IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL ARKEN, DALE CANNON, ROBYN CARRICO, CAROL YOUNG, JOHN HAWKINS, LESLIE HUNTER, RICK MULLINS, S.M. RUONALA, PATRICIA THOMPSON WESTOVER, and MYRNAWILLIAMS, et al., Plaintiffs, v. CITY OF PORTLAND, WESTERN OREGON UNIVERSITY, PORTLAND SCHOOL DISTRICT, CITY OF GRESHAM, LINN COUNTY, UNIVERSITY OF OREGON, PORTLAND COMMUNITY COLLEGE, MULTNOMAH COUNTY, CENTRAL SCHOOL DISTRICT 13J, FOREST GROVE SCHOOL DISTRICT #15, and PUBLIC EMPLOYEES RETIREMENT BOARD, Defendants.	Case No. 0601-00536 **OPINION AND ORDERS IN RELATED PERS CASES – RE: MOTIONS FOR CLARIFICATION AND SUMMARY JUDGMENT**

RUTH ROBINSON, GERALD BUTTON, NORMAN FABIAN, BECKY HANSON, RENE REULET, LINDA GRAY, LAREN FERRELL, STUART GILLETT, ROBERT PEARSON, GARY REESE, BRUCE JOHNSON, et al., Petitioners, v. PUBLIC EMPLOYEES RETIREMENT BOARD and STATE OF OREGON, Respondents.	Case No. 0605-04584

This court issued an Opinion and Orders dated June 20, 2007 ("2007 Decision") in these related cases. This decision responds to the issues raised in connection with the Plaintiffs' motion for clarification of the 2007 Decision filed in *Arken* and should be viewed as a supplement to the 2007 Decision. Therefore, the introductory portions of the 2007 Decision will not be repeated here[1] and the court will assume the reader's general familiarity with the related cases of *Strunk v. PERB*, 338 Or 145, 108 P3d 1058 (2005), *referring attorney fees*, 341 Or 175, 139 P3d 956 (2006), *on attorney fees*, 343 Or 226, 169 P3d 1242 (2007) ("*Strunk*"), and *City of Eugene v. PERB*, 339 Or 113, 117 P3d 1001 (2005), *on reconsideration*, 341 Or 120, 137 P3d 12188 (2006) ("*City of Eugene*").[2]

The Need for and Scope of Clarification

In its 2007 Decision, this court granted summary judgment in favor of the *Robinson* petitioners and against the *Robinson* respondents on the various claims and defenses presented in *Robinson*. This court declared that the Order Adopting Repayment Methods ("Repayment Order") issued by respondent Public Employees Retirement Board

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[1] As an update, the Supreme Court has issued its opinion in *Joarnt v. Autozone, Inc.*, 343 Or 187, 166 P3d 525 (2007), referred to in footnote 1 on page 4 of the 2007 Decision. It now is clear that certification for interlocutory appeal under ORS 19.225 is an available procedural option in cases filed as class actions such as these cases.

[2] These directly instructive appellate decisions comprise over 180 printed pages for this court to construe and apply. Another indicator of the scope of these cases comes from the last *Strunk* opinion, 343 Or at 233-37, which revealed that the parties in those cases actually agreed that the overall dispute, which without question includes these cases, should be valued at over $1.1 billion. The parties in these cases appear to agree that the amount at stake in just these cases exceeds $800 million.

("PERB") in 2006 was invalid and unenforceable as a matter of law. Those rulings are not being revisited in this decision, although they necessarily are discussed below.

In its 2007 Decision, this court also granted summary judgment in favor of the *Arken* plaintiffs[3] and against the *Arken* defendants on the plaintiffs' Third and Fourth Claims for Relief and all defenses related thereto. However, as stated on page 8 of the 2007 Decision, the *Arken* plaintiffs moved for summary judgment only on Count One of their First Claim for Relief and on their Second Claims for Relief, and not on their Third and Fourth Claims for Relief. Even though the court assumed that the *Arken* plaintiffs joined in the *Robinson* petitioners' motion for summary judgment, as the remedies sought were nearly identical, the parties in *Arken* agree that the court's assumption was in error. Therefore, the court withdraws its 2007 rulings on the *Arken* plaintiffs' Third and Fourth Claims for Relief.

Because this court ruled (in error) in favor of the *Arken* plaintiffs on their Third and Fourth Claims for Relief, and determined that the relief afforded by that ruling was so

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[3] The *Arken* plaintiffs (like the *Robinson* petitioners) and the class they seek to represent are public employees who joined the Public Employees Retirement System ("PERS") before January 1, 1996 (making them "Tier One" public employees), and who retired between April 1, 2000, and April 1, 2004, under the "Money Match" plan. *Strunk*, 338 Or at 150 n3. The parties consistently describe this group as the "Window Retirees," which term this court will use as well.

significant, the court concluded that the *Arken* plaintiffs' First Claim for Relief and any motions related to it were moot. That ruling also is withdrawn.[4]

In their motion for clarification, the *Arken* plaintiffs ask the court to rule (in their favor) on their now pending motion for summary judgment on Count One of their First Claim for Relief. In response, defendant PERB argues (in addition to its original arguments) that the court's reasoning in ruling in favor of the *Robinson* petitioners necessarily rejects the *Arken* plaintiffs' fundamental legal positions in support of their First, Third and Fourth Claims for Relief, so that the pending *Arken* defendants' motions for summary judgment against those claims should be granted. Therefore, the motion for clarification is granted and the court needs to review the parties' arguments and rule anew on the pending motions for summary judgment.[5]

Pending Claims and Motions

In their First Claim for Relief, the *Arken* plaintiffs set out two counts under a breach of contract theory. In Count One, they allege that the *Arken* defendants breached the plaintiffs' pension contracts by withholding Cost of Living Adjustments ("COLAs") from "fixed service retirement allowances" for 2003 and thereafter, by pursuing

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[4] The court's rulings against the *Arken* plaintiffs' Second Claim for Relief stand and are not withdrawn. Nor are they the subject of the pending motion for clarification.

[5] Since the 2007 Decision, the *Arken* plaintiffs were permitted to file their Second Amended and Supplemental Complaint, which the *Arken* defendants have answered. The amendments therein are not pertinent to the legal issues presented by the parties' pending cross-motions for summary judgment.

collection actions and by reducing future benefits. In Count Two, under the heading "Promissory Estoppel," the *Arken* named plaintiffs allege that defendant PERB made representations that they would receive pension benefits based upon the value of their Public Employees Retirement System ("PERS") accounts at the date of retirement plus an annual COLA of up to two percent, that the value of each PERS account included 20 percent earnings for 1999 and that defendant PERB's representations were made to induce reliance by the retirees, who did reasonably rely to their detriment. The *Arken* plaintiffs seek damages in an amount equal to the difference between the benefits they are actually receiving and the benefits they would have received had there been no retroactive readjustment of the 1999 earnings and they had received annual COLAs. Beyond denying the *Arken* plaintiffs' essential allegations, the *Arken* defendants affirmatively assert in response to this claim for relief that they acted in good faith within the law and that any alleged breach is excused by the defenses of illegality, impossibility, impracticability or discharge of duty.

In their Third Claim for Relief, the *Arken* plaintiffs seek judicial review of the PERB's Repayment Order because it is contrary to ORS Chapter 238 as construed in *Strunk*, it outside the discretion delegated to the PERB by law and it is in violation of ORS 238.660. In their Fourth Claim for Relief, the *Arken* plaintiffs request a declaration that the PERB's withholding of COLAs over 2003-2006 and pursuit of collection actions are without probable cause and contrary to the Window Retirees' rights as established in

Strunk, and seek an injunction prohibiting the PERB from taking any further collection actions, under ORS 238.715 or otherwise, which would reduce the Window Retirees' fixed service retirement allowances. Beyond denying the *Arken* plaintiffs' essential allegations, defendant PERB affirmatively asserts in response to these claims for relief that the recovery methods attempted by the PERB are neither arbitrary or capricious, that it acted in good faith and in accordance with the law, that any reduction in or withholding of benefits to the Window Retirees were made within its discretion and/or rule-making power and that it acted with reasonable cause.

The specific motions pending are: (1) the *Arken* plaintiffs' motion for summary judgment as to Count One of their First Claim for Relief;[6] (2) defendant PERB's cross-motion for summary judgment as to all remaining claims for relief (joined in by the State and Non-State Defendants); and (3) the Non-State Defendants' cross-motion for summary judgment as to all remaining claims for relief.

The Parties' Arguments and The Controlling Issue

In its 2007 Decision, the court identified the following legal issue as controlling and dispositive of what it (mis)understood to be the pending motions:

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[6] This motion must be viewed as being against all defendants even though defendant PERB is not designated in the complaint as a defendant on this claim for relief, as there is no dispute that defendant PERB is an agent or conduit for the other defendants for the purposes of this case. *See Stovall v. State of Oregon*, 324 Or 92, 123-24, 922 P2d 646 (1996).

In enacting the 2003 PERS reform legislation, did the Legislative Assembly intend to limit the methods by which PERB could recover amounts determined to have been paid in error to the two methods set out in Oregon Laws 2003, Chapter 67, Section 14b, and thereby prevent PERB from utilizing the methods for recovery set out in ORS 238.715?

The court answered that question "yes" and ruled accordingly in the context of the administrative law challenge to the PERB's order presented in *Robinson*. That is not the legal issue which the court must resolve in first deciding the primary breach of contract claim, which then will strongly influence the decision on the remaining claims.

The *Robinson* petitioners argued that the PERB's 2006 order was illegal and unenforceable, so that any overpayments could not be recouped directly from the Window Retirees. For purposes of that argument, they assumed that the payments made to those retirees based on an earnings rate in 1999 in excess of 11.33 percent were overpayments subject to Oregon Laws 2003, Chapter 67, Section 14b. In construing that statute and in making its rulings, this court also assumed the payments were overpayments.

The *Arken* plaintiffs contend that the payments were not overpayments at all but rather were a "determined allowance" which falls within a part of the PERS contract which may not be impaired or modified by the defendants. This contention is based primarily on certain statements by the Supreme Court in *Strunk*, 338 Or at 322-23 (emphasis added):

> "In light of the identical wording in ORS 238.360 (2001) and ORS 238.715(1) (2001), regarding allowances that a member is 'entitled to receive' and amounts 'received' that exceed those to which a member is 'entitled,' we conclude that the promise set out in ORS 238.360(1) (2001) respecting the application of

annual COLAs does not extend to erroneous overpayments included in a member's service retirement allowance that the member was not entitled to receive. *However, the promise does extend to properly calculated service retirement allowances.*

"Having defined the scope of the legislature's promise, we turn to the 2003 PERS legislation to determine whether-and, if so, to what extent-it is inconsistent with that promise. As explained earlier, Oregon Laws 2003, chapter 67, section 10, as amended by Oregon Laws 2003, chapter 625, section 13, provides that the original service retirement allowance for each retired Tier One member who is affected by that section shall be recalculated in two ways, resulting in a 'revised' service retirement allowance and an alternative 'fixed' service retirement allowance. As also noted above, the 'revised' service retirement allowance continues to be subject to an annual COLA under ORS 238.360(1). The 'fixed' service retirement allowance is set at the amount that was payable to the retired member as of July 1, 2003, or as of the member's retirement date, whichever is later, and is not subject to an annual COLA under ORS 238.360(1). The crux of the question before us, then, is whether the 'fixed' service retirement allowance calculated under Oregon Laws 2003, chapter 67, section 10(3), as amended by Oregon Laws 2003, chapter 625, section 13, either does or does not qualify as an allowance that is subject to an annual COLA under ORS 238.360(1) (2001). Stated more specifically, does the 'fixed' service retirement allowance represent payment of an 'allowance' that the member was not 'entitled to receive?'"

The *Arken* plaintiffs take from the above Supreme Court statements that, prior to the 2003 PERS legislation, they already had received a fixed service retirement allowance based on a 20 percent earnings rate in 199 which was expressly determined by the legislature, notwithstanding the fact that the 1999 earnings rate subsequently was charged to 11.33 percent following the trial court's determination that the 20 percent rate was erroneous in the *City of Eugene* litigation. They contend that the language in *Strunk* "effectively insulated the 'fixed' service retirement allowance from additional collection action under ORS 238.715 by ruling that the allowance could not be said to transfer to retirees any funds to which they are not entitled." *Arken* Plaintiffs' Memorandum in

Support of Motion for Summary Judgment at 10, citing *Strunk*, 338 Or at 223. This is because ORS 238.715 (the statute on which defendant PERB relies to pursue further collection) is only available if the retiree "has received any amount in excess of the amount that the [retiree] is entitled to under [the applicable pension laws]." ORS 238.715(1). So, the *Arken* plaintiffs argue, as the *Strunk* court has held that the fixed service retirement allowance represents funds which the retiree is entitled to receive, 338 Or at 223, defendant PERB cannot seek collection or recoupment under ORS 238.715.

The *Arken* defendants counter this theory by pointing out that the above quotations from *Strunk* are taken out of context and are belied by more important truths, shown by the Supreme Court's own words:

> "Before turning to our analysis of petitioners' claims, we think it helpful to clarify the precise nature of our inquiry here. First, no party appears to dispute that, in creating the 'fixed' service retirement allowance coupled with the suspension of an annual COLA, **the legislature's intent was to recoup what it deemed to be overpayments to the affected members' regular accounts in 1999**.*FN57* Second, as discussed below, respondents note that the PERS statutes contemplate that PERB erroneously might pay certain amounts to a member who already has retired and that PERB generally is permitted, as a statutory matter, to recoup erroneous payments. And, third, as respondents appear to suggest, *Strunk* and *Sartain* petitioners' particular contractual challenges to the COLA suspension in Oregon Laws 2003, chapter 67, section 10(3), in essence raise the question whether the legislature's choice *to preclude application of annual COLAs on fixed retirement allowances* was a permissible method of facilitating such a recoupment. Stated differently, by directing PERB to suspend annual COLAs on fixed retirement allowances, does the 2003 PERS legislation either impair or breach PERB's obligation to apply annual COLAs under ORS 238.360 (2001)?
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> *FN57.* As noted, **in light of the pending *City of Eugene* litigation, PERB's 1999 crediting decision remained subject to reversal at the time that the legislature enacted the 2003 PERS legislation**."

Strunk, 338 Or at 220 (italics in original; bold emphasis added). The court's next footnote adds the following explanation:

> "[T]the legislature took what it deemed to be restorative action, but used as the mechanism for doing so an adjustment that implicated the COLA provision of the PERS contract. *Our conclusion that that particular legislative action amounted to a breach of the PERS contract, however, implies nothing about PERB's-or, for that matter, the legislature's-authority to recover amounts determined to have been paid from the fund in error.*"

Id at 224 n 58 (emphasis added). The court's comments continue with these words:

> " * * * The effect of our choice to declare [the part of the law providing that the fixed service retirement allowance may not be adjusted] to be void is that *petitioners will be returned-at least for the time being-to the same position in which they would have been if the legislature had not enacted the COLA suspension.*"

Id at 225 (emphasis added; footnote omitted).

The *Arken* defendants take from the above Supreme Court statements that it is absurd to even consider that *Strunk* created a contractual entitlement to benefits based on the 20 percent earnings rate for 1999 when it so clearly used limiting language like "implies nothing about PERB"s *** authority to recover amounts" and "for the time being." They contend that the clear intent of the legislature was to provide for recoupment, which is completely inconsistent with the creating of a contractual right which would preclude recoupment. This is the case because what *Strunk* decided was whether the COLA freeze was a permissible method of recoupment and the Supreme Court never mentioned much less held that some type of new contractual right which

precluded other types of recoupment had been or was being created. The *Arken* defendants add that the plaintiffs' theory is fundamentally flawed, as the 20 percent earnings rate for 1999 was never finally fixed but rather was subject to reversal, as acknowledged by the Supreme Court. They go on to explain that their efforts to recoup the overpayments have been reasonable and timely and, therefore, not a breach of any contract.

The foregoing supports the court's recognition of a single question of law which is both controlling and dispositive:

> *In construing the 2003 PERS reform legislation, did the Supreme Court acknowledge or cause the creation of a contractual right on behalf of the Window Retirees to receive benefits based on the 20 percent earnings rate for 1999?*

If the answer is "yes," then the PERB may not attempt to recoup payments made based on those benefits as "overpayments." If the answer is "no," then the PERB may attempt to recoup the overpayments, consistent with this court's prior rulings.

Discussion and Answer to Question of Law

Before any analysis of the parties' positions is done, it is appropriate also to consider the Supreme Court's own descriptions of its principal holdings and the status of recoupment options, first in the context of discussing the *Strunk* petitioners' rights to attorney fees:

> "Petitioners succeeded in two of their claims when this court identified two areas in which the 2003 PERS legislation had violated state law by depriving some PERS members of monies lawfully due them:

> 'We conclude that, in two respects, petitioners have prevailed on their claims for relief. First, petitioners in each of the cases correctly have argued that the provisions of the 2003 PERS legislation that alter the manner in which earnings are credited to the regular accounts of Tier One members impair an obligation of the statutory PERS contract in violation of Article I, section 21, of the Oregon Constitution. As such, those provisions are void and of no effect. Second, Strunk and Sartain petitioners are correct in their assertion that the provision of the 2003 PERS legislation that directs PERB to not apply annual COLAs to certain retired members' "fixed" service retirement allowances breaches the contrary obligation of the PERS contract to do so; that provision also is declared void and of no effect. In all other respects, we conclude that petitioners' claims for relief are not well taken.'

338 Or at 238. Our decision in that regard effectively restored two aspects of the PERS benefit plan that the 2003 PERS legislation had removed: (1) the guarantee of an annual eight percent earnings allocation to all Tier One PERS members; and (2) COLA adjustments for members who had retired between April 1, 2000, and March 31, 2004.*FN1*

> *FN1. The suspension of COLA adjustments for the retirees in question was a temporary measure designed by the legislature to recapture funds that were found to have been erroneously credited to member accounts.*"

Strunk, 341 Or at 180 (emphasis added).

In its last decision, in the context of awarding amply justified substantial attorney fees, the *Strunk* court added:

> "First, both sets of parties stipulated to the preservation of a fund in this case that totals nearly $1.1 billion overall: $448.5 million in restored Tier One 8 percent earnings allocations and approximately $700 million in restored COLA adjustments. Second, the parties also stipulated to methodologies for apportioning the attorney fee awards from the preserved funds among the benefitted parties. In their third and final stipulation, the parties acknowledged that, following *Strunk* I 's $1.1 billion restoration of employee and retiree accounts, PERB had recalculated members' 1999 annual earnings. Member accounts, which had previously been credited with a 20 percent earnings rate for that year, were recalculated using an 11.33 percent earnings rate. The result, the parties agreed,

was that PERB would recover approximately $388.9 million from the same accounts to which it had recently credited the $448.5 million in restored Tier One 8 percent earnings allocations. The parties also acknowledged that PERB had begun both the recalculation of retiree benefits based on that amended 11.33 percent 1999 earnings rate and the recovery of what PERB considered to be overpayments made under the old rate. *The resulting recapture of those benefits,*FN4 *the parties stated, would more than offset the $700 million in COLA benefits returned to retirees in Strunk I. That said, however, petitioners refused to concede that PERB had the legal authority to take the actions described above and noted that legal challenges were presently pending with regard to those actions.*

> FN4 *ORS 238.715(1) allows PERB to recover any sum improperly paid from the state retirement fund by*:
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> '(a) Reducing the monthly payment to the member or other person for as many months as may be determined by the board to be necessary to recover the overpayment or other improperly made payment; or
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> '(b) Reducing the monthly payment to the member or other person by an amount actuarially determined to be adequate to recover the overpayment or other improperly made payment during the period during which the monthly payment will be made to the member or other person.'"

Strunk, 343 Or at 233-34 (emphasis added). It is clear that the "legal challenges" referred to by the Supreme Court are these very cases (*Arken* and *Robinson*) and possibly also including *White v. PERB*, Case No. 0404-04118 (pending in this court and set for trial on August 4, 2008).

With the Supreme Court's words in mind, the next step is to determine whether a PERS contractual right has been created which entitles the Window Retirees to receive benefits based on the 20 percent earnings rate for 1999, even though that rate was later vacated and substituted with the 11.33 percent earnings rate. In making that determination, it is essential to remember that PERS is a statutory contract and, therefore,

the question of whether a PERS contractual term exists is a question of legislative intent. *Strunk*, 338 Or at 175, citing *Hughes v. State of Oregon*, 314 Or 1, 25, 838 P2d 1018 (1992). This requires application of the statutory construction methodology established in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), keeping in mind especially in these cases that the Supreme Court's interpretation of a statute becomes part of the statute at the first level of construction. *Bergerson v. Salem-Keizer School District*, 341 Or 401, 413, 144 P3d 918 (2006).

In this case, the *Arken* plaintiffs' breach of contract claim for relief depends not on the specific language in the statutes but rather on how the Supreme Court arguably has interpreted the statutes. Therefore, this court will examine the Supreme Court's words to discern if they reveal a legislative intent to create the statutory right in question.

Contrary to the *Arken* defendants' assertion, the idea that it is absurd, that the Supreme Court may have described or discussed a legislative intent to treat what was left of the 2003 PERS reform legislation after most of the *Strunk* holdings as a limitation on the PERB's right to attempt to recoup alleged overpayments, simply is not supported. The *Arken* plaintiffs fairly point to just such statements in various parts of the 120 pages of opinions. However, the mere existence of such statements has little legal significance.

It is most persuasive to this court that the Supreme Court went out of its way, in various *dicta*, to inform all concerned that it was NOT deciding in *Strunk* whether and how the PERB could recoup the overpayments identified by the legislature. As a result, there is no logical way to square the Supreme Court's references to recoupment of

overpayments with any view that there was some holding by the Supreme Court that there was some type of contractual right which prevents any recoupment attempts whatsoever.

After specifically acknowledging that that there was no dispute that "the legislature's intent was to recoup what it deemed to be overpayments," the court noted first that the 1999 crediting decision which is the basis of the Window Retirees' claims here "remained subject to reversal at the time" that the legislature changed the earnings rate from 20 percent to 11.33 percent and then that the legal conclusion supporting its holding in *Strunk* "implies nothing about PERB's – or, for that matter, the legislature's – authority to recover amounts determined to have been paid from the fund in error." 338 Or at 220 and 224 nn 57 and 58. In later describing what it actually did earlier in *Strunk*, the court made clear in two separate footnotes that it did not do what the *Arken* plaintiffs need for it to have done, by first clarifying that the suspension of COLA adjustments it held was illegal in *Strunk* "was a temporary measure designed by the legislature to recapture funds that were found to have been erroneously credited to member accounts" and then pointing to ORS 238.715 as authority for the PERB "to recover any sum improperly paid from the state retirement fund." 341 Or at 180 n 1; 343 Or at 233-34 n 4.

Given the Supreme Court's own words and the lack of any language in the underlying statutes which point elsewhere, this court concludes as a matter of law that the legislature did not intend to create a PERS statutory contractual right for the Window Retirees to receive benefits based on the original determination of the 20 percent earnings

rate for 1999. This conclusion is derived from the court's examination of the text and context of the statute and therefore does not rely upon any legislative history (even the legislative history which drove the court to its conclusion in its 2007 Decision). In support of this conclusion, the court agrees with the *Arken* defendants that payments made to the Window Retirees based on the erroneous 1999 earnings rate were and are "overpayments" and not the type of fixed payments which might form a contractual obligation.

The foregoing requires the court to deny the *Arken* plaintiffs' motion for summary judgment and to grant the *Arken* defendants' motions for summary judgment against this count of the first claim for relief.

Promissory Estoppel

The elements of a claim for a breach of contract based on promissory estoppel are: "(1) a promise, (2) which the promisor, as a reasonable person, could foresee would induce conduct of the kind which occurred, (3) actual reliance on the promise, (4) resulting in a substantial change in position." *Rick Franklin Corp. v. State Dept. of Transportation*, 207 Or App 183, 190, 140 P3d 1136, *rev den*, 342 Or 116 (2006), *drawn from Schafer v. Fraser*, 206 Or 446, 468, 472, 290 P2d 190 (1955), 294 P2d 609 (1956), *drawn from Restatement (Second) of Contracts*, § 90. "'Promissory estoppel' is not a 'cause of action' in itself; rather, it is a subset of a theory of recovery based on a breach of

contract and serves as a substitute for consideration." *Rick Franklin Corp. v. State Dept. of Transportation, supra*, 207 Or App at 190 n. 5.

In these cases, it is beyond dispute (1) that representations were made, in the form of notices to the Window Retirees, that future benefits would be based on an earnings rate of 20 percent for 1999; (2) that the PERB reasonably expected that the Window Retirees would rely on those representations to make their retirement decisions; and (3) that the Window Retirees did rely or likely relied on those representations as part of their decision of whether and when to retire from secure employment. As explained further below, the question presented here is whether the PERB's representations equate to a lawful promise which would support the right of the Window Retirees to rely.

There is some doubt as to whether a claim for breach of contract based on promissory estoppel can lie against a governmental actor such as the PERB. For example, in *Twohy Bros. Co. v. Ochoco Irrigation Dist.*, 108 Or 1, 210 P 873 (1922), 216 P 189 (1923), the court was dealing with an irrigation district owing a large sum for which fair dealing would require payment. The court concluded, however, that the sum would not be ordered to be paid under the theory of promissory estoppel because to do so "would destroy the effect of a statute declaratory of the state's public policy * * * [which] policy is lawful and must be sustained, regardless of the plaintiff's claim as to the sum owing it." *Id*, 108 Or at 37. *And see Jablon v. United States*, 657 F2d 1064, 1069 (9th Cir 1981) (Goodwin, J) ("We have not discovered, and the parties have not cited, any precedent in

this circuit for an independent cause of action against the government founded upon promissory estoppel."). Nonetheless, for the purposes of the following discussion, the court will assume that some type of promissory estoppel theory could support a breach of contract claim against a governmental agency such as the PERB, as have other Oregon courts have done in other contexts.

In *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 698-701, 669 P2d 1132 (1983), Justice Linde's concurring opinion explains how difficult it can be to apply the separate doctrine of equitable estoppel[7] to governmental agencies. Oregon courts since have limited such claim to "rare" circumstances. *Employment Division v. Western Graphics Corp.*, 76 Or App 608, 612, 710 P2d 788 (1985). One of the limitations is that the false or misleading statement at issue must be one of "existing material fact and not of intention, nor may it be a conclusion from facts or a conclusion of law." *Coos County v. State of Oregon*, 303 Or 173, 180-81, 734 P2d 1348 (1987).

In *Wilkinson v. PERB*, 188 Or App 97, 102-103, 69 P3d 1266 (2003) ("*Wilkinson*"), the court was dealing with the doctrine of equitable estoppel as applied to the PERB (in a very different context than these cases). In that regard, the *Wilkinson*

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[7] "The elements of equitable estoppel are: (1) a false representation, (2) made with knowledge of the facts, (3) when the other party is ignorant of the truth, (4) made with the intention that the other party rely on the representation, and (5) that the other party is induced to act upon it to its detriment." *Mittleman Properties v. Bank of California*, 131 Or App 666, 673, 886 P2d 1061 (1994), citing *Donahoe v. Eugene Planning Mill*, 252 Or 543, 545, 450 P2d 762 (1960).

court made the following important statement: "[T]o establish reasonable reliance, petitioner must show that the representations made by the state agency were within its lawful power to make." 188 Or App at 103, citing *Wiggins v. Barrett & Associates, Inc., supra*, 295 Or at 697. The court went on to hold that "[b]ecause PERS must distribute the fund in compliance with the statutes, it could not make a representation that the funds would be distributed to someone other than the named beneficiary." *Wilkinson*, 188 Or App at 103.

This court concludes that the statement in *Wilkinson* about lawfully authorized representations would apply equally to a claim based on promissory estoppel. This is consistent with the following principles expressed in the promissory estoppel case of *Harsh Investment Corp. v. State Housing Division*, 88 Or App 151, 158, 744 P2d 588 (1987), *rev den*, 305 Or 273 (1988):

> " * * * Those who deal with state officers must know the extent of their authority and cannot claim by estoppel what they could not receive by contract. The state is no more bound by a promise that it may not lawfully make or perform than is a municipality. * * * "

It also fits with the view that statements by a state agency "may not bind the state to any arrangement that contravenes the statutes," recognized in a case involving not promissory or equitable estoppel but rather concerning a constitutional challenge to an initiative. *Does 1-7 v. State of Oregon*, 164 Or App 543, 560, 993 P2d 822 (1999), *rev den*, 330 Or 138 (2000).

As applied in these cases, the foregoing means that the representations made by the PERB to the Window Retirees may only serve as the basis for a breach of contract claim based on promissory estoppel if the representations were promises which were consistent with and did not contravene the statutes governing PERS, as interpreted by the Supreme Court. The court already has concluded that the statutes governing PERB do not support a claim that the representations regarding the earnings rate of 20 percent were part of the PERS statutory contract. The court now concludes that, therefore, the PERB could not promise the Window Retirees that their benefits would be based on the earnings rate of 20 percent and, consequently, that the Window Retirees could not as a matter of law rely on such a promise.

An additional reason for concluding that the PERB is not promissorily estopped from "taking back" the representations regarding the 20 percent earnings rate is that both the rate and the representations were based on a determination that was not final. The PERB's order establishing the earnings rate was an order subject to administrative appellate review under ORS Chapter 183. Just such a review was timely sought – in the *City of Eugene* case. Until that case was finally resolved (albeit under terms which involved both a settlement and a vacation of the court ruling which led to the settlement), the rate was not final and was subject to change (and, of course, did change). Even though the Window Retirees likely were not familiar with that appellate review process,

they are charged with knowledge of the law[8] and, therefore, could not rely on the representations as promises. This view is consistent with the principle that the promise sought to be enforced cannot be one of intent (*e.g.* to base future benefits on the 20 percent earnings rate). *See Coos County v. State of Oregon, supra*, 303 Or at 180-81.

For these reasons, the court grants the *Arken* defendants' motions for summary judgment against this count of the first claim for relief. Taken together with the court's prior ruling, this means that the *Arken* plaintiffs' First Claim for Relief fails in its entirety.

Claims for Declaratory and Injunctive Relief

To the extent these claims are based on the *Arken* plaintiffs' contention that they have a contractual right which prohibits the PERB from seeking recoupment of overpayments, defendant PERB is entitled to summary judgment as to these claims in its favor for the reasons previously stated. To the extent these claims are based on the same arguments proffered by the *Robinson* petitioners, defendant PERB"s motion for summary judgment as to these claims is denied for the reasons set out in the 2007 Decision.

In its motion, defendant PERB explains how none of its conduct arguably violated ORS 238.660, a lengthy statute generally requiring the PERB to maintain the long-term

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[8] "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it." *North Laramie Land Co. v. Hoffman*, 268 US 276, 283, 45 S Ct 491, 69 L Ed 953 (1925). This maxim has been referred to in Oregon courts, along with the acknowledgment that its use is limited. *See Sorenson v. Gardner*, 215 Or 255, 259-260, 334 P2d 471 (1959).

stability and viability of the PERS fund as part of its fiduciary duties. In their response to defendant PERB's motion for summary judgment, the *Arken* plaintiffs appear to limit their contention that ORS 238.660 was violated to the withholding of COLAs without proper notice. The court is satisfied that the PERB has done what it can in light of the incredibly uncertain legal stage and complicated required calculations to not unreasonably delay the granting of the COLAs which have been held to be required and that there are no legal frailties contained in the various notices sent to Window Retirees in this regard.

In their response to defendant PERB's motion for summary judgment, the *Arken* plaintiffs also assert that the PERB has acted improperly in determining whether a Window Retiree was overpaid. This assertion is neither fairly contained within the first or second amended complaints nor otherwise established to even a *prima facie* level by the *Arken* plaintiffs and, therefore, will not be considered in this decision.

For these reasons, the court grants defendant PERB's motion for summary judgment against these claims for relief except to extent these claims also seek the same relief sought by the *Robinson* petitioners and granted in the 2007 Decision, as to which the motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

1. The *Arken* plaintiffs' motion for clarification is granted;

2. The *Arken* plaintiffs' motion for summary judgment is denied;

3. The *Arken* defendants' motions for summary judgment against the *Arken* plaintiffs' First Claim for Relief are granted;

4. Defendant PERB's motions for summary judgment against the *Arken* plaintiffs' Third and Fourth Claims for Relief are granted in part and denied in part as indicated above; and

5. Counsel in both cases are directed to confer as to the appropriate steps to resolve any remaining issues so as to allow entry of final judgment in these cases and to so advise the court at their earliest convenience.

DATED May 24, 2008.

Henry Kantor
Circuit Court Judge

cc: Gregory A. Hartman/Aruna A. Masih
James S. Coon
William F. Gary/Sharon A. Rudnick
Joseph M. Malkin/Sarah C. Marriott
Townshend Hyatt
Amy Edwards[9]

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[9] As reported to counsel, more than a few members of the putative classes in these cases have telephoned and sent letters or e-mails to the undersigned, urging the court to rule in their favor for various reasons or, in any event, to rule more quickly. Except for a few referrals by this department's judicial assistant (in response to some of the telephone inquiries) to contact the *Arken* plaintiffs' lawyers or the *Robinson* petitioners' lawyers, there has been no response to these communications, which the court has disregarded as well-intentioned but prohibited *ex parte* communications under Judicial Rule 2-102(B) of the *Oregon Code of Judicial Conduct*:

> "A judge shall not communicate or permit or cause another to communicate with a lawyer or party about any matter in an adversary proceeding outside the course of the proceeding, except with the consent of the parties or as expressly authorized by law or permitted by this rule."

See also Rule 4.2 of the *Oregon Rules of Professional Conduct* (similar rule for lawyers). *And see* A. Conte & H. Newberg, 5 *Newberg on Class Actions* § 15.14 (4th ed 2002); *Manual for Complex Litigation, Fourth*, § 21.12 (Federal Judicial Center 2004) (both regarding limits on opposing counsel's precertification communications with putative class members).

This court agrees with the following view as applied to these cases: "Although some judges may believe in good faith that they can personalize or demystify the judicial system through direct contact with the parties, the more common result is some form of prejudgment or other unfair advantage." J.J. Alfini, S.L. Lubet, J.M. Shaman & C.G. Geyh, *Judicial Conduct and Ethics* § 5.03B at pp. 5-9-10 (4th ed LexisNexis 2007).