SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

ELAINE ANN GOLD, AMY JACOBSON SHAYE, HEATHER HUNTER, and RODERICK BENSON, on behalf of themselves and all others similarly situated, Plaintiffs, v. DEKALB COUNTY SCHOOL DISTRICT, et al., Defendants.	Civil Action File No. 11-CV-3657-5 CLASS ACTION JURY TRIAL

MOTION FOR CLASS CERTIFICATION AND BRIEF IN SUPPORT

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INTRODUCTION

"If ever there was a question that ought to be resolved once and for all, it is whether this school district shortchanged these teachers unlawfully." *Gold v. DeKalb County School District* ("*Gold II*"), Georgia Court of Appeals Case No. A14A1557, March 30, 2015, Pls. Ex. 2, Concurring Op. of Judges McFadden and Phipps at 1.[1]

Twelve thousand educators have an identical claim that the School District illegally terminated contributions to their retirement plans on the same day by a single Board action. The Board resolution and policy violated by this termination are legislative acts that apply uniformly to every single class member. The question is whether these claims can be brought once in a class action or must be brought as 12,000 separate claims (or more likely not brought at all). A pension plan for public employees needs to be uniformly applied to all employees in the plan, and not dependent upon whether each member can afford to hire a lawyer to pursue an individual lawsuit. That is why employee benefit cases, and in particular government benefits cases are normally certified for class treatment. *See, e.g. Teachers Ret. Sys. v. Plymel*, 296 Ga. App. 839 (2009) (class of teachers who contended retirement pay was incorrectly calculated); *Murray County Sch. Dist. v. Adams*, 218 Ga. App. 220, (1995) (class of teachers who "challenged the Board's decision to terminate the employer matching portion of a previously established annuity retirement savings plan for employees"); *Fulton County Sch. Employees Pension Fund v. Teachers Retirement Sys.*, 176 Ga. App. 612 (1985) (class of teachers seeking recovery of

[1] All Exhibit references (*e.g.* "Pls. Ex __") are to the Plaintiffs' Appendix filed this same day. A concurring opinion is **binding as** law of the case where, **as here**, a majority of judges in the division join in the concurring opinion. *Brown v. Reeves*, 168 Ga. App. 403, 404 (1983). A concurring opinion joined in by two of three judges of the panel is treated as a majority opinion for law of the case purposes. *Lowance v. Dempsey*, 99 Ga. App. 592, 596 (1959).

pension funds); *Borders v. City of Atlanta*, 298 Ga. 188, 190 (2015) (class of city employees suing for changes to pension plan).[2]

SUMMARY OF ARGUMENT

This case has been to the Court of Appeals twice. In the first appeal, the Court of Appeals rejected the School District's claim of immunity for the contract claim. *DeKalb County Sch. Dist. v. Gold*, 318 Ga. App. 633 (2012) ("*Gold I*"), Pls. Ex. 1. In the second appeal, on the issue of class certification, the Court of Appeals made the above statement that this case deserved to be resolved once and for all, and then held that:

> the dialectical process of appeal has **narrowed down to three the many objections raised below to certification** and that **on remand the plaintiffs will have an opportunity to revisit *those issues* in light of our opinion**.

Gold v. DeKalb County School District, Ga. Ct. App. Case No. A14A1557, Order ("*Gold II*"), Pls. Ex. 2 (*Gold II*), Concurring Op. at 1 (emphasis added). The holdings of the Court of Appeals in both prior appeals are binding on this Court. O.C.G.A. § 9-11-60(h) ("any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court...."). Thus, under the law of the case rule, all

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[2] *See also Faulkenbury v. Teachers' & State Emps'. Ret. Sys. of N.C.*, 424 S.E.2d 420 (N.C. App. 1993) (approving "impairments" case involving teacher retirement benefits for class certification). *Maine Ass 'n of Retireees v. Bd. of Trs. of Maine Pub. Ret. Sys.*, No. 1:12-cv-59, 2012 WL 5874783 (D. Me. Nov. 20, 2012) (same); *Carrao v. Health Care Serv. Corp.*, 454 N.E.2d 781 (Ill. App. 1983); *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983) (citing, among others, *Georgia Inv. Co. v. Norman*, 229 Ga. 160 (1972)); *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 121 F.R.D. 664, 669 (N.D. Ill. 1988); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003); *White v. Heckler*, 108 F.R.D. 85, 90 (S.D.N.Y. 1985) ("no difficulty in finding that the necessary class action yardsticks have been met" in case involving guidelines used to calculate Social Security Administration benefits); *Ortiz v. Eichler*, 616 F. Supp. 1046 (D. Del. 1985); *Buckhanon v. Percy*, 533 F. Supp. 822 (E.D. Wis. 1982) (certifying class whose benefits were reduced or terminated as a result of implementation of statute).

objections to class certification other than those three described by the Court of Appeals are resolved in plaintiffs' favor. Because of the remand to consider only "those issues", the School District is barred from bringing up additional objections to class certification not raised the first time.[3] Those three remaining issues, to be revisited by this Court on remand, are:

> **(1) Alleged Distinctions as to Notice –**
>
> there are distinctions among the plaintiffs regarding the two-year notice period. **There is no such distinction as to the overlapping two-year periods beginning in August 2009, when the district stopped making contributions, and beginning in June 2010, when the district broke a promise to resume payments.** But as to the plaintiffs who contend that their first paycheck in 2010 reflecting that broken promise did not provide notice, there are distinctions regarding various subsequent incidents that arguably did provide notice.

Pls. Ex. 2 (*Gold II*), Concurring Op. at 2 (emphasis added).

> (2) **Alleged Distinctions between Employees With Annual Contracts and At-will Contracts –**
>
> the district's contention that authority for its challenged conduct is implicit in certain contract language creates a distinction between those plaintiffs with written employment contracts and those without written contracts.[4] As the majority notes, **those issues might be resolved by creating subclasses**. [citations omitted]. **They also might be resolved by a closer examination of the merits**.

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[3] *Ballistics Research, Inc. v. BRI Funding, LLC*, 336 Ga. App. 77, 79-80 (2016) (emphasis added) states:

> the defendants claim that BRI Funding's status as an assignee precludes any punitive damages recovery**. But the defendants did not raise this argument in the first appeal, and although we vacated the initial punitive damages award, we remanded the case for consideration of one limited issue**: whether a punitive damages award in excess of the $250,000 cap is appropriate here. In reaching this decision, we tacitly approved the trial court's award of general punitive damages (up to the statutory cap) — a decision that we cannot reconsider at this point.

[4] The annual contracts contain language authorizing the School District to reduce "contract salary" upon a budget shortfall. The school district contends this overrides the two year notice provision for reducing the funding provision for the alternative plan to social security, creating a distinction between employees with annual contracts and those with at-will contracts. As demonstrated below, this is both incorrect as a matter of law and admitted fact and, given the subclasses sought below, irrelevant to the issue of class certification.

Id., Concurring Op. at 2 (emphasis added).

(3) **Alleged Complexity with Calculating Lost Investment Income (an alternative to 7% pre-judgment interest)—**

> **the present record** supports the trial court's determination that a calculation of lost investment income would be unduly complex. **On remand that issue might be addressed** by a **restructuring of the claim, OCGA § 9-11-15 (a)**, or **by reinforcement of the supporting evidence**, *Georgia-Pacific*, 295 Ga.at 535 (Hunstein, J., dissenting), or by bifurcation of the issues of liability and damages.

Id., Concurring Op. at 3 (emphasis added). No other objections to class certification remain extant. And each of the three issues identified by the Court of Appeals is addressed and resolved by this motion as follows.

Issue 1- Alleged Distinctions as to Notice. As to Issue 1, the Court of Appeals established conclusively that there are no distinctions between class members as to notice for the recovery of withheld contributions for the 34 months from August 2009 through June 2012. "There is no such distinction as to the overlapping two-year periods beginning in August 2009, when the district stopped making contributions, and beginning in June 2010, when the district broke a promise to resume payments." Pls. Ex. 2 (*Gold II*), Concurring Op. at 2.

As an initial matter, based on the Court of Appeals' conclusion, Plaintiffs' claim regarding the first 34 months of withheld contributions should be certified for class treatment immediately. As a matter of process, and to eliminate any conceivable argument against certifying the claim for the first 34 months, Plaintiffs have amended the complaint to make the claim for those contributions separate counts (Counts One and Two) from those for withheld contributions on or after July 1, 2012. (Count Three).

Thus, Plaintiffs hereby move to certify a class as to all counts of the Third Amended Complaint. However, should the Court conclude that there remain insurmountable problems

with certification as to any count, Plaintiffs move (in the alternative only) to certify a class as to each Count of the Third Amended Complaint. Thus, for example, should the Court somehow conclude that distinctions between the plaintiffs as to notice affecting contributions withheld on or after July 1, 2012, precludes certification of the claim for such contributions, the Court could certify as to every count except Count Three.

In any event, even as to the Count Three claim for those later withheld contributions, Plaintiffs have addressed the concerns of the Court of Appeals by, *inter alia*, obtaining post-remand admissions from the School District that the "subsequent incidents" referred to by the Court of Appeals ***did not constitute notice*** as required by the Board Policy. For example, the 30(b)(6) witness for the School District was asked whether there were any other notices, after two emails in July 2009 and January 2010, that the district contended met the notice requirements. The answer was unequivocal: "No, the District does not believe there are any other notices." 30(b)(6) Deposition of Michael Bell dated Feb. 25, 2016 ((Bell 30(b)(6) Dep.), attached as Pls. Ex. 11, at 111-112. If there was no notice after January 2010, there certainly was no notice after July 2010. The School District further confirmed this, stating that, "Relative to Exhibit 12 [the Board Policy on Withholding of Funds containing the two-year notice requirement], ***I am not aware of anything that occurred that would satisfy that specific [notice] provision***." *Id.* at 127:15-18 (emphasis added). The notice issue is thus resolved the same way for the entire class.

Issue 2- Alleged Distinctions between Employees With Annual Contracts and At-Will Contracts. As to the Court of Appeals' second concern, distinctions between those with annual employment contracts and those with at-will contracts, Plaintiffs have addressed that concern by adding additional class representatives and by moving hereby to certify two

subclasses: one for those employees with annual contracts, and one for those without. This was expressly contemplated in the Court of Appeals' Opinion and addresses entirely that Court's concern.

Further, Plaintiffs have undertaken a "closer examination of the merits" as the Court of Appeals also contemplated, and demonstrate based on that examination that the distinction between those with written versus unwritten contracts is immaterial.

Issue 3- Alleged Complexity In Calculating Lost Investment Income. As to the claim for lost investment income (now Count Four), the Court of Appeals held that plaintiffs had not "***yet***" submitted sufficient evidence to show how to make the calculations on a class-wide basis. Pls. Ex. 2 (*Gold II*) at 20 (emphasis added). To be clear, this issue does not affect the claims for withheld contributions (Counts One, Two and Three)[5] or the claim for statutory interest (Count Five). This issue deals with an alternative damages model where plaintiffs could seek their lost investment return for the delay in receiving the missed contributions in lieu of 7% statutory pre-judgment interest.

With regard to this count, Plaintiffs have addressed the alleged complexity in two ways, both of which were expressly contemplated by the Court of Appeals. First, Plaintiffs have substantially "reinforced the supporting evidence," as contemplated by the Court of Appeals, including performing ***actual formulaic calculations of the lost investment income for each class member;*** obtaining discovery and admissions from the defendants as to how the District itself calculated lost investment income for missed or late contributions; obtaining admissions

[5] *See* Pls. Ex. 2 (*Gold II*) at 22 n. 3 ("the trial court could have determined that simply calculating the amount of lost TSA retirement *contributions* from the School District – a set percentage of salary, either 6.1 percent or 5.0 percent, depending on the employee – could be susceptible of classwide calculation.") (emphasis in original).

that the methodology used by Plaintiffs was reasonable and consistent with the parties' expectations; obtaining admissions from Defendants' own experts on correcting errors in retirement benefits that the earnings should be calculated on a class-wide basis; and obtaining evidence from the company that manages the employees' investments regarding the available information and the manner in which earnings calculations can be made. *See, e.g.* Report of Karen Fortune dated Oct. 13, 2016 ("Fortune Report"), attached as Pls. Ex. 36 (calculating lost contributions and lost investment income based on mathematical formulas applied to data acquired from Defendants and Fidelity Investments); DeKalb County, Georgia Board of Education Tax Shelter Annuity Plan dated Feb. 12, 2003 ("2003 Plan Document"), attached as Pls. Ex. 12, at § 3.4 (describing District's process for replacing missed contributions "plus an amount equal to the net earnings, if any, which would have been credited to such Contributions during the applicable time period"); Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 69:6-11 (noting District's prior handling of lost investment calculations); *id.* at 61:13-67:10 (discussing different methods for calculating lost earnings, including account reconstruction).

Second, Plaintiffs amended the complaint (as expressly contemplated by the Court of Appeals) to make the claim for investment income a separate count (Count Four) from those for withheld contributions (Count One - Three) or statutory interest (Count Five). Should this Court somehow conclude that there remain insurmountable problems with the calculation of lost investment income, this Court could certify as to every count except Count Four.

Ultimately, the issue on class certification is not whether the class will prevail, but how best to decide their claims. The issue is whether the claims of the Class Representatives and the class will be decided once and for all in a single class action, or in ***thousands of individual actions*** – or even worse and more likely, **never decided at all** because no one would file an

individual action given the circumstances. But as the Court of Appeals held, "[i]f ever there was a question that ought to be resolved once and for all, it is whether this school district shortchanged these teachers unlawfully." Pls. Ex. 2 (*Gold II*), Concurring Op. at 1.

STATEMENT OF FACTS

Elaine Gold, Amy Shaye, Rod Benson and Heather Hunter are current and former employees of the DeKalb County School District. Their breach of contract claim is based on the fact that the District formed a contract with its employees (a) to provide an "Alternative Plan" to Social Security, with several components, and (b) to provide two years notice prior to reducing the funding provisions of that Alternative Plan. With respect to the four plaintiffs, and all of the other members of the putative class, the facts show that the District breached this contract by eliminating retirement benefits without any notice whatsoever. As discussed below, the contract was the same for every member of the class, the relevant facts establishing the breach are the same for every member of the class, and the district administered the benefits in a systematic way so that the damages flowing from the breach are calculated using the same data and same formula for every member of the class.

I. The Four Named Plaintiffs Are Representative Of The Class And The Two Proposed Subclasses.

It is undisputed that each of the named Plaintiffs was an employee subject to the District's policies in place in July 2009. Each of them served as employees of the District for many years. Each of them received the TSA retirement benefits for many years and each of them fall within the class of persons who stopped receiving TSA contributions as a result of the District's elimination of those benefits on July 27, 2009.

Employees with Annual Contracts--Elaine Gold and Amy Shaye: In 1993, Elaine Gold began a twenty year tenure with the District. Deposition of Elaine Gold dated May 20,

2013 (Gold Dep.), Pls. Ex. 60 at 14:4-9. She taught preschool special education for many years and later taught gifted children at Evansdale Elementary. Until July 2009, Elaine received contributions into her TSA Plan retirement account equal to five percent (5%) of her compensation for each payroll period. *Id.* at 62:14-63:1. After July 30, 2009, although she continued to work for DeKalb County School District, contributions into her TSA Plan retirement account stopped. *Id.* at 101: 6-13. During her tenure, Elaine worked according to an annual contract that the District provided to its teachers. *Id.* at 111:24. Elaine retired in 2013.

Amy Shaye worked for the District as a teacher for more than two decades. Deposition of Amy Shaye dated May 20, 2013 ("Shaye Dep."), Pls. Ex. 61 at 14:10-12. She was a school psychologist, working at Fernbank Elementary, Briar Vista Elementary and Gateway to College Academy among others. Until July 2009, Amy received contributions into her TSA Plan retirement account equal to five percent (5%) of her compensation for each payroll period. *See, e.g.*, *id.* at 29: 14-17. After July 30, 2009, although she continued to work for the District, contributions into her TSA Plan retirement account stopped. *Id.* at 34:22-23, 73:12-20. During her tenure, Amy worked according to an annual contract that the District provided to its teachers. *Id.* at 82:20-22. Amy retired in June of 2012.

Employees Without Annual Contracts—Rod Benson and Heather Hunter: Rod Benson has worked for the District in several capacities since 1998. Deposition of Roderick Benson, dated January 7, 2016 ("Benson Dep."), Pls. Ex. 62 at 72:21-23. He served for years as an officer and detective with the District's internal police force. *Id.* at 74:15-20. He has been a campus security advisor at several schools, and he currently is a security officer at one of the District's administrative buildings. Before July 2009, Rod received contributions into his TSA Plan retirement account equal to five percent (5%) of his compensation for each payroll period.

After July 30, 2009, although he continued to work for the District, contributions into his TSA Plan retirement account stopped. *Id.* at 244:12-22. Rod is currently employed at the District and during his tenure he has not had any annual contract provided by the District. *Id.* at 10:10-11; *id.* at 257:11-14.

Heather Hunter has worked for the District as a paraprofessional since 1997. Deposition of Heather Hunter dated March 4, 2016 ("Hunter Dep."), Pls. Ex. 63 at 14:3-23. She currently works everyday with special needs children at Fernbank Elementary. *Id.* at 12:23-25. Before July 2009, Heather received contributions into her TSA Plan retirement account equal to five percent (5%) of her compensation for each payroll period. *Id.* at 89:23-91:7. After July 30, 2009, although she continued to work for the District, contributions into her TSA Plan retirement account stopped. *Id.* at 93:2-25. Heather is currently employed at the District and during her tenure she has not had any annual contract provided by the District. *Id.* at 13:14-14:2.

II. The Relevant Contract Relating To Retirement Benefits Is The Same For The Entire Putative Class.

As detailed in Plaintiff's concurrently-filed Motion for Partial Summary Judgment, and as the Court of Appeals has already held in this case, the contract at issue arises from the legislative acts of the District establishing a retirement plan for its employees. *See* Pls. Ex. 1 (*Gold I*) at 23 ("[T]he legislative acts of the Board establishing a retirement plan for the School District employees may become part of the employees' contract of employment."); Plaintiffs Motion for Partial Summary Judgment at 20-33.

These legislative acts and Board Polices apply with equal force and in the same way to each of the District's employees, and thus to every member of the putative class. Specifically, the School District implemented a plan to remove its employees from Social Security in 1979.

Resolution dated Oct. 1, 19979 ("1979 Resolution"), Pls. Ex. 4 at DCSD000016. To compensate for the fact that the employees would not get Social Security, the School District agreed to provide them with an alternative to Social Security that would provide life insurance and certain other retirement benefits—the so called "Alternative Plan to Social Security." *Id.* This "Alternative Plan" was enshrined in the Board of Education's policies for decades, and specifically included a requirement that the District could not reduce the funding provisions of the plan without giving employees two years' notice. *See, e.g.*, Affidavit of Joseph Willingham dated March 26, 2013 ("Willingham Aff."), Pls. Ex. 5 ¶ 20. From at least September 11, 2000, the Board Policy relating to the Alternative Plan was published on line, and stated as follows:

> ALTERNATIVE PLAN TO SOCIAL SECURITY
>
> MISSION: To ensure that employees of the DeKalb County School System are provided retirement and insurance plans as alternatives to Social Security.
>
> The DeKalb County Board of Education shall provide all full-time employees with an alternative program to Social Security. ***The amount of funds placed annually in the alternative program shall equal the amount that the school system would have paid had the school system remained under Social Security.***
>
> The Alternative Plan to Social Security shall include, as a minimum, the following:
>
> 1. Improvements to the survivor benefit life insurance plan in existence in September 1979
>
> The survivor benefit plan is designed to provide lump sum payments to beneficiaries and monthly income to eligible surviving family members upon the death of an employee.
>
> 2. Improvements to the long-term disability plan in existence in September 1979
>
> The disability benefits plan provides disabled employees a coordinated benefit for a specified period of time following an established elimination period.
>
> 3. ***Supplemental retirement plan paid for by the Board of Education***
>
> ***The supplemental retirement plan provides retirement benefits through legally mandated and/or Board approved contributions and investment strategies.***
>
> ***The Board of Education shall give a two-year notice to employees before reducing the funding provisions of the Alternative Plan to Social Security.***

Board Policy Withholding of Funds dated Sept. 11, 2000 ("Policy on Withholding of Funds"), Pls. Ex. 7 at DCSD000161 (emphasis added).

This policy is the binding law of the district, and it applies equally and consistently to all employees. *See, e.g.*, Deposition of Tekshia Ward-Smith dated Jan. 5, 2016 ("Ward-Smith Dep."), Pls. Ex. 6 at 37:17-21 ("All policies are available on our website and employees sign a notification that they are aware of all district policies. That is their responsibility."); Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 91:16-21 (noting that policies apply consistently to all employees); Deposition of Rhonda Kelly dated Nov. 30, 2015 ("Kelly Dep."), Pls. Ex. 9 at 70:3-10 (employee testifying: "Q. ...in the course of your employment do you understand that you have to follow school board policy in carrying out your job? A. Yes. Q. And is it your understanding that everybody else in the school district has to follow the school board's policy, too? A. Yes."); *see also* Deposition of Eugene Walker dated July 29, 2015 ("Walker Dep."), Pls. Ex. 8 at 46:24-47:11 (Testifying regarding the Board Policy on Withholding Funds: "Q. But do you think that if I had been hired in September of 2000 and I read this policy and I went out there to teach or I went out there to be a security guard or I went out there to be a maintenance guy, could I rely upon this that, as a board policy, that I was going to get this benefit? ...A. I wouldn't see why you shouldn't. Q. Yes, sure. A. It is a board policy.").

Pursuant to this uniform policy, the District administered its obligations to provide the relevant benefits in accordance with a Plan Document, which is also common to each and every member of the class. Specifically, to implement the third prong of the Alternative Plan (the "supplemental retirement plan"), the Board adopted a "Tax-Sheltered Annuity" or "TSA" plan and a series of Plan Documents to administer it. *See, e.g.*, Pls. Ex. 5 (Willingham Aff.) ¶ 9; The

Valuable Annuity Life Insurance Company dated Oct. 1, 1979 ("1979 VALIC Contract"), Pls. Ex. 34; DeKalb County Georgia Board of Education Tax Shelter Annuity Plan dated July 11, 1983 ("1983 Plan Document"), Pls. Ex. 13; Ex. 12 (2003 Plan Document). The currently operative plan document is dated February 12, 2003 and details the District's performance of its retirement plan obligations under the Alternative Plan. Pls. Ex. 12 (2003 Plan Document).

The Plan Document shows that the District administers the relevant employee benefits in a uniform and consistent way for all employees. As it states on its face, the purpose of the Plan Document is to ***"provide a standard written procedure under which defined contribution retirement benefits are provided and administered on behalf of Participants***." *Id.* at DCSD000065 (emphasis added).[6]

Further, the District is in fact required to administer the TSA plan uniformly because it was established to "qualify as a tax-exempt retirement plan ... as described in Section 403(b) of the Internal Revenue Code of 1986." Pls. Ex. 12 (2003 Plan Document) at DCSD0000065.[7] The IRS's regulations require that the District treat its employees in accordance with a consistent plan. Indeed, as the district's 403(b) expert testified, 403(b) plan fiduciaries, like the District, are obliged to adhere to a "consistency requirement": "you want to make sure that individuals in different groups or classes aren't corrected in a different way or adjusted in a different way."

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[6] Similar language appears in the 1983 Plan Document as well. *See* Pls. Ex. 13 (1983 Plan Document) at DCSD000043 ("The purpose of this Plan is to provide a written standard procedure under which retirement benefits to serve in lieu of Social Security are provided and administered on behalf of Eligible Employees.").

[7] A 403(b) plan operates in many ways like its more well-known cousin, the 401(k) retirement plan. But 403(b) plans are created for employees of public education organizations or non-profits (rather than by private, for-profit employers) and there are some differences in governing law and in certain obligations for 403(b) plans created by government entities like the District.

Deposition of Charles Yovino dated Dec. 12, 2016 ("Yovino Dep."), Pls. Ex. 14 at 211:20-23; *see also, id.* at 141:23-142:6 (all employees are treated according to same terms).

III. The District Breached The Contract In The Same Way For Each Class Member: By Terminating The Retirement Benefits Without Providing The Requisite Two Years' Notice.

At an "emergency" meeting on Monday, July 27, 2009, the DeKalb Board of Education eliminated the TSA benefits that it was paying to certain employees (the members of the class). The only notice of this "emergency" meeting was sent three days before—on Friday July 24, 2009, and said nothing at all about reducing employee benefits. *See, e.g.*, Deposition of Jay Cunningham dated July 30, 2015 ("Cunningham Dep."), Pls. Ex. 16 at 32:4-33:22 (discussing July 24 meeting announcement and agreeing that "it doesn't give anybody any notice at all about the TSA."); Memo to All DeKalb Employees dated July 24, 2009 ("July 24, 2009 Meeting Notice"), Pls. Ex. 17; Memo to All DeKalb Employees regarding Budget Cut Letter to Employees dated July 27, 2009 ("July 27, 2009 Budget Cut Letter"), Pls. Ex. 18.

At that meeting, the School Board amended the TSA Plan Document to eliminate contributions for certain employees who participate in the Teacher Retirement System of Georgia ("TRS") or the Employees Retirement System of Georgia ("ERS") as of July 31, 2009. *See* Pls. Ex. 12 (2003 Plan Document) at DCSD000100-101. Specifically, the operative plan amendment states as follows:

> With respect to Participants who participate in the Teachers Retirement System of Georgia ["TRS"] or the Employees Retirement System of Georgia ["ERS"]... the Employer shall make no contribution (that is, 0% of Compensation) to the Plan for each payroll period commencing after July 31, 2009.

Id. at DCSD000100.[8] This elimination of benefits affected the so called "TRS" and "ERS" employees as a group, making their loss of funding a common injury to all Class-members. Further, just as the decision to suspend funding was categorical and not specific to individual Class members, so was its implementation. *See, e.g.*, Email from L. Hammel to M. Turk dated Aug. 7, 2009, Pls. Ex. 37 at DCSD009506 (e-mail reporting that the relevant finance personnel had stopped payment of TSA benefits: "The Board TSA for TRS/ERS employees has been ended.").

It is undisputed—and indeed admitted in Defendants' Answer—that there was no notice ***before*** the District's elimination of the benefits. *See* Answer to Plaintiffs' First Amended Complaint ¶ 46; *see also, e.g.*, Pls. Ex. 16 (Cunningham Dep.) at 32:4-33:22; Pls. Ex. 17 (July 24, 2009 Meeting Notice). In addition the district has repeatedly admitted that it never provided ***any*** notice regarding this decision that could comply with the contractual notice requirement. In its 30(b)(6) deposition, the District testified that "Relative to Exhibit 12 [the Board Policy on Withholding of Funds containing the two-year notice requirement], ***I am not aware of anything that occurred that would satisfy that specific [notice] provision***." Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 127:15-18 (emphasis added); *see also id.* at 98:15-18 (no evidence "that the Board took any specific action to provide this specific notice [referenced in the board policy] relative to the actions taken in July of 2009"); *id.* at 105:9-13 ("not aware" and "have not ... seen any documents that would indicate some type of calculation of options of notice ...").

[8] Beneficiaries of the Public School Employees Retirement Plan, or "PSERS," who also participate in the TSA retirement benefit plan, were not affected by the District's action. Pls. Ex. 10 (2003 Plan Document) at DCSD0000100. The PSERS employees continue to receive benefits today, while TRS and ERS employees do not.

In an email sent to all employees, then-superintendent Crawford Lewis stated that the Board had "temporarily" suspended the TSA benefits "from August 1, 2009 through June 30, 2010 for all employees who participate in the Teachers Retirement System of Georgia (TRS) retirement plan." Pls. Ex. 18 (July 27, 2009 Budget Cut Letter). Later that same school year, Superintendent Lewis again communicated with all employees regarding the TSA "suspension," and stated that, "I am pleased to announce that the BTSA will be restored as of July 1, 2010 as promised." Budget FY 2010 News Flash dated Jan. 25, 2010, Pls. Ex. 23.

These Crawford Lewis emails are the official communications of the District. *See* Pls. Ex. 16 (Cunningham Dep.) at 37:4-24 (Superintendent is responsible for all communication between the School Board and employees); *id.* at 41:13-16 (same); Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 105:15-23. These emails go to all employees, and the District expects the employees to believe and rely on these communications. Pls. Ex. 16 (Cunningham Dep.) at 76:24-77:6; Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 83:3-13. According to the district, there was no other official notice sent to employees. *Id.* at 111-12 ("...the District does not believe there are any other notices."). Of course, these emails were misleading, and the TSA payments have never been restored. These facts are common to the class.

Finally, the School Board itself discovered that its lack of notice violated its own established Board Policy, and admitted as much. At the School Board's May 10, 2010 meeting, Board Member Jim Redovian consulted with the Board's lawyers and then informed the Board that its elimination of the TSA benefits violated the Board Policy requiring two-year's notice. According to the minutes of the May 10 meeting:

> Mr. Redovian stated that ... [a]fter reviewing the Board's policy on withholding funds [for the TSA Plan], it was determined that the Board violated its own policy and now need to correct that action. He went on to say that the current policy

> states that the Board must provide a two (2) year notice of suspension to all employees before reducing the funding provision of the Alternative Plan to Social Security. Mr. Redovian stated that the policy amendment would eliminate the two (2) year notice. He also stated that the Board is working with the staff to identify funds to correct the error of suspension during the 2009-2010 fiscal year.

Business Meeting of the DeKalb County Board of Education dated May 10, 2010 ("May 10, 2010 Board Meeting Minutes"), Pls. Ex. 19 at DCSD0000227; *see also* Video of May 10, 2010 Board Meeting, Pls. Ex. 20.

Mr. Redovian's statement shows that (a) the Board understands that it is governed by its policies; (b) the two-year notice requirement was mandatory; (c) the Board's action in eliminating the TSA contributions "violated" this requirement; and (d) the consequence for a violation of the two-year notice requirement was to "identify funds to correct the error of suspension," *i.e.* pay the employees the benefits they should have received. These facts are all common to the class.

Lastly, rather than provide clear notice to its employees or remedy the violation of its own policies, the School Board took the opposite approach. At the next Board meeting on June 14, 2010, the Board purported to amend the Board Policy on Withholding of Funds to eliminate the two-year notice requirement. Business Meeting of DeKalb County Board of Education dated June 14, 2010 ("June 14, 2010 Board Meeting Minutes"), Pls. Ex. 21 at DCSD0000218; *see also* Redlined Version of Board Policy, Pls. Ex. 22. Again, this is a tacit admission that the District violated its own polices, never provided any notice, and did not ever intend to provide any. The impact of this action is common to all members of the class.