IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

LT. GLENN SLIGH, CAPT. MYRON HALL,
CORP. RICKY BRIGGS, CAPT. LOYD FRANKLIN,
SGT. MACK THOMPSON, MAJOR CLEVE BARFIELD
AND OTHERS SIMILARLY SITUATED PLAINTIFFS

VS. NO. 60cv-2012-344

ARKANSAS STATE POLICE
RETIREMENT SYSTEM, KIRK BRADSHAW,
JOHN W. ALLISON, BRANT TOSH, BLAKE WILSON,
DONNIE UNDERWOOD, JOE MILES, DR. JOHN SHELNUTT,
IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE
BOARD OF TRUSTEES OF THE ARKANSAS
STATE POLICE RETIREMENT SYSTEM DEFENDANTS

PLAINTIFFS' BRIEF IN SUPPORT OF ITS RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I.

SUMMARY OF THE ARGUMENT

This brief in response to Defendants' Motion for Summary Judgment will make clear that sovereign immunity is not a bar to this case. It will reiterate that funds accumulated in the Deferred Retirement Option Plan ("DROP") of the state police retirement system is money which does not belong to the state treasury – it belongs to members of this plaintiff class and other DROP members who allow the state to use their money each month instead of having it paid to them as vested retirement benefits. Even more importantly, sovereign immunity is waived to correct errors in the Arkansas State Police Retirement System including the DROP. *Weiss v. McLemore,* 371 Ark. 538, 268 SW2d 897 (2007). It would be unconstitutional to apply

Act 38 of 2011, codified as A.C.A. § 24-6-103 retroactively to defeat the Plaintiffs' vested contract and property rights. Nor can Act 404 of 2007 be applied retroactively for the same reasons: applying it retroactively will divest the plaintiff class of vested property and contract rights which they are guaranteed under the U.S. and Arkansas constitutions.

The Plaintiffs' DROP accounts including the statutorily guaranteed interest rates were fully vested rights at the time the Plaintiff Officers entered the DROP. As such the benefits which they are paid at the conclusion of their DROP participation are not gratuitous allowances as contended by the Defendants. To the contrary, they are fully vested benefits which cannot be taken away by subsequent legislation.

There is a long line of Arkansas cases starting with *Jones v. Chaney*, 253 Ark. 926, 489 S.W. 2d 785 (1973) and *Pyle v. Webb*, 253 Ark. 940, 489 S.W. 2d 796 (1973), which establish that vested retirement benefits of state retirement funds may not be denied to a retiree based on legislation passed after vesting. Similarly there is a long line of cases holding that in determining whether a statute may be applied retroactively or prospectively the general rule is that retroactive effect must be clear from the legislation. Even more importantly when considering whether to make a retroactive or prospective application the Arkansas appellate courts never allow statutes to operate retroactively if they would serve to divest a party of a fully vested property or contract right. *State ex rel. Moose v. Kansas City & Memphis Railroad & Bridge Company,* 117 Ark. 606, 612, 174 S.W. 248, 251 (1914).

Despite the Defendants' arguments to the contrary, the DROP is a fully contributory plan not a noncontributory plan. Even though this distinction lacks real legal significance in this case (since the plaintiff class is fully vested the distinction between contributory vs. noncontributory

is not relevant), the funds in each officers' DROP plan account consists of his own monthly benefit which he would have received in the mail each month had he not entered the DROP. To that is added interest rates which are guaranteed under the law which are drawn from the Arkansas State Police Retirement Plan trust fund.

There is no statute of limitations to bar the prosecution of this case. Act 404 of 2007 is unconstitutional as applied to these class members, as was fully alleged in paragraphs 14 and 15 of the Plaintiffs' First Amended Complaint. However, the Plaintiffs' cause of action here did not accrue upon passage of Act 404. Instead the cause of action accrued when Act 404 was applied in an unconstitutional manner upon the class members. That did not occur until July of 2009 when the Trustees of the retirement plan, acting on the authority of Act 404 lowered the interest, for the first time below the threshold set forth in the original DROP legislation. After passage of Act 404 of 2007 the officers were receiving 7.75% interest which, previous to Act 404 was expressed as the *minimum* amount payable. Act 404 made 7.75% a *maximum* amount but the reality was that between 2007 and 2009 the interest rate earned by the investment portfolio of the State Police Retirement Plan was below 7.75% in any event so these officers would not have received more in interest had Act 404 never been passed at all until the Trustees voted in 2009 to lower their rates to 3.25%. As such the Officers' suit was filed well within three (3) years from the time the cause of action accrued.

The Arkansas Attorney General has opined that no statute of limitation exists to bar a mandamus action against a public pension plan (A.G. op. 2002-324, Ex. 20 to Officers' Motion). Also, the state retirement systems routinely pursue persons and entities for errors made in the

benefit calculations or contributions, even when those errors have occurred many years previous to corrective action being taken.[1]

By its very nature the DROP creates contractural rights between the Trustees and the Officers. The officer must have thirty (30) credited years of service and then apply for enrollment and be accepted by the Trustees. The officer must agree to forego receipt of monthly benefits and continue to refrain from drawing those benefits for a period of seven (7) years while each month the Trustees enjoy the use and benefit of that officer's money by making investments for the state police retirement fund in general. Once enrolled the officer cannot change his mind and return to "unretired" status. He has retired. Meanwhile, the only benefit the officer gets is guaranteed interest rates upon that investment and the expectation of receiving these benefits at the end of seven (7) years in a lump sum payment. Otherwise there is no benefit at all to the officer because most always the officer takes early retirement to enter into the DROP. This means the monthly retirement benefits are lessened for life, because the monthly benefit is based on the officers highest five (5) years of earnings on his retirement date.

The Defendants have conceded that the Administrative Procedures Act could not serve as a bar to the Plaintiffs' suit. In fifty (50) pages of the Defendants' brief they never mentioned the Administrative Procedures Act one (1) time. As such they have waived their contention, in Answers and Motions previously filed, that the APA serves as a bar to this Court's subject matter jurisdiction. Likewise the Defendants' have conceded the point that legislation from other states which attempted to reduce vested rights for public retirement beneficiaries have been disallowed by state supreme courts. The Plaintiffs have cited cases from Florida, New Hampshire, Colorado

[1] See Exhibit "A" to this Response. Minutes from APERS board meeting May 2014, where APERS board ordered Jefferson County, as employer, to pay past due contributions into APERS which accrued in 1980-1986.

and the Defendants have not argued the contrary at all. Instead they have simply rested on their assertion that Arkansas law is clear because the Arkansas State Police Retirement System, in general, (not the DROP) is a noncontributory system. The Defendants have completely ignored the contributory nature of the DROP which is a separate plan within the state police retirement system. The DROP, of course, is totally contributory because if the officer was not allowing the state to use his money each month the check would be sent to the officer and not the state police retirement system.

II.

SOVEREIGN IMMUNITY IS NO BAR TO THE PLAINTIFFS' CASE

A. The funds contained in the DROP reserve account belong to the officers, not the state.

The decisive issue in determining if sovereign immunity would bar the Plaintiffs' claim is whether a judgment for plaintiff "would implicate the state's treasury and subject it to liability." *Arkansas Lottery Commission v. Alpha Marketing*, 2013 Ark. 232 (2013). Interest payments in DROP come from the A.S.P.R.S. Trust Fund not the state general treasury. (Exhibit 1, Stone Depo. Page 22-24) The "corpus" of the fund however consists entirely of funds that belong to the officers-not the state or any state agency.

A.C.A. § 24-6-303 **Contributions** provides:

> "(c) The monthly retirement benefit that would have been payable had the member elected to cease employment and receive a service retirement shall be paid into the Arkansas State Police Officers Deferred Option Plan Account."

And A.C.A. § 24-6-304 **Benefits-Rate of Return** provides:

> "(b)(1) A member who participates in this plan shall earn interest at the rate of 2 percentage points below the rate of return of the investment portfolio of the state

police retirement system, but no less than the actuarially assumed interest rate as certified by the actuary.

"(2) The interest shall be credited to the individual account balance of the member on an annual basis."

So the DROP reserve account reflects DROP members contributions together with interest applied. (Exhibit 1 to original Motion, Stone Depo., Page 39, Lines 18-23). Mr. Weiss has testified that once money is appropriated and transferred from the general state treasury to the Arkansas state police trust fund, those funds cannot later be invaded by the treasury for general obligation purposes. (Exhibit 21 to original Motion, Weiss Depo., Page 14, Lines 8-14). He also indicated that once a state police officer chooses to draw retirement, retirement benefits are paid solely from the Arkansas State Police Retirement Trust Fund. (Exhibit 21 to original Motion, Weiss Depo, Page 16) And he testified that once money is transferred from the state treasury into the retirement trust fund it cannot be used for any purpose other than to pay a beneficiary. (Exhibit 21 to original Motion, Weiss Depo, Page 17, Lines 12-18) Finally, Mr. Weiss testified that the DROP is funded solely for the state police retirement system trust fund and that it is accounted for separately from the state police retirement system in general. (Exhibit 21, Weiss Depo., Page 29)

Thus, the State of Arkansas' financial obligations will not increase if the Plaintiffs prevail in this suit. There are no facts or basis for Mr. Weiss' comment in his affidavit that there would be some "shortfall" in the retirement system should Plaintiffs prevail in this case. Ms. Stone testified that interest payments come from the trust fund, not the general state treasury. Interest payments in the DROP have always fluctuated but the legislature does not make appropriations from the general treasury every time the fund suffers a bad year in the stock market. As the

appropriation acts show, the state police retirement benefits are appropriated each year "from the State Police Retirement Fund" to pay these benefits. There's no general treasury appropriation. And each year the legislature appropriates whatever sum it takes to pay officers retirement benefits "from the State Police Retirement Fund". (Def. Ex. A-3, p. 3)

The only way the retirement fund ever suffers is when the stock market is poor – not when it's paying interest on some retiree's monthly benefit. Ms. Stone has conceded that any change in interest rate in officers' benefits, in light of stock market vagaries is "unquantifiable". (Ex. 1, original Motion, Stone depo., p. 53)

Both Mr. Weiss' affidavit and Ms. Stone's affidavit are somewhat disingenuous concerning the funds contained within the general state treasury versus funds that have been allocated, appropriated and set aside for the retirement plans. Taking the Weiss and Stone testimony literally, it could be argued that weekly wages for state employees are subject to sovereign immunity and could be withheld simply because the payments come from the state treasury and weekly payroll is something that causes the state treasury to be lessened. Of course that isn't case because payroll is authorized to be paid yearly in general appropriation bills. Likewise the appropriation bills for the State Police Retirement System are stated in very general terms which simply do not reflect specific payments to specific officers for specific purposes. That does not change the character of the funds which have been previously set aside and are held by the state police retirement fund or particularly the DROP account which is accounted for separately within the state police retirement fund. Defendants Exhibit A-3 is instructive at Section 5 where it is clearly revealed that the money appropriated for the state police operations comes from "the state police retirement fund".

There is no separate appropriation for funds to be paid into the DROP. The monthly retirement benefits are statutorily mandated: The officers "appropriate" their own benefits – the state treasury is not implicated. Simply put the State of Arkansas' financial obligations will not increase if Plaintiffs prevail in this suit. Even if DROP interest rates could be viewed as part of the states' general treasury that point is moot because of *Weiss v. McLemore*, below.

One final point on this topic must be made. Throughout their brief the Trustees refer misleadingly to the language of A.C.A. § 24-6-303(a), which reads as follows:

> "When a member begins participation in the Arkansas state police deferred option plan, the employer contribution shall continue to be paid."

This language **is not** referring to contributions into the Arkansas state police officers deferred option plan account. Instead this section refers to the State of Arkansas contributions of 22% of the average member payroll into the Arkansas state police retirement plan. A.C.A. § 24-6-209 sets forth the employers contribution into the plan.

A.C.A. § 24-6-303 (c) is the statutory language in the DROP establishing payments that are made into the DROP account of each officer. That section reads as follows:

> "The monthly retirement benefits that would have been payable had the member elected to cease employment and receive a service retirement shall be paid into the Arkansas state police officers deferred retirement plan account."

It is this account which is at issue in this case. It is this account upon which the interest rate described in A.C.A. § 24-6-304 is applied.

It is very misleading for the Trustees to continually refer to A.C.A. § 24-6-303 (a) when that statutory provision has absolutely nothing to do with the funds which are held in the DROP plan account of each officer which is at issue in this case.

B. Sovereign Immunity is waived to correct errors in calculations of ASPRS funds, including the DROP.

Weiss v. McLemore, 371 Ark. 538, 268 S.W. 2d 897(2007) is controlling precedent for the proposition that sovereign immunity is waived in this class action case. These officers whose accounts were improperly calculated are entitled to recover the interest that has been withheld from them by the ASPRS by having their retirement records corrected. With regard to A.C.A. § 24-6-205, the Supreme Court has concluded that "to construe § 24-6-205 in such a way as to preclude state police retirees from bringing suit to compel the state to correct its error and adjust the payment would eviscerate the purpose of the statute." *Id., 544.* Despite the passage of Act 38 of 2011 *Weiss v. McLemore* was still controlling precedent at the time when the Trustees voted in 2009 to amend the interest rate from 7 ¾% to 3 ¼ %.

It is beyond argument that all statutes are to be construed as having a prospective operation, unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared from the language used. *Gannett River States Publishing Company v. Arkansas Judicial Discipline and Disability Commission,* 304 Ark. 244, 801 S.W. 2d 292 (1990). When the officers were first affected by the Trustees' vote to change their interest rates in the DROP, July 1, 2009, Act 38 of 2011 was over two (2) years away from being passed. *Weiss v. McLemore* was controlling precedent. Until July 1, 2009, the Officers cause of action on the unconstitutional application of Act 404 of 2007 hadn't accrued, because its terms hadn't resulted in damages to the officers. This is because of the poor rate of return on the investment portfolio of the retirement fund in general the officers would have still earned (under Act 404) 7.75% whether it be called "maximum" or "minimum" (under existing law, prior to Act 404).

As the Officers' opening brief established, these Officers did not rush to file suit in July 2009 because they first sought to appeal to the Trustees at various of their quarterly meetings to describe how the Officers had been mislead into taking early retirement into the DROP based upon the existing law providing for their guaranteed interest rates. Reading the Trustees' minutes which were attached as exhibits to the Officers' opening brief is very instructive on this point. On numerous occasions the Trustees discussed whether the Officers in the DROP had been treated unfairly. On numerous occasions the Trustees discussed how the stock market and thus the retirement trust fund, in general, was making great progress after 2009 and that in hindsight it was not necessary to have made any changes in the DROP interest rate.

Principal class member Glenn Sligh appeared before the Trustees to speak as reflected in the minutes on two (2) different occasions and was present at all of the meetings. Lt. Sligh's final appearance before the Trustees was at their November 17, 2011, meeting in which he addressed the Trustees about the unfairness of the situation which has resulted in this lawsuit. Despite this plea the Trustees denied Lt. Sligh's relief. Lt. Sligh was requesting that the Trustees correct their errors. *Weiss v. McLemore* is controlling precedent here because exactly the same thing happened here as happened to the troopers in *Weiss v. McLemore*. In both cases, Arkansas troopers aggrieved by actions of the ASPRS Trustees were seeking relief from the Trustees and in both instances the Trustees have denied that corrective action and then tried to hide behind the doctrine of sovereign immunity. The only thing that changed between *Weiss* and commencement of this suit was passage of Act 38 of 2011. That legislative enactment is ineffective to "create" sovereign immunity because (a) it was passed two (2) years after this cause of action arose; and, (b) it is unconstitutional as applied to the facts of this case in any

event. It would be unconstitutional because it would deny a contractual right or property right protected by both the U.S. and Arkansas Constitutions.

i Neither Act 404 of 2007 nor Act 38 of 2011 may be applied retroactively to divest the Plaintiffs of vested rights.

In Arkansas since 1914 it has been clearly settled law that a legislative enactment will never be given retroactive application if doing so would disturb a vested right. *State ex rel. Moose v. Kansas City & Memphis Railroad & Bridge Company,* 117 Ark. 606, 612, 174 S.W. 248, 251 (1914).

> "The proposition that a legislature has the power to take the property of one man and transfer to another is at once monsterous and absurd. And what is the difference between that proposition and the one that the legislature has the power to deprive a man of legal defense against a demand set up against him?" *Rhodes v. Cannon,* 112 Ark. 6, 164 S.W. 752 (1914)

In fact, Justice Newbern, writing for majority in *Gannett River* defined "retroactive" as "one which has the affect of disturbing a vested right" citing Black's Law Dictionary 1184 (5th Addition 1979). *Gannett River*, at 248. The long line of cases holding that legislation cannot be applied retroactively to disturb contractual or vested rights is unbroken. *Harrison v. Matthews,* 235 Ark. 915, 362 S.W. 2d 704 (1962); *Tarkington v. Turbow,* 190 Ark. 1138, 83 S.W. 2d 71 (1935).

In this case it is beyond argument that the Officers had a vested right in the DROP. The Trustees concede as much in their brief:

> "The issue in this case is not whether Plaintiffs are entitled to retirement benefits, which the clearly are. Plaintiffs "retired" when they entered the DROP, A.C.A. § 24-6-303(c), having met the criteria for retirement and thus have "vested" in the ASPRS (Deferred Retirement Option Plan)." (Trustees Brief at Page 37)

every right to rely on the black letter law setting forth their interest rates. To apply Act 38 of 2011 retroactively to "undo" the statutory language in effect when these officers fully vested into the DROP would not only be unconstitutional, it would be unconscionable. In *Forrest City Machine Works, Inc. v. Aderhold,* 273 Ark. 33, 616 S.W. 2d 720 (1981) the Arkansas Supreme Court held that it would determine retroactivity and vested rights after weighing the fairness of the act and the general welfare of the people affected. The Court stated that the courts do not regard rights vested contrary to the equity and justice of the case and that one of the principal factors in determining the retroactive application of an act is the public policy set out in the act. *Id.,* at 42,616 S.W. 2d at 725.

It would be hard to imagine a more inequitable or unfair proposition than to apply Act 38 of 2011 retroactively to bar this class action. Consider the purpose of the DROP; and consider the stock market gains between 2009 and now. This brings the inequity of the defendants' argument into full light. The Trustees used the Officers' monthly retirement benefits to place on deposit in state police retirement account to earn huge market gains as indicated in opening brief at page 12. Since 2010 the net assets held in trust for pension benefits for the state police retirement system has grown at an average rate of 12.7% per year. Meanwhile, starting in fiscal year 2010 the Trustees decided to lower the payments made to the Officers to 3¼%. The Officers allowed the Trustees to use the officers' money for between one (1) and seven (7) years to earn the returns averaging 12.7% since 2009 and in exchange the Trustees would only pay them only 3¼% on the officers' own money. This, when state law guaranteed them a minimum of 7¾% when they retired.

them only 3 ¼ % on the officers' own money. This, when state law guaranteed them a minimum of 7 ¾ % when they retired.

Consider also the minutes of the ASPRS Trustees' meeting from May of 2011 (ex.9, original Motion). It is clear that the sole purpose for passage of Act 38 of 2011 was to prevent these particular fifty-seven (57) Plaintiffs from being paid the interest which they had relied upon when they entered the DROP. Minutes reflect that:

> "Ms. Stone stated that yesterday staff had received a letter from Lt. Sligh arguing that interest should not be lowered on DROP account. Act 38 of 2011 was a technical bill with language inserted in an attempt to head off further *Weiss v. McLemore* style lawsuits by stating specifically that the system has sovereign immunity..."

The Trustees also basically concede in their brief here that the sole purpose of Act 38 of 2011 was to prevent this particular lawsuit.

> This provision was added to the section of the code governing the ASPRS after *Weiss v. McLemore* was decided. During the 2011 session of the general assembly, the legislature enacted §24-6-103. This section providing for the correction of errors – A.C.A. § 24-6-205 – was not repealed or modified in any way during the 2011 session... (Def. Brief at 29)

The 2011 Act pronounces that the Arkansas Supreme Court got it all wrong in *Weiss v. McLemore* and that in fact an aggrieved officer should have no possible means whatsoever to recoup funds that he lost if his retirement account was miscalculated; but on the other hand the state could pursue an officer for funds improperly paid to that officer per A.C.A. § 24-6-205. This is the precise inequity which the Arkansas Supreme Court cured in *Weiss v. McLemore*. For the legislature to come, four (4) years later and indicate that the Supreme Court got it wrong just to bar this case is inequitable at best, mean spirited and unconstitutional at worst.

Sovereign immunity cannot bar this case, not only because a plaintiffs judgment will have no effect on the state treasury, and because *Weiss v. McLemore* waives immunity to correct Trustees' errors; but also because sovereign immunity cannot be applied when the state violates a citizen's constitutional rights.

III.

SOVERIGN IMMUNITY CANNOT BE APPLIED WHEN THE STATE VIOLATES CONSTITUTIONAL RIGHTS.

Act 404 of 2007 was unconstitutional when it was passed if it was to be applied to the particular class members here. The first question to be determined for contract clause analysis is whether "the statute has, in fact, operated as a substantial impairment on preexisting contractural relationships." *Equipment Manufacturers Institute v. Janklow,* 300 F.3d 842, 850 (8th Cir. 2002). This inquiry involves a three (3) part analysis: "[1] whether there is a contractural relationship, [2] whether a change of law impairs that contractural relationship, and [3] whether the impairment is substantial. If substantial impairment exists courts next determine whether the state has a "significant and legitimate public purpose behind the regulation." *Educ. Employees' Credit Union vs. Mutual Guarantee Corp.,* 50 F.3d 1432, 1438 (8th Cir. 1995). If there is no significant and legitimate public purpose, the state law is unconstitutional under the contract clause.

In this case the Trustees have not addressed a critical differentiation between the state police DROP and both the Arkansas Public Employees' DROP and the Teachers Retirement System DROP. In those latter two plans which are far larger in participation, the Trustees of the

plan have **always** had statutory authority to adjust the interest rates. Not so with the state police DROP. From its inception until Act 404 of 2007 the interest was set out statutorily.

The teachers' DROP and state police DROP were established in the same legislative session. Legislative intent is clear: for state police the interest rate on DROP is to be set in stone. That fact makes the analysis of this case identical to the analysis in *Jones v. Chaney,* 253 Ark. 926, 489 S.W. 2d 785 (1973). There the Supreme Court affirmed a trial court's issuance of a writ of mandamus against the state requiring it to pay vested pension rights which the state had denied based on a change in law that had occurred between the time Mr. Chaney become a vested pensioner and the time his benefits were paid (or denied). The most important language from Supreme Court in that case reveals that:

> "We hold that Chaney's rights become firmly vested when he fulfilled the service requirements, which was prior to the passage of the 1967 Act. ... We say that is the better rationale to apply in the present case and the one we adopt; so that after [Chaney's] rights became vested by his having met the service requirements, his entitlements could not, thereafter, without his consent, be effected by any future enactment, - not by the 1967 Act." (*Jones v. Chaney,* at 933-934)

In their brief Defendants mischaracterize the importance of Mr. Chaney's having been fully vested in the retirement plan at issue and place unjustified reliance upon the fact that Mr. Chaney contributed payments into that plan from his public service payroll. A fair reading of the case however, indicates that the Supreme Court was driven by the fact that Chaney was fully vested by his service. The Supreme Court quoted its prior opinions in stating that "retirement pay is generally considered not to be a pension or gratuity but as adjusted compensation presently earned by the employee but payable in the future." *Commissioner of Labor v. Renfroe,*

253 Ark. 380, 486 S.W. 2d 73 (Ark. 1972). The following language from Chaney is particularly instructive on this topic:

> "[Chaney] voluntarily accepted the provisions of the 1967 Act. He made all of the requirements which constituted his contribution to the retirement fund. This had the affect of [Chaney's] having received his full salary and returning the part to meet his share of the contribution to the retirement fund. The deducted sums belonged to him and were withheld through his agency and agreement. The consideration for his so doing was set forth in the 1965 Act. Now to hold the 1967 Act effective against [Chaney] would deprive him of his constitutional right to have his relationship remain unimpaired." (*Chaney* at page 932)

and this:

> "Chaney's rights were clearly defined in Act 148 of 1965 and his rights became consummate when he fulfilled the service requirements created by the act. The rights of anyone elected after the effective date of the 1967 Act become a member of the retirement system would, of course, be governed by the law as so amended. Cross v. Graham, 224 Ark. 277, 272 S.W. 2d 682 (1954). Accordingly, there is no basis on which to classify the 1967 Act as ex post facto legislation. It was certainly not within the constitutional power of the legislature to enact legislation which operated retroactively so as to affect the contractural relationship between the retirement system and Chaney created before the passage of the 1967 Act, as the 1965 Act contained no reservation permitting any such change. The constitutional provision prohibiting the passage of laws impairing obligations of contracts applies to contracts, not only between individuals, but also to those made by the state or by one of its agencies when authorized by law. (*Chaney* at 936)"

In the case at bar, the officers clearly were fully vested when entering he DROP: in order to "enter the DROP" one must be fully vested. The Trustees have conceded this point. Even if the "contributory" versus "non-contributory" argument has any application, the DROP by its very definition is funded fully by the officers' money and not one penny of the state's money goes into the corpus of this trust. The officers have retired, they are deferring acceptance of their retirement benefits and literally loaning it to the Trustees in exchange for a guaranteed interest

rate. "Vesting" is the key word in *Chaney* and for the case as bar; not "gratuitous allowance" as urged by Trustees.

In opinion number 2010-022 the Arkansas Attorney General in essence agrees with this position (Ex. 23 original Motion). That opinion reveals:

> "As I and several of my predecessors have previously explained, the Arkansas Supreme Court has held that legislation violates the so called "impairment of contract" prohibition if it operates retroactively so as to divest previously existing contractural rights, and specifically rights arising under a public retirement plan. E.g., Op. Attorney General 2008-057, 2006-138 and 97-435 (citing *Pyle v. Webb*, 253 Ark. 940, 489 S.W. 2d 796 (1973) and *Jones v. Chaney*, 253 Ark. 926, 489 S.W. 2d 785 (1973)). See also Op. Attorney General 2009-049 and 2008-052.

The opinion further concludes:

> "If a contract exists [in the DROP] and if the interest formula specified by Act 1969 of 2005 is included among the contract's terms, then in my opinion a court faced with the question might conclude that the interest rate changes made by Act 404 of 2007 cannot be constitutionally applied to those state police DROP participants who entered the plan before Act 404 effective date."

The Trustees will argue that since the precise interest rate is not set out in the DROP legislation that the interest rate cannot be considered as an essential element of the contract. This position is absurd. As pointed out in the officers' original brief, the interest rate is one of only two reasons why an officer would ever even consider entering into the DROP. The other is the ability to receive five (5) to seven (7) years of monthly benefits **plus interest** in a lump sum. Otherwise the terms of the DROP are all favorable to the Trustees, not the Officers. The officer must take early retirement and give up increases in his monthly retirement benefits which the added five (5) to seven (7) years of salary increases would yield. He must be "retired" but return to work in the same position as he held before his retirement. He has retired yet he defers

receiving his retirement each month, allowing the Trustees to tend to it and if he doesn't have a favorable interest rate then there is no point in the whole process.

The position taken now, in this case, by the Trustees is curious given that the same Attorney General made the pronouncements stated above two (2) years prior in a published attorney general's opinion. The facts are the same now as they were then and so is the law. This is the third reason why sovereign immunity does not bar this case.

IV.

THERE WAS NO LIGITIMATE PUBLIC PURPOSE

TO APPLY ACT 404 RETROACTIVELY

Act 404 could not applied retroactively to divest these class members from their vested pension rights for the sole reason that upon entry into the DROP the officers were already vested into the plan and the law governing the plan was set forth statutorily. The Trustees have not identified any single overriding public purpose to justify the act to be retroactively applied to these pensioners.

While Ms. Stone and Mr. Weis provided affidavits that briefly described the economic conditions in the mid 2000's, the court can take judicial notice of that fact anyway. Other than the general downturn in the markets there was simply no reason to apply this law retroactively to 57 individuals. As the Officers' brief has shown, the stock markets are constantly in flux and any time the stock market in general is up or down the state police retirement system follows right along. This has always been the case and will always be the case. There simply is no monumental catastrophic public disaster which was averted by applying Act 404 retroactively.

It is thus clear that the language establishing the DROP is contractural and that Act 404 of 2007 as applied to these officers has operated as a substantial impairment on their preexisting contractural relationship. Given that there is a substantial impairment of a contractural right the only legal justification for impairing that right is if the State has a "significant and legitimate purpose behind the regulation." *Educ. Employees' Credit Union v. Mutual Guarantee Corp.*, 50 F. 3d 32, 1438 (8th Cir. 1995). Although economic concerns can give rise to the states legitimate use of the police power, such concerns must be related to "unprecedented emergency", such as mass foreclosures caused by the great depression. *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 242, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). Further, to survive a challenge under the Contract Clause any law addressing such concerns must deal with a broad, generalized economic or social problem. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 444-445, 54 S. Ct. 231, 78 L. Ed. 413 (1934). As has been established here there simply is no such over arching public purpose established by the Trustees.

V.

42 U.S.C. § 1983

While it is generally true that causes of action based upon 42 U.S.C. § 1983 may not be maintained against a state or state agencies, the reason behind the rule is the 11th Amendment to the United States Constitution. Of course, this provides that states enjoy sovereign immunity in federal court actions. Since § 1983 cases are traditionally filed in federal court the 11th Amendment bars those actions from being maintained. In § 1983 cases brought in state court the analysis is similar, however, the 11th Amendment to the Constitution does not apply to actions brought in state court. Normally, sovereign immunity would bar a cause of action seeking

money damages or injunctive relief which requires payment of state funds in state court. That is the argument put forth by the Trustees in this case. They allege that the § 1983 case is barred by sovereign immunity and also by the statute of limitations.

It has been contended here however that since a judgment against the retirement system or the Trustees would be paid from the Arkansas state police retirement fund and not the state treasury then sovereign immunity is not implicated. As will be explained in the next section, the statute of limitations does not bar this action either.

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L.Ed. 2d 123 (1998) supports this approach urged here: that the only reason why states are not "persons" under § 1983 jurisprudence is because of the 11th Amendment. Since the 11th Amendment is not applicable in state courts and since sovereign immunity is also not applicable in our case then this court can maintain a § 1983 action for prospective injunctive relief even if it requires paying money from state police retirement fund, not the state general treasury. This approach is also supported in *Kansas State Medical Board v. Leipzig*, 299 Ark. 71, 770 S.W. 2d 661 (1989).

There simply is no question but that there is a constitutional violation and that the violation should be addressed in this action. Because there is no sovereign immunity this action should be maintainable under 42 U.S.C. § 1983. Candidly, the primary reason for urging this point is that § 1983 actions also support payment of attorney's fees to the prevailing party. As the court is aware from previous pleadings the plaintiff class has executed a contingency fee agreement which will provide for payments out of funds they receive to be paid to the attorney. However it would be more favorable and equitable to the plaintiff class if attorney's fees, at the rate indicated under the agreement, would be payable in addition to the total reimbursement of

each plaintiff class member of the interest rate which he has been deprived thus far. Since there is a clear constitutional violation, the officers should receive full compensation.

One final point is that a judgment in favor of the Plaintiffs is not dependent on 42 U.S.C. § 1983 cause of action. The cause of action on the other counts is fully supported irrespective of the court's ruling on 42 U.S.C. § 1983.

VI.

STATUTE OF LIMITATIONS

There is no statute of limitations which would bar the Plaintiffs' cause of action. This fact is made clear in several instances, some of which were never addressed by the Trustees in their brief.

A.G., Op. 2002-324 (Ex. 20, Officers' original Motion) makes clear that statute of limitations will not bar a mandamus action where statutory duty that the action seeks to enforce is a "continuous duty".

The public retirement plans of the State of Arkansas obviously abide by this opinion. As pointed out in the officers' original brief, the Arkansas Teacher Retirement Plan added a specific statutory provision in 2011 to create, for the first time, a five (5) year "look back" period for correcting errors concerning benefits. A.C.A. § 24-7-205 and 24-7-202 (39). Prior to 2011 there was no limitations for the state teacher retirement system or its members in pursuing improperly calculated benefits or contributions.

Likewise, there is no set statute of limitations for the adjusting of improperly paid or withheld benefits in Arkansas Public Employees Retirement System. As pointed out in the original brief, on May 21, 2014, the APERS board voted to assess a penalty and interest to a

public employer for failure to make contributions on behalf of an employee over thirty (30) years in the past. Attached as an exhibit to this response as exhibit "A", minutes from the APERS Trustees' meeting of May 21, 2014, which contains a synopsis of the case. The APERS Trustees concluded that they had the authority to assess this collection order against Jefferson County for contributions that should have been made by Jefferson County to APERS between the years of 1980 and 1986.

The Arkansas State Police Retirement System does not contain statute of limitation language and neither did the other plans until the teachers added one in 2011. There simply is no statute of limitations applicable to this cause of action. As further proof of this point please consider comments that APERS/ASPRS general counsel, Jay Wills, made in minutes of the Trustees' regularly scheduled meeting of August 18, 2011, where the following appears:

> "Mr. Wills reminded the board that there was no statute of limitations with any of these actions." (Ex. 19, original Motion, Trustees Minutes 8-18-2011)

Even if, for the sake of argument, none of these points were valid, this case was commenced within three (3) years from the date that the cause of action accrued. This cause of action accrued on July 1, 2009, when the effects of Act 404 of 2007 created damage to the plaintiff class. While Act 404 of 2007 had been in existence for over two (2) years at that time, the plaintiff class interest rates had not yet been lowered. When the Officers began accruing interest rates at 3 ¼ % in July 2009 they began suffering damages. This case was commenced within three (3) years of that time and thus there is no conceivable statute of limitations which could be applied. It is well established Arkansas law that a litigants cause of action doesn't

accrue until he suffers some damage. Civil Practice & Procedure, Fifth Ed., Newbern, Watkins & Marshall, § 5.3.

As this Court is well aware, actions to "enforce" written obligations, duties, or rights" must be commenced within five (5) years after the cause of action accrues. A.C.A. § 56-111 (a) So even if, for the sake of further argument, there were a statute of limitations to be applied; and even if the court believes that the cause of action for the unconstitutionality of Act 404 of 2007 accrued when the act became effective March 22, 2007, this cause of action was still commenced within five (5) years of that date.

Finally, the Trustees have alleged that the Plaintiffs' cause of action based upon 42 U.S.C. § 1983 is time barred because the statute of limitations for such actions is three (3) years. Plaintiffs concur that the three (3) year period applies but the key issue is the accrual of the cause of action. Because plaintiffs suffered no damage until July 1, 2009, the § 1983 action would be time-barred if commenced July 1, 2012 or later. It wasn't. So the Trustees argument is unfounded.

There is just no credible argument that a statute of limitations could bar this cause of action.

VII.

CONCLUSION

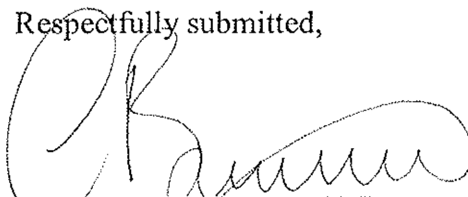
This brief summarizes four (4) legal justifications for denying sovereign immunity as urged by the Trustees. These theories are well supported in the case law and perhaps the most prominent theory, that of the impermissibility for state to impinge contractural rights with legislation subsequent to vesting in those rights is fully supported by Attorney General opinions

in addition to Arkansas Supreme Court opinions. That the Attorney General represents the Trustees in this case creates an obviously awkward situation for the Trustees.

Since it is beyond argument that these officers had vested contractural rights impinged upon by subsequent legislation divesting them of fully earned contractural rights the law requires that they be reimbursed. This will not create any financial burden upon the Trustees given the limited number of the class, the very limited nature of the compensation requested and the fact that this situation will never again arise. This case has immediate value to these officers but will have little precedential value given that by its closed class definition this situation will not ever occur again.

The Trustees acted recklessly and perhaps upon bad advice when they voted to reduce the officers' interest rates in 2009. They reflected further bad judgment in the following years as the stock market thrived and as these officers pleaded for the Trustees to rescind their earlier decision by ignoring the officers' requests. It is now the time for justice to be rendered on behalf of the Plaintiff class and it is the officers' belief that their briefs and the summary judgment pleadings clearly establish their right to receive full compensation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a copy of the above and foregoing pleading was this 28 day of October, 2014, served by U.S. Mail, postage paid to:

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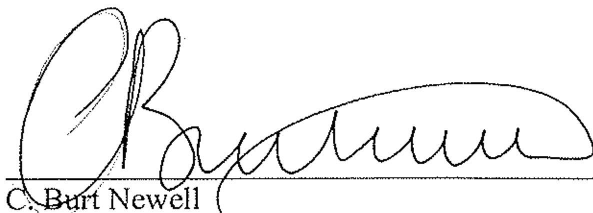

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