IN THE 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 and DEKALB COUNTY BOARD OF EDUCATION,

Defendants.

CIVIL ACTION FILE
NO. 11-CV-3657-5

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This Court is confronted with the question of whether to allow more than 10,000 school teachers and other employees of the DeKalb County School District to consolidate their claims in a single lawsuit to resolve a contract dispute over the District's Alternative Plan to Social Security. Plaintiffs contend, and the appellate courts have established, that Defendants breached their contract by improperly reducing certain retirement benefits. *Gold v. DeKalb County School District*, 346 Ga. App. 108 (2018) (hereinafter "*Gold III*") and *DeKalb County School District v. Gold*, --Ga.--, 834 S.E.2d 808 (Oct. 21, 2019) ("*Gold IV*").

On this motion, the only question before the Court is ***how*** to resolve this dispute. Should it be decided once and for all in a single class action? Or is it preferable and superior that it should it be decided in more than 10,000 separate and individual lawsuits? As the Georgia Court of Appeals has instructed trial courts in Georgia, "'[t]he rule asks us to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available

methods' of adjudication." *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 906-07 (2011). Thus, "[t]he issue is not whether a class action will be difficult to manage. Instead, the trial court is to consider the relative advantages of a class action suit over other forms of litigation which might be available." *Id.* at 907.

In the interest of promoting fairness and efficiency for all parties, this Court agrees with the judges in *Gold II* who already stated that, "[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." *Gold v. DeKalb County School District* ("Gold II"), Georgia Court of Appeals Case No. A14A1557, March 30, 2015 (Concurring Op. of Judges McFadden and Phipps at 1). The Court thus exercises its discretion and **GRANTS** Plaintiffs' Motion for Class Certification based on the following findings of fact and conclusions of law.

BACKGROUND: FINDINGS OF FACT

This breach of contract case involves the DeKalb County School System's Board Policies regarding certain retirement benefits, and whether the District validly discontinued those benefits or, on the other hand, violated the Georgia Constitution's "Impairment Clause," prohibiting retroactive laws and "laws impairing the obligation of contract." *See* Ga. Const. of 1983, Art. 1, Sec. 1, Par. X.

Plaintiffs Elaine Gold, Amy Shaye, Rod Benson and Heather Hunter are each current or former employees of the DeKalb County School District and "class members" as defined in the Third Amended Complaint. They brought this breach of contract action claiming that the District formed a written contract with its employees through a School Board Policy (a) to provide an "Alternative Plan" to Social Security, with several components, and (b) to provide two years notice before reducing the funding provisions of that Alternative Plan. Given the

extensive procedural and appellate history, this Court is not writing on a blank slate. Plaintiffs have contended, and the appellate courts have now held, that the District breached this written contract by eliminating funding for their TSA retirement benefit component of the Alternative Plan for the Class without providing two years' prior notice to impacted employees. *See, generally, Gold III* and *Gold IV, supra.*

A. The Four Named Plaintiffs Are Members Of The Proposed Class And Include Members Of The Two Proposed Subclasses.

It is undisputed that each named Plaintiff was an employee and Class-member whose right to funding of the relevant employment benefit was protected by the District's Policy requiring two-years notice and generally applicable to all employees in July 2009. Each served as an employee of the District for many years. Each received TSA retirement benefits for many years, and each are in the class of persons who stopped receiving TSA contributions because of the District's elimination of those benefits, without a two-year notice, on July 27, 2009.

Elaine Gold and Amy Shaye worked pursuant to annual employment contracts. *See* Pls. Ex. 60, Deposition of Elaine Gold dated May 20, 2013 (Gold Dep.) at 111:24; Deposition of Amy Shaye dated May 20, 2013 ("Shaye Dep.") at 82:20-22. Rod Benson and Heather Hunter worked for the District as "at-will" employees. *See* Pls. Ex. 62, Deposition of Roderick Benson, dated January 7, 2016 ("Benson Dep.") at 10:10-11 & 257:11-14; Pls. Ex. 63, Deposition of Heather Hunter dated March 4, 2016 ("Hunter Dep.") at 13:14-14:2.

B. Plaintiffs Rely On A Contract For Retirement Benefits That Is The Same For The Entire Putative Class.

Plaintiffs allege that the legislative acts of the Board establishing a retirement plan for the School District employees may become part of the employees' contract of employment."; *see* Pls. Ex. 1 (*Gold I*) at 23; *see also* Plaintiffs Motion for Partial Summary Judgment at 20-33; *see also, generally,* Third Am. Compl. (June 30, 2015). These legislative acts apply with equal force

and in the same way to each of the District's employees, to every member of the putative class, and without regard to whether employment status was "at will" or otherwise. *See, e.g., Shelnutt v. Mayer of Savannah*, 349 Ga. App. 499, 502 (2019) (firefighters' rights to benefits under City pay policy were separate and distinct from the duration of at-will firefighters' employment).

Specifically, the School District implemented a plan to remove its employees from Social Security in 1979. *See* Pls. Ex. 4, Oct. 1, 1979 Resolution, at DCSD000016. To compensate for the fact that the employees would no longer receive Social Security benefits, 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.* Defendants promoted the Alternative Plan as superior to Social Security as a way to attract better teachers and employees to work for the District. This "Alternative Plan" was an official Board of Education Policy for decades, and it specifically included a requirement that the District could not reduce the funding provisions of the Alternative Plan without first giving employees a two-year notice. *See, e.g.*, Pls. Ex. 5, Affidavit of Joseph Willingham dated March 26, 2013 ("Willingham Aff."), ¶¶19- 20.

From at least September 11, 2000, the Board Policy on the "Alternative Plan to Social Security" was published online 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).

The evidence establishes this Policy applies equally and consistently to all employees. *See, e.g.*, Pls. Ex. 6, Deposition of Tekshia Ward-Smith dated Jan. 5, 2016 ("Ward-Smith Dep."), at 37:17-21 ("All policies are available on our website and employees sign a notification that they are aware of all district policies."); Pls. Ex. 11, Deposition of Michael Bell dated Feb. 25, 2016 (Bell 30(b)(6) Dep.) at 91:16-21 (noting that policies apply consistently to all employees). This is also the conclusion of courts in this case.

In *Gold III* and *Gold IV*, the Court of Appeals and Supreme Court decided the two-year notice requirement applied to all District employees equally. By its terms, the two-year notice requirement applied without distinction "to the employees," which the Board Policy defined inclusively of "all full-time employees." *Gold III* ruled that this two-year notice requirement applied to at-will and contract- employees alike because the TSA contributions (as part of the Alternative Plan) were owed to "*any eligible employee* who was or who might become a Plan

participant." *Gold III*, 346 Ga. App. at 113 (emphasis supplied). The Supreme Court concurred: "This action constituted a standing offer by the Board to provide two-years notice to *all* its employees, *current and new*, before reducing funding to the plan benefits for those employees. And *each employee accepted this offer by performing work* pursuant to these terms." *Gold IV*, 834 S.E.2d at 812 (emphasis supplied).

Without reference to the supposed distinctions Defendants have contended prevent class certification, the Supreme Court ruled for all four Plaintiffs "that the trial court erred in . . . in denying [Plaintiffs'] motion for summary judgment on the issue of liability for breach of contract." *Gold IV*, 834 S.E.2d at 814. Had Defendants' supposed distinctions mattered, the appellate courts would not have ignored them in granting partial summary judgment as to both contract employees—like Elaine Gold and Amy Shaye—and to at-will employees—like Heather Hunter and Rod Benson. This Court therefore concludes that Defendants' purported distinctions are not relevant to the Class-members rights to two-years' notice and do not pose obstacles to certification.

This finding is undergirded by two additional consideration: (1) the historic actions of the Defendants; and (2) the legal obligation of the District to administer the TSA Plan in a consistent manner. As a matter of history (and as mandated by the District's legislative acts), the Board executed and administered its obligations to provide the relevant benefits in accordance with a "Plan Document," which is yet another document that applies equally and consistently to all employees. Specifically, to implement the third prong of the Alternative Plan (identified in the Policy on Withholding Funds as the "supplemental retirement plan"), the Board adopted a "Tax-Sheltered Annuity" (the "TSA" plan) and a series of Plan Documents to administer it. *See, e.g.*, Pls. Ex. 5 (Willingham Aff.) ¶ 9; Pls. Ex. 34, The Valuable Annuity Life Insurance Company

dated Oct. 1, 1979 ("1979 VALIC Contract"); Pls. Ex. 13, DeKalb County Georgia Board of Education Tax Shelter and Annuity Plan dated July 11, 1983 ("1983 Plan Document"); Pls. Ex. 12, DeKalb County Georgia Board of Education Tax Sheltered Annuity Plan dated Feb. 12, 2003 ("2003 Plan Document"). The parties agree that the currently operative Plan Document is dated February 12, 2003 and details the District's administration 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, 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).[1]

Further, the District is legally 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.[2] According to the Defendants' proffered 403(b) expert, IRS regulations require that the District treat its employees consistently and without discrimination. Pls. Ex. 14, Deposition of Charles Yovino dated Dec. 12, 2016 ("Yovino Dep.") at 211:20-23; *see also, id.* at 141:23-142:6 (all employees are treated according to same terms).

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[1] Similar language appeared in the 1983 Plan Document as well. *See* Pls. Ex. 13 (1983 Plan Document) at DCSD000043.

[2] 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.

C. The District Breached The Contract In The Same Way For Each Class Member: By Terminating TSA Benefits Without Providing A Two-Year 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 (*i.e.*, the members of the putative class). The only notice of this "emergency" meeting was sent three days before, on Friday July 24, 2009, and this was not "notice of a reduction" because it said nothing whatsoever about reducing employee benefits. *See, e.g.*, Pls. Ex. 17, Memo to All DeKalb Employees dated July 24, 2009 ("July 24, 2009 Meeting Notice"); Pls. Ex. 18, Memo to All DeKalb Employees regarding Budget Cut Letter to Employees dated July 27, 2009 ("July 27, 2009 Budget Cut Letter"). At the meeting, the School Board voted to eliminate contributions for 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 DCSD000101.[3] Although the plan amendment was a public document, it was not sent or distributed to any of the employees and, therefore, could not be "notice" of a reduction, much less a notice given to employees two-years in advance.

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[3] 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 and are not included in Class, as defined by the Third Amended Complaint. Pls. Ex. 12 (2003 Plan Document) at DCSD0000101. PSERS employees continue to receive benefits today, while TRS and ERS employees do not. The Class only includes those who have missed a contribution as a result of the July 27 elimination of benefits.

This elimination of benefits affected the "TRS" and "ERS" employees as a group, making their loss of funding an injury common to all Class members. Further, just as the decision to suspend funding was categorical and not specific to any individual Class members, so was its implementation. *See, e.g.*, Pls. Ex. 37, Email from L. Hammel to M. Turk dated Aug. 7, 2009, at DCSD009506 (internal 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. 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, the same superintendent 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." Pls. Ex. 23, Budget FY 2010 News Flash dated Jan. 25, 2010. But no restoration ever happened.

These employee-wide emails from the Superintendent are the official communications of the District. *See* Pls. Ex. 16, Deposition of Jay Cunningham dated July 30, 2015 ("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 testimony of the District's 30(b)(6) representative, there was no

other official notice sent to employees. *Id.* at 111:25-12:12 ("...the District does not believe there are any other notices.").

CLASS CERTIFICATION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

As an initial matter, the parties have extensively argued the impact of various prior rulings in this case. First, Defendants argue that the "law of the case" rule binds this Court to the prior factual findings included in the January 14, 2014 ruling on class certification. However, the evidentiary record is undeniably and materially different than it was at the 2014 ruling on class certification that was appealed. Since then, there have been numerous depositions, thousands of documents produced, and extensive expert discovery. Also, the Court of Appeals expressly directed that the Plaintiffs could submit additional evidence on class certification after remand. *See, e.g.* Pls. Ex. 2 (*Gold II*), Concurring Op. at 3; *see, also, J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 378 (2006) (because "certification orders are 'inherently tentative,' the trial court retains jurisdiction to modify or even vacate them as may be warranted by subsequent events in the litigation."). The Court thus analyzes the full and current record before it and enters these findings of fact based on that record.

This Court is obliged to take into account the holdings of the appellate courts in *Gold III* and *Gold IV* that "the trial court erred in granting the District's Motion for Summary Judgment and in denying the [Plaintiffs'] Motion for Summary Judgment on the issue of liability for breach of the two-years' notice provision." *Gold III*, 346 Ga. App. at 115 (remanding for reconsideration of class certification). *Gold IV* unanimously affirmed. Liability for breach by the Defendants is now established in Plaintiffs' favor and on terms broadly applicable to all class members based upon their accepting the "standing offer" and "performing work." *Gold IV*, 834 S.E.2d at 812; *see also, id.* ("This action constituted a standing offer by the Board to provide

two-years notice to *all* its employees, *current and new*, before reducing funding to the plan benefits for those employees. And *each employee accepted this offer by performing work* pursuant to these terms.") (emphasis supplied). This Court has resumed its evaluation of this case for class certification consistent with the reasoning and directives expressed by the Court of Appeals and Supreme Court. *See* 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."). After full consideration of the entire record and analysis of all of the issues, and explaining herein the reasons for its exercise of discretion, the Court finds that class certification is appropriate.

I. Conclusions of Law Regarding The Requirements Of O.C.G.A. § 9-11-23.

Plaintiffs have moved for certification pursuant to O.C.G.A. § 9-11-23(b)(3). O.C.G.A. § 9-11-23 specifically provides as follows:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> > (1) The class is so numerous that joinder of all members is impracticable;
> >
> > (2) There are questions of law or fact common to the class;
> >
> > (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> >
> > (4) The representative parties will fairly and adequately protect the interests of the class.
>
> (b) An action may be maintained as a class action if the prerequisites of subsection (a) of this Code section are satisfied, and, in addition: ...
>
> > (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy....

O.C.G.A. § 9-11-23. This case meets each of these requirements.

II. Numerosity (and "Ascertainability")

A. Numerosity Conclusions of Law:

"In order to satisfy this requirement, [Plaintiffs] need not allege the exact number and identity of the class members, but must only establish that joinder is impracticable through some evidence or reasonable estimate of the number of purported class members." *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 903 (2011). As few as 25 class members are sufficient to satisfy the numerosity requirement. *See, e.g., Stevens v. Thomas*, 257 Ga. 645, 649 (1987).

B. Numerosity Findings of Fact:

Plaintiffs have satisfied the numerosity requirement by providing evidence and a reasonable estimate establishing that more than 10,000 persons who were actively employed by Defendants before July 27, 2009 did not receive TSA contributions after July 31, 2009 as a result of the July 27, 2009 elimination of TSA contributions. *See* Pls. Ex 36, Expert Report of Karen Fortune dated Oct. 13, 2016 ("Fortune Report") at 3.

Defendants do not contest this issue with respect to the overall class or the two proposed subclasses. Instead, Defendants argue that if the Court were required to certify more than two sub-classes, it is possible that some of those additional subclasses would lack numerosity. But the holdings of *Gold III* and *Gold IV* were that the two-year notice applied to all District employees equally: *"each employee accepted this offer by performing work* pursuant to these terms." *Gold IV*, 2019 WL 5301936, at *4 (emphasis supplied). Therefore, Defendants' contention that additional subclasses are somehow required is implicitly, if not explicitly, foreclosed by the law of the case following *Gold III* and *Gold IV*.

Given the low bar for numerosity and the large number of employees affected by the issues in this case, Defendants have not provided any evidence to support their contention that even their allegedly required smaller subclasses would be too small to satisfy the requirement.

Based on the evidence in the record, to the extent that any of the smaller subclasses suggested by Defendants exist at all and that grounds requiring the creation of such subclasses exist, such smaller subclasses would likely contain more than 25 individuals. But as discussed below, on the current record there is no basis to create such smaller subclasses.

C. Ascertainability: Conclusions of Law.

The parties dispute whether the so-called "ascertainability" requirement exists in Georgia law. "[T]here is no requirement that every classmember, other than the named plaintiffs, be identified at the outset of the litigation." *City of Roswell v. Bible*, 833 S.E.2d 537, 544 (Ga. Ct. App. 2019). Defendants rely on unpublished, federal cases like *Karhu v. Vital Pharms., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015) and *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014), to argue for a heightened ascertainability standard. *But see Cox v. Porsche Fin. Servs., Inc.*, 330 F.R.D. 322, 330–31 (S.D. Fla. 2019) (distinguishing *Karhu* and rejecting argument that class members could not be determined reliably from defendant's documents). The Plaintiffs argue for a less-stringent inquiry, citing *Resource Life Insurance Co. v. Buckner*, 304 Ga. App. 719 (2010). *See also Owens v. Metro. Life Ins. Co.*, 323 F.R.D. 411, 416 (N.D. Ga. 2017) (finding ascertainability satisfied even though class membership determination would require examination of individual files). This Court analyzes ascertainability because it is desirable "to avoid the necessity of mini-trials to determine membership in a class." *Owens v. Metro. Life Ins. Co.*, 323 F.R.D. at 416–17 (certifying employee class involving employment benefits notwithstanding that "individual records will have to be examined in order to determine class membership."). Therefore, the Court makes the following findings of fact on "ascertainability" to facilitate any review of this Court's decision.

D. Ascertainability Findings of Fact

Surprisingly, the Defendant contends that it cannot identify its own current or former employees based on its own data. This is not only surprising, but given the facts in the record, this argument cannot defeat certification. The Court finds this case meets any reasonable ascertainability standard.

First, Plaintiffs seek to certify the following class:

> Each person – or his or her properly-designated beneficiary or beneficiaries – who was actively employed by the DeKalb County School District or DeKalb County Board of Education before July 27, 2009 … and who did not receive TSA contributions after July 31, 2009 as a result of the July 27, 2009 elimination of TSA contributions.[4]

Pls. Mot for Class Cert at 24.

The Court finds that this definition requires class members to have been (a) employed prior to July 27, 2009; and (b) missed a TSA contribution as a result of the challenged July 27, 2009 elimination of the benefits (the 2009 Reduction).

The Court further finds that three **objective** questions determine whether an employee "missed a TSA contribution… as a result of" the 2009 Reduction. Those three questions are: (1) were they employed in an eligible TSA job? (which determines if they are eligible for TSA benefits); (2) were they a TRS/ERS employee? (which determines if they were subject to the elimination of benefits); and (3) would they have met the three-year waiting requirement at some point during the class period? (which would confirm that they would have lost a contribution they would have otherwise received). These three questions are based on the 2003 TSA Plan Document that the District used to administer its TSA benefits, and the District also used to

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[4] Notably, the two subclasses have the same eligibility criteria, other than the existence or nonexistence of an annual contract. The Court finds that the District's records are sufficient to identify the individuals who have an annual contract. Defendants do not dispute this fact.

eliminate TSA benefits for its employees. *See generally* Pls. Ex. 12, 2003 TSA Plan Doc (detailing administrative procedures); *see also id.* at § 3.1 (identifying eligibility criteria for when payments would be made); *id.* at DCSD 000101 (July 27, 2009 amendment eliminating benefits for TRS/ERS employees). This process resembles the process of determining class membership in other lawsuits over employee benefits. *See e.g., Owens v. Metro. Life Ins. Co.*, 323 at 416–17 ("Class membership will be determined by answering three yes or no questions . . . . Plaintiff has set forth a process for answering all three questions. While this might take time and effort, that is due solely to the number of possible class members, not the difficulty or thoroughness of the inquiry. Denying certification on such a basis is not the purpose of ascertainability."); *see also City of Roswell, supra*, at 543 ("documents produced by the City during discovery provided the names and work hours of potential class members during the relevant time period").

The Court finds that for each member of the class, the answer to each of these objective questions can be ascertained. First, all potential class members were employees of the District, and the District has admitted that it possesses the data needed to make a determination about whether they are members of the class. *See, e.g.*, Pls. Ex. 85, Deposition of Gary Brantley dated Feb. 25, 2016 ("Brantley 30(b)(6) Dep.") at 51:17-52:18 (every piece of data can be traced to a physical employee file at the District); Pls. Ex. 69, Letter from T. Bundy to J. Carter dated Dec. 18, 2015 ("Dec. 18 Letter") (any data anomalies could be resolved with analysis of individual employment files). This case is therefore an easier case for "ascertainability" than *Resource Life* and *Kahru*, because in those cases the defendants did not possess the necessary data at all.

The evidence shows and the Court finds that the District administered the TSA Plan for years (and in fact continues to do so for its employees that do not participate in TRS/ERS). The

District administers its payroll and the other benefits for its sizeable workforce every pay period. It does so with an automatic payroll calculator that uses the District's employee databases to determine which employees are eligible for which benefits, and to calculate the amount of those benefits. *See, e.g.*, Pls. Ex. 29 ("Hudgins Dep.") at 9:19-10:1 ("***Everything is pretty much automated with the TSA***, and it was set that once an employee had that three-year-wait, once that three-year wait was implemented, that the TSA started. So there -- ***there wasn't a lot of manual intervention with it***, just making sure that the program ran, to -- to load it and then that type of thing.") (emphasis added); *see, also id.* at 46:1-15 (noting automated nature of TSA payments, and that the automatic payroll calculator "still [performs these functions] for PSERS folks").

The District has a team of employees who continually audit, update and correct the employee data to ensure its accuracy. *See, e.g.*, Pls. Ex. 91, Deposition of Rhonda Kelly dated Nov. 30, 2015 ("Kelly Dep.") at 19:5-14 (testifying that her job was "to be sure that the system is operating correctly because the district relies on the system to pay the salaries and to pay the benefits, and because its automated, the folks that run the system have to make sure that it's -- that it's -- that it's accurate and that it's reliable."); *id.* at 29:19-21 ("Q... they run these sort of audits to make sure that there –that there's no errors in the data? A. Right."). *Id.* at 36:8-37:19 (describing automated systems for identifying and correcting errors every pay period).

The District testified that it would "never knowingly store data that is inaccurate," and that the District's "policies and procedures that are in place to ensure the accuracy of the data are adequate." Pls. Ex. 85, (Brantley 30(b)(6) Dep.) at 22:12-23:18.

Testimony established the District has never had a systematic or "major" error of any kind. Pls. Ex. 91, (Kelly Dep.) at 40:22-41:19. Errors in the data are limited individual errors

based on errors with data entry. *Id.* at 38. And, as discussed above, the District combs through the data every pay period to minimize and correct these errors. Further, the Court finds that the number of errors in the data would be *de minimis*, with an error rate as low as 0.25% (a quarter of one percent), and easily remedied. *See* Pls. Ex. 92, Deposition of Nefreteria Williams dated Dec. 7, 2015 ("Williams Dep.") at 54:22-55:6 (noting that she finds between 1-30 errors in a payroll run with more than 12,000 employees); *see also*, *id.* at 32:19-21 ("Q. Okay. How long does it take to deal with the errors? A. ***It doesn't take long at all.***") (emphasis added).

Given this evidence, the Court concludes that the Defendants' employee data is sufficiently reliable to calculate eligibility for the class by reference to objective data maintained by the District regarding its employees. Even under a heightened ascertainability standard, the data would still be sufficient to ascertain the class.

Plaintiffs' expert has demonstrated that she can use the Defendants' data to sort employees and determine eligibility using a computer. Pls. Ex. 36 (Fortune Report); *see also* Pls. Ex. 80 (Fortune Dep.) at144:7-19 (expert can perform calculations based on any inputs).[5] Further, given the accuracy of the data and the fact that the Defendants rely on the data in ordinary course of business to determine benefits eligibility and amount, the Court finds that it is reasonable to use that same data to calculate eligibility for the class and the amount of damages.

Lastly, if there are data anomalies or individuals whose eligibility is not clearly established by the relevant employee data, the District still possesses sufficient information to

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[5] Both plaintiffs and defendants have moved for the exclusion of the other sides' experts. After applying and analyzing the relevant rules regarding expert testimony, the Court denies all of these motions for purposes of class certification. However, the Court reserves judgment on the admissibility of any expert testimony for purposes of trial or any further proceeding. The Court may order additional briefing or an additional hearing with respect to expert testimony at some later date.

identify them and determine if they are eligible class members. Defendants' attorneys, experts, and the testimony of their witnesses have provided a road map for how any data anomalies can be addressed with a systematic manual review. *See, e.g.*, Pls. Ex. 69 (Dec. 18 Letter) (data anomalies could be resolved with analysis of individual employment files); Pls. Ex. 85 (Brantley 30(b)(6) Dep.) at 51:17-52:18 (each data point can be traced to a hard file); Pls. Ex. 82, Deposition of Joseph Pope dated Dec. 12, 2016 ("Pope Dep.") at 61:23-62:10 & 143:24-144:9 (forensic verification of data is possible by consulting employee files according to standard, repeatable procedure). Defendants' witness testified that they not only can do the manual review, but that they used to do it all the time. Pls. Ex. 85 (Brantley 30(b)(6) Dep.) at 20:11-22:11 (District performs manual review after system populates errors); Pls. Ex. 92 (Williams Dep.) at 32:19-21 (doesn't take long at all).

Such a manual review would be systematic and administratively feasible. In fact—according to Defendants' own legal argument—a manual review is included in the very "administrative process" that the District has chosen as the most efficient way to administer these benefits in the regular course of its business. *See* Defendants' Response in Opposition to Plaintiffs' Motion for Class Certification at 19-21. Thus, the Court concludes that it is possible to use Defendants' data to identify eligible class members. And to the extent that this cannot be done in automated fashion for each and every employee, a limited manual review can be used. Because these anomalies are likely to occur in only a tiny fraction of the potentially eligible class members, this process is administratively feasible.

III. Commonality

A. Commonality Conclusions of Law:

In general, "[t]o establish the requisite commonality [for class certification], the Plaintiffs must show the existence of common questions of law and fact," but "'the commonality

requirement does not require that all questions of law and fact be common to every member of the class.'" *Brenntag*, 308 Ga. App. at 903 (citation omitted). Plaintiffs have satisfied this requirement. As *Gold III* and *Gold IV* confirm in their holdings, this case presents common questions. Those questions that can be answered with common evidence. The answers to the common questions are the same for the members of the class. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 76 (2008) ("The legality of the ETF will be assessed on a class-wide basis, and the answer will not vary with each class member.").

"[W]here each of the class members' claims arise out of identical terms in the Policy Manual and each of their claims are brought under the same causes of action, the issue of the [District's] contractual liability will be determined on a class-wide basis." *City of Roswell*, 533 S.E.2d at 542. *City of Roswell v. Bible* resembles this case. A class of fire-fighter employees brought a class action against their government employer (the City of Roswell, Georgia). In echoes of this case, the Roswell firefighters complained that the City's employment classification system deprived them of certain benefits to full-time pay promised by the City's Policy Manual. *Id.* at 541 (class members' claims "arise out of a single contract—the Policy Manual"); *id.* at 540 ("All City employees, including the putative class members, are subject to the provisions of the City's Policy Manual."). Affirming certification, the Court of Appeals remarked that "similar claims arising from the breach of a single contract present ***a classic case*** for treatment as a class action." 833 S.E.2d at 542 (emphasis supplied).

B. Commonality Findings of Fact

(1) Contract Issues Are Common

In this contract case, the questions of contract formation, construction, and breach are all common to the class. First, the question of whether Defendants were legally obligated to provide a two-year notice before reducing TSA contributions is an over-arching common question that

itself involves additional common questions – such as what the 1979 Resolution means and requires, what the long-standing Board Policy on Withholding Funds means and requires, the meaning of the 1983 and 2003 TSA Plan Documents, and whether Board Policy BDC (Policy Adoption) permitted Defendants to reduce TSA contributions without a two-year notice. *Gold IV* proves that the answers to all of these common questions must be the same for all class members. Absent a class action, each of the more than 10,000 class members theoretically would be required to go separately to court to seek answers to these exact same questions if they wanted to obtain relief for what the Supreme Court has already ruled was Defendants' violation of their constitutionally-protected contractual rights.

Analyzing the District's adoption of the Board Policy containing the two-year notice requirement, the Supreme Court was emphatic: "This action constituted a standing offer by the Board to provide two-years notice to *all* its employees, *current and new*, before reducing funding to the plan benefits for those employees. And *each employee accepted this offer by performing work* pursuant to these terms." *Gold IV*, 834 S.E.2d at 812 (emphasis supplied). Defendants previously contended that a clause in the written employment contracts entered by members of the Annual Contract Subclass (relating to the reduction of contract salary) permitted defendants to reduce TSA contributions without two years notice. This, too, presents a common question, at minimum, to that subclass. The above-cited quotation from *Gold IV* dispenses with Defendants' argument, suggesting the distinction between employees at-will and those with annual written contracts was never relevant considering the language of the Board Policy. *See, e.g., Gold IV*, at 813, n. 6 (rejecting Defendants' argument that teachers' "annual written contracts . . . containing a reservation of rights" required a different result). The legal consequence of the Board Policy,

thus, must be the same for "all [the Defendants']s employees" because "each employee accepted this offer by performing work pursuant to these terms." *Gold IV*, 834 S.E.2d 812.

Defendants' own defenses raise a number of common questions. These common questions include, among others:

(a) whether sovereign immunity bars the Class's claims (clearly not, after *Gold I* and *Gold IV*);

(b) whether the doctrine of waiver can be applied to a government's own laws;

(c) whether certain documents, common to the entire class, constitute parol evidence; (clearly not, after *Gold III* and *Gold IV*) and

(d) the impact of Internal Revenue Code § 403(b).

This Court's findings that those questions, and the answers to those questions, are common to the class is consistent with the Court of Appeals opinions in *Gold I*, *Gold II*, and *Gold III*, as well as the Supreme Court's Opinion in *Gold IV*. Indeed, as the Court of Appeals stated in *Gold II*:

> ***The named plaintiffs pose common questions and contentions***, including whether the 1979 Resolution establishing the two-year notice requirement and/or other Board policies became part of the contract of employment and a part of compensation for services; whether the School District breached a legal duty by failing to give the class two years' advance notice before reducing or terminating TSA funding; and the contention that each class member's claim stems from the School District's discontinuation of TSA contributions in 2009.

Pls. Ex. 2 (*Gold II*), Op. at 9 (emphasis added).

The question of whether Defendants breached their alleged contractual obligation to provide a two-year notice before reducing TSA contributions is an over-arching common question. Plaintiffs argue that the same act – the discontinuation of TSA contributions in July of 2009 – constituted a breach of the contract for every class member. Defendants contended that this did not constitute a breach for any class member. But the courts in *Gold III* and *Gold IV*

have ruled otherwise. Thus, the answer to this common question will be the same for all class members.

(2) Notice Issues Are Common

Plaintiffs argue that the contract required advance notice, and that the lack of such advance notice renders the District's 2009 Reduction of benefits null and void. "[T]he impairment clause of our constitution . . . precludes the application of an amendatory statute or ordinance in the calculation of the employee's retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable." *Withers v. Register*, 246 Ga. 158, 158 (1980) (emphasis supplied); *see also City of Athens v. McGahee*, 278 Ga. App. 76, 78 (1986). The 2009 Reduction by the District was void for violating the Georgia Constitution. "No . . . laws impairing the obligation of contract. . . *shall be passed.*" *Gold III*, 346 Ga. App. at 113, quoting Ga. Const. Of 1983, Art. I, Sec. I, Par. X (emphasis supplied); *Malcolm v. Newton Cty.*, 244 Ga. App. 464, 467 (2000) (government employer's action in violation of "the guarantee in Art. I, Sec. I, Par. X of the 1983 Georgia Constitution against impairment of contracts . . . was void."). These cases remain good law as shown by the Supreme Court's approving citations in *Gold IV*. *See, e.g., Gold IV*, 834 S.E.2d at 813, n. 5 (citing *City of Athens v. McGahee* and *Malcom v. Newton Cty.*). *Gold III* and *IV* therefore recognize that the unlawful 2009 Reduction was void under Georgia's Constitution.

The voidness of the District's 2009 Reduction of funding presents common questions sufficient to satisfy commonality for the entire class as to Counts One, Two, and Three.

More specifically, as the Court of Appeals in *Gold II* expressly found, for lost contributions from August 1, 2009 through July 29, 2011 (Count One), Defendants' admissions establish commonality (and predominance). *See* Pls. Ex. 2 (*Gold II*), Op. at 14 (because "the

School District has admitted that it failed to provide two years' notice . . . . for the proposed initial period of August 2009 to August 2011, we find no need for individual determinations as to the timing or content of the notice, and no bar to commonality or typicality on this issue. Here, *common issues of fact and law predominate . . . .*") (emphasis added); *see also, e.g., Gold III*, 346 Ga. App. At 113 (Defendants "did not give two-years' notice prior to suspending funding").

Additionally, the first two-year period is not the only period for which commonality has already been established. It has also been established for lost contributions from July 30, 2011 through June 30, 2012 (Count Two). Indeed, the evidence shows that the only class-wide and official communication regarding the reduction in 2009 actually promised that funding would ***resume*** in 2010. *See, e.g.* Pls. Ex. 18 (July 27, 2009 email from Crawford Lewis). Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 111:24-112:12 ("No, ***the District does not believe there are any other notices.***") (emphasis added). As *Gold II* also found in the majority concurrence:

> There is no such [notice] 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*), Op. (concurrence) at 2. Given the current record, the Court agrees with this conclusion and finds that it is supported by the evidence. Again, the Court finds that the common question of sufficiency of notice prior to June 30, 2010 justifies certification of the entire class and, at a minimum, justifies certification of the proposed class as to Counts One and Two.

Defendants have raised a number of alleged distinctions regarding "subsequent notice" after June of 2010, which would affect lost contributions from July 1, 2012 through the present (Count Three). This argument is that the damages sustained by the Plaintiff-Class might (theoretically) be mitigated had Defendants provided valid notice after the breach. But the

current record reveals that the notice questions as to Count Three are also common to the entire class and justify class treatment.

First, as discussed above, if the the reduction in benefits was void, then any subsequent notice could be irrelevant. If subsequent notice is relevant, then a number of commons questions remains. For example, what is meant by the language of the Board Policy requiring the giving of notice to all employees? What form or quality of notice was required by the Board Policy for the District to effectuate a valid reduction in funding?

Defendants may argue that mere constructive notice would be enough for the District to validly reduce funding (although there is reason to doubt this premise given the nature of the notice provision and context—a promise of employee retirement benefits—in which it appears). Taking the phrase "give a two-year notice to employees," the critical words "give" and "notice" are not defined by the Board Policy itself. Pls. Ex. 7 at DCSD000161. Arguably, the Court would then construe these terms according to their "ordinary" or natural meaning. *Lafarge Bldg. Materials, Inc. v. Thompson*, 295 Ga. 637 (2014); *see also* O.C.G.A. § 13-2-2(2). The ordinary, dictionary definition of "notice" is "information concerning a fact, *actually communicated* to a person *by an authorized person*, or actually derived by him from a proper source, and is regarded in law as 'actual' *when the person sought to be affected by it knows thereby of the existence of the particular fact* in question." *Notice*, Black's Law Dictionary 1061 (6th ed. 1990) (emphasis supplied). It might be insufficient merely to post notices in the workplace or make them merely "available." *See Prod. & Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1403 (7th Cir. 1992) ("posting several notices on bulletin boards throughout the [workplace] *is not the same as* providing 'a written notice . . . to each participant.'") (emphasis supplied); *Normann v. Amphenol Corp.*, 956 F. Supp. 158, 165–66 (N.D.N.Y. 1997) (where a notice

requirement requires notice that is written or formal, "informational meetings" are not sufficient); *In re Clubhouse Investments, Inc.*, 451 B.R. 626, 635 (Bankr. S.D. Ga. 2010) ("notice was not 'given' until received. Until then it had merely been "sent."); *Menke v. First Nat. Bank of Atlanta*, 168 Ga. App. 495, 498 (1983) (to be valid, notice must be given to the recipient).

Plaintiffs rely on the District's testimonial admissions that, even after the elimination of the benefits, there was never any notice that would comply with the notice requirement at issue. If the Court accepts these admissions as a matter of law or a jury accepts them as the trier of fact, then (again) all of the "subsequent notices" alleged by Defendants would be irrelevant and could not pose any "individualized issues." Specifically, Defendants testified that the notice required by the Board Policy is distinct from "informational occurrences." Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 118:21-119:4 (distinguishing "between notice and informational occurrences."). As the District further clarified, "[n]otice connotes some type of, in one sense, obligation on the part of one party to inform another party..." *Id.* at 126:24-127:5. The District then specifically admitted that it was "***not aware of anything*** that occurred that would satisfy that specific provision [the Board Policy's two-year notice requirement]." *Id.* at 127:6-18 (emphasis added). Further, the District specifically conceded under oath that any inconsistent or "conflicting messages" would not constitute a proper "notice." *Id.* at 87:7-15.

At this time, on this Rule 23 motion, the Court need not decide who is right or wrong on the damages issue of "subsequent notice." *See, e.g., Sta-Power Indus. v. Avant*, 134 Ga. App. 952, 954 (1975) (on class certification, question is "not [who] may ultimately prevail on the merits but whether the requirements of [Rule] 23 (a) have been met."). What matters is whether Plaintiffs rely on proofs that are common to all class members, and the Court finds that this testimony would provide common proof for each and every class members' claim. The dispute

over the quality or meaning of notice hinges primarily on the proper interpretation of language in the Board Policy, which is simple: "The Board of Education shall ***give*** a two-year notice ***to employees*** before reducing the funding provisions of the Alternative Plan to Social Security." *See* Pls. Ex. 7 at DCSD000161. The purpose of the Board Policy is unmistakable: to protect the interests of the employees in their benefits by requiring meaningful advance notice and disclosure of future reductions. *Id.* Based on the entire record, the Court finds that common questions exist regarding any subsequent notice, including for example: (1) what quality or level of accuracy would be required to effectuate valid notice of a reduction; (2) the type of notice required by the alleged contract; (3) was any notice sufficiently distributed or delivered; (4) assuming constructive notice might be valid, whether any of these "informational occurrences" would be sufficient notice; and (5) whether the overall conflicting messages from the Defendants rendered any alleged "notice" legally ineffective. Without deciding the merits of these arguments, the Court finds that common questions exist even with regard to alleged subsequent notice issues arising after June 2010, and that the Court or a jury could conclude that all of the supposed distinctions regarding notice may be irrelevant.

Lastly, with respect to the "subsequent notice" issue, the Court notes that this relates only to Count Three of Plaintiff's Third Amended Complaint and whether damages continued accruing after June of 2012. Should the Court in the future conclude that individualized issues outweigh the common questions, the Court has the ability to address those individualized issues then.

(3) Damages Issues Are Common

In addition to the above common questions regarding contract issues and notice issues, the Court finds that there are common questions regarding damages.

Since *Gold II*, Plaintiffs have come forward with evidence of various alternative methods or processes by which the factfinder could calculate damages reasonably and objectively for each Class member. The overwhelming evidence demonstrates that the benefits at issue were calculated by the District in accordance with a formula that was common to each and every member in the class. Indeed, the calculation is mere multiplication: each employee's gross compensation for each pay period is multiplied by 6.1% (if hired before April 1, 1986) and by 5.0% (if hired after April 1, 1986). *See, e.g.* Pls. Ex. 29, Deposition of Brenda Hudgins dated Nov. 30, 2015 ("Hudgins Dep.") at 46:4-15; *see also* Pls. Ex. 12 (2003 Plan Document) § 3.1.

The District's witnesses consistently testified that, for years, it would perform this calculation automatically and in the same way for each employee. *See, e.g.*, Pls. Ex. 29 (Hudgins Dep.) at 46:4-15; Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 20:16-22:9 (discussing formulaic calculation of lost contributions for certain employee); *id.* at 23:13-24:11 (another example using same calculation); *id.* at 78:6-83:2 (formula remains the same for each employee); *see also* Pls. Ex. 38, Email from A. House to M. Turk dated Jan. 18, 2006; Pls. Ex. 39, Email from J. Wilson to B. Hudgins dated Sept. 6, 2007 (emails discussing missed contributions and showing calculations for different employees). That makes sense given that Plaintiffs are asking for damages based on payments the District itself previously calculated and provided to the Class. Plaintiffs have proffered an expert to perform this calculation for putative class members, and the expert has in fact performed it using the same calculation for all of them. *See, e.g.* Pls. Ex. 36 (Fortune Report) at 6-17 (calculating lost contributions and interest). Given this evidence, the Court finds that calculation of the amount of lost contributions is a common question for the class.

Plaintiffs also allege that each class member is entitled to pre-judgment interest on each lost contribution. As a matter of law, prejudgment interest is automatic if the damages at issue are liquidated. *See* O.C.G.A. § 7-4-15; *see also Holloway v. State Farm Fire & Cas. Co.*, 245 Ga. App. 319, 322 (2000)("An award of prejudgment interest for liquidated damages is mandatory rather than discretionary and is awarded as a matter of law.")(citing O.C.G.A. § 7-4-15). Defendants dispute that the damages are liquidated. But, as a matter of fact, whether the damages are liquidated (or not) is yet another question common to all members of the class because the damages are calculated pursuant to the same formula using the same data. And, the Court further finds that if the damages are liquidated, then the calculation of 7% interest will be the same for all members of the class. Again, Plaintiffs have proffered an expert to make this calculation, and the expert has demonstrated that it can be done for each putative class member. *See, e.g.* Pls. Ex. 36 (Fortune Report) at 6-17 (calculating lost contributions and interest); Deposition of Karen Fortune dated Nov. 4, 2016 ("Fortune Dep."), Pls. Ex. 41 (discussing same).

The Court also concludes as a matter of law that, even if prejudgment interest is not automatic and mandatory, the fact-finder could award 7% prejudgment interest in its discretion. *See, e.g., Colonial Bank v. Boulder Bankcard Processing, Inc.*, 254 Ga. App. 686 (2002). The fact findings regarding prejudgment interest also demonstrate that this discretionary 7% calculation would be the same for each class member. .

And even assuming that Plaintiffs are neither entitled to prejudgment interest as a matter of law nor as part of a discretionary award by the fact-finder, Plaintiffs make the alternative argument that a jury could award a calculation of damages for the lost time-value of money that otherwise would have been directed towards their individual accounts based on lost investment income. *Gold III*, 346 Ga. App. at 112 n. 7 (defining "defined contribution plan" as "a plan

which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains, and losses").

Based on the record evidence, the Court finds that the District would perform this calculation in the same way for each class member. The documents demonstrating how the District administered the TSA plan show that it would calculate lost 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. 12 (2003 TSA Plan Document) at § 3.4. The evidence—including Defendants' expert testimony—suggests that the District in fact selected, or would select, the same formula for each employee. Pls. Ex. 38, DCSD 013235 (Internal District email reflecting choice of "account reconstruction method" for particular employee); Pls. Ex. 43, DCSD020867 (District "Plan Direction" to Fidelity Investments reflecting a choice of "account reconstruction method" for a group of other employees); Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 48:16-52:23 (discussing same); Pls. Ex. 14, Deposition of Charles Yovino dated Dec. 12, 2016 ("Yovino Dep."), at 211:20-23 (revenue code requires employees to be treated consistently); *see also, id.* at 141:23-142:6 (all employees are treated according to same terms). Indeed, there is no evidence that the District would use different formulas for different employees. Thus, the Court finds that the proper formula for determining net earnings is another common question for the class. Again, Plaintiffs' proffered expert demonstrated that such a common formula could be used for the putative class members – a common answer to this common question. *See* Pls. Ex. 36 (Fortune Report) at 9-17.

Further, by ensuring similarly-situated employees are compensated uniformly in a single action, class treatment avoids the risk that separate individual proceedings would result in inconsistent remedies for the exactly the same type of injury.

In conclusion, given the vast number of common questions, evidence, and answers relating to virtually every aspect of the claims in this case, the Court finds that the commonality requirement is clearly met.

IV. Typicality

A. Typicality Conclusions of Law

Earlier, the Court of Appeals considered commonality and typicality together (*see Gold II* at 7-8), reflecting the U.S. Supreme Court's practical observation that "the commonality and typicality requirements of Rule 23 (a) tend to merge." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 n.5 (2011). Regarding typicality, the Court of Appeals recently reminded, "[t]his test *is not demanding* and is satisfied 'if the claims or defenses of the class and the class representative *arise from the same event* or pattern or practice and are based *on the same legal theory*." *City of Roswell v. Bible*, 833 S.E.2d at 544 (citation omitted; emphasis supplied); *see also Liberty Lending Svcs. v. Canada*, 293 Ga. App. 731, 738 (2008).

B. Typicality Findings Of Fact

As discussed above with respect to commonality, Plaintiffs have satisfied this requirement by basing their claim on evidence that Defendants "committed the same unlawful act[]," (breach of contract), "in the same method," (ceasing TSA contributions from July 31, 2009 forward), "against an entire class." *Liberty Lending,* 293 Ga. App. at 738. And the claims of the named plaintiffs arise out of "the same event or pattern or practice" as the class members and are based on "the same legal theory": that the Board policies created a binding notice obligation that Defendants breached. *Kornberg*, 741 F.2d at 1337.

C. Numerous subclasses are not required at this time.

Defendants have argued that there are distinctions between the various class members that would require more than two "subclasses."

(1) Conclusions of Law regarding the need for additional subclasses

The creation of subclasses is firmly within the discretion of the Court. *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 988 (11th Cir. 2016). Subclasses are not necessary unless there are truly conflicting claims or divergent elements of proof. *Lehocky v. Tidel Techs., Inc.*, 220 F.R.D. 491, 499 (S.D. Tex. 2004); *see also, e.g.*, *Liberty Lending*, 293 Ga. App. at 738. "[T]he existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003), *quoting* 1 Herbert Newberg & Alba Conte, Newberg on Class Actions §3:26 (3d ed. 1992).

(2) Findings of Fact regarding the need for additional subclasses.

The Court finds that none of the Defendants' proposed subclasses are based on fundamental conflicts of interest or material differences in proof. As discussed above, virtually all, if not all, of the questions in this case (including Defendants' own defenses) are common to the entire class and will require the same proof for every member. And as discussed *supra*, *Gold III* and *Gold IV* disprove the Defendants' claims of fundamental conflicts between Class members, such as the supposed distinction between employees who are "at-will" and those who have annual employment contracts. The vast majority of the evidence is likewise identical for every member of the class. This even applies to the individual damages information which includes the same data from the same data sources for every class member, and a formulaic computerized calculation.

In addition, Defendants say subclasses are necessary because current teachers, DeKalb property owners, and parents of District students, may suffer economically *in the future* if the Defendants have to pay damages to the class pursuant to a class-wide judgment. Defendants'

arguments place the court(s) in the position of hypothesizing about the size of a potential judgment or its impact upon the finances of one party or the other, a subject traditionally avoided by courts. Lady Justice is blindfolded for a reason. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). By definition, satisfaction of a judgment by a defendant would only happen *after* plaintiffs' duties as class representatives were over and complete, and therefore arguably would no longer present a Rule 23 concern about the fairness of allowing plaintiffs to represent the interest of fellow class-members. Even so, the impact of any future and hypothetical judgment upon the tax-burden of individual class members is a *de minimis* concern regarding whether these plaintiffs will give fair representation to the class members. Any costs would be spread across the District's aggregate tax digest. And it cannot be that, at this stage, such a hypothetical and nominal increase in tax burden so outweighs class members' expected recovery as to create actual conflicts of interest, or even antagonism with the class. *See, e.g.*, Deposition of Rhonda Kelly dated Nov. 30, 2015 ("Kelly Dep.") at 68:1-9 (Defendants' employee noting that District employees would all want to recover their lost contributions). In the absence of cognizable evidence raising this issue as to a particular class member, this is mere speculation. Previously, the Court of Appeals in *Gold II* questioned the probity of this kind of argument against certification:

> The trial court reasoned, rather, that in order to pay the damages plaintiffs seek, the School District or the county might have to resort to furloughs, pay cuts, and layoffs, which could be opposed by current school employees but supported by retirees; increase property taxes, which could be unpopular with workers who lived in DeKalb County but desirable for class members living in other counties; and cut school programs and services, which might be opposed by class members with children in the DeKalb school system, yet favored by those without children in the system. .... While it is true that intraclass conflicts may negate adequacy under OCGA § 9-11-23 (a) (4), *such conflicts "must not be speculative*[.]" [Citations omitted.] Based on the record, at this stage of the litigation, any

> conflict between putative class members appears merely speculative. .... In the instant case, plaintiffs do have opt out rights and may choose to leave the class, should it be certified, if they do not wish to pursue the damages sought. "[S]hould any fundamental conflict arise, a ready mechanism exists to protect [the class] – the opt-out provision. The opt-out provision in Rule 23 (c) (2) (B) is an important method for determining whether alleged conflicts are real or speculative. It avoids class certification denial for conflicts that are merely conjectural and, if conflicts do exist, resolves them by allowing dissident class members to exclude themselves from the action."

Pls. Ex. 2 (*Gold II*), Op. at 15-17 (emphasis supplied). As the Court of Appeals indicated, the opt-out provisions in a Rule 23 class action are sufficient safeguard for dissident class members. The benefits of Rule 23 should not be discarded when its structural safeguards can alleviate representational concerns. Since the Court of Appeals noted that the alleged conflicts are speculative and conjectural, the Court finds that Defendants have not developed any record evidence to demonstrate otherwise. *Gold III* and *Gold IV* diminish the force of this argument even further. This Court agrees with the Court of Appeals in *Gold II* that the opt-out provisions in Rule 23(c)(2)(B) sufficiently protect class members who may object to the class action.

As the Court of Appeals held, the Court cannot take any action based on "merely conjectural" differences between class members. Pls. Ex. 2 (*Gold II*), Op. at 15-17. As another court in an employment class action held:

> **One can always dream up a scenario** where an employee, due to his or her exceptional situation, will not benefit from a particular labor regulation. This type of general speculation alone cannot defeat class certification; tangible and plausible examples of individual issues need to be given.

Garvey v. Kmart Corp., No. C 11-02575 WHA, 2012 WL 2945473, at *4 (N.D. Cal. July 18, 2012); *see also Hurt v. Midrex Div. of Midland Ross Corp.*, 556 P.2d 1337, 1339 (Or. 1976) ("If plaintiffs have presented a case which is otherwise proper for a class action, it would be unreasonable to construe the statute to mean that defendants can automatically prevent such an action from proceeding by ***dreaming up*** a theoretical defense requiring individual inquiries, for

which there is little basis in fact.") (emphasis added in both); *see also Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (defeating adequacy requirement of Rule 23 requires a conflict that is "more than merely speculative or hypothetical").

Of course, as noted above, should any evidence at trial (or otherwise) show that material differences arise with respect to a particular subclass of employees, the Court can create any necessary subclasses at that time. But "[t]o deny class certification now, because of a potential conflict of interest that may not become actual, would be premature." *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 680 (7th Cir. 2009).

V. Adequacy

A. Adequacy Conclusions of Law

"The important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." *Stevens v. Thomas*, 257 Ga. 645, 649 (1987). Georgia continues to follow this two-pronged approach to adequacy. *See, e.g., Brenntag*, 308 Ga. App. at 905 ("The important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class"); *Taylor Auto Group v. Jessie*, 241 Ga. App. 602, 603-04 (1999) (same).

B. Adequacy Findings of Fact

Both aspects of adequacy are satisfied here. There is no dispute that Plaintiffs' Counsel are experienced and competent. Ample evidence in the record demonstrates their experience in the field of class action litigation. *See* Pls. Ex 45 (Affidavit of John F. Salter dated April 22, 2013); Pls. Ex.46 (Affidavit of Roy E. Barnes dated April 22, 2013); Pls. Ex. 47 (Affidavit of Michael B. Terry dated January 11, 2017). They have pursued this cause since February 2011. Counsel and the Plaintiffs have persevered, and prevailed, through multiple appeals. They have

achieved substantial success, achieving favorable rulings in *Gold III* and *Gold IV* that the two-year notice requirement applied, by its terms, to all District employees equally. Such sustained professional effort is evidence of counsel's dedication to the cause of the Plaintiffs and the Class-members. The Court thus finds that Plaintiffs' Counsel, Roy Barnes and John Salter of the Barnes Law Group, and Michael Terry, Jason Carter and Naveen Ramachandrappa of Bondurant, Mixson & Elmore are more than adequate class counsel. As discussed below, the Court orders that they be named class counsel for the certified class.

The Court also rejects the Defendants' attack on the adequacy of Plaintiff Rod Benson. As a matter of both fact and law, the issues raised by Defendants are not relevant to his adequacy as a class plaintiff in this breach of contract class action.[6] Further, even if Mr. Benson were inadequate, the remaining class plaintiffs—Ms. Gold, Ms. Shaye and Ms. Hunter—are adequate representatives either with or without Mr. Benson as a class representative.

Plaintiffs also meet adequacy's second prong because the named plaintiffs' interests are not antagonistic to the class. As discussed above, the Court finds that, as a matter of fact, there are no identifiable conflicts between the named Plaintiffs and putative class members. The Court finds that the named Plaintiffs have a lengthy track record from which to evaluate the adequacy of their representation. They have already litigated this case on behalf of the class members for 10 years. They have pursued this cause with diligence and persistence. They are aided by counsel

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[6] The Court also finds that, after the alleged incidents occurred, Defendants fully investigated the incidents, continued to employ Mr. Benson, and assigned him to be the School Resource Officer at one of our county's Middle Schools. In other words, Defendants chose to continue to employ Mr. Benson and decided he should continue to work for DeKalb County schools. Such a determination by the District supports a finding that he is fit to represent a Class of his colleagues.

with extensive experience with, and qualifications, for litigating class actions. Further, any class member who may have an objection to their representation has the opportunity to out-out.

VI. Superiority

A. Superiority Conclusions of Law.

As the Court of Appeals held in this case, "[s]uperiority pursuant to OCGA § 9-11-23 (b) (3) requires a showing that 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" Pls. Ex. 2 (*Gold II*), Op. at 22.

Superiority focuses "not [on]whether a class action will be difficult to manage. Instead, the trial court is to consider the relative advantages of a class action suit over other forms of litigation which might be available." *Brenntag*, 308 Ga. App. at 906-07. "It is only when . . . a class action [is] less fair and efficient than some other method, such as individual interventions or consolidation of individual lawsuits, that a class action is improper." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004); *see also id.* at 1273 ("[W]e are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management problems than any of the alternatives (including, most notably, 600,000 separate lawsuits by the class members).").

B. Superiority Findings of Fact

In this case, a class action is the more fair and efficient method available to both Defendants and the Class. Indeed, in the absence of a class action, the claims of the District's thousands of school teachers and other employees theoretically would have to be decided in individual proceedings. Because there are over 10,000 class members, the Court finds that this would present a gross inefficiency for the Court and the parties. *See, e.g.* Pls. Ex. 51 (Resource Life Order) at 30-35 (discussing superiority and efficiency of even a complex class action).

The Court finds that in this case, "[h]olding separate trials . . . 'would be costly,

inefficient, and would burden the court system' by forcing individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts." *Klay*, 382 F.3d at 1270. "[C]lass action treatment is far superior to having the same claims litigated repeatedly, wasting valuable judicial resources" (*id.*), or otherwise "clogging the ... courts with innumerable individual suits litigating the same issues repeatedly." *See also id.* at 1273

Further, the Court finds that the individual proceedings are unrealistic and are unlikely to even occur. Because each class member's contract damages average around $10,000, there is insufficient incentive for any class member to pursue an individual action.[7] Indeed, it would cost more to litigate an individual action than could be recovered. Thus, for this independent reason, the Court finds that a class action is superior to the supposed decisional alternative.

VII. Predominance

A. Predominance Conclusions of Law

Common questions of law and fact predominate when an action is based on agreements from a common source, the character of the right sought to be enforced is common, and common relief is sought. *Sta-Power*, 134 Ga. App. at 954, *citing Georgia Inv. Co. v. Norman*, 229 Ga. 160 (1972). Claims arising from interpretation of form agreements are considered "classic" cases for treatment as a class action. *UNUM Life Ins. Co. of Amer. v. Crutchfield*, 256 Ga. App. 582, 583 (2002), cert. denied (Sept. 20, 2002). Where a case focuses on "standard practices and documents, not on facts individual to each class member," the common issues predominate over the individualized and class certification is proper. *Village Auto Ins. Co. v. Rush*, 286 Ga. App. 688, 690-91 (2007).

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[7] *Dale v. ComCast Corp.*, 498 F.3d 1216, 1223 (11th Cir. 2007) ("O.C.G.A. § 13-6-11 does not provide the same incentive . . . as the automatic, or likely, award of fees and costs available [under statutes like FLSA, ADEA, and RICO].").

In analyzing whether individual calculation of damages defeats predominance, "it is well established that the need for individual damage calculations does not defeat class certification." *SunTrust Bank v. Bickerstaff*, 349 Ga. App. 794, 802 (2019) (internal quotations omitted); *see also Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 325 (2009). Plaintiffs need only show a plausible methodology exists, the court denying certification only if it "amount[s] to no method at all":

> [i]n assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods for computing damages are so insubstantial as to amount to no method at all. Plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis. Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification.

Fortis Ins. Co., 299 Ga. App. at 325 (*quoting Klay*).

B. Predominance Findings of Fact

The common questions in this case dwarf any legally-relevant distinctions between the class members. The fundamental questions of contract formation, contract construction, and breach are all common to the class. The defenses that Defendants have raised are common to the class. And even the issues that Defendants contend involve supposedly individual distinctions—notice and damages—are common questions that predominate and are susceptible to class treatment. *See supra* at 12-20.

A recent case from the Court of Appeals shows why Defendants' notice arguments do not prevent class certification. *EndoChoice Holdings, Inc. v. Raczewski*, 351 Ga. App. 212 (2019). *EndoChoice* was a securities fraud case certified as a class action by the trial court. On appeal, the defendant attacked the court's findings, *inter alia*, that commonality, predominance and superiority were met. One focus of the defendant's argument centered on an affirmative defense in securities fraud cases for "investor knowledge," whereby a defendant "can avoid liability by

showing that a particular purchaser knew of the untruth or omission" at issue. *EndoChoice Holdings*, 351 Ga. App. at 218. In opposing class certification, those defendants cited putatively "corrective" public statements that supposedly created individualized issues of "investor knowledge," relying upon what could "be imputed from" "earnings calls and public disclosures issued by EndoChoice and disseminated by outlets such as Bloomberg." 351 Ga. App. at 219. Similar to the argument the District makes as to notice and/or its impact on supposedly "individualized damages," the defendant argued that common issues could not predominate over individual inquiries because "individualized inquiries pertaining to this affirmative defense cannot be determined on a class-wide basis." 351 Ga. App. at 218.

Unpersuaded, the Court of Appeals noted that the trial court had "determined that the discrepancies in the statements and the facts known to the defendants rendered the statements "misleading." *Id.* at 220. This Court could say exactly the same thing about the Defendants' at-best-inconsistent statements to its employees regarding the status of the TSA Plan. The *EndoChoice* Court also found insufficient evidence of individual investor knowledge:

> With respect to common questions, it is undisputed that the defendants issued the offering materials, and the claims arise out of the same offering materials. . . . Thus, the common legal issues of whether EndoChoice's offering materials contained material misstatements or omissions ***will predominate over the question of whether some investors may have had knowledge of corrective disclosures***. Therefore, we conclude that the trial court did not err in ruling that individual considerations do not predominate over those relevant to the entire class. Accordingly, the trial court did not abuse its discretion in concluding that the plaintiffs satisfied the predominance requirement of OCGA § 9-11-23 (b) (3).

351 Ga. App. at 220 (internal citations omitted). The Court finds this case persuasive, and applying the class-certification principles of *EndoChoice* to this case shows why Defendants' arguments are not an obstacle to predominance in particular, or class certification generally.

On the record as of 2014, the Court of Appeals explained that issues relating to the calculation of lost investment income ***could*** defeat a finding of predominance for those specific damages. Pls. Ex. 2 (*Gold II*), Op. at 19-20. The majority concurrence also invited Plaintiffs to address damages issues in the following ways on remand:

> [T]he 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 (3) (Hunstein, J., dissenting), or by bifurcation of the issues of liability and damages.

Id., Concurring Op. at 3 (emphasis added). The record has changed significantly since that time. *Gold III* and *Gold IV* illustrate how straightforward a question the liability issue was in this case, begging the question of why this Court should put more than 10,000 individuals to the test or pretend that 10,000 separate lawsuits would be a more efficient (or fair) resolution. Based on the current record, it is clear that calculation of damages can be performed on a class-wide basis and that the fundamental method of calculating damages, the type of data and the sources of that data are common to the class.

Through the Third Amended Complaint (filed in the wake of *Gold II*), Plaintiffs have now restructured the claims to make clear that damages issues are common to the class, they have "reinforced the supporting evidence," and they have presented expert testimony accounting for the "complexity" identified by the prior rulings. Plaintiffs' restructured claims demonstrate that most categories of damages are common to the class and can be calculated using the simplest of mathematical formulae. Specifically, Plaintiffs have separated into separate counts their claims for lost contributions (Counts I-III), 7% pre-judgment interest (Count V) and lost investment income (Count IV). There is no reasonable doubt that lost contributions can be calculated on a class wide basis. As discussed above, the damages calculation requires a simple

multiplication problem for each class member. And the evidence shows that Defendants themselves have performed this same calculation repeatedly in the past. *See* Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 20:16-22:9 (discussing formulaic calculation of lost contributions for certain employee); *id.* at 23:13-24:11 (another example using same calculation); *id.* at 78:6-83:2 (formula remains the same for each employee); *see also* Pls. Ex. 38, Email from A. House to M. Turk dated Jan. 18, 2006; Pls. Ex. 39, Email from J. Wilson to B. Hudgins dated Sept. 6, 2007 (emails discussing missed contributions and showing calculations for different employees). The Court of Appeals in *Gold II* agreed with this assessment. *See* Pls. Ex. 2 (*Gold II*), Op. at 22 n. 2 ("the School District acknowledges that it maintains payroll information, including the dates employees were hired, and that if an award were made, it likely could determine how the lost retirement contributions would have been contributed to each of the participants."); *id.* at 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 class wide calculation.") (emphasis in original).

Similarly, the facts show that the calculation of 7% simple interest on those lost contributions is formulaic and calculable on a class-wide basis and in the same way for each class member. *See, e.g.*, Pls. Ex. 36 (Fortune Report) at 6-17 (calculating lost contributions and interest). Again, this Court's finding comports with the Court of Appeals' expectation that this 7% statutory interest calculation could be conducted on a class wide basis. Pls. Ex. 2 (*Gold II*), Op. at 21-22. These two mathematical calculations alone would be sufficient to establish that common questions predominate as to damages because full damages could be calculated for the entire class without the requirement of any individualized determinations.

However, even with respect to the calculation of lost investment income, the Court finds that common questions predominate. With respect to this calculation, the Plaintiffs have presented evidence from Fidelity Investments (the company that managed or manages employees' investments) as to what information is available and what calculations can be made, and how Fidelity itself calculated lost investment income. Pls. Ex. 36 (Fortune Report) at 9-17 (calculating lost investment income based on Fidelity data). Plaintiffs have presented evidence from the School District as to how it calculated lost investment income when it inadvertently missed contributions and voluntarily attempted to make the affected employee whole. *Id.;* Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 69:6-11 (noting District's prior handling of lost investment calculations). And Plaintiffs have cited testimonial admissions from the School District that Plaintiffs' methodology is reasonable. *See, e.g.,* Pls. Ex. 11 (Bell 30(b)(6) Dep.) at 61:13-67:10 (discussing different methods for calculating lost earnings, including account reconstruction); Pls. Ex. 36 (Fortune Report) at 11 (discussing District's testimony); *see also supra* at 22. The Court finds that this is all common evidence which can be used by every member of the class.

"[W]here damages can be computed according to some formula... or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification." *Fortis Ins. Co.*, 299 Ga. App. at 325. The Court finds that Plaintiffs have shown multiple damages formulas that plausibly and fairly could be applied for every member of the class. See *supra* at 17-20. This is precisely the type of situation where common issues predominate and issues regarding calculation of damages do not outweigh the overwhelming advantages of class certification.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, and pursuant to Rule 23 (b)(3), the Court **GRANTS** Plaintiffs' motion for class certification as to each Count of the Third Amended Complaint. The Court hereby **CERTIFIES** the following Class and Subclasses:[8]

Annual Contract Subclass

> Each person – or his or her properly-designated beneficiary or beneficiaries – who was actively employed by the DeKalb County School District or DeKalb County Board of Education before July 27, 2009 on an annual contract basis and who did not receive TSA contributions after July 31, 2009 as a result of the July 27, 2009 elimination of TSA contributions.

At-Will Contract Subclass

> Each person – or his or her properly-designated beneficiary or beneficiaries – who was actively employed by the DeKalb County School District or DeKalb County Board of Education before July 27, 2009 on an at-will contract basis or any basis other than an annual contract basis and who did not receive TSA contributions after July 31, 2009 as a result of the District's suspension of TSA contributions.

The Court **ORDERS** that Plaintiffs Elaine Ann Gold and Amy Jacobson Shaye shall serve as Class Representatives for the Annual Contract Subclass, and Plaintiffs Heather Hunter and Roderick Benson shall serve as Class Representatives for the At-Will Contract Subclass.

The Court further **ORDERS** that Roy E. Barnes and John F. Salter of The Barnes Law Group, LLC and Michael B. Terry, Jason J. Carter, and Naveen Ramachandrappa of Bondurant, Mixson & Elmore, LLP shall serve as Class Counsel for the Class and Subclasses. The Court reserves the right to appoint additional counsel to serve as Class Counsel for the Class and Subclasses should the Court deem it appropriate.

(Signature on following page)

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[8] While the two subclasses are perhaps unnecessary following *Gold III* and *Gold IV*, the Court certifies them now out of an abundance of caution and with the knowledge that the Court may ultimately treat the classes identically or modify this order as necessary.

SO ORDERED this 26th day of March, 2020.

Honorable Gregory A. Adams.
Superior Court Judge
DeKalb County Georgia

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