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7 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

8 FOR THE COUNTY OF MARICOPA

9 THE HONORABLE KENNETH FIELDS
 10 (ret.), a retired state court judge; and THE
 11 HONORABLE JEFFERSON
 12 LANKFORD (ret.), a retired state court
 judge, on behalf of themselves and others
 similarly situated,

NO. CV2011-017443

COMPLAINT

(Declaratory Judgment; Injunction;
 Mandamus; Class Action)

13 Plaintiffs,

14 vs.

15 THE ELECTED OFFICIAL
 16 RETIREMENT PLAN OF THE STATE
 17 OF ARIZONA,

18 Defendant.

19

20 For their Complaint against Defendant, Plaintiffs allege as follows:

21 **PARTIES AND JURISDICTION**

22 1. Plaintiff the Honorable Kenneth Fields is a retired judge of the Superior
 23 Court, State of Arizona. He is an Arizona resident. He retired as a state court judge
 24 in June 2007. Plaintiff the Honorable Jefferson Lankford is a retired judge of the
 25 Court of Appeals, State of Arizona. He retired as a Court of Appeals judge in June
 26 2006.

1 determinations, the Arizona Legislature created a COLA statutory provision benefit
2 that depended upon excess earnings of the Plan. The Board of Trustees manages a
3 fund for the payment of benefits to retirees. The fund consists of contributions from
4 employers and employees, along with other monies paid to the fund such as a
5 percentage of court filing fees. The Board of Trustees invests monies of the fund in
6 various investments for the growth of the fund over time. Each year the Board of
7 Trustees states in its annual report earnings on the plan funds.

8 7. To create a fund that would be available for a COLA for EORP retirees,
9 the Arizona Legislature assumed an average annual rate of return for the fund at 9%.
10 Anything over that 9% return ("the hurdle rate") was considered excess earnings. In
11 1990, A.R.S. § 38-818 (benefit increases) was enacted and provided for a COLA only
12 from 1990 to 1994. In 1996, the Arizona Legislature removed the sunset provisions
13 in the COLA statute, and they became a permanent part of the EORP. Under the
14 COLA formula in effect at the time of Plaintiffs' retirement set forth in A.R.S. § 38-
15 818, 50% of earnings in excess of 9% per annum are paid into an excess earnings
16 fund. These "excess earnings" are put into a separate fund for payment of an annual
17 COLA, which can fund an annual permanent increase of benefits up to a maximum
18 4% of an eligible retiree's pension. Excess earnings not used for COLA benefit
19 adjustments in any one year are available for future COLA benefit increases; that is,
20 unused monies stay in the excess earnings fund.

21 8. Plaintiffs have received a COLA each year beginning one year after
22 their retirements.

23 9. During the 2011 legislative session, the Arizona Legislature passed
24 SB 1609 which was signed by the Governor in April 2011, and effectively became
25 law in July 2011. Under SB 1609, the EORP COLA provision in place when
26 Plaintiffs retired will be changed. Changes as to the rollover of excess earnings funds

1 are retroactive effective to May 2011, and other substantive changes to the provisions
2 of the COLA formula will be effective July 1, 2013. These changes are set forth in a
3 new A.R.S. § 38-818.01. As of July 1, 2013, the hurdle rate for excess earnings will
4 be raised to 10.5%. In addition, after July 1, 2013, the COLA formula for any year
5 will be based on and tied to the actuarial funding of the EORP; that is, the ratio of
6 actuarial value of the plan to accrued liability. For example, the EORP has to be
7 actuarially funded by at least 60% for a beneficiary to receive a 2% COLA. For every
8 5% increase in the actuarial funded rate, the COLA increases .5% until it caps at 4%
9 when the actuarial funded rate is 80% and investment earnings are in excess of 10.5%.
10 Finally, retroactively effective to May 2011, excess earnings that are not utilized in a
11 plan year are no longer available for future benefit increases and will not roll over to
12 the next year; rather, excess funds will revert back to employer accounts.

13 10. SB 1609 will diminish or impair the COLA benefits that Plaintiffs and
14 the Class will receive. It will immediately impair Plaintiffs and the Class's COLA
15 benefits by prohibiting unused excess investment earnings from being rolled over to
16 the following year to pay a COLA benefit. All rollovers from year to year of excess
17 earnings not used for payments will cease. Once the other COLA formula provisions
18 of SB 1609 become effective on July 1, 2013, it will further diminish or impair the
19 COLA benefits that Plaintiffs and the Class will receive. The COLA fund will not
20 grow from year to year with unused excess earnings. Moreover, Plaintiffs will likely
21 not receive a less than 4% annual benefits increase as (a) the hurdle rate for excess
22 earnings is higher, from 9% to 10.5%; (b) the COLA is affected by the actuarial
23 funding ratio of the fund; and (c) excess earnings that are not used are no longer
24 available in future years for COLAs but revert back to employers. Insofar as SB 1609
25 will impair and decrease the benefits of the COLA that Plaintiffs and the class is
26 entitled to under the COLA formula in place prior to the effective date of SB 1609,

1 SB 1609 substantially impairs the contract Plaintiffs and the class have with the State
2 of Arizona.

3 11. SB 1609 also enacted a number of other changes to EORP, such as
4 increases to the contribution rate, calculation of other benefits under the Plan, time of
5 retirement, early retirement, spousal benefits and prior service purchases. This case
6 does not concern any of those changes, and none of these changes affect retired
7 member benefits.

8 **CLASS ALLEGATIONS**

9 12. Plaintiff Fields retired from his position as a judge of the State of
10 Arizona in June 2007; Plaintiff Lankford retired from his position as a Court of
11 Appeals Judge of the State of Arizona in June 2006. Under Arizona constitutional
12 law, and under the specific provisions of the EORP statutes, they are fully vested
13 members in their retirement benefits under the EORP.

14 13. The class similarly situated with Plaintiffs consists of all elected
15 officials who have retired from employment and became eligible and vested for
16 receiving benefits under EORP prior to the effective date of SB 1609. The class
17 includes survivors of COLA-eligible retirees, as upon the death of a Cola-eligible
18 retiree, benefits may devolve upon widows, widowers or children under a certain age.
19 The class does not include new members of the EORP who came into elected office
20 after the passage of SB 1609, or current elected officials who are active employee
21 members and who have not yet retired and applied for benefits to the EORP. The
22 class consists of only retired members and their survivors who are fully vested in the
23 plan under Arizona constitutional law and the EORP statutes.

24 14. The number of retirees is so numerous that joinder of all members is
25 impractical.

26 15. There are questions of law common to the members of the class.

1 the EORP, and substantially impairs the obligation of contract between Plaintiffs, the
2 class, and the State of Arizona.

3 23. Plaintiffs and Defendants have an actual case or controversy over
4 whether or not SB 1609's modification of the EORP COLA provision formula is an
5 unconstitutional impairment of contract. EORP has advised Plaintiffs that unless SB
6 1609 as it applies to COLAs is declared unconstitutional, it will follow SB 1609 to
7 calculate the Plaintiffs' COLA benefit and to eliminate the reserve fund for excess
8 earnings for COLAs.

9 24. By reason of the above, Plaintiffs are entitled to a declaratory judgment
10 that SB 1609 as applied to the EORP COLA benefit to Plaintiffs is a violation of the
11 Arizona constitution as it diminishes Plaintiffs benefits and is an impairment of
12 contract with Plaintiffs and the class's rights to a specific COLA formula-based
13 benefit under the EORP. Plaintiffs are entitled to a declaration that the EORP Board
14 of Trustees cannot utilize new SB 1609 to calculate Plaintiffs and the class's COLA
15 benefit. Rather, Plaintiffs and the class are entitled to a declaratory judgment that the
16 Board should calculate Plaintiffs and the class's COLA benefit under 38-818, the
17 COLA statutory provisions in effect prior to the effective date of SB 1609.

18 **COUNT TWO**
19 **Injunctive and Mandamus Relief**

20 25. Paragraphs 1 to 24 above are incorporated by this reference.

21 26. Defendants have advised Plaintiffs that their COLA benefits will be
22 calculated under SB 1609 despite Plaintiffs' demand that their COLA benefits be
23 calculated under A.R.S. § 38-818. Unless an injunction is issued by the Court, the
24 Board of Trustees of EORP will apply SB 1609 prospectively to stop the funding of
25 excess earnings into the excess earnings account to fund COLA benefits, stop the use
26 of rollover funds to calculate the COLA, and, in the future, change the way Plaintiffs'

1 and the class's contractual right to a COLA is calculated to the detriment of Plaintiffs
2 and the class. All these provisions of SB 1609 will impair Plaintiffs' and the class's
3 contractual formula-based right to a COLA benefits increase.

4 27. Application of SB 1609 to Plaintiffs and the class would violate
5 Plaintiffs' constitutional rights under the Arizona Constitution.

6 28. Inasmuch as the damage to Plaintiffs and the class is the deprivation of
7 Arizona constitutional rights, the damage is irreparable and injunctive relief is
8 appropriate.

9 29. By Arizona constitutional law, the Board of Trustees of EORP have a
10 non-discretionary duty to enforce the contract between the State of Arizona and
11 Plaintiffs and the class, and must calculate their COLA increase in benefits pursuant
12 to the contract and law in effect prior to the enactment of SB 1609.

13 30. By reason of the above, Plaintiffs are entitled to an injunction and writ
14 of mandamus to the EORP requiring it prospectively to calculate Plaintiffs' and the
15 class's increase in benefits under the COLA formula in effect prior to the enactment
16 of SB 1609.

17 Wherefore, Plaintiffs pray:

18 A. That the Court certify a class of all retirees of the EORP as of the
19 effective date of SB 1609 for injunctive and declaratory relief; and

20 B. For a declaratory judgment that SB 1609, insofar as it changes the
21 specific contractual COLA benefits formula that Plaintiffs and the class are entitled to
22 under the EORP prior to the enactment of SB 1609 is unconstitutional under the
23 Arizona Constitution as applied against Plaintiffs and the class; and

24 C. For an injunction that the Board of Trustees cannot prospectively apply
25 SB 1609 against Plaintiff and the class for the calculation of their COLA benefits; and
26

1 D. For a writ of mandamus that the Board of Trustees must calculate
2 Plaintiffs' and the class's benefit to a COLA under the contract in effect before the
3 enactment of SB 1609 and must pay Plaintiffs and the class under that contractual and
4 statutory formula; and

5 E. For attorneys' fees under any other applicable statute or common law
6 theory for attorneys' fees such as arising from contract (A.R.S. sec. 12-341.01),
7 common fund and common benefit, and private attorney general; and

8 F. For taxable costs and nontaxable costs as may be allowed by law; and

9 G. For such other and further relief as the Court may deem just and
10 equitable.

11 DATED this 20 day of September, 2011.

12 OSBORN MALEDON, P.A.

13
14 By 

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