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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MULTNOMAH

6 MICHAEL ARKEN, DALE CANNON,  
7 ROBYN CARRICO, CAROL YOUNG, JOHN  
8 HAWKINS, LESLIE HUNTER, RICK  
9 MULLINS, S.M. RUONALA, PATRICIA  
THOMPSON WESTOVER, and MYRNA  
WILLIAMS,

10 Plaintiffs,

11 v.

12 CITY OF PORTLAND, WESTERN OREGON  
13 UNIVERSITY, PORTLAND SCHOOL  
14 DISTRICT, CITY OF GRESHAM, LINN  
15 COUNTY, UNIVERSITY OF OREGON,  
16 PORTLAND COMMUNITY COLLEGE,  
MULTNOMAH COUNTY, CENTRAL  
SCHOOL DISTRICT 13J, FOREST GROVE  
SCHOOL DISTRICT #15, and the PUBLIC  
EMPLOYEES RETIREMENT BOARD,

17 Defendants.

Case No. 0601-00536

PLAINTIFFS' MOTION FOR  
CLARIFICATION OF RULING ON  
PREVIOUSLY FILED MOTIONS

ORAL ARGUMENT REQUESTED

18 Oral Argument Requested: Yes.

19 Court Reporting Service Requested: Yes.

20 Estimated Time for Argument: One hour.

21 On June 20, 2007 this court issued its opinion and orders in this case and in *Robinson*

22 *et al. v. PERB, et al.*, Case No. 0605-04584. Although the cases are not consolidated, they

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1 both address claims brought by groups of PERS retirees and the court resolved cross motions  
2 for summary judgment in a single opinion and order.<sup>1</sup>

3 In both cases plaintiffs seek to set aside PERB's January 27, 2006 order adopting  
4 repayment methods, but on fundamentally different legal bases. It is the *Arken* plaintiffs'  
5 position that the 2003 legislature established a new "fixed benefit" for window retirees<sup>2</sup> and  
6 that the court in *Strunk v. PERB*, 338 Or 145, 108 P3d 1058 (2005), determined that window  
7 retirees are entitled to receive this fixed benefit plus all COLA adjustments (plaintiff's  
8 memorandum in support of motion for summary judgment at p. 5). This "fixed benefit" is  
9 calculated based on the full 20% earnings distribution for 1999 (plaintiffs' memorandum in  
10 support of motions for summary judgment at p. 4). So while *Robinson* plaintiffs focus on the  
11 limitations the legislature placed on PERB in recovering benefits "erroneously" paid, *Arken*  
12 plaintiffs assert that no benefits were "erroneously paid."

13 The court ruled that the January 27, 2006 order adopting repayment methods is  
14 unenforceable as a matter of law as it violates 2003 Or Laws, Chapter 67, Section 14b; the  
15 court invalidated the order and granted injunctive relief to the *Robinson* plaintiffs. The court  
16 also granted summary judgment on the *Arken* plaintiffs' third and fourth claims for relief  
17 (which also seek to invalidate the January 27, 2006 order and obtain injunctive relief, but on  
18 different grounds) and the court concluded that the plaintiffs' first claim for relief (breach of  
19 contract) was moot.

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21 <sup>1</sup>The *Arken* plaintiffs retired between April 1, 2000 and April 1, 2004, and seek to  
22 represent a class known as "window retirees." The *Robinson* plaintiffs seek class action  
23 representation of a larger class of retirees, one that includes all of the window retirees but  
24 also includes persons who are receiving (or who have received) benefits based on 1999 Tier  
25 One account balances prior to the reallocation of 1999 earnings.

26 <sup>2</sup>This is entirely consistent with this court's general review of legislative history  
which reveals that neither the governor nor the legislature wanted retirees to pay back  
benefits which were based on the 1999 distributions.

1 THE COURT SHOULD WITHDRAW ITS RULING GRANTING PLAINTIFFS  
2 SUMMARY JUDGMENT ON THE THIRD AND FOURTH CLAIMS

3 Plaintiffs did not move for summary judgment on their third and fourth claims. It is  
4 well settled that the trial court cannot grant summary judgment *sua sponte*. *Harbert v. River*  
5 *Place Associates*, 114 Or App 80, 83, 834 P2d 476 (1992). The *Arken* plaintiffs thus find  
6 themselves in the unusual position of asking the court to reverse a ruling made in their favor.<sup>3</sup>  
7 Nevertheless, it is in everyone's best interest to avoid a procedural error which would be cause  
8 for reversal or remand of this case by the appellate courts without reaching the merits or which  
9 would otherwise delay final resolution of the case.

10 ARKEN PLAINTIFFS' CLAIMS ARE NOT MOOT

11 A. Nature of *Arken* Plaintiffs' Claims

12 In their first claim for relief *Arken* plaintiffs assert they are entitled to monetary  
13 damages from their respective employers for breach of contract in an amount equivalent to the  
14 difference between the amount they are receiving in benefits and the amount they should have  
15 received in benefits had there been no retroactive readjustment of 1999 earnings and had they  
16 received annual COLAs for each year since their date of retirement.<sup>4</sup>

17 In the case of two of the plaintiffs (*Arken* and *Mullins*) PERB has taken action under  
18 ORS 238.715 pursuant to the January 27, 2006 order (Affidavits of *Arken* and *Mullins* filed  
19 herewith). As a result, PERB recalculated both plaintiffs' pensions to include COLAs but at  
20 the same time reduced their benefit to reflect a smaller member account based on lowered 1999

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22 <sup>3</sup>If the court withdraws its ruling in *Arken* it will not adversely impact the rights of  
23 *Arken* plaintiffs. All *Arken* plaintiffs are members of the *Robinson* class and any rights they  
24 have under §14b can be fully protected in the *Robinson* litigation.

25 <sup>4</sup>In *Stovall v. State of Oregon*, 324 Or 92, 124, 922 P2d 646 (1996) the court held that  
26 each employee has a pension contract with the individual employer and that the employer is  
liable for any breach of the pension contract.

1 earnings. PERB has not taken any action against the other *Arken* plaintiffs and so they are  
2 have had no reduction in benefits, but also have not received their COLAs.

3 B. The *Arken* Plaintiffs' Claims are not Moot.

4 There are two requirements for a justiciable controversy to exist. The first is whether  
5 the interests of the parties to the action are adverse. The second is that the court's decision in  
6 the matter will have some practical effect on the rights of the parties to the controversy.

7 *Brumnett v. PSRB*, 315 Or 402, 406, 848 P2d 1194 (1993).

8 In *Safeway, Inc. v. OPEU*, 152 Or App 349, 954 P2d 196 (1998), the question was  
9 whether a grocery store could enjoin a union from entering its doors for purpose of gathering  
10 signatures for initiative petitions. The trial court reasoned that because defendant OPEU had  
11 no current plans to engage in initiative petitioning at Safeway stores, no live controversy  
12 existed between the parties. The Court of Appeals held that there was a justiciable controversy  
13 because defendant continued to claim a constitutional right to go onto plaintiff's property even  
14 if it had no current plans to do so again.

15 In *Starrett v. City of Portland ex rel State*, 196 Or App 534, 539, 102 P3d 728 (2004),  
16 the Court of Appeals held:

17 "The fact that a controversy between the parties arises from a discrete  
18 event that has ended at the time of the litigation does not mean,  
19 necessarily at least, that the legal issues in the case are moot. They  
20 may not be if, for example, the *rights* of the parties remain in dispute  
and the activities that give rise to the dispute are ongoing." (Citing  
*Safeway, Inc. v. OPEU, supra*; emphasis in original.)

21 In *Starrett* the court concluded that the plaintiff had a "baseline" position that he has a right to  
22 carry a concealed handgun on public property and that the City could not lawfully lease public  
23 property on terms that permit the infringement of that right. The City's baseline position was  
24 that the law does not restrict the City from permitting private lessees of public property to  
25 make their own choices about whether to admit persons carrying handguns onto the property so  
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1 leased. The court concluded that a judicial resolution of that dispute will bear on the parties'  
2 disputed future rights and obligations arising out of activities that assertively were ongoing.

3 Under these standards plaintiffs' claims are not moot. Because PERB's "baseline"  
4 position is that it has the duty and ability to continue collection efforts against plaintiffs the  
5 fact that *Robinson* has restricted those efforts, but may not enjoin all possible efforts, does not  
6 result in mootness of the *Arken* plaintiffs' case.

7 This situation is similar to that faced in *Associated Reforestation Contractors, Inc. v.*  
8 *Workers Compensation Board*, 59 Or App 348, 650 P2d 1068 (1982), where a trade  
9 association representing the interests of reforestation companies brought suit for a declaratory  
10 judgment that defendant was subject to the workers compensation law. On the eve of trial  
11 defendant voluntarily purchased workers compensation insurance and then asserted that the  
12 claim was moot. The Court of Appeals held that the case was not moot, explaining:

13 "The essential controversy in this declaratory judgment action remains: plaintiff  
14 contends and defendant denies that defendant is legally required to maintain  
coverage for its workers."

15 Similarly here, so long as PERB asserts it has the right to seek repayment of the alleged over-  
16 crediting from plaintiffs this controversy is not moot.

17 Even if PERB cannot use the collection methods in the January 27, 2006 order, PERB  
18 has made it clear that it intends to seek recovery of the alleged overcrediting. It maintains that  
19 it may seek recovery under its general obligations under ORS 238.601. See defendant PERB's  
20 reply memorandum in support of its cross-motion for summary judgment at p. 6. It asserts that  
21 it has a fiduciary duty to collect from plaintiffs so that other members do not have to subsidize  
22 the excess benefits. See PERB's memorandum in support of motion for summary judgment in  
23 *Robinson*, at p. 11. Thus, even if the *Robinson* decision nullifies the January 27, 2006 order it  
24 may not stop PERB from attempting to collect under some other theory. On the other hand, a  
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1 determination in *Arken* that plaintiffs have a contract right to receive their "fixed benefit" plus  
2 COLA would protect plaintiffs from additional collection efforts.<sup>5</sup>

3 Assuming the judgment entered in the *Robinson* case will order PERB to account for  
4 and repay retirees benefits wrongfully withheld it could still be years before the *Arken*  
5 plaintiffs receive these funds. PERB may delay such payment by appealing and obtaining a  
6 stay of enforcement.<sup>6</sup> If *Arken* plaintiffs obtain a money judgment now for the amounts they  
7 are owed interest will run on that judgment at the legal rate. On the other hand (if *Arken* is  
8 dismissed for mootness) when after all appeals are exhausted and PERB finally pays the *Arken*  
9 plaintiffs no interest will be included, as ORS 238.470 provides that no interest is payable on  
10 benefits. Thus, the *Arken* plaintiffs have a very practical reason to pursue their claim to  
11 judgment.<sup>7</sup>

12 Any determination that the *Arken* plaintiffs' contract claim is moot is premature. At  
13 the informal conference with the court after the court's ruling it became clear that there will be  
14 substantial dispute about the proper scope of the remedy in *Robinson*. If the court determines  
15 that the remedy available in *Robinson* is not as broad as that requested in *Arken* then the  
16 contract claim cannot be moot.

17 In addition, all parties acknowledge that these cases are highly likely to be appealed and  
18 so the final outcome of either case cannot be known at this time. Even if the trial court  
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21 <sup>5</sup>A determination of *Arken* plaintiffs' contract rights will not only protect plaintiffs but  
22 will also provide significant guidance to PERS. If there are no "erroneous" benefits for *Arken*  
23 plaintiffs then § 14b does not apply and PERS need not attempt to collect these amounts as  
24 administrative expenses.

25 <sup>6</sup>PERB has announced on its website ([http://www.oregon.gov/PERS/MEM/section/strunk\\_eugene/strunkeugeneinfo.shtml](http://www.oregon.gov/PERS/MEM/section/strunk_eugene/strunkeugeneinfo.shtml)) that in response to the court's ruling in *Robinson* it  
26 will cease collection efforts but it will not be making any retroactive payments. See attached.

<sup>7</sup>The *Arken* plaintiffs intend to move to amend their complaint to assert the right to  
pre-judgment interest for all members of the class.

1 reviewed the arguments above and still believes *Arken* to be moot, the appellate courts could  
2 modify the trial court's *Robinson* decision in ways which would alter that analysis.  
3 Application of the mootness doctrine prior to a final determination of the parties' rights is  
4 premature, does not promote judicial efficiency and would likely cause this litigation to be  
5 extended indefinitely.

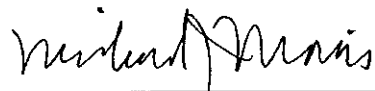
## 6 CONCLUSION

7 *Arken* and *Robinson* raise substantially different legal issues with different legal  
8 remedies which overlap only to the extent that in both cases plaintiffs ask the court to set aside  
9 the January 27, 2006 collection order and grant relief which flows from setting aside that order.

10 Resolution of *Robinson* does not fully resolve the dispute between the parties, does not  
11 give *Arken* plaintiffs all relief requested, and is premature, as the results of *Robinson* could  
12 well be modified on appeal.

13 Plaintiffs encourage the court to reconsider the mootness issue and make a  
14 determination that plaintiffs are entitled to receive their "fixed benefit" based on an allocation  
15 of 20% interest for 1999 and their COLA benefits, as determined in *Strunk*. Because this claim  
16 raises a pure question of law this court should decide the cross-motions for summary judgment  
17 on this claim so that the question can be squarely presented to the appellate courts.

18 Dated this 13<sup>th</sup> day of July, 2007.

19 

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## Strunk/Eugene Information

### Strunk Eugene Update - Kantor Decision

Following Judge Kantor's June 20, 2007 ruling, the next activity is a status conference August 16, 2007 with Judge Kantor and attorneys for all parties.

As a result of Judge Kantor's June 20, 2007 ruling, PERS has taken the following actions:

1. Sent checks back to lump-sum benefit recipients that were received on or after June 20, 2007 (the day that Judge Kantor's ruling was issued).
2. Lump-sum benefit recipients who were invoiced for the overpayment were sent a letter informing them that collection activity has been suspended and asking them to not take any further action in response to the invoice.
3. Monthly benefit recipients who were notified their benefit would change July 1, 2007 to collect the Strunk/Eugene recalculation received a letter confirming that their benefit will not change and their benefit will continue as paid on June 1, 2007.
4. Monthly benefits for those recipients (retired members and beneficiaries) who have already had their benefit payments adjusted will not change until we have more direction from the courts. PERS continues to carefully review Judge Kantor's decision and study all available options. We will provide further information once we have more direction from the courts.

Information regarding Strunk/Eugene is available via the links below.

[I am a benefit recipient \(retiree, beneficiary, or withdrawal\)](#)

[I am a current or inactive Tier One member](#)



CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFFS' MOTION FOR

CLARIFICATION OF RULING ON PREVIOUSLY FILED MOTIONS upon the following

persons at the following addresses:

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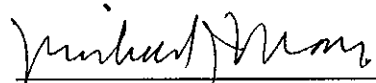
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by the following indicated method or methods:

- ☒ by **mailing** a copy thereof in a sealed, first-class postage-paid envelope,  
addressed to the attorney(s) listed above, and deposited with the United States  
Postal Service at Portland, Oregon, on the date set forth below.
- ☐ by **hand delivering** a copy thereof to the attorney(s) listed above, on the date  
set forth below.
- ☐ by **sending via overnight courier** a copy thereof in a sealed, postage-paid  
envelope, addressed to the attorney(s) listed above, on the date set forth below.
- ☐ by **faxing** a copy thereof to the attorney(s) at the fax number(s) shown above,  
on the date set forth below.

Dated this 13<sup>th</sup> day of July, 2007.

  
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