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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

THE DISTRICT OF OREGON

WILLIAM ROBERTSON, CYNTHIA  
CARLISLE, RUSSELL HATHHORN,  
CHRISTOPHER MYERS, MICHAEL  
SIMPSON, JANET BOWLER, LARRY  
DEAN, AND JEAN DEJARNATT,

Plaintiffs,

v.

GOVERNOR THEODORE KULONGOSKI  
(Official Capacity), DAWN MORGAN  
(Official Capacity), JANICE DERINGER  
(Official Capacity), MARK GARDINER  
(Official Capacity), JEANNE GARST  
(Official Capacity), GLENN HARRISON  
(Official Capacity), TODD SCHWARTZ  
(Official Capacity), GEORGE RUSSELL  
(Official Capacity),

Defendants.

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CV

COMPLAINT  
(42 U.S.C. 1983, U.S. Const. Art. I,  
Section 10; Declaratory Relief - 28  
U.S.C. 2201 *et seq*; Injunctive Relief)

1.

This action arises under 42 U.S.C. 1983 and under Article I, Section 10 of the U.S. Constitution to declare as unconstitutional two laws passed by the 2003 Oregon Legislature. Plaintiffs seek a declaration that those laws, as the official policy of the State, deprive plaintiffs of contract rights and therefore impair the contracts between plaintiffs, the State of Oregon, and their public employers, in violation of Article I, Section 10 of the U.S. Constitution. Plaintiffs also seek to enjoin implementation of those laws as to plaintiffs.

#### JURISDICTION AND VENUE

2.

This court has federal question jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1343.

3.

Venue in this district is proper under 28 U.S.C. 1391 because the claim arose in this Judicial District.

#### PARTIES

4.

Plaintiffs are public employees or retired public employees and “Tier One” members of the Public Employees Retirement System (“PERS”), that is, they became members of PERS before January 1, 1996.

5.

Plaintiff William Robertson is an employee of the State of Oregon, Department of Environmental Quality, a public employer, and is a member of the American Federation of State

County and Municipal Employees. Plaintiff Robertson will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's benefits on retirement will be substantially reduced.

6.

Plaintiff Cynthia Carlisle is an employee of Springfield School District, a public employer, and is a member of Oregon School Employees Association. Plaintiff Carlisle will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's benefits on retirement will be substantially reduced.

7.

Plaintiff Russell Hathhorn is a retired employee of Portland Community College, a public employer, and is a member of American Federation of Teachers. Plaintiff Hathhorn will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's retirement benefits will be substantially reduced.

8.

Plaintiff Christopher Myers is an employee of the State of Oregon, Oregon Department of Transportation, a public employer, and is a member of the Association of Engineering Employees of Oregon. Plaintiff Myers will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's benefits on retirement will be substantially reduced.

9.

Plaintiff Michael Simpson is an employee of the State of Oregon, Department of Human Services, a public employer, and is a member of the Service Employees International Union. Plaintiff Simpson will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's benefits on retirement will be substantially reduced.

10.

Plaintiff Janet Bowler is an employee of Clatsop County School District, a public employer, and is a member of the Oregon Education Association. Plaintiff Bowler will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's benefits on retirement will be substantially reduced.

11.

Plaintiff Larry Dean is an employee of City of Salem, a public employer, and is a member of the International Association of Fire Fighters. Plaintiff Dean will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's benefits on retirement will be substantially reduced.

12.

Plaintiff Jean DeJarnatt is an employee of Marion County, a public employer, and is a member of the Oregon Nurses Association. Plaintiff DeJarnatt will be adversely and irreparably harmed by HB 2003 and HB 2004 in that plaintiff's benefits on retirement will be substantially reduced.

13.

The Public Employees Retirement Board ("PERB") administers PERS. Defendants Dawn Morgan, Janice Deringer, Mark Gardiner, Jeanne Garst, Glenn Harrison, Todd Schwartz, and George Russell ("PERB Members") are members of the PERB, are responsible for implementing HB 2003 and HB 2004, and are subject to suit in this action in their official capacity under 42 U.S.C. 1983.

14.

Defendant Theodore Kulongoski, Governor of the State of Oregon, is chief executive of the State of Oregon, a public employer, is responsible for the execution and implementation of HB 2003 and 2004, and is subject to suit in this action in his official capacity under 42 U.S.C. 1983.

#### COMMON ALLEGATIONS

15.

The provisions of ORS Chapter 238 (2001), in relevant part, combined with rules promulgated by PERB under its rulemaking authority, create contracts between the public employers and their public employees (“the PERS contracts”). Pursuant to the PERS contracts the State of Oregon acting through PERB and the public employers agreed to provide certain pension benefits to plaintiffs upon retirement.

16.

On May 9, 2003, Governor Kulongoski, acting on behalf of the State of Oregon, signed into law House Bill 2003 (“HB 2003”) and House Bill 2004 (“HB 2004”), altering, amending or repealing the PERS contracts as set forth further herein. That action by Defendant Kulongoski and the execution of those laws has and will impair Plaintiffs’ PERS contracts.

17.

Defendant PERB Members intend to implement HB 2003 and HB 2004 through the adoption of administrative rules, thereby altering, amending or repealing the PERS contracts as set forth further herein. Defendant PERB Members, will implement HB 2003 and HB 2003 unless enjoined by this court.

18.

Defendants, under color of and at the direction of state law, have deprived plaintiffs of rights, privileges, and immunities guaranteed by Article 1, Section 10 of the U.S. Constitution, by impairing plaintiffs' PERS contracts, and therefore are subject to suit under 42 U.S.C. 1983 and Article I, Section 10 of the United States Constitution.

19.

Benefits provided by PERS are calculated pursuant to ORS 238.300 using three separate, alternative calculations; the PERS participant is entitled to a pension based on the calculation that produces the highest benefit. The three methods are:

a. Full Formula. A participant is entitled to a refund annuity based on the member's account, which is supplemented by an annuity provided by employer contributions, so that the total annuity is equal to 1.67% (2% for police and fire fighters) times the employee's final average salary times the employee's years of credited service. ORS 238.300(1) and (2)(a).

b. Money Match. The retirement benefit may not be less than the amount of the refund annuity plus a match in an amount equal to that annuity, provided by employer contributions. ORS 238.300(2)(b)(A).

c. Pension Plus Annuity. For those members who had service prior to August 21, 1981 a third alternative calculation is performed. They are entitled to the refund annuity as calculated in (a) above plus an employer-funded annuity equal to 1% (1.3% for police and fire fighters) times final average salary times years of credited service. ORS 238.300(2)(b)(B).

20.

There is a justiciable controversy between plaintiffs and defendants in that plaintiffs will be directly and adversely affected by HB 2003 if it is not declared unconstitutional. There is a justiciable controversy between plaintiffs and defendants in that plaintiffs will be directly and adversely affected by HB 2004 if it is not declared unconstitutional.

21.

Plaintiffs are entitled to reasonable attorney fees under 42 U.S.C. 1988.

#### FIRST CLAIM FOR RELIEF

(HB 2003, Section 1; Elimination of Employee Accounts –  
Unconstitutional Impairment of Contract)

22.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt reallege paragraphs 1 through 21.

23.

ORS 238.200 provides that every active member of PERS is required to contribute 6% of salary to PERS which is placed in an individual account created pursuant to ORS 238.250. All income earned by these employee accounts is also credited to the employee account pursuant to ORS 238.205. The benefits provided under ORS 238.200, 238.205, and 238.250 are part of plaintiffs' PERS contracts.

24.

Pursuant to Section 1 and 13 of HB 2003 all employee contributions after January 1, 2004 will now be placed into a "transitional account" and will no longer be credited to

the members' accounts created by ORS 238.200. As a result, the benefits plaintiffs will receive upon retirement as calculated under ORS 238.300 will be substantially reduced.

25.

Section 1 of HB 2003 unconstitutionally impairs the contracts between plaintiffs, the State of Oregon and public employers in violation of Article I, Section 10 of the United States Constitution.

26.

Plaintiffs will be irreparably injured by implementation of Section 1 of HB 2003. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, plaintiffs seek an order of this court enjoining defendants from implementing Section 1 of HB 2003 as to plaintiffs.

27.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiffs are entitled to a declaration that, as applied to their PERS contracts, Section 1 of HB 2003 is unconstitutional, null and void.

28.

## SECOND CLAIM FOR RELIEF

(HB 2003, Sections 5 and 6; Elimination of Guaranteed Rate -  
Unconstitutional Impairment of Contract)

29.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt reallege paragraphs 1 through 21.

30.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt plan to retire after April 1, 2004.

31.

Prior to the enactment of Sections 5 and 6 of HB 2003, ORS 238.255 guaranteed to Tier One members that each year all earnings, less administrative expenses and payments to reserves, would be credited to their accounts and that the amount so credited would be no less than the assumed interest rate which is currently set at 8%. The benefits provided under ORS 238.255 are part of plaintiffs' PERS contracts.

32.

Pursuant to Section 5 and 6 of HB 2003, ORS 238.255 is amended to eliminate earnings credits to Tier One accounts in any year in which there is a deficit in the gain-loss reserve or if the crediting of earnings would result in a deficit in the gain-loss reserve. Because there is currently a deficit in the reserve the amount of earnings paid to plaintiff's accounts will decrease and the benefits plaintiffs will receive upon retirement will be substantially reduced.

33.

Section 5 and Section 6 of HB 2003 unconstitutionally impair the contracts between plaintiffs, the State of Oregon, and public employers in violation of Article I, Section 10 of the United States Constitution.

34.

Plaintiffs will be irreparably injured by implementation of Section 5 and Section 6 of HB 2003. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, plaintiffs

seek an order of this court enjoining defendants from implementing Section 5 and Section 6 of HB 2003 as to plaintiffs.

35.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiffs are entitled to a declaration that, as to their PERS contracts, Section 5 and Section 6 of HB 2003 are unconstitutional, null and void.

### THIRD CLAIM FOR RELIEF

(HB 2003, Sections 5 and 6; Repayment of Deficit -  
Unconstitutional Impairment of Contract)

36.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt reallege paragraphs 1 through 21.

37.

ORS 238.255 provides that a gain-loss reserve be established and that the reserve may not be in deficit for more than 5 years. Public employers are responsible for paying any deficit in the reserve after five years of deficit. The benefits provided by ORS 238.255 were part of the PERS contracts for Tier One members.

38.

Sections 5 and 6 of HB 2003 eliminate the former requirement of ORS 238.255 that the public employers pay the deficit in the gain-loss reserve after five years of deficit. As a result, the benefits plaintiffs will receive upon retirement will be substantially reduced.

39.

Sections 5 and 6 of HB 2003 unconstitutionally impairs the contracts between plaintiffs, the State of Oregon and public employers in violation of Article I, Section 10 of the United States Constitution.

40.

Plaintiffs will be irreparably injured by implementation of Sections 5 and 6 of HB 2003. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, plaintiffs seek an order of this court enjoining defendants from implementing Sections 5 and 6 of HB 2003 as to plaintiffs.

41.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiffs are entitled to a declaration that, as applied to their PERS contracts, Sections 5 and 6 of HB 2003 are unconstitutional, null and void.

#### FOURTH CLAIM FOR RELIEF

(HB 2003, Sections 7 and 8; Change in Method of Crediting Accounts -  
Unconstitutional Impairment of Contract)

42.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt reallege paragraphs 1 through 21.

43.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt intend to retire after April 1, 2004.

44.

Prior to enactment of Section 7 and Section 8 of HB 2003, ORS 238.255 required that the regular account of a PERS member shall be examined each year and credited with the appropriate amount of earnings or minimum credit pursuant to the assumed interest rate for that year. The benefits provided by ORS 238.255 are part of the PERS contracts for plaintiffs.

45.

Pursuant to Section 7 and Section 8 of HB 2003 minimum crediting to plaintiffs' accounts will be on a career-long basis, rather than on an annual basis. As a result, the benefits plaintiffs will receive upon retirement will be substantially reduced.

46.

Section 7 and Section 8 of HB 2003 unconstitutionally impair the contracts between plaintiffs, the State of Oregon and public employers in violation of Article I, Section 10 of the United States Constitution.

47.

Plaintiffs will be irreparably injured by implementation of Section 7 and Section 8 of HB 2003. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, plaintiffs seek an order of this court enjoining defendants from implementing Section 7 and Section 8 of HB 2003 as to plaintiffs.

48.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiffs are entitled to a declaration that, as applied to their PERS contracts, Section 7 and Section 8 of HB 2003 are unconstitutional, null and void.

#### FIFTH CLAIM FOR RELIEF

(HB 2003, Sections 9 and 10; Elimination of COLA -  
Unconstitutional Impairment of Contract)

49.

Plaintiff Hathhorn realleges paragraphs 1 through 21.

50.

Plaintiff Hathhorn retired after April 1, 2000 but before April 1, 2004.

51.

Through the operation of ORS 238.360, part of his PERS contract, plaintiff is entitled to cost of living adjustments (COLA) to retirement benefits each year.

52.

As a result of Sections 9 and 10 of HB 2003 plaintiff's COLA benefits will be reduced or eliminated for several years.

53.

Sections 9 and 10 of HB 2003 unconstitutionally impair the contract between plaintiff, the State of Oregon and his public employer in violation of Article I, Section 10 of the United States Constitution.

54.

Plaintiff will be irreparably injured by implementation of Sections 9 and 10 of HB 2003. Plaintiff has no plain, speedy, or adequate remedy at law. Therefore, plaintiff seeks an order of this court enjoining defendants from implementing Sections 9 and 10 of HB 2003 as to plaintiff.

55.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiff is entitled to a declaration that, as applied to his PERS contract, Sections 9 and 10 of HB 2003 are unconstitutional, null and void.

SIXTH CLAIM FOR RELIEF

(HB 2003, Section 3; Elimination of Right to Invest in Variable Account -  
Unconstitutional Impairment of Contract)

56.

Plaintiffs Robertson, Carlisle, Bowler and DeJarnatt reallege paragraphs 1 through 21.

57.

Prior to enactment of Section 3 of HB 2003, ORS 238.260 provided that PERS members could elect to have 25, 50 or 75 percent of contributions credited into a Variable Account and at their option used for the purchase of a variable annuity at retirement. Plaintiffs Robertson, Carlisle, Bowler and DeJarnatt all elected to have portions of their contributions contributed into the variable account. The benefits provided by ORS 238.260 were part of the plaintiffs' PERS contracts.

58.

Pursuant to Section 3 of HB 2003 plaintiffs are no longer permitted to direct contributions to the variable account. As a result, the benefits plaintiffs will receive upon retirement will be substantially reduced.

59.

Section 3 of HB 2003 unconstitutionally impairs the contracts between plaintiffs, the State of Oregon and public employers in violation of Article I, Section 10 of the United States Constitution.

60.

Plaintiffs will be irreparably injured by implementation of Section 3 of HB 2003. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, plaintiffs seek an order of this court enjoining defendants from implementing Section 3 of HB 2003 as to plaintiffs.

61.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiffs are entitled to a declaration that, as applied to their PERS contracts, Section 3 of HB 2003 is unconstitutional, null and void.

#### SEVENTH CLAIM FOR RELIEF

(HB 2003, Section 14b(1)(a); COLA Remedy in *City of Eugene v. State of Oregon - Unconstitutional Impairment of Contract*)

62.

Plaintiff Hathorn realleges paragraphs 1 through 21.

63.

Plaintiff Hatthorn is a retired member of PERS, effective May 30, 2003, who has been receiving retirement benefits.

64.

Prior to the enactment of Section 14b(1)(a) of HB 2003 plaintiff received retirement benefits calculated by PERB according to the provisions of ORS Chapter 238 and the rules promulgated thereunder. As part of the PERS contract, PERS retirees are entitled to yearly

cost of living adjustments pursuant to ORS 238.360. Plaintiff was legally entitled to receive and retain those benefits as part of the PERS contract.

65.

In *City of Eugene v. State of Oregon*, Marion County No. 99C-12794, the trial court held that PERB incorrectly calculated certain employer rate orders and abused its discretion in distributing 1999 earnings to employee accounts. The court also ruled that PERS misinterpreted certain statutes and did not properly fund reserves as a result of which some PERS participants may have received a benefit in excess of that provided by statute. Plaintiff completed his public service and elected to give up his employment and retired based on the statute as it existed and was interpreted at the time of their retirement. There has been no legal challenge to the calculation of plaintiff's retirement benefits. Plaintiff is entitled to all his rights under the system as it existed at the time of their retirement.

66.

Under Section 14b(1)(a), plaintiff's COLA benefits will be withheld until the allegedly erroneous benefit calculations are recovered. Section 14b(1)(a) of HB 2003 is an unconstitutional impairment of plaintiff's contractual rights to receive cost of living increases in violation of Article I, Section 10 of the United States Constitution.

67.

Plaintiff will be irreparably injured by implementation of Section 14b(1)(a) of HB 2003. Plaintiff has no plain, speedy, or adequate remedy at law. Therefore, plaintiff seeks an order of this court enjoining defendants from implementing Section 14b(1)(a) of HB 2003 as to plaintiff.

68.

Pursuant to 28 U.S.C. 2201 *et seq*, plaintiff is entitled to a declaration that, as applied to his PERS contract, Section 14b(1)(a) of HB 2003 is unconstitutional, null and void.

EIGHTH CLAIM FOR RELIEF

(HB 2003, Section 14b(1)(b) - Reduction of Current Employee Accounts to Enforce  
*City of Eugene v. State of Oregon* - Unconstitutional Impairment of Contract)

69.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt reallege paragraphs 1 through 21.

70.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt are current employees.

71.

ORS 238.255 provides that earnings on employee accounts, less administrative expenses (ORS 238.610) and properly constituted reserves (ORS 238.670), are to be paid to employee accounts. This is part of the plaintiffs' PERS contracts.

72.

Section 14b(1)(b) of HB 2003 provides that amounts erroneously paid to retirees are to be considered administrative expenses and charged to future earnings on active member accounts. Plaintiffs received no benefit from any allegedly erroneous payments to retirees.

73.

Section 14b(1)(b) of HB 2003 unconstitutionally impairs the contracts between plaintiffs, the State of Oregon and public employers, in violation of Article I, Section 10 of the United States Constitution.

74.

Plaintiffs will be irreparably injured by implementation of Section 14b(1)(b) of HB 2003. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, Plaintiffs seek an order of this court enjoining defendants from implementing Section 14b(1)(b) of HB 2003 as to plaintiffs.

75.

Pursuant 28 U.S.C. 2201 *et seq*, Plaintiffs are entitled to a declaration that, as applied to their PERS contracts, Section 14b(1)(b) is unconstitutional, null and void.

#### NINTH CLAIM FOR RELIEF

(HB 2003, Section 14b(2) - Employers Not Responsible for Mistaken Benefits -  
Unconstitutional Impairment of Contract)

76.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean, and DeJarnatt reallege paragraphs 1 through 21.

77.

ORS 238.255 requires that employers fund PERS in an amount determined to be actuarially necessary to adequately fund the promised benefits. An actuarially-sound, funded plan is part of the plaintiffs' PERS contracts.

78.

HB 2003, Section 14b(2) provides that employer's liability to fund the plan is limited by excluding any amount mistakenly paid from that funding obligation. As a result, the PERS system will no longer be funded on an actuarially-sound basis.

79.

Section 14b(2) of HB 2003 unconstitutionally impairs the contracts between plaintiffs, the State of Oregon and public employers in violation of Article I, Section 10 of the United States Constitution.

80.

Plaintiffs will be irreparably injured by implementation of Section 14b(2) of HB 2003. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, plaintiffs seek an order of this court enjoining defendants from implementing Section 14b(2) of HB 2003 as to plaintiffs.

81.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiffs are entitled to a declaration that, as applied to their PERS contracts, Section 14b(2) is unconstitutional, null and void.

#### TENTH CLAIM FOR RELIEF

(HB 2004, Section 4; Retroactive Change of Actuarial Equivalency Factor Tables -  
Unconstitutional Impairment of Contract)

82.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt reallege paragraphs 1 through 21.

83.

Plaintiffs Robertson, Carlisle, Myers, Simpson, Bowler, Dean and DeJarnatt became members of PERS prior to January 1, 1999.

84.

Prior to the enactment of HB 2004, plaintiffs' benefits on retirement were calculated according to actuarial equivalency factors adopted by the Board pursuant to ORS 238.630(g). Furthermore, PERB, under the authority granted by ORS 238.650 and ORS 238.630(g) and (h), promulgated a rule, OAR 459-005-0055, providing that plaintiffs' benefits could not be reduced as the result of adoption of new actuarial equivalency factors. ORS 238.630 and OAR 459-005-0055 are part of plaintiffs' PERS contracts.

85.

Pursuant to HB 2004, PERB is required to adopt new actuarial equivalency factors and apply them retroactively, which will reduce plaintiffs' benefits on retirement. PERB has adopted new regulations pursuant to this provision which substantially reduce plaintiffs' benefits.

86.

HB 2004 and the PERB Members's implementation of HB 2004 will unconstitutionally impair the contract between plaintiffs, the State of Oregon and public employers in violation of Article I, Section 10 of the United States Constitution.

87.

Plaintiffs will be irreparably injured by implementation of HB 2004. Plaintiffs have no plain, speedy, or adequate remedy at law. Therefore, plaintiffs seek an order of this court enjoining defendants from implementing HB 2004 as to plaintiffs.

88.

Pursuant 28 U.S.C. 2201 *et seq*, plaintiffs are entitled to a declaration that Section 4 of HB 2004 is unconstitutional, null and void.

WHEREFORE, plaintiffs petition this court for an order:

1. Pursuant 28 U.S.C. 2201 *et seq*, declaring HB 2003 and HB 2004 to be an unconstitutional impairment of contract and void in whole or in part as to plaintiffs;
2. Enjoining defendants from implementing HB 2003 and HB 2004 in whole or in part as to plaintiffs, including issuing a preliminary injunction;
3. Granting such other relief as may be just and equitable, including ancillary relief; and

4. Awarding plaintiffs their costs, disbursements and reasonable attorney fees incurred herein.

DATED this 22<sup>nd</sup> day of July, 2003.

/s/ Gregory A. Hartman

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Of Attorneys for Plaintiffs

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