, *Simpson* and the other cases cited above, the employee earns the future benefit by providing labor and services. After the benefit is earned by working and fulfilling the eligibility criteria, the benefit becomes a vested part of the employment contract and cannot be diminished by subsequent legislative action. To do so would destroy the employee's benefit of the bargain after their performance has already been completed. This is antithetical to fundamental contract law.

B. The Terms of the Contract – Vesting

Central in the long line of government employment cases is the concept of vesting. Vesting is an important and simple concept. Black's Law Dictionary defines "vested" as "Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute." Black's Law Dictionary (3rd Pkt. Ed. 2006). North Carolina precedent is consistent with this definition: when "[plaintiffs] 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 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. *See Simpson*, 88 N.C. App. at 224, 363 S.E.2d at 94. "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*. 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. *Faulkenbury***,** 345 N.C. at 692–93, 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.").

Since *Simpson, Faulklenbury*, and *Bailey*, the principal of vesting has been utilized 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 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.

All these cases stand for the idea that once the Plaintiffs have fulfilled the condition their rights become vested, and Defendants cannot reduce the benefits. *Faulkenbury***,** 345 N.C. at 692, 483 S.E.2d at 428. This is the simple concept of vesting that controlled in *Simpson*, *Faulkenbury*, and *Bailey*. The same concept controls in this case.

Since 1982, the State offered to all its employees a premium-free health plan for the duration of their retirement at a minimum level of coverage if they worked a specific term of years in employment with the State. *See* Pl.'s Second Amendment to Resp. to Def.'s First Set of Interrogs., #1. The term of years that an employee was required to work to be eligible differed based on when they retired. For those employees who retired prior to January 1, 1988, in order to be eligible for the RHB, they only had to retire and be in receipt of pension payments from the State. *See* N.C.G.S. § 135-40.1(17) (1986); Pl.'s Dep. Ex. 41 at pp. 32–33 [1988 Your Retirement Benefits]. 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 for employees that retire on or after January 1, 1988:[2]

> 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) (2016); *see also* Pl.'s Ex. 41 at p. 18. 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 found it to be a vesting provision.

Defendants' prior assertions in this litigation, that the five (5) year requirement is not vesting, but merely eligibility requirements, ignore two major facts. First, the requirements or conditions precedent in prior cases were also labeled as eligibility requirements. 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). 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

[2]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.

recognized. *See* e.g. N.C.G.S. §§ 135-5, 135-57 ("Consolidated Judicial Retirement Act"). Further, the requirements to receive long term disability, which was at issue in *Faulkenbury*, was described in Retirement Benefits booklets in the terms of eligibility: "you become eligible . . . provided you meet the following requirements: (1) you must have at least five years of contributing membership service in the Retirement System . . ." Pl.'s Ex. 41 at pp. 32–33. The vesting is presumed by law from the language of the statutes and the nature of the bargain between the employee and the state.

Second, the Defendants themselves considered and expressed these eligibility requirements to be vesting requirements in the context of the RHB. In fact, the Defendants referred to these eligibility provisions as vesting requirements in numerous formats, including[3]:

1. In the Legislative Bill Titles that changed eligibility requirements:
    a. Session Law 2006-174 (S.B. 837) (Short Bill Title "State Health Plan / 20 Year ***Vesting***")
    b. Session Law 2006-174 (S.B. 837) (prior un-enacted version listed the Short Bill Title at that time as "State Health Plan / 10 Year ***Vesting***.")
2. In Press Releases pertaining to the State Health Plan:
    a. Pl.'s Dep. Ex. 28 at LakeDef.016140 ("The benefits provided through the State Health Plan were earned through past service by North Carolina state employees and teachers who are now retired or already ***vested*** in the retirement system.")

[3] The variety and volume of documents that mention "vesting" are too vast to fully include in this brief, but this list is an incomplete list of where the term "vesting can be found to refer to the RHB.

3. In training manuals used by retirement division customer service personnel to advise retirees and current employees:

a. Introduction to Retirement, Vol. II, First Contact Training, Pl.'s Dep. Ex. 47 at LakeDef.003938 ("In order for the retiree to have paid health insurance, he must have 5 years of contributing membership in the State System, and be in receipt of a monthly retirement benefit with the State….With growing concern about health insurance in our society today, this is an important piece of information that the member should know if he is ***vested*** with the 5 years of contributing membership in the State.")

b. Introduction to Retirement, Vol. II, First Contact Training, Pl.'s Dep. Ex. 47 at LakeDef.003939 ("Reminder for ***Vested*** Deferred Retirees"… "It is very important to remind ***vested*** deferred retirees that the health insurance begins a month later than their effective retirement date.")

c. Ret. Sys. Standard Operating Procedures, Pl.'s Dep. Ex. 46 at LakeDef.020878 ("Be sure to remind ***vested*** deferred retirees that health insurance is effective the month following their retirement date.")

d. Ret. Sys. Emails, Pl.'s Dep. Ex. 52 ("The member must still be ***vested*** with 5 years of membership service to meet the eligibility to retire."… "All the new law addresses is the cost of the individual coverage after the member has 5 years membership service, not eligibility for coverage.")

e. Ret. Sys. Ltr to Employment Security Comm. HR Rep., March 10, 2005, Pl.'s Dep. Ex. 97 (with respect to RHB "Ms. Boese would need to complete an additional 1.7666 years of State service in a 12-month contractual position to be fully ***vested*** with five years of contributing membership in the State Retirement System.")

4. Your Retirement Benefits Handbooks:

a. 2008 "Your Retirement Benefits" Booklet includes under the heading "How to Qualify For Benefits" and the subheading "Becoming ***Vested***" states:

> "You become ***vested*** in the Retirement System once you have completed a minimum of five years of membership service. This means that you are eligible to apply for lifetime monthly retirement benefits based on a formula, and the age and service requirements described in this handbook, provided you do not withdraw your contributions. You may also be eligible for retiree health coverage as described on page 20."
>
> Pl.'s Dep. Ex. 43 at p. 4; see also Pl.'s Ex. 44 at p. 4 (Your Retirement Benefits 2009); Pl.'s Ex. 45 at p. 5 (Your Retirement Benefits 2014).

5. Actuarial Reports:

a. Actuarial Projections for SHP, Pl.'s Dep. Ex. 78 at LakeDef.000729 (chart showing possible new funding scenarios for SHP for various groups for "Projected Accrued Liability", including "Baseline", "Applied to Not ***Vested***", and "Applied to All")

b. SHP Actuarial Report to State Budget Director, 2011, Pl.'s Dep. Ex. 82 at LakeDef.001359, 001372) (chart of membership data listing "Terminated ***Vested***" and "Spouses of current actives and

vested terminations are assumed to be covered in retirement at a rate of 10%.")

c. State of N.C. OPEB Strategy Study, March 21, 2011, Pl.'s Dep. Ex. 80 at LakeDef.000648–49 (modeling of benefit and eligibility changes for "Elimination of 5 YOS ***vested*** eligibility" and "Elimination of all ***vested*** elig., must retire from Act. Svc" and "Strategies that show intermediate levels of savings: service based contribution schedule and the removal of ***vested*** benefits." and "Legal and litigation implications have not been reviewed for administrative feasibility.")

d. State of N.C. OPEB Strategy Study, March 21, 2011, Pl.'s Dep. Ex. 80 at LakeDef.000650 (chart showing "Elimination of 5 YOS ***vested*** eligibility" would yield $7.8 billion in "Liability Savings" and "Elimination of all ***vested*** eligibility" yields savings of $12.3 billion if "Applied to All"

e. State of N.C. OPEB Strategy Study, March 21, 2011, Pl.'s Dep. Ex. 80 at [Vieira] LakeDef.000652 (chart showing "Elimination of 5 YOS ***vested*** eligibility" would yield $4 billion in "Liability Savings" and "Elimination of all ***vested*** eligibility" yields savings of $4.6 billion if "Applied to Non-***Vested***")

f. State of N.C. OPEB Strategy Study, March 21, 2011, Pl.'s Dep. Ex. 80 at LakeDef.000680–81) ("Currently, individuals who leave State employment after becoming ***vested***, may work elsewhere and then enroll in health benefits at retirement." and "Apply to

everyone" approach applies the change to all current and future retirees. "Apply only to Non-***Vested***" applies the change only to future employees and current employees with less than five years of service.")

g. Vieira Letter to SHP, 2006, Pl.'s Dep. Ex. 73 at LakeDef.000484–85) (discussing "terminated employees with a ***vested*** benefit").

6. In PowerPoint Presentations:

    a. State Health Plan Update by Mona Moon, Dec. 12, 2012, Pl.'s Dep. Ex. 27 at LakeDef.004484 (stating that "the State's unfunded liability associated with retiree health benefits earned by: current retirees, active employees, and former employees with a ***vested*** retiree health benefit" and listing 30,241 "Inactive ***Vested*** Participants" along with retirees, etc.)

In depositions, certain Defendants or former agents of the Defendants admitted that these eligibility requirements were considered vesting requirements:

1. Cowell Dep. at 28:5–10 ("Q: Are you ***vested*** in the retiree health benefits at this point? A: ***Yeah. I am*** – I came into the – in '05, so I am eligible at a certain age to receive some retiree health benefits."); Cowell Dep. at 28:11–17 ("Q: What is it that you consider yourself entitled to receive at retirement? A: Whatever health benefits are offered at that time. Q: At the time of your retirement? A: Yes.");
2. Cowell Dep. at 242:8–17 ("Q: Would you agree that the benefit provided through the State Health Plan, however defined, in if fact earned through past service would indicate that the employee is entitled to something? A: I'd say under the – under the law as they're describing it, yes, somebody with five years would be eligible for some sort of State Health Plan benefit.")
3. Moon Dep. at 212:9–16, 216:9–18, 307:25–308:6 ("Q: Do you acknowledge that there have been ***vesting*** requirements for certain years of contributing membership in order for someone to be eligible for state paid individual health insurance coverage at retirement? A: ***I do***")

4. Moon Dep. [9-14-15] at 89:19–24, 90:1–9 ("Q: And are you ***vested*** in the retirement health benefit? A: My understanding is the retirement health benefit is something that is available to retirees. So I would ***vest*** in the Retirement System at the time that I would draw a pension. If I meet the other eligibility requirements, then a health benefit might be a part of that.")

5. Moon Dep. [9-14-15] at 234:20–24, 235:1-8 (Q: So--and I think you've already explained this—the retiree's health benefit and the retirement pension benefit are both part of the retirement package, if I may use that word, that an employee for the State of North Carolina may be able to earn through their service given the conditions and the requirements? A: Yes. I believe that employees are earning, **vesting**, whatever word, a retirement benefit over the course of their employment that may include a retiree health benefit upon their retirement.")

6. Causey Dep. at 101:8–19 ("Q: Someone who was employed by the state as a teacher or state employee prior to October 1 of 2006, if they remained active and contributed to the retirement fund with their paychecks every period would vest in the retirement fund after five years; is that correct. A: Correct. Q: And it's the same five years of membership in the retirement fund that makes them eligible for retiree health benefits if they continue and retire with the State; correct? A: It would. Correct."); Causey Dep. at 131:2–132:10, 147:12–23 (admitting that the 5 year ***vesting*** in the retirement system is the same qualification for disability income, retirement pension, and eligibility for RHB); 171:13–172:6 (agreeing with the premise that a state employee who has vested in the retirement system has a right to RHB)

7. Trogdon Dep. at 69:9–16 ("Q: Does that mean you are also ***vested*** in the retirement health benefits? A: ***That is correct***."); Trogdon Dep. at 127:18–23 (short title for SB 837 was "State Health Plan / 20 Year Vesting.")

8. Crabtree Dep. at 172:11–18 (admitting she is unaware of any documents that say the RHB is not vested upon completion of the eligibility requirements)

9. Vieira Dep. at 73:24–74:10 (admitting that five years of service was the vesting requirement for RHB); Vieira Dep. at 181:22–182:14 (admitting term vesting used by Retirement System with respect to health benefit reports and that use of the term vesting normally means "that's the benefit they would be getting.")

10. Wall Dep. at 32:12–23, 71:6–18, 141:1–9

11. Spruill Dep. at 20:20–24, 21:1–6, 25:10–20, 26:18–22, 56:10–17

Plaintiffs also considered these eligibility terms to be vesting requirements. For example see:

1. Lake Dep. at 55:1–11
2. Evans Dep. at 30:17–21
3. Currie Dep. 34:11–24
4. Atwell Dep. 124:15–25, 125:10–16
5. Blanton Dep. 115:9–19
6. Barnes Dep. at 34:8–14, 111:11–15
7. Hanes Dep. at 52:1–7
8. Hayes Dep. at 41:4–7

In this case, the Defendants admit that all the Plaintiffs had reached 5 years of creditable service prior to the challenged amendment to the Retiree Health Benefit. Answer ¶¶ 1–26. For

those employees who retired prior to 1988 (before the express 5 year rule was created), vesting occurred upon their retirement, as they were not eligible to receive the Retiree Health Benefit until they had retired and were receiving payments from the Retirement System. N.C.G.S. § 135-40.1(17) (1986), *now codified at* N.C.G.S. § 135-48.40(a) (2016). These eligibility terms will hereinafter be referred to as the vesting requirements as there is no genuine issue of material fact that these terms were indeed treated and referred to as vesting requirements.

The language of the statutes, the expectations of the Plaintiffs (and other retirees), the expressed legislative intent, the testimony of the Defendants, and the legal precedence of *Simpson, Faulkenbury*, *Bailey,* etc. indicates undeniably that the Plaintiffs are vested in the Retiree Health Benefit. Once Plaintiffs' rights have vested "[t]he defendants [can] not then reduce the benefits." *Faulkenbury,* 345 N.C. at 692, 483 S.E.2d at 428.

C. The Terms of the Contract – An 80/20 Premium-Free Health Plan

Beyond the vesting requirements, the contractual terms of the RHB promised each vested retiree the provision of (1) a premium-free 80/20 health plan for the duration of their retirement and (2) the option to participate in a 90/10 health plan with the payment of a partial premium. Prior to the unilateral legislative changes made in 2011, and for nearly two decades prior, all Retirees were provided a premium-free comprehensive health plan that offered benefits based on an overall split in cost between the State and the Retirees of 80% and 20% respectively.

While the Defendants may squabble that the method by which the 80/20 plan was provided changed over the course of the years, until 2011, an 80/20 plan or better was always provided premium free for vested retirees. *See* Answer ¶ 47, 64; *see also* Def.'s Resp. to Pl.'s First Req. for Admis. 24; Moon Dep. [1-27-16] at 28:19–29:10. Prior to 2006, the State offered a single indemnity plan to employees and retirees with no retiree premium that was an 80/20

Plan or better. *See id.* In 2006, the State introduced two premium-free PPO plans, one at an 80/20 level and one at a 70/30 level. *See Comparison of Monthly Contribution Rates for 12 Month Employees* (Plan Year 2006/2007) (LakeDef.008122). Both plans were offered to employees and retirees with no premium alongside the premium-free 80/20 indemnity plan. *See id.* The new 70/30 plan offering was meant to be an additional and optional plan – not a replacement for the standard 80/20 plan. When such plan was introduced the State added a definition to the statute entitled "Optional alternative comprehensive benefit plans" and described the additional alternative plan as follows:

> that differ in coverage, deductibles, coinsurance ***from the Standard Plan providing for 80/20 coinsurance***, and that are alternative choices for coverage at the option of the Plan member.

N.C.G.S. § 135-45.1 (18) (2009) and (2010) (emphasis added). The 70/30 Basic Plan was intended to provide savings for dependent coverage under the plan by offering a reduced premium for family coverage, while the 80/20 Plan was intended for retiree only premium free coverage. Pl.'s Dep. Ex. 96 at 3–5. When the 80/20 indemnity plan was phased out in 2008, employees and retirees who did not choose otherwise, were by default enrolled in the 80/20 PPO Standard Plan. *See* North Carolina State Health Plan, *2008 Annual Enrollment and Indemnity Transition* (Lake Def. 005395). Throughout all of the changes in the plan design, an 80/20 Plan was the standard plan for retiree-only coverage. In fact, the 80/20 plan was described as the "Standard Plan" until 2014 when it became "Enhanced" and the "Basic" 70/30 became "Traditional." Moon Dep. at 41:7–42:24.

The Statutes and retirement materials further described the 80/20 Plan available to retirees. The General Statutes, for instance, expressed the terms of this general split in coverage in detail. For example, in 1999, N.C.G.S. § 135-40.8(a) stated that

For the balance of any fiscal year after each eligible employee, retired employee, or dependent satisfies the cash deductible, the Plan pays eighty percent (80%) of the eligible expenses outlined in G.S. 135-40.6. The covered individual is then responsible for the remaining twenty percent (20%) until one thousand dollars in excess of the deductible has been paid out-of-pocket. The Plan then pays one hundred percent (100%) of the remaining covered expenses.

N.C.G.S. § 135-40.8(a) (1999); *see also* N.C.G.S. § 135-40.8(a) (2005) (referencing 80%/20% split in out-of-pocket expenditures). Further, sections of the General Statutes went into additional details about the benefits offered. *See, e.g.*, N.C.G.S. §§ 135-40.4(a), 135-40.5, 135-40.6 (1999); *compare to id.* (2005). Handbooks provided to current employees and Retirees by the State Health Plan likewise contained details of the benefits offered. *See, e.g.*, Def.'s Dep. Ex. 11 at LakeDef.016433 [2004 Summary Plan Description]; Def.'s Dep. Ex. 133 at pp. 2, 3 [1996 Your Benefits]; Def.'s Ex. 7) at pp. 14–20 [1992 Comprehensive Major Medical Plan]; Def.'s Ex. 55 at p. 2 [2007 Guides to Selecting Health Coverage through SHP]. In her deposition, Defendant Treasurer Cowell testified that she understood an 80/20 health plan to be: "It's where eighty percent of the piece is covered, and then the employee covers twenty percent of the remaining." Cowell Dep. at 258:9–15. She further testified that she did not know whether that 80/20 cost sharing was applied just to co-insurance or was broader in scope and application. Cowell Dep. at 258:16–19. The Executive Director of the SHP admitted that the 80/20 plan had been a premium-free plan that had been offered premium-free prior to 2011 to retirees who had vested in the plan. *See* Moon Dep. [2-26-16] at 215:24–216:18. She further admitted that this was received as part of their retirement benefit package. *See* Moon Dep. [2-26-16] at 220:19–23) Each of the named Plaintiffs who were deposed stated that they understood that they were entitled to receive a premium-free 80/20 Health Plan. *See* Barnes Dep. at 48:11–22; Blanton Dep. at 20:9–14; Buchanan Dep. at 68:4–6 and 75:12–18; Cooper Dep. at 86:23–87:7 and 110:25–11:10; Currie Dep. at 47:22–25; Davis Dep. at 34:10–23; Evans Dep. at 29:10–13; Fisher Dep. at 59:17–22 and 61:2–5; Futrelle Dep. at 105:9–15; Hanes Dep. at 39:16–40:2; Hayes Dep. at 43:12–19; Jarvis Dep. at 46:4–9; Jones Dep. at 37:24–28:5; Kaiser Dep. at 149:13–19; Lake

Dep. at 51:14–52:2; Latta Dep. at 146:17–23; Libby McAteer Dep. at 185:7–14; Porter McAteer Dep. at 136:23–137:5; Nobels Dep. at 57:7–11 and Savell Dep. at 104:11–17.

Furthermore, under North Carolina law, Plaintiffs vested into the 80/20 plan when they finished their 5 year service requirement. As stated in *Simpson*:

> 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 93–94 (emphasis added); *Bailey*, 348 N.C. at 150–51, 500 S.E.2d at 65–66; *see also Faulkenbury*, 345 N.C. at 629, 483 S.E.2d at 428 (Once a plaintiff worked five years, their benefits were vested and defendant cannot reduce them). When each Class Member vested, the State provided an 80/20 plan or better premium free. Answer ¶¶ 1–26, 47, 64; Moon Dep. [1-27-16] at 28:19–29:10. Therefore, the Plaintiff Class Members must be provided an 80/20 premium free plan, or better. Consistent with this concept, the Plan has done so until 2011. *See* McCarthy Aff. Ex. B at p. 6 (hereinafter the "McCarthy Report"). Mr. McCarthy concluded that the overall actuarial value of the 80/20 plan had been at or in excess of eighty percent (80%), while the 70/30 plan's actuarial value was more than seventy percent (70%) but less than eighty percent (80%). *See* McCarthy Report at p. 6. Charles Fuhrer, the actuary retained by the Defendants, produced a report that similarly showed that the retirement health benefits offered for numerous years have always been part of a comprehensive medical plan. *See* Def.'s Notice of Service of Expert Report, attached Report of Charles Fuhrer (hereinafter the "Fuhrer Report"). This difference amounts to a real diminution in the benefit the Plaintiffs were offered, including a difference in lost value per year in the range of $434.04 –

$497.16 based on the difference between the 80/20 and 70/30 plans over a time period inclusive of the claims in this case. *See* McCarthy Report at p. 6.

That the 70/30 plan is a diminished benefit from the 80/20 plan is not in dispute. The Defendants admit that a 70/30 plan is a less valuable benefit than an 80/20 plan, which is a less valuable benefit than a 90/10 plan. *See* Moon Dep. [9-15-15] at 165:6–9 ("Q: [Y]ou would agree, would you not, that the 70/30 plan is generally a less valuable plan than an 80/20? A: Yes."); Moon Dep. [1-27-16] at 104:20–24 ("Generally speaking you will see a higher premium for what is considered to be a richer or higher benefit. So the dependent rates for the 80/20 plan are going to be higher than what you see in the 70/30 plan."); Moon Dep. [2-26-16] at 179:5–21); Moon Dep. [2-26-16] at 183:15–19 ("Q: And the 80/20 would be the richer plan or the 70/30 would have less value then by that comparison; is that correct? A: Yes.") The Defendants further admit that the differences in value between the plans is measurable. *See* Moon Dep. [2-26-16] at 183:21–24. While the terms of the plans do differ in some of the administrative details and minutiae attendant in any health plan, a side-by-side review of the benefits offered under the plans show the single most important fact – that the cost-sharing benefits between the plans vary in often uniform terms based on the level of coverage offered (i.e. 70/30, 80/20, 90/10).

The 80/20 premium free benefit has long been a part of the retiree's contract with the State of North Carolina. It was expressed through statute and handbooks and has been provided consistently until 2011. Importantly, each retiree in this case completed the necessary service while an 80/20 premium free benefit plan was offered by the state. Once they have vested into that plan, its provision cannot be reduced.

D. Evidence of the Contract

There is an overwhelming amount of evidence presented in this case that shows without a doubt that the State intended to offer the Retiree Health Benefit as a contractual lifetime benefit and as part of State employees' overall deferred compensation package. This evidence can be found in statutes and legislative history, in numerous and various documents from multiple state agencies, and implied overall in the general compensation and benefits scheme that the State employed to recruit, retain, and compensate its employees.

1. The Language of Chapter 135 Expressed an Intent to Offer the Retiree Health Benefit and to be Bound by Contract to Provide that Benefit

While discovery in this case has uncovered numerous documents evidencing the contractual nature of the retirement health benefits, the statutes themselves provide a significant source of proof that the retirement health benefits were offered in the way of a contractual obligation.

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").[4]

[4]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.")

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 word "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. (***emphasis added***). 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*, *Bailey*, and *Stone* did not contain such unequivocal undertaking language and did not make 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 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. Specifically, the legislature used the words "vesting" and "obligation" in connection with 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***." Session Law 2006-174 (emphasis added). The title of an act is an indication of legislative intent. *See Dickson v. Rucho*, 366 N.C. 332, 342, 737 S.E.2d 362, 370 (2013). An Actuarial Note commissioned by the General Assembly to investigate the 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***).[5] 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***).[6] 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

[5] Def.'a Resp. to RA's, Ex. A, p. 3, a*lso* a*vailable at* http://ncleg.net/Sessions/2005/FiscalNotes/Senate/PDF/SFN0837v1.pdf

[6] Pl.'s Dep. Ex. 30 at LakeDef.001225, *also available at:* http://ncleg.net/Sessions/2005/FiscalNotes/Senate/PDF/SAH0837v2.pdf

obligation to provide the 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 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).

Third, at least one codified eligibility section of the State Health Plan statutes even expressly uses the term "vested" in reference to eligibility for the Retiree Health Benefit. In N.C.G.S. § 135-48.41(f), the General Assembly used the phrase "[f]or the support of the benefits made available to any member vested at the time of retirement" to proscribe additional eligibility provisions for participation in the SHP for certain TSERS members who had become part of the TSERS system through a transfer from certain outside groups associated with the State. While this section is admittedly limited in its scope and application (being a small sub-set of retired members), the fact that the General Assembly chose to use the term "***vested at the time of retirement"*** to explain eligibility provisions for the SHP is additional evidence of the intent of the State to create a vesting scheme for use in administering and providing the Retiree Health Benefit.

The statutes in this case are substantially similar to the statutes in *Bailey*, *Faulkenbury*, *Wiggs* and others.[7] In fact, some of the same statutes in Chapter 135 are at issue. For instance, in *Wiggs*, the statute at issue did not contain the term "contract" or "vesting." It merely proscribes the period an officer must work before retirement and that on retirement, the officer will receive a separation allowance.

The State will also likely contend that "conditional language" in the statute prevents a contract from being formed. The State made similar arguments in *Faulkenbury* and *Simpson*, by arguing that statutory language reserving a right to amend defeated the plaintiffs' vested contractual rights. *Simpson*, 22 N.C. App. 218, 221–23, 363 S.E.2d 90, 92–93; *Faulkenbury*, 345 N.C. at 691, 483 S.E.2d at 427. The Courts rejected those arguments, as it should here. *Id.* Instead, North Carolina Courts have been consistent in holding that once an employee fulfills the stated eligibility criteria, their rights vest and cannot be retroactively diminished. That is the current condition of the Plaintiffs in this case who already earned the Retiree Health Benefit by completing the required years of service.

Even without reference to the numerous documents and testimony elicited in this case, the statutes and the legislative history alone evince an intent to contract for the provision of the Retiree Health Benefits.

2. The Defendants Used Words of Contract in Describing the Retiree Health Benefit

It is well settled law that benefit handbooks, pamphlets, written correspondence and even oral representations to public employees can serve to create or evidence a contract between the

[7] A statutory enactment is not even necessary to create a contract between the State and its employees. *See Pritchard v. Elizabeth City*, 81 N.C. App. 543, 344 S.E.2d 821 (1986) (holding that oral representations are sufficient to bind a governmental employer).

employee and the State. *Stone v. State*, 191 N.C. App. 402, 410–15 (2008); *Bailey v. State*, 348 N.C. 130 (N.C. 1998) (considered written and oral representations including employee handbooks and pamphlets); *Bolick v. County of Caldwell*, 182 N.C. App. 95, (N.C. Ct. App. 2007) (personnel policy); *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 552–53 (1986) (oral representations were sufficient to express contract).

The Retirement System under the auspices of the North Carolina Treasurer published a series of "Your Retirement Benefits" booklets, all of which included retirement health benefits. In each of these booklets appears an opening letter from the Treasurer explaining the benefits described therein. Each letter from the Treasurer included a statement that the benefits included in the booklet were a part of the retirement benefit they would receive at retirement. Pl.'s Dep. Ex. 41 [Your Retirement Benefits, August, 1988]; Your Retirement Benefits, March 1, 1995, (Lake Def. 003226); Pl.'s Dep. Ex. 42 at LakeDef.002756 [Your Retirement Benefits, 2002]; Pl.'s Dep. Ex. 43 at LakeDef.002987 [Your Retirement Benefits, 2008]. Further, each booklet included a statement that the benefits explained therein were a part of the total compensation package deferred until the employee retires. *See id.* During Richard Moore's tenure as Treasurer, his opening letter to the Your Retirement Benefits handbook explained that the booklet "describes the retirement benefits you can expect to receive as a member of the Teachers' and State Employees' Retirement System." It goes on to explain that "Your retirement benefit is a part of your compensation earned during your active working career that has been deferred until the time you stop working." Pl.'s Dep. Ex. 42 at LakeDef.002756; Pl.'s Ex. 43 at LakeDef.002987.

Since the implementation of the 5 year vesting requirement, the Your Retirement Handbooks have also included conditional contractual language for the receipt of the premium

free health benefit. The 1988 Your Retirement Benefits booklet states "When you retire, if you have at least 5 years of service as a contributing teacher or State employee, you are eligible for coverage under the State's Comprehensive Major Medical Plan with the State contributing toward the cost of *your* coverage." Pl.'s Dep. Ex. 41 at LakeDef.003383; *see also Your Retirement Benefits*, March 1, 1995 at LakeDef.003239. That same benefit booklet was preceded with a letter from Treasurer Harlan Boyles which states: "This booklet describes your benefits as a member of the Teacher's and State Employees' Retirement System. The benefits provided by the State Retirement System ***are part of your total package of compensation which is deferred until you retire***." Pl.'s Dep. Ex. 41 at LakeDef.003370; *Your Retirement Benefits*, March 1, 1995 at LakeDef.003226 (emphasis added); *see also* Pl.'s Dep. Ex. 42 at LakeDef.002756; Pl.'s Dep. Ex. 43 at LakeDef.002987.

Similarly, the SHP 1988 Plan Booklet stated that the State would pay for "noncontributory (no cost to you)" coverage to "[r]etired North Carolina public school teachers and State employees," but that "In order to qualify for benefits under the Plan, an employee who retires on or after January 1, 1988 must have completed at least 5 years of contributory service prior to retirement." Complaint ¶ 48; Answer ¶ 48; *see also* Def.'s Dep. Ex. 115 at LakeDef.008685, 008630. [Summary Plan Description, Nov. 1989] ("The State of North Carolina pays for coverage under the Plan for the following individuals: Retired North Carolina public school teachers and State employees … Employees who retire on or after January 1, 1988, must complete at least 5 years of creditable service prior to retirement to be eligible."). In both instances, the State emphasizes that the coverage will be provided at no cost to the retiree only if they meet certain service requirements, namely 5 years of creditable service to the State. Such language, which offers a benefit and the consideration in order to receive that benefit is the

language of contract. This language is consistently expressed throughout the years from 1988 to 2011 in both the State Health Plan Booklets and the Your Retirement Benefits Booklets.

The publications also explicitly explain that becoming vested enables one to receive the health benefit. The 2008 "Your Retirement Benefits" Booklet includes under the heading "How to Qualify For Benefits" and the subheading "Becoming Vested" states:

> You become vested in the Retirement System once you have completed a minimum of five years of membership service. This means that you are eligible to apply for lifetime monthly retirement benefits based on a formula, and the age and service requirements described in this handbook, provided you do not withdraw your contributions. You may also be eligible for retiree health coverage as described on page 20.

Pl.'s Dep. Ex. 43 at LakeDef.003001; *see also* Pl.'s Dep. Ex. 44 at LakeDef.003041 [Your Retirement Benefits 2009]; Pl.'s Dep. Ex. 45 at LakeDef.003198. The State Health Plan has even referred to the coverage provided by the Plan directly as contracts: "The Plan offers the following contracts: 1. Employee Only- covers only the employee or retiree." Def.'s Dep. Ex. 11 at LakeDef.016440 [2004 Summary Plan Description].

Similarly, the Fiscal Research division and the State's actuaries consistently refer to the Retirement Health Benefit as a "liability" and an "obligation." For instance, in reference to the Retirement Health Benefit, the Fiscal Research Division states: "This unfunded ***liability*** represents … the unfunded benefit ***obligations*** already ***earned*** by current retired employees, active employees, and inactive former employees eligible to retire at some point in the future." Pl.'s Dep. Ex. 34 at LakeDef.016264 (emphasis added). The State's actuaries also consistently referred to the Retirement Health Benefit as a "liability" in the many actuarial valuations of the Retirement Health Benefit. *See, e.g.*, Pl.'s Dep. Ex. 32 at LakeDef.016142–016169 [Report of the Actuary on Post Employment Medical Benefits Valuation].

By consistently referring to the Retirement Health Benefit as requiring an employee or retiree to complete a task of service, the State was expressing an offer and the consideration for accepting that offer. By consistently using the terms "earned," "vested," "obligation," "liability" and "contract," the State is unequivocally using common terms of contract when referring to the Retirement Health Benefit. Any argument that the State never considered, or does not consider the benefit a contract is unfounded in light of the numerous admissions and representation as evidence in this case. For example, the State at high levels is cognizant that the Retiree Health Benefit is a contract. In a Meeting of the Actuarial Committee on Retirement Health Benefits, the State's Controller "Mr. McCoy said that making a change in existing benefits would involve a discussion about whether current employees have a contract for these benefits." Pl.'s Dep. Ex 77 at LakeDef.001422 [Minutes of Meeting of Actuarial Valuation Committee]; *see also* Pl.'s Dep. Ex. 80 at LakeDef.000649 [OPEB Strategy Study] ("Legal and litigation implications have not been reviewed for administrative feasibility"); Pl.'s Dep. Ex. 81 at LakeDef.001210) (same). The Executive Director of the SHP admitted that the delivery of health benefits to eligible retired employees is a "duty of the State Health Plan." Moon Dep. [9-14-15] at 34:13–16. Even the State's Treasurer, a named defendant in this case, concedes that a retiree that has completed their eligibility requirements can expect to receive some benefit and that there is an "obligation" to provide a plan. Cowell Dep. at 86:5–87:10. This is the fundamental understanding of a contract.

Documents have also explicitly expressed, and it has been generally understood, that the benefits were intended to be until the death of the retiree. The University of North Carolina at Chapel Hill issued personal benefits statements which stated that the retirement health plan "***continues for life***" if you have vested. See RA 78(q), Exhibit Q at 2 (***emphasis added***). In some of the training manuals used by retirement benefits counselors the term "for life" is used to

describe duration of the premium free health benefit. Pl.'s Dep. Ex. 46 at LakeDef.02894) [Health Insurance Standard Operating Procedure]. In Ms. Cowell's first introduction letter to the "Your Retirement Benefits" Booklet, after describing that the benefits described in the booklet constitute "retirement benefits" she states that "your ***life long benefits*** are guaranteed and protected by the Constitution of the State of North Carolina." Pl's Dep. Ex. 44 at LakeDef. 003037 (emphasis added).

The State treated and accounted for the benefit as a lifetime benefit and a lifetime liability of the State. The State's actuaries in their OPEB valuations list "Coverage duration: ***Lifetime***" as the relevant duration of the Retiree Health Benefits. Pl.'s Dep. Ex. 86 at LakeDef.005798 (emphasis added); *see also* North Carolina State Health Plan Actuarial Valuation as of December 31, 2011 (Revised October 11, 2012) (Lake Def. 002532) ("Duration of coverage: ***Lifetime***."). Asked to explain, the State's actuary Ken Vieira stated, "Everyone assumes they're going to be there for the lifetime unless it's defined." Vieira Dep. at 147:1–4. Additionally, North Carolina's Treasurer understands that the provision of the retirement health benefit does not end until death. Cowell Dep. at 89:20–90:10.

3. The Retiree Health Benefit is Part of the Total Compensation Package Offered to the Plaintiff Class

a. The Retiree Health Benefit is Inexorably Intertwined with the Contractual Pension Benefit Plan

The Retiree Health Benefit is inextricably linked to the contractual Retirement System, and they are part of the same employment contract. The RHB was set up as a part of the total deferred compensation package for State retirees through its structure, operation and eligibility rules; the State represented the health benefit to retirees as a part of the total retirement package;

and the State considered and accounted for the health benefit as a total part of the employee's retirement compensation.

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. 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."). Even 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).

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). The five year service requirement meant that the service had to be creditable; in other words, they had to contribute to the Retirement System in order to receive the benefit. Pl.'s Ex. 42 at LakeDef.002775 [Your Retirement Benefits 2002]. As it was presented to employees and retirees, "Creditable service

means any period during which you contribute to the System, provided you do not withdraw you contributions." *Id.* at LakeDef.002760. Creditable service by this same definition is used to determine pension benefits along with determining retirement benefits. *Id.*

Further emphasizing the importance of contributing to the pension plan, if an employee receives a refund of their contributions to the pension plan, they forfeit their right to the RHB. *See* Pl.'s Dep. Ex. 42 at LakeDef.002775. Retirement counselors used this fact to encourage employees leaving their job to keep their pension contributions with the state instead of withdrawing them. Pl.'s Dep. Ex. 12 at 1 [Retirement System Division FAQ] ("If you have accumulated five years of service . . . you should consider how long it will be before you will be eligible to receive a monthly benefit (and possible free individual health insurance if retiring from the Teachers' and State Employees' Retirement System).)"

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. *See 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]

Additionally, 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.

Consistent with the structure of the Retirement Health Benefit, the state consistently presented the benefit as a part of the total retirement package. The Retirement Health Benefit is included in the Your Retirement Handbooks which "describe[] the retirement benefits you can expect to receive as a member of the Teachers' and State Employees' Retirement System." Pl.'s Dep. Ex. 42 at LakeDef.002756 [Your Retirement Benefits, 2002]; Pl.'s Dep. Ex. 43 at LakeDef.002987 [Your Retirement Benefits, 2008]. The Booklets describe, without distinction,

[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.

the benefits to be received which include pension benefits, disability benefits, and retirement health benefits.

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. 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.

b. The Retiree Health Benefit is a Part of the Retirees' Total Deferred Compensation

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. According to *Simpson v. North Carolina Local Government Employees' Retirement System*, "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." *Simpson v. North Carolina Local Government Employees' Retirement System,* 88 N.C. App. 218 (N.C. Ct. App. 1987). 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.

Consistent with the obvious similarities and links between retirement pension and retirement health benefits, the State has consistently referred to the Retiree Health Benefit as a part of a retirees "total compensation" which is deferred until retirement. In 2008, the North Carolina Office of State Personnel released a Compensation and Benefits Report, which outlines the concept of total compensation as "an employee's base salary, benefits and other perquisites that the employer provides" noting that "the focus is on total compensation rather than base pay." Plaintiff's First RAs 78(n), Exhibit N at 5 (labeled as pages 2 and 3 of the report). Included in the report is a "Total Comparison Model" chart which includes what percentage of pay is spent on "Health Insurance" and "Retiree Health Plan Reserve." *Id.* The report adds "The state needs to communicate this important aspect of employees' compensation to both current and prospective employees." *Id.* The State did just that.

The Retirement System regularly released "Your Retirement Benefits" handbooks which included the benefits class members would receive such as pension, disability, and retirement health benefits. During Harlan Boyles's tenure as Treasurer, his opening letter specified that "This booklet describes your benefits as a member of the Teacher's and State Employees' Retirement System. The benefits provided by the State Retirement System ***are part of your total package of compensation which is deferred until you retire***." Pl.'s Dep. Ex. 41 [Your Retirement Benefits, August, 1988]; *Your Retirement Benefits*, March 1, 1995 at LakeDef.003226 (emphasis added). During Richard Moore's tenure as Treasurer, his opening

letter to the Your Retirement Benefits handbook explained that the booklet "describes the retirement benefits you can expect to receive as a member of the Teachers' and State Employees' Retirement System." It further explains that "***Your retirement benefit is a part of your compensation earned during your active working career that has been deferred until the time you stop working***.", Pl.'s Dep. Ex. 42 at LakeDef.002756 [Your Retirement Benefits, 2002]; Pl. Dep. Ex. 43 at Lake Def. 002987 [Your Retirement Benefits, 2008] (emphasis added).

The State Health Plan also used similar language, explaining in a 2006 press release what the State "'owes' today for future retiree health care costs." Pl.'s Dep. Ex. 28 at Lake Def. 016140 [Press Release]. It goes on to state that "The benefits, provided through the State Health Plan, were earned through past service by North Carolina state employees and teachers who are now retired or already vested in the retirement system." *Id.* The State's understanding of the Retirement Health Benefit as deferred compensation is similar and consistent with the understanding of pension as a "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." *Simpson v. North Carolina Local Government Employees' Retirement System*, 88 N.C. App. 218 (1987). Like the pension plan, the retirement health benefit is "part of [the] total package of compensation which is deferred until you retire" and already "earned through past service" by the class members.

The Retiree Health Benefit as deferred compensation was also regularly expressed in State budgetary and financial documents. The State's Fiscal Research Division describes retiree health benefits as "benefit obligations already earned to date by current employees, existing retired employees, and inactive former employees eligible to retire at some point in the future."

Fiscal Research Division's Fiscal Brief Dated March 23, 2007, RA 78(k), Exhibit K to Plaintiffs First RAs at 2; see RA 41. It goes on to describe deferred compensation in general:

> Benefits provided in retirement including pension benefits are generally considered to be deferred compensation earned by an employee during their active service employment then redeemed once they transition to an eligible retired employee. Healthcare benefits for retired employees are typically the most significant recognized OPEB component.

Id. Similarly, "Just as salary compensation is ***earned*** and paid to an employee, so is an OPEB type benefit like health benefit coverage in retirement." Pl.'s Dep. Ex. 34 at Lake Def. 000447 [Fiscal Research Division, "State-Funded Health Benefit Coverage for Retired Employees"] (emphasis in original). "The Difference is the OPEB is ***earned in the present*** but payment of the compensation (or benefit) is ***deferred to the future*** after the employee has retired from active service to the employer." *Id.* (emphasis in original).

A labor economist reviewed the State's compensation practices and compared them with the practices of other public and private employers. *See* Kursh Report. At sum, the labor economist concluded that the Retiree Health Benefits were a part of the overall compensation package offered to State employees and that it represented deferred compensation since the enjoyment of the same is deferred until retirement. *See id.* at 3. Further, Mr. Kursh concluded that North Carolina State employees earn on average $7,853 less per year than their counterparts in the private sector. *See id.* at 4. He further concluded that the provision of benefits like the Retiree Health Benefit helped to make up for the lower earnings and that "[g]uaranteed health benefits in retirement would likely have been one of the more heavily weighted factors in employee decision-making given the limited availability of such benefits in private sector employment." See id. at 6–7.

c. The Retiree Health Benefit was used as Method of Recruitment

Until 2012, it was the stated policy of the State of North Carolina to "compensate its employees at a level sufficient . . . to maintain the labor market competitiveness necessary to recruit and retain a competent workforce." N.C.G.S. § 126-7(a) (2011) (This language was repealed in 2012 by 2012 Sess. L. 142). The State of North Carolina has long used the health benefit and retirement benefits as a tool for recruitment and retention of employees. See RA 78(n), Exhibit N at 4. Both the State Office of Personnel and labor economist consider retirement health benefits to be deferred compensation, which is a part of employees' total compensation. *See* Kursh Report ¶ 6; RA 78(n), Exhibit N at 4. The State acknowledges that the salaries of State employees is not commensurate with private sector employees and sought to make State jobs more attractive through benefits packages, which is a common practice among governmental employers. See RA 78(n), Exhibit N at 4; *see also* Kursh Report ¶¶ 11–16 ("The state needs to communicate this important aspect of employees' compensation to both current and prospective employees."). Employees, in turn, accepted lower earnings in exchange for these fringe benefits, especially retiree health benefits, which are largely unavailable from private employers. *See* Kursh Report ¶ 27.

E. Other Jurisdictions Have Refused to Allow Unilateral Retroactive Reduction to Governmental Retiree Health Benefits

In addition to the abundant North Carolina precedent, opinions from other jurisdictions – including Pennsylvania, California, Alaska, and Illinois – support Plaintiffs' arguments that their health insurance benefits are part of the Retirement System in North Carolina and are contractual in nature.

In *Township of Tinicum v. Fife*, 505 A.2d 1116 (Pa. Commw. Ct. 1986), the Commonwealth Court of Pennsylvania held that retirement medical insurance benefits for township police officers were deferred compensation that created vested contractual rights to those benefits that could not later be retracted. *See id.* at 1119. Similar to North Carolina, the court noted that "[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." *Id.* (citing *Commonwealth ex rel. Zimmerman v. Officers and Employees Ret. Bd.*, 469 A.2d 141 (1983); *Wright v. Allegheny Cnty. Ret. Bd.*, 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. *See Thorning v. Hollister Sch. Dist.*, 15 Cal. Rptr. 2d 91 (Cal. App. 1992) (citing *California League of City Emp. Ass'n v. Palos Verdes Library District*, 150 Cal. Rptr. 739 (Cal. App. 1978)). Relying on *California League*, the *Thorning* court held that health insurance benefits for two retired school district board members could not be unilaterally terminated because they "were included in the district's official declaration of policy pertaining to remuneration and other benefits" and "were of importance to the board members as an inducement for their continued service . . . and as a factor in their decision to retire." *Thorning*, 15 Cal. Rptr. 2d at 95–96.

In *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882 (Alaska 2003), the Alaska Supreme Court also found that retirement health insurance benefits are protected from subsequent changes in the same way that general pension benefits are protected. Specifically, the Alaska 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." *Id.* at 888.

Additionally, the Supreme Court of Illinois recently held in *Kanerva v. Weems*, 13 N.E.3d 1228 (Ill. 2014), that retirement health insurance benefits – the terms of which were described to state employees through various pamphlets and handbooks – were included in the overall state retirement system and thus were protected from subsequent legislation that reduced the state's contributions to the retiree's health insurance premiums. *See id.* at 1239–40, 1244.

Several other jurisdictions that have considered the 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).

The foregoing decisions, especially when considered with North Carolina's own precedent discussed herein, indicate that Plaintiffs' retirement health benefits are contract rights that are part of the Retirement System, therefore having protection from the State's substantive unilateral action.

F. The Defendants Breached the Contract

Plaintiffs have demonstrated *supra* that Plaintiff Class Members have vested into an 80/20 premium free retirement health benefit. It is also undisputed that in order to receive an 80/20 benefit after 2011, retirees must pay a premium. RA # 30; Answer ¶ 40; Answer ¶ 52; Answer ¶ 66; RA # 67. Further, it is undisputed that the premium free 70/30 plan is a less valuable, or diminished, benefit from the previous 80/20 plan. Fuhrer Report; McCarthy Report; Moon 9-14-15 Dep. 164:22 – 165:9; Kursh Report. While Defendants may claim that provision of the 70/30 benefit is good enough to satisfy their contractual obligations to the retiree class member, this position would be inconsistent with the precedent set out in *Bailey*, *Faulkenbury* and *Simpson*. As stated in Simpson:

> 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 93–94 (***emphasis added***); *Bailey*, 348 N.C. at 150–51, 500 S.E.2d at 65–66. Similarly, the Court in *Faulkenbury* stated that once Plaintiffs vested "The defendants could not then reduce the benefits." *Faulkenbury***,** 345 N.C. at 692, 483 S.E.2d at 428. Because the Plaintiffs in this case vested into the Retiree Health Benefit and

Defendants unequivocally reduced and diminished that benefit, Defendants have breached the contract.

Further, the breach is a substantial one, both on the additional costs it presents to retirees and because it represents a serious threat to the health benefit in its entirety.

L.J. "Mac" McCarthy, a certified health care actuary, explained in his report that the different levels of plans offered by the SHP varied in the value of the benefits that were offered. McCarthy Aff. Ex. B (hereinafter the "McCarthy Report"). Mr. McCarthy conducted an actuarial valuation on the SHP's benefit plan structures to determine the average differences in the level of benefits offered. *Id.* Based on that analysis, Mr. McCarthy concluded that the average non-Medicare participant would experience a difference in lost value per year in the range of $434.04 – $497.16 based on the difference between the 80/20 and 70/30 plans over a time period inclusive of the claims in this case. McCarthy Report at pg. 6. In short, an average 70/30 participant would experience almost $500 in lost value each year due to the lesser benefits offered by the 70/30 plan. A similar trend was seen in comparing the 80/20 and 90/10 plans where Mr. McCarthy concluded the average difference in value in those plans to be $377.64 – $411.12 per year. McCarthy Report at pg. 7. Medicare enrolled retirees experienced a lesser reduction in value due to the SHP being secondary coverage to Medicare; however, Mr. McCarthy still concluded that those retirees also noted a reduction in value between the plans. McCarthy Report at pgs. 7-8. Furthermore, Mr. McCarthy concluded that the overall actuarial value of the 80/20 plan had been at or in excess of eighty percent (80%), while the 70/30 plan's actuarial value was more than seventy percent (70%) but less than eighty percent (80%). McCarthy Report at pg. 6. Charles Fuhrer, the actuary retained by the Defendants, produced a report that similarly showed that the retirement health benefits offered for numerous years have

always been part of a comprehensive medical plan. Defendants' Notice of Service of Expert Report, attached Report of Charles Fuhrer (hereinafter the "Fuhrer Report"). Even the Defendants' own expert admitted the differences in value between 70/30, 80/20, and 90/10 level plans. Fuhrer Report, pg. 9. In fact, in some cases the Defendants' Actuary noted greater discrepancies in the average value between the plans than the Plaintiffs' Actuary. For example, for the 2014 year, Defendants' Actuary noted an average difference in value of $584 between the 70/30 and 80/20 plans that year, while Plaintiffs' Actuary noted a difference of $480.96. *Compare* Fuhrer Report, pg. 9 Results Table 1 *to* McCarthy Report, pg. 6.[9]

[9] The Parties agreed to defer any arguments and determination of non-premium related actual damages owed for any excess out of pocket damages and this issue is not a part of the Motion for Summary Judgment. Order Denying Defendants' Motion to Amend Case Management Order and Setting Briefing Deadlines and Hearing Dates for Class Certification and Summary Judgement, filed Aug. 18, 2016, ¶¶ 9-10. As stated in the referenced Order, further expert discovery may be necessary to fully develop those issues.

The State has previously used actuarial valuations to determine the level of benefits provided by the SHP. For example, in July of 2015, a division of the General Assembly (The Program Evaluation Division) authored a report that explained the use and function of actuarial valuations with respect to the SHP:

> Although the State Health Plan could shift medical costs to retirees by increasing out-of-pocket costs, North Carolina already does not have a rich plan compared to other states. Plan richness reflects the relative cost sharing between a health plan and enrollees based on the required deductibles, coinsurance, and copayments. The richness of a plan depends on its actuarial value, which represents the proportion of overall cost a plan pays for an employee.

Pl.'s Dep. Ex. 37 [Trogdon], pg. 35; see also Vieira Dep. 97:1–16. Over the years, the SHP and its actuaries calculated the actuarial value of the plans offered by the SHP to help in making changes to plan design. Vieira Dep. 97:17–98:12. The SHP's actuaries calculated that the unilateral changes made to the Retiree Health Benefits in 2011 "has reduced the [State's] liability by approximately $960,000,000." Pl.'s Dep. Ex. 82 (LakeDef.1353), pg. 1. The SHP's actuaries also calculated in 2011 (after the challenged legislation) that the 70/30 Plan that year had a relative value eight percent (8%) less than the 80/20 Plan. Vieira Dep. 135:7–15; Pl.'s Dep. Ex. 82 (LakeDef.1371). Several years prior, the SHP's actuaries had calculated that the State reduced its liability by $486 million through the 2009 elimination of the 90/10 Plan. Pl.'s Dep. Ex. 77 (LakeDef.1420). On the other hand, since 2011, the Retiree Health Benefit Trust Fund has built up a reserve of over one billion dollars due to the reductions made to the Retiree Health benefits. Trogdon Dep. 99:8–100:10.

The State has acknowledged the substance of the breach in a Legislative Commission Report that it may have to pay damages in excess of $100 million for this case in premiums alone. (Pl.'s Dep. Ex. 37 pg. 37)("If the plaintiffs are successful, the damages may exceed $100

million, which does not include the cost to the State Health Plan of complying with the plaintiffs' demands going forward.")

Beyond the out of pocket costs to retirees, the State's charging of a premium for the first time for the previously free 80/20 benefit plan promises to be only the beginning of the State's derogation of Plaintiffs' vested benefits. The State has already steadily increased the premiums needed to pay for the 80/20 benefit each year. *See* Premium Rate Chart, § I.1. *infra*. Further, the State has threatened to decrease the value of the 70/30 even further. The Executive Director of the State Health Plan has opined that virtually any type of co-insurance plan (even a 60/40, 50/50 or 40/60) split would satisfy the States admitted statutory requirement to provide a non-contributory plan to retirees. Moon Dep. (9-14-15) 85:6–86:2. Treasurer Janet Cowell has also expressed concerns that based on budgetary pressures from the General Assembly, the State Health Plan may have to be converted to a defined contribution plan, rather than its current status as a defined benefit plan. Cowell Dep. 68:11–20. Defendants' breach here represents a substantial one, not just monetarily, but in its significance as the beginning of a campaign to reduce the benefits that retirees had previously performed for and vested into.

G. The Impairment of the Contract was Not Reasonable or Necessary

Defendants unconstitutionally impaired Plaintiffs' contracts with the State under the Contract Clause (Art. I § 10) of the United States Constitution. Under the three-part test utilized by North Carolina, an unconstitutional impairment of contract exist where (1) there is a contractual obligation, (2) the state's actions impaired that contract, and (3) the impairment was not reasonable and necessary to serve an important public purpose. *See Bailey*, 348 N.C. at 140, 500 S.E.2d at 60 (quoting *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977)). Those elements are satisfied in the present case.

As discussed herein, there is no question that the relationship between the State and Plaintiffs regarding retiree health benefits was contractual and that the State was obligated to provide a non-contributory 80/20 plan. *See* § IV.A-D *supra*. Additionally, it also clear that the State breached its contract with Plaintiffs by charging premiums for the 80/20 plan and reducing the non-contributory plan to a 70/30 plan through Session Law 2011-96. *See* § IV.F. *supra*. Such breach was a substantial impairment of the State's contract with Plaintiffs.

First, there can be little doubt that the State's changes to the RHB resulted in an outcome different than that which was "reasonably expected" under the contract. *See N.C. Ass'n of Educators v. State*, ___ N.C. ____, 786 S.E.2d 255, 265 (2016) (quoting *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569, 580 (1983)) ("'Total destruction of contractual expectations is not necessary for a finding of substantial impairment.' However, a showing that the change in the law results in an outcome different from that 'reasonably expected from the contract' may be sufficient to show a substantial deprivation."). Obviously, having to pay a significant premium – over $100/month as of January 1, 2016 – to maintain the same level of plan is different than that which was reasonably expected when under the terms of the contract with the State it was completely non-contributory. *See* Premium Rate Table, § I.1.

Additionally, the differences in the non-contributory 70/30 plan and previously non-contributory 80/20 plan also reinforce substantial impairment. For example, as described in more detail previously, L.J. "Mac" McCarthy, a certified health care actuary, conducted an actuarial valuation on the State Health Plan's benefit plan structures to determine the average differences in the level of benefits offered. Based on that analysis, Mr. McCarthy concluded that the average non-Medicare participant would experience almost $500 in lost value each year due

to the lesser benefits offered by the 70/30 plan as opposed to the 80/20 plan. When looked at individually as to each class member, this is a significant difference and deprives Plaintiffs of the value of their contractually vested rights. *See N.C. Ass'n of Educators*, 786 S.E.2d at 265.

Moreover, looking at the overall impact to the class as a whole even further supports the assertion that Defendants impairment was substantial. *See Bailey*, 348 N.C. at 151, 500 S.E.2d at 66. In *Bailey*, the Court found that the legislative amendment at issue there substantially impaired the plaintiffs' contracts with the State because of the "overall impact" of the changes:

> The legislative amendment placed a $ 4,000 annual exemption cap on retirement benefits. While this will affect retirees in differing degrees depending on their individual benefit levels, the overall impact is substantial. **The record evidence reveals that, at last count, losses to retirees in expected income will be in excess of $ 100 million.** In *Simpson*, the Court of Appeals determined that plaintiffs' contractual rights had been impaired, "as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge." Such is the case here. Thus, it is clear and we hold that the statutory amendment in question substantially impairs the employees' contractual right to a tax exemption.

Id. (quoting *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94) (***emphasis added)***. Here, the State has admitted that the damages that Plaintiffs have suffered "may exceed $100 million", an amount that the *Bailey* court deemed to qualify as substantial to trigger an unconstitutional impairment. Pl.'s Dep. Ex. 37 at p. 37 ("If the plaintiffs are successful, the damages may exceed $100 million, which does not include the cost to the State Health Plan of complying with the plaintiffs' demands going forward."). Thus, pursuant to *North Carolina Association of Educators* and *Bailey*, the Defendants' actions constituted a substantial impairment of the State's contractual obligations to Plaintiffs.

The Defendants' substantial impairment of the contract between the State and Plaintiffs was also not reasonable and necessary to serve an important public purpose. The North Carolina Supreme Court noted in *Bailey* that "courts are not bound by just any rationale put forward by

the legislature to justify its actions." *Bailey*, 348 N.C. at 151–52, 500 S.E.2d at 66 (quoting *U.S. Trust*, 431 U.S. at 25–26) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. . . . If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

In *Bailey*, the Defendants asserted that the exemption cap was a reasonable and necessary approach to effectuate an important state interest – there, compliance with a U.S. Supreme Court decision. *See id.* at 152, 500 S.E.2d at 66–67. While recognizing the State interest as important, the court rejecting the notion that the exemption cap was a reasonable and necessary means to serve that interest. *See id.* at 152, 500 S.E.2d at 67. First, the *Bailey* court held that the State's actions were not "necessary" – i.e., essential – because there were "numerous ways that the State could have achieved [its purpose] without impairing the contractual obligations of plaintiffs." *Id.* ("As the Supreme Court stated [in *U.S. Trust*], 'a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.'"). The *Bailey* court additionally held that the State action was not reasonable because it was based on legislative convenience and "[l]egislative convenience is not synonymous with reasonableness." *Id.* (holding that the legislature's action in enacting the exemption cap and impairing its contracts with the plaintiffs was based on convenience because it allowed the State to pursue a "revenue neutral" approach, meaning that the legislature would not have to raise taxes or cut other programs in order to comply with Supreme Court decision).

In the present case, the State has never expressly identified exactly what "important purpose" it sought to serve through the reduction in benefits/imposition of premiums on vested retirees. However, in deposition testimony, Mona Moon, the Executive Director of the State

Health Plan, made statements indicating that the State's action was motivated by the desire of the State to alleviate the financial situation of the State Health Plan. Specifically, in response to the question, "Was there anything that you're aware of . . . that compelled the change in treatment of premiums from a noncontributory basis to a partially contributory basis for the 80/20 plan?," Ms. Moon stated in her deposition that "the [State Health] Plan was experiencing increases in cost that traditionally the State had had to cover through increases in the employer contribution", that "[t]he State was experiencing budget issues", and that "[t]he General Assembly wanted the [State Health] Plan to determine other ways to raise funds than just the employer contribution." Moon Dep. at 115:13-116:9. Assuming that the State's purpose in impairing its contractual obligations with Plaintiffs was in fact to alleviate the financial situation of the State Health Plan, and even further assuming *arguendo* that such purpose is important, it is clear that the State's actions were not reasonably and necessary to serve that purpose.[10]

First, the State's actions were not necessary because there were "numerous ways that the State could have achieved [its purpose] without impairing the contractual obligations of [P]laintiffs." *Bailey*, 348 N.C. at 152, 500 S.E.2d at 67. In her September 2015 deposition, Mona Moon admitted that the State could have taken other actions to "balance things out" instead of imposing premiums on retirees. *See* Moon Dep. 115:8–12 (Question: "There were other ways to balance things out… without necessarily charging a premium to the employee, active or retired, in 2011, isn't that right?" Answer: "Yes"). Some of the other actions that the State could have taken are laid out in a March 2011 study the State commissioned on ways to reduce retiree medical and other post-employment benefits plan (OPEB) costs. *See* Pl.'s Dep. Ex. 80. That study maps out 15 different plan redesigns to manage OPEB costs. *See id.* at pp.

[10] Plaintiffs are in no way acknowledging that any purpose of the State was an "important purpose" for determining whether the State unconstitutionally impaired its contracts with Plaintiffs.

4–7 (setting forth potential plan changes based on redesign strategies including switching to Medicare Advantage and/or a Prescription Drug Plan, limiting the State's contributions towards coverage, increasing the minimum age for eligibility, and eliminating coverage). Each of these plan redesigns is separately modeled as applying "to all current and future retirees, including future hires" *or* applying only "to new hires and current employees with less than 5 years of service" (i.e., new hires and non-vested employees). *See id.* at p. 5. Any of those 15 plans, as applying to new hires and non-vested employees, could have been adopted without impairing the contractual rights of Plaintiffs. *See* U.S. Trust, 431 U.S. at 30 ("[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.").

Further, a 2015 legislative report regarding the State's unfunded actuarial liability for retiree health benefits sets forth additional actions that could be taken by the State to reduce its liability. See Pl.'s Dep. Ex. 37 at pp. 27–36. Those actions include: (1) the General Assembly increasing appropriation, (2) increasing service time requirements for the non-contributory health benefit, (3) requiring active employees to contribute to the Retiree Health Benefit Fund, and (4) eliminating benefits for new hires and non-vested employees. The State could also have taken any of these approaches in 2011 with regard to new hires or non-vested active employees and avoided impairing its contracts with Plaintiffs. Therefore, the State's actions in impairing its contacts with Plaintiffs were not necessary, or essential.

The State's actions were also not reasonable. In her deposition, Mona Moon testified that part of the reason the State took the actions that it did through Session Law 2011-96 was the General Assembly did not want to put more money into the State Health Plan and wanted the Plan to resolve its financial issues itself. *See* Moon Dep. 116:7–9, 118:21–119:10 ("The General

Assembly wanted the Plan to determine other ways to raise funds than just the employer contribution."; "Given the financial situation that the Plan was facing, the desire by the General Assembly to not put any more money into the Health Plan through the employer contribution that was necessary, the General Assembly wanted the State Health Plan to solve its financial problem. And that means we had to do something around member cost sharing."). In other words, the General Assembly was seeking a "revenue neutral" approach to avoid appropriating additional funds through either raising taxes or cutting other programs. This type of convenience approach – impairing "vested rights of current and future state . . . retirees to whom the State had made promises . . . in consideration of their many years of public service – was found by *Bailey* to not be reasonable. *Bailey*, 348 N.C. at 152, 500 S.E.2d at 67 ("Legislative convenience is not synonymous with reasonableness."). The State's actions in impairing its contract with Plaintiffs were not reasonable or necessary. This Court should therefore hold that the State's actions violated the Contract Clause (Art. I § 10) of the United States Constitution.

H. The Retroactive Reduction in the Retiree Health Benefits Violated the Plaintiffs' Constitutional Rights Under the State and Federal Constitutions

The Fourteenth Amendment to the United States Constitution and the North Carolina Constitution's Law of the Land Clause afford individuals the fundamental right to just compensation as well as the right to procedural due process. *See supra*, § III.D. The Defendants' actions in eliminating the non-contributory 80/20 plan constitute both an impermissible taking without just compensation and failed to provide Plaintiffs with the required due process.

Under the state and federal Constitutions, a State has an obligation to pay just compensation for taking the private property of an individual. *See supra*, § III.D. It is clear in

the present case that the Plaintiffs had a property right in the non-contributory 80/20 health plan. In *Bailey*, the Supreme Court of North Carolina held that because the relationship between the State and the plaintiffs there was contractual the retirement benefits at issue were private property that could not be taken without just compensation. *See Bailey*, 348 N.C. at 154–55, 500 S.E.2d at.68–69. Relying on United States Supreme Court precedent, the court stated that "valid contracts are property, whether the obligor be a private individual, a municipality, a *State* or the United States." *Bailey*, 348 N.C. at 154–55, 500 S.E.2d at 68–69 (emphasis added) (quoting *Lynch v. United States*, 292 U.S. 571 at 579 (1934)). The plaintiffs in *Bailey* "contracted, as consideration for their employment, that their retirement benefits once vested would be exempt from state taxation." *Id*. at 155, 500 S.E.2d at 69. As result, legislation placing a cap on those exemptions, while failing to compensate the plaintiffs, constituted an impermissible taking of the plaintiffs' private property. *See id.*

As described herein, Plaintiffs' had a contractual right in a non-contributory 80/20 health plan. *See supra* § IV. Just as in *Bailey*, the Plaintiffs contracted for that retirement benefit as "consideration for their employment" with the State. *Id.* As such, under North Carolina precedent, Plaintiffs also had a property right that could not be impaired or taken without just compensation.[11] *See id*. at 154–55, 500 S.E.2d at.68–69; *N.C. Ass'n of Educators, Inc. v. State*, ___ N.C. App. ___, 776 S.E.2d 1, 47 (2015) (citing *Bailey*, 348 N.C. at 154–55, 500 S.E.2d at

[11] It bears noting that even if there were no contractual relationship between Plaintiffs and the State (as Defendants are expected to argue), Plaintiffs still had a sufficient property right to be entitled to constitutional protections. 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 did not need to do anything to receive them other than be eligible. *See Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). The Court reasoned that the benefits were of such importance to the recipients that they constituted a property right. *See id*. at 262–64 & n.8. Given the importance of the benefits at issue here, they should be considered property rights subject to constitutional protections even if it is determined that they were not in fact contractual.

68–69) (stating that a vested employment benefit "confers a contractual right, which is also a property right, the uncompensated impairment of which by subsequent legislation can constitute a taking in violation of the Law of the Land Clause"). The enactment of Session Law 2011-96 constituted a taking of Plaintiffs' private property by eliminating the non-contributory 80/20 plan. Such taking was accomplished without any compensation – let alone just compensation – from the State. *See* S.L. 2011-96 This Court should therefore hold that Session Law 2011-96 violates Plaintiffs' fundamental right to just compensation under the state and federal Constitutions and grant summary judgment in Plaintiffs' favor.

In addition to taking Plaintiffs' property without just compensation, the Defendants violated Plaintiffs' rights to due process. Having established that the Plaintiffs had a valid property interest, the Plaintiffs were entitled to adequate notice and a meaningful opportunity to be heard prior to the deprivation of those interests. When asked to identify "what notice, opportunity to be heard, and due process was given" to Plaintiffs regarding changes in their health benefits, Defendants merely asserted that procedural due process was not required in this instance, tacitly acknowledging that there was no notice or opportunity to be heard at all. *See* Def. Resp. to Plaintiff's Third Set of Interrogatories and Second Set of Req. for Prod. of Documents at pp. 2–3 (asserting that "[a] widely applicable enactment of the General Assembly is not assailable on procedural due process grounds" and that "[i]t is legally irrelevant whether the Plaintiffs . . . were provided notice, opportunity to be heard and procedural due process"). To the contrary, because Plaintiffs have shown that they were deprived of a property interest by Session Law 2011-96, they *were* entitled to notice and an opportunity to be heard. *See Johnston v. State*, 224 N.C. App. 282, 305, 735 S.E.2d 859, 875 (2012) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)) ("Procedural due process imposes constraints on governmental decisions

which deprive individuals of 'liberty' or 'property' interests . . ."); *Lipinski v. Town of Summerfield,* 230 N.C. App. 305, 308, 750 S.E.2d 46, 49 (2013) (quoting *Peace v. Emp't Sec. Comm'n of N.C.*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998)) ("The fundamental premise of procedural due process protection is notice and the opportunity to be heard."). Defendants failed to provide such due process prior to depriving Plaintiffs of their property interests. This Court should hold that Defendants violated Plaintiffs' right to due process under the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

I. The Plaintiff Class is Entitled to Relief from this Court

If this Court determines that the Defendants have breached the contract, impaired the contract, or otherwise negatively affected the rights of the Plaintiff Class, the Plaintiff Class is entitled to relief in the form of: (1) monetary damages, and (2) declaratory and injunctive relief and specific performance to compel the Defendants to comply with the terms of the contract going forward and to protect the Plaintiff Class's constitutional rights in the future.

1. Monetary Damages

There is no genuine issue of material fact that if the Retiree Health Benefit is a contractual obligation of the State, then the Plaintiff Class has incurred monetary damages for the unilateral diminution of the benefits. The monetary damages in this case can be classified into two categories: (1) already paid excess premiums for those class members who received the 80/20 Plan, and (2) already paid excess out-of-pocket expenses for those class members who elected the 70/30 Plan. It is important to note that the parties and this Court have agreed that the issue of excess out-of-pocket damages is not presently a part of the motion for summary judgment proceedings and has been deferred pending additional expert discovery. (Order

Denying Defendants' Motion to Amend Case Management Order and Setting Briefing Deadlines and Hearing Dates for Class Certification and Summary Judgement, filed Aug. 18, 2016, ¶¶ 9-10). Therefore, only the basis for monetary damages for the excess premiums is at issue in this Motion. Due to the nature of this case as a class action, the Plaintiff Class is currently only requesting the Court to hold that the Plaintiff Class has been damaged and entitled to monetary damages and order and find the correct formula to be used to calculate the excess premium damages owed to the Class.[12]

Because the Plaintiff Class is entitled to a premium-free 80/20 Retiree Health Benefit, each Plaintiff Class Member who elected the 80/20 Plan and paid a premium for said Plan from September 1, 2011 to the present is entitled to damages for the excess premiums they actually paid. For the 2011-2012 Plan Year ("PY"), that excess premium rate was $21.62 per month for non-Medicare retirees and $10.00 per month for Medicare eligible retirees. The monthly premium rates thereafter increased each PY as indicated in the table below:

PPO 80/20 Standard Plan Retirees' Monthly Payment Rate		
Plan Year-Rate Period	**Non-Medicare**	**Medicare[13]**
09/01/2011-06/30/2012	$21.62	$10.00
07/01/2012-12/31/2012	$22.76	$10.52
01/01/2013-06/30/2013	$22.76	$10.52
07/01/2013–12/31/2013	$22.76	$10.52
01/01/2014-12/31/2014	$63.56	$00.00
01/01/2015-12/31/2015	$63.56	$00.00
01/01/2016-12/31/2016	$104.20	$00.00

[12] It is anticipated by Class Counsel that the Court may wish to appoint either a class administrator, referee, or special master to actually review the substantive premium payment data for the class and thereafter apply the formula to the actual data.

[13] Starting with the 2014-2015 PY, the SHP introduced a Medicare Advantage Plan ("MA") for Medicare retirees only, which replaced the 80/20 plan. The premium for that MA Plan is currently $0.00. Subject to review of this equivalency by the actuary experts, Medicare Class Members who are on the MA Plan will not have excess premiums for their 2014-2016 PY's.

In order to determine the amount of damages a Class Member is entitled for excess premiums, the following formula should be used on a yearly basis for each year since the 2011-2012 PY:

[PY Premium Rate] x [No. of Months Paid] = [Total PY Excess Premium Damages]

[This formula would be repeated for each year that a Class Member Paid Any Premiums for their Individual Coverage under the 80/20 Plan]

There is no dispute between the parties as to the excess premium rates for the 80/20 Plan. There does not appear to be a dispute between the parties as to the formula to be used to calculate any excess premiums. In fact, in 2015 the State acknowledged in a Legislative Commission Report that it may have to pay damages in excess of $100 million for this case. (Pl.'s Dep. Ex. 37 pg. 37)("If the plaintiffs are successful, the damages may exceed $100 million, which does not include the cost to the State Health Plan of complying with the plaintiffs' demands going forward.") Therefore, the Court should find that there are no genuine issues of material fact as the excess premium damages, order that the above formula be used to calculate said damages, and make such further rulings to compel the administrative calculation of the actual damages owed based on the data held by the Defendants.

2. Declaratory and Injunctive Relief

In addition to monetary damages, the Plaintiff Class is entitled to both declaratory and injunctive relief to compel the Defendants to provide a non-contributory 80/20 health plan and access to a partially contributory 90/10 health plan. Pursuant to N.C.G.S. § 1-253, if this Court finds that the Plaintiff Class is entitled to a non-contributory 80/20 health plan and a partially

contributory 90/10 health plan, then the Plaintiff Class would be entitled to a declaratory judgment finding that they have a vested contractual right to said Retiree Health Benefits.

In addition, the Plaintiff Class would also be entitled to entry of an order compelling the Defendants to provide said Retiree Health Benefits. Specific performance is available when there is a valid contract and the non-breaching party has fully performed. *See Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981)) (quoting *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E. 2d 44, 53 (1952)). In addition or in lieu of specific performance, the Court should also order the Defendants to provide the Retiree Health Benefit in the future by way of a mandatory injunction and a writ of mandamus. Said mandatory relief is available when (1) the party seeking relief has a clear legal right to the act requested; (2) the defendant has a legal duty to perform the act requested; (3) the duty is clear and not reasonably debatable; (4) the performance of the duty-bound act is ministerial in nature, not involving the exercise of discretion; (5) the defendant has neglected or refused to perform the act requested, and the time for performance as expired; and (6) the party seeking relief has no alternative legal remedy. *See Graham County Bd. of Elections v. Graham County Bd. of Comm'rs*, 212 N.C. App. 313, 322, 712 S.E.2d 372, 379 (2011) (quoting *In re T.H.T.*, 362 N.C. 446, 453-54, 665 S.E.2d 54, 59 (2008)). Specifically, the Plaintiff Class requests that the Court order that the Defendants provide a non-contributory comprehensive retirement health benefit to all Plaintiff Class members at a minimum actuarial value of at least eighty percent (80%) and that the Defendants be required to conduct yearly actuarial valuations to prove compliance with the same. Similarly, the Plaintiff Class requests that this Court order that the Defendants provide an optional partially-contributory comprehensive retirement health benefit to all Plaintiff Class members at a

minimum actuarial value of ninety percent (90%) and that the Defendants be required to conduct yearly actuarial valuations to prove compliance with the same.

V. CONCLUSION

For all the foregoing reasons, this Court should grant the Plaintiffs' Motion for Partial Summary Judgment and follow the long-standing precedent set forth in similar North Carolina cases and hold that (1) the Plaintiff Class has a vested contract right to the Retiree Health Benefits, (2) that the Defendants breached that contract and otherwise violated the Plaintiff Class's Constitutional rights to receipt of the benefits, and (3) that the Plaintiff Class is entitled to relief in the form of monetary damages and declaratory and other equitable relief as requested herein.

This 14th day of September 2016.

GRAY, LAYTON, KERSH,
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CERTIFICATE OF SERVICE

This is to certify that on this date I served a copy of the foregoing **BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** upon 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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This 14th day of September 2016.

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