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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

EDWARD D. WRZESIEN and LACEY VAN GRINSVEN, individually and on behalf of all similarly situated persons, and MEGAN ASHTON, individually, Plaintiffs, v. STATE OF MONTANA and MONTANA PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION, Defendants.	)	Cause No. DDV 2012-931 **MOTION FOR SUMMARY JUDGMENT**

Defendants move this Court for summary judgment in the above-captioned matter pursuant to Mont. R. Civ. P. 56. As argued in the accompanying brief, Defendants are entitled to judgment as a matter of law.

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Respectfully submitted this 28th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

EDWARD D. WRZESIEN and LACEY VAN GRINSVEN, individually and on behalf of all similarly situated persons, and MEGAN ASHTON, individually, Plaintiffs, v. STATE OF MONTANA and MONTANA PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION, Defendants.	)	Cause No. DDV 2012-931 **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This claim presents a classic case of buyer's regret. Plaintiffs, after being provided extensive educational material and educational opportunities, deliberately chose the Defined Contribution Plan (DC Plan) of the Montana Public Employees' Retirement System and the Optional Retirement Program (ORP). They now dispute the fairness of the Plan Choice Rate, which requires the **employer** of the DC Plan or ORP participant,

not the employee (i.e. the participant), to allocate a certain percentage of funds to the Defined Benefit Plan's pension trust fund. But the Plan Choice Rate was fully explained when Plaintiffs made their respective elections, and the rate, as well as details of potential future changes to that rate, was specified by statute and disclosed in the education materials.

Plaintiffs had every right and opportunity to remain in the Defined Benefit Plan if they had so desired. In fact, without an affirmative election, Plaintiffs would have remained enrolled in the Defined Benefit Plan by default. Consequently there can be no equal protection violation here, where the determinative action was taken by Plaintiffs, not by the State or as a mechanism of the challenged law, and where Plaintiffs are treated equally to all other similarly situated participants in their chosen plans.

This Court need not even reach the equal protection or due process analysis, however, because the statute of limitations on this claim for statutory benefits is long past. Plaintiffs also, when filing their elections, assumed "complete responsibility" for their decision, and should be estopped from challenging the plan they chose at this late date. There is no genuine dispute of material fact. This case presents only legal issues and Defendants are entitled to judgment as a matter of law.

STATEMENT OF FACTS

I. OVERVIEW OF THE STATE RETIREMENT SYSTEM

A. The Defined Benefit and Defined Contribution Plans

Prior to 2001, the Montana Public Employees' Retirement System (PERS), contained only a defined benefit plan. *See* Mont. Code Ann. § 19-3-103(1) (defined

benefit retirement plan established in 1945). A defined benefit plan is, in essence, a pension trust fund wherein an employee, upon retirement, is provided a defined amount of income per month, as opposed to a lump sum of money. *Governmental Plans Answer Book*, § 2:27, Calhoun, Moore and Brainard, at 2-16 (2d ed. 2007).

In order to allow the employee an opportunity to assume greater risk and potentially obtain greater returns, the Legislature assigned the Committee on Public Employee Retirement Systems (the Committee) to study the creation of a defined contribution retirement option. House Bills 90 and 91 (1997). The Committee met periodically from July 1997 through the end of 1998 and received numerous reports from actuaries and retirement contribution plan administrators. Ex. 1A to Vladic Decl. (Final Recommendations of the Committee); *see also, e.g.*, Ex. 2A to Symons Decl. (PERS Report No. 2, May 13, 1998).

Any defined contribution option would have to ensure that the Defined Benefit (DB) Plan's pension trust fund remain "funded on an actuarially sound basis," based on the directive of the Montana Constitution. Mont. Const. art. VIII, § 15. Montana law defines "actuarially sound basis" to mean "that contributions to each retirement plan must be sufficient to pay the full actuarial cost of the plan." Mont. Code Ann. § 19-2-409. As applied to the DB Plan, "the full actuarial cost includes both the normal cost of providing benefits as they accrue in the future and the cost of amortizing unfunded liabilities over a scheduled period of no more than 30 years." *Id.* The constitutional requirement that retirement plans be "funded on an actuarially sound basis" does not apply to the DC Plan

or the ORP because a defined contribution plan does not guarantee a certain level of benefit and thus has no associated actuarial liability.[1]

To maintain actuarial soundness and offset the lack of contributions that would otherwise come from an employee's participation in the DB Plan, the actuarial analysis suggested that the employer would have to provide a percentage of funds to the DB Plan pension trust fund for each employee in the defined contribution plan. Ex. 1A to Vladic Decl. at 3 (Plan Choice Rate intended "to pay for past unfunded liability obligations and to compensate the DB plan for increased DB plan costs resulting from PERS members selecting the DC plan"); Ex. 2A to Symons Decl. at III-6 to III-7; Ex. 2B to Symons Decl. at 2 (Milliman letter re: Plan Choice Rate-DCRP, November 25, 2003) (acknowledging "the purpose of the PCR is to maintain adequate funding of the DBRP Unfunded Actuarial Liability"). This actuarially-required rate was originally estimated at 2.96 % of the employee's compensation. Ex. 2A to Symons Decl. at III-7. Ultimately the Legislature, after receiving updated actuary accounts of the pension trust fund's unfunded liability, settled on a rate of 2.37%. Ex. 1A to Vladic Decl. at 3; House Bill 79 (1999). This rate is referred to as the "Plan Choice Rate" in statute. Mont Code Ann. § 19-3-2117(2)(a)(ii).

Covered employees when hired are initially placed in the DB Plan, and then have a year to choose whether to elect the DC Plan or to remain in the DB Plan. Mont. Code

[1] DC Plan participants are entitled to receive only their vested account balances at termination (Mont. Code Ann. § 19-3-2123), so there is no associated present value or normal cost (see discussion below). The DC Plan's liability to terminating participants is solely the participants' vested account balances.

Ann. §§ 19-3-401(1), -2111(2)(a), -2112(2)(b). If the employee fails to make an election within the first year of employment, the employee "remains a member of the defined benefit plan." Mont. Code Ann. §§ 19-3-2111(2)(b), -2112(2)(c). An election, once made, is irrevocable.[2] Mont. Code Ann. §§ 19-3-2111(2)(c); -2112(2)(d).

Under the DB Plan the funds contributed by the employer are allocated to the pension trust fund, not to an individual account. Mont. Code Ann. § 19-3-316. The funds contributed by the employee are designated as the employee's contributions but invested in the PERS trust fund. Mont. Code Ann. § 19-3-315(5). Upon retirement, the employee's monthly benefit is determined by a formula that considers the employee's age at retirement, length of employment, and the employee's highest consecutive three or five years of compensation. Mont. Code Ann. §§ 19-3-108(6), -904. The total contributed by the employee and his or her employer, though tracked, does not determine the amount of benefits the employee is entitled to upon retirement. *Id.* If DB Plan employees leave employment prior to meeting age and tenure requirements, *see* Mont. Code Ann. §§ 19-3-901, -902, they are entitled to their individual contributions and regular interest on those contributions, but not to the employer contributions which remain in the pension trust fund. Mont. Code Ann. §§ 19-2-503, -602.

The DC Plan, on the other hand, does not specify a particular retirement benefit, but instead specifies how much is contributed to the individual account. Under the DC Plan, the employee chooses between at least eight investment alternatives based on the

[2] Unless the employee leaves covered employment for more than two years before being rehired. Mont. Code Ann. § 19-3-2113.

employee's risk tolerance and preference of investment options. Mont. Code Ann. § 19-3-2122. The resulting retirement account of a vested DC Plan member is made up of the employee's and employer's statutorily-prescribed contributions, as well as any investment gain (or loss). Mont. Code Ann. §§ 19-2-303(55), 19-3-2116. The employee also has the option to roll over contributions from another eligible retirement plan to his or her individual account. Mont. Code Ann. § 19-3-2115(1)(a).

The employer contributions to a DC Plan retirement account vest after five years, which means employees keep the employer contributions and the investment income earned on those contributions when they leave employment. Mont. Code Ann. § 19-3-2116(2). When vested employees retire, their retirement benefits consist of the accumulated funds in their individual accounts. Mont. Code Ann. §§ 19-3-2116, -2123. They are not entitled to any payments from the DB Plan pension trust fund. Mont. Code Ann. § 19-3-909. And while DC Plan participants are not able to switch to the DB Plan once they have made their election, they are able to switch between the investment alternatives and to change the allocation of their contributions. Mont. Code Ann. § 19-3-2122(2), (5).

Employers[3] of covered employees are required, under Mont. Code Ann. § 19-3-316, to contribute to the retirement system "6.9% of the compensation paid to all of the employer's employees plus any additional contributions under [19-3-316(3)]" for a total

[3] Meaning State, University or local governmental agencies. *See* Mont. Code Ann. § 19-3-316.

contribution amount of 8.17% through fiscal year 2014. For each employee in the DB Plan, the employer contribution is allocated to the DB Plan pension trust fund, with the exception of the .04% allocated to the education fund. *Id.;* § 19-3-112(1)(b). For each employee in the DC Plan, the 8.17% employer contribution is divided: 4.19% "to the member's retirement account"; 2.37% "to the defined benefit plan as the plan choice rate"; .04% to the education fund; .3 % "to the [DC Plan's] long-term disability plan trust fund"; .27% "to the defined benefit plan to eliminate the plan choice rate unfunded actuarial liability"; and 1% "to the defined benefit plan unfunded liabilities." Mont. Code Ann. §§ 19-3-2117(2), (3). The .27% allocation will be reallocated "to the long-term disability plan trust fund" once "the plan choice rate unfunded actuarial liability" is eliminated." Mont. Code Ann. § 19-3-2117(2)(b).[4]

B. <u>The Optional Retirement Program</u>

The ORP (renamed the University System Retirement Program (MUS-RP) in 2013, *see* Mont. Code Ann. § 19-21-101 (2013))[5], was originally established as an elective option for university system employees "instead of the teachers' retirement system." Mont. Code Ann. § 19-21-201(1). In 1993 the ORP became the mandatory program for all university system faculty and employees, except for those employees covered by PERS. Mont. Code Ann. §§ 19-21-201(2)(a). For "a university system employee in a position covered under the public employees' retirement system," the ORP

[4] The "plan choice rate unfunded actuarial liability" refers to the specific actuarial liability associated with PERS members who chose the DC Plan.

[5] For ease of reference, because the program has been referred to as the ORP in case filings up to this point, and because it was titled the ORP when Wrzesien joined the program and when this lawsuit was initiated, the State will continue to refer to the program as the ORP.

is an alternative to the DB or DC plan. Mont. Code Ann. §§ 19-3-2112(1), 19-21-213. A university system employee covered by PERS, then, has three retirement plan options: the DB Plan, the DC Plan or the ORP.

Covered MUS employees have a year to make this election. Mont. Code Ann. § 19-3-2112(2)(b). If the employee fails to make an election within the allotted year, the employee "remains a member of the defined benefit plan." Mont. Code Ann. § 19-3-2112(2)(c). An election, once made, is irrevocable. Mont. Code Ann. § 19-3-2112(2)(d).

Like the DC Plan, in the ORP the employee chooses between a variety of investment alternatives based on the employee's risk tolerance and preference of investment options. *See* Ex. 3A to Berry Decl. (MUS retirement program document). The resulting retirement account is made up of the employee's and employer's statutorily prescribed contributions, as well as any investment gain (or loss). Ex. 3B to Berry Decl. at ¶ G (Montana Board of Regents' Policy 803.2)[6]. When ORP employees retire, their retirement benefits consist solely of the accumulated funds in their individual accounts. *Id.* at ¶ J. They are not entitled to any payments from the DB Plan pension trust fund. *Id.* While ORP participants are not able to switch to the DB Plan once they have made their election, they are able to switch between the investment alternatives and to change the allocation of their investment. Ex. 3A to Berry Decl.

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[6] Also available at: http://mus.edu/borpol/bor800/803-2.pdf.

For each PERS employee in the ORP, the 6.9% employer contribution is divided: 4.49% "to the participant's program account"; 2.37% "to the defined benefit plan under the public employees' retirement system as the plan choice rate"; .04% to the education fund; and .27% "to the defined benefit plan to eliminate the plan choice rate unfunded actuarial liability." Mont. Code Ann. § 19-21-214(2). The .27% allocation sunsets once "the additional employer contributions terminate pursuant to 19-3-316." Mont. Code Ann. § 19-21-214(2)(b).

The additional 1% in employer contributions added by the 2013 legislature to § 19-3-316(3)(b) was inadvertently omitted from the employer contributions addressed in § 19-21-214. Therefore, the Montana Public Employees' Retirement Board (the Board) adopted Mont. Admin. R. 2.43.3601, effective November 15, 2013, requiring that the 1% additional employer contribution be directed to the PERS defined benefit plan trust fund, as is the case with the DC Plan.

C. Increases to the Plan Choice Rate

The Board is charged with periodically reviewing "the sufficiency of the Plan Choice Rate to actuarially fund the defined contribution plan member's appropriate share of the defined benefit plan's unfunded liabilities," and adjusting the rate if necessary, as provided in Mont. Code Ann. § 19-3-2121. If the Board determines that the Plan Choice Rate should be increased, the employer's allocation to the DC Plan employee's account is decreased accordingly. Mont. Code Ann. § 19-3-2121(5). Similarly if the Board implements a rate decrease, the employer allocation to the DC Plan employee's account is increased. *Id.*

To date, the Board has not adjusted the Plan Choice Rate. The Legislature, however, has adjusted the rate by statutory change. The rate increased from 2.37% to 2.505% in 2007; and to 2.64% in 2009. *See* Mont. Code Ann. § 19-3-2117 (2007). Unlike a Board adjustment, the statutory adjustment did not decrease the employer's contribution to the DC Plan or ORP participant's account. The employer contribution has remained 4.19% for DC Plan participants and 4.49% for ORP participants.

II. PLAINTIFFS' PLAN ELECTIONS

During the one-year time period a covered employee has to decide whether to join the DB or DC Plan, or if applicable the ORP, the Montana Public Employee Retirement Administration (MPERA), the agency that administers PERS, provides numerous educational resources to inform covered employees about the available plan choices, as required by Mont. Code Ann. § 19-3-112(2)(a). Weigand Decl., ¶ 2. The resources provided include booklets, handouts, and PowerPoint presentations, as well as a toll-free line where employees may ask specific questions of MPERA staff. *Id.* As noted above, if the employee fails to make a selection within a year, he or she will by default become a permanent member of the DB Plan. Mont. Code Ann. §§ 19-3-2111(2)(b), -2112(2)(c).

Megan Ashton was hired by the State of Montana on October 20, 2003. Weigand Decl., ¶ 3. Prior to the expiration of her year-long selection window, MPERA provided her with handouts, booklets and a video[7] containing educational material regarding the DB and DC plans. *Id.* There was also an optional PowerPoint workshop provided by

[7] Because of its bulk, the VHS video is not included in the attached education materials but is available upon request. It has been provided to Plaintiffs.

MPERA throughout the year. *Id.*, ¶ 6. Among other aspects of the DB and DC Plans, these materials describe in detail the Plan Choice Rate and its effect on employer contributions for DC Plan participants. For example, the "Workbook" at p. 15, Ex. 4A to Weigand Decl., clarifies that the Plan Choice Rate:

> is the percent of the employer contribution allocated to the Defined **Benefit** Retirement Plan for employees who choose the Defined **Contribution** Retirement Plan. Required by statute, the rate is actuarially determined to maintain the financial stability of the Defined **Benefit** Retirement Plan. This rate is currently 2.37%.

(emphasis in original). The Workbook also provided information on the types of investments and funds and the potential risks and rewards of each type, as well as information about financial planners, including questions to ask when selecting a financial planner. *Id.* at 40-56; 61-74.

Ashton elected to enroll in the DC Plan five and a half months after her hiring, on April 4, 2004, by signing a "Retirement Plan Choice" election form. Ex. 4E to Weigand Decl. Ashton's election form states, in bold, that the choice to enroll in the DC Plan is "**irrevocable.**" *Id.* (emphasis in original). The election form also contains an acknowledgement section, which is followed by Ashton's signature. The acknowledgment begins: "I have had the opportunity to be educated about the retirement plan choices *and assume complete responsibility for this irrevocable election.*" *Id.* (emphasis added). The last paragraph of the acknowledgment specifically states: "my retirement contributions and a *statutorily-defined portion* of my employer's future retirement contributions will be placed in my DCRP account." *Id.* (emphasis added).

MPERA sent Ashton an official confirmation letter on April 20, 2004, which reiterates that her election to join the DC Plan is irrevocable. Ex. 4F to Weigand Decl.

Lacey Van Grinsven (formerly Lacey Lutz) was hired by the State of Montana on April 3, 2006. Weigand Decl., ¶ 4. She also received educational materials regarding the DB and DC Plan in a packet containing handouts and booklets. *Id.* One of the handbooks provided, titled "Defined Contribution Retirement Plan Basics," has a similar definition of "Plan Choice Rate" to that appearing in the workbook provided to Ashton, as quoted above, emphasizing that the rate is required by statute, allocated to the DB Plan, and is "actuarially determined to maintain the financial stability of the" DB Plan. Ex. 4B to Weigand Decl. at 2 (emphasis added). Further, during 2006, MPERA provided several educational PowerPoint workshops regarding the plan options, including one in Missoula on December 14, 2006. Ex. 4D to Weigand Decl.

Van Grinsven elected to enroll in the DC Plan 11 months after her hiring, on March 1, 2007, by signing a "Retirement Plan Choice" election form. Ex. 4G to Weigand Decl. Her election form, like that filled out by Ashton, states, in bold, that the choice to enroll in the DC Plan is "**irrevocable**," and contains an identically-worded acknowledgment, followed by her signature. *Id.* (emphasis in original). MPERA sent Van Grinsven an official confirmation letter on March 13, 2007, which reiterates that her election to join the ORP is irrevocable. Ex. 4H to Weigand Decl.

Edward Wrzesien was hired by the Montana University System on July 24, 2006. Weigand Decl., ¶ 5. Like Ashton and Van Grinsven, he was provided with handouts and booklets containing educational material regarding the DB and DC plans, *id.*, and had

available to him several PowerPoint workshops, including one in Missoula on December 14, 2006. Ex. 4D to Weigand Decl. His education materials were identical to those provided to Van Grinsven, except they contained additional material about the ORP.

A separate handbook titled "Optional Retirement Program" explains the basics of the ORP for those employees in the Montana University System. Ex. 4C to Weigand Decl. Within the handbook there is a chart comparing the differences between the DC Plan and the ORP. *Id.* at 3. For example, unlike the DC Plan, .30% of the employer contribution does not go towards a "Disability Plan" because a disability plan is not available through the ORP. *Id.* The administrative costs for the ORP are also slightly higher, and the investment options for the ORP consist of different annuities, whereas the options under the DC Plan consist of different mutual funds. *Id.*

Wrzesien elected to enroll in the ORP on August 10, 2007, by signing a "Retirement Plan Choice" election form. Ex. 4I to Weigand Decl. His election form, like that signed by Ashton and Van Grinsven, states, in bold, that the choice to enroll in the ORP is "**irrevocable**," and contains an identically-worded acknowledgment[8], followed by Wrzesien's signature. *Id.* (emphasis in original). MPERA sent Wrzesien an official confirmation letter on September 7, 2007, which reiterates that his election to join the ORP is irrevocable. Ex. 4J to Weigand Decl.

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[8] Except that it refers to the ORP, not the DC Plan.

ARGUMENT

Even if Plaintiffs did have a viable cause of action, which Defendants deny, their claim is barred. It is time barred because the applicable statute of limitations has run. It is also barred because Plaintiffs acknowledged the risk and made an **irrevocable** choice. If this Court nevertheless looks to the merits, Plaintiffs have failed to present a cognizable equal protection or due process claim because the defining "action," the election of the particular retirement plan, was taken by the Plaintiffs individually, not imposed by the State, and in any case Plaintiffs are not similarly situated to the employees in the DB Plan. Finally, even if undertaken, the law easily withstands rational basis review because the Plan Choice Rate is rationally related to the constitutional requirement to protect the DB Plan's actuarial soundness.

I. THE STATUTE OF LIMITATIONS HAS RUN FOR ALL PLAINTIFFS.

A. This Action, Regarding the Receipt of Retirement Benefits, Is Subject to a Two-Year Limitation Period.

The prescribed period in which to bring an action to enforce "a liability created by statute" is two years. Mont. Code Ann. § 27-2-211(1)(c)[9]. The Montana Supreme Court has held that one must look to the underlying cause of action to determine whether a statute creates a liability. *State ex rel. Fallon Co. v. District Court*, 161 Mont. 79, 505 P.2d 120 (1972). In *Marx v. Belgrade Volunteer Firefighters Relief Assoc.*, the district court determined that a declaratory judgment action, alleging "that the Board (of a

[9] Plaintiffs have not alleged a breach of contract, but are nevertheless trying to avoid the terms of the contract they entered by choosing a defined contribution plan. If they are trying to void their contract based upon fraud or mistake, the statute of limitations is also two years. Mont. Code Ann. § 27-2-203.

rural fire department) had abused its discretion and acted arbitrarily and capriciously in denying [the claimant a] pension," constituted a liability created by statute, subject to the two-year limitation period. 2008 MT 410, ¶¶ 7-8, 347 Mont. 256, 198 P.3d 247. The Supreme Court, however, did not have cause to analyze the issue on appeal because the claimant did not make a substantive argument that a different statute of limitations should apply. *Id.*, ¶ 19.

A Montana Attorney General Opinion has also considered "[w]hat statute of limitations applies to wage claims . . . and claims for longevity payments" submitted by county officers and employees. 43 Mont. Atty. Gen. Op. 58. Looking to the underlying cause of action, Attorney General Racicot determined that wage and longevity claims are "not based upon a contractual relationship" but instead upon statutes which "define the extent and nature of the public officer's duties, and the amount of compensation." *Id.* A two-year limitation period therefore applies. *Id.*

Here, as with the claim for pension benefits considered in *Marx*, and the wage and longevity claims considered by Attorney General Racicot, the underlying cause of action is a claim for benefits, specifically retirement benefits, that Plaintiffs claim they are due under the state public employee retirement system. State statutes "define the nature and extent" of the retirement system, including "the amount of" employer contribution. Admittedly Plaintiffs allege that the Plan Choice Rate is unconstitutional, but the relief Plaintiffs seek is for additional employer contributions to flow to their accounts under the statutory retirement scheme. As such, Plaintiffs' cause of action seeks to enforce a

liability allegedly created by statute, and is therefore subject to the two-year limitation period imposed by Mont. Code Ann. § 27-2-211(1)(c).

B. <u>The Cause of Action, if Any, Accrued When Plaintiffs Enrolled in the Retirement Plan</u>.

The prescribed statute of limitation period, here two years as explained above, "begins when the claim or cause of action accrues." Mont. Code Ann. § 27-2-102(2). And a claim "accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action." Mont. Code Ann. § 27-2-102(1)(a). Furthermore, a claimant need not have specific knowledge that the claim has accrued: "[l]ack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation." Mont. Code Ann. § 27-2-102(2).

Here the claim made by the Plaintiffs accrued when they affirmatively rejected the DB Plan and enrolled in the DC Plan or the ORP, respectively, as the election was "irrevocable." A litigant "affected by a statute" may "obtain a declaration of rights" as to "any question of construction or validity arising under the . . . statute." Mont. Code Ann. § 27-8-202.

The Plan Choice Rate, a statutory mechanism, was in effect when Plaintiffs elected to join these plans, and thus all elements for a declaratory judgment--the question of whether the Plan Choice Rate is constitutionally valid--existed at that time. Similarly, Plaintiffs, once enrolled, had a right to immediately bring their claims in district court, as

there is no required administrative process they must utilize first. And finally, it does not matter whether Plaintiffs understood the effect of the Plan Choice Rate (though they should have at least been aware based on the comprehensive educational material provided), as lack of knowledge does not toll the accrual date.

It has been well over two years since Ashton (April 4, 2004), Van Grinsven (March 1, 2007), and Wrzesien (August 10, 2007) enrolled in the DC Plan or the ORP. Consequently, their claims regarding the constitutionality of the Plan Choice Rate are time barred by Mont. Code Ann. § 27-2-211(1)(c). The State is therefore entitled to judgment as a matter of law.

II. THE DOCTRINE OF LACHES BARS PLAINTIFFS' CLAIMS BROUGHT YEARS AFTER THEY MADE THEIR ELECTIONS.

To the extent this case sounds in equity, laches also bars Plaintiffs' claims. The DC Plan and the ORP, including the Plan Choice Rate, became effective as an option for members of the public employee retirement system on July 1, 2002. Mont. Code Ann. §§ 19-3-2102(1) (1999), 19-21-213 (2001). Ashton elected the DC Plan in April of 2004, Van Grinsven in March of 2007, and Wrzesien elected the ORP in August of 2007. After making this optional election, Ashton waited some 8 1/2 years and Van Grinsven and Wrzesien waited over 5 years to challenge the Plan Choice Rate. As such, Plaintiffs' constitutional claims have expired.

The doctrine of laches:

> is a concept of equity that can apply when a person is negligent in asserting a right. Laches exists where there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable, and is appropriate when a party is actually or presumptively

> aware of his [or her] rights but fails to act. A party is held to be presumptively aware of his or her rights; where the circumstances of which he [or she] is cognizant are such as to put a [person] of ordinary prudence on inquiry . . . .
>
> Hence, the doctrine of laches is the practical application of the maxim--Equity aids only the vigilant.

Cole v. State ex rel. Brown, 2002 MT 32, ¶¶ 24-25, 308 Mont. 265, 42 P.3d 760 (internal quotes and citations omitted).

The plaintiffs in *Cole* brought an original action before the Montana Supreme Court seeking a declaratory judgment that CI-64, a constitutional initiative imposing term limits, is null and void, and an injunction prohibiting the Secretary of State from complying with CI-64. *Cole*, ¶¶ 1, 17. The State responded that laches barred the nine-year-old challenge to CI-64's enactment, and the Supreme Court agreed. *Id.*, ¶ 23.

The Court determined that if CI-64 was in fact invalid, "then it was invalid in November 1992 when the initiative was enacted and the case or controversy was ripe at that time." *Cole*, ¶ 27 (citation omitted). The *Cole* plaintiffs thus could have brought their challenge upon passage of CI-64, regardless of whether they were specifically aware of the term limits enacted by the initiative, as "people are presumed to know the law." *Id.* Additionally, for the Court to consider the challenge after a nine-year delay would be prejudicial to the former office holders and potential candidates who had relied on the initiative's presumptive validity. *Id.*, ¶ 32.

Here, Plaintiffs were likewise dilatory in asserting their challenge to the Plan Choice Rate. If the Plan Choice Rate violates equal protection as Plaintiffs claim, then it did so when they opted into the DC Plan and the ORP, and "the case or controversy was

ripe at that time." *Cole*, ¶ 27. As explained above, Plaintiffs were, or at least had the opportunity to be, educated as to the effect of the Plan Choice Rate, and in any case the Plan Choice Rate is statutory and "people are presumed to know the law." *Id.*

Moreover, entertaining a challenge to the Plan Choice Rate now, after the defined contribution options have been in effect for over ten years, will prejudice not only the members of the DB Plan but the whole State. Members of the DB Plan relied on the actuarial soundness of the Plan's pension trust fund when opting to remain a member of the DB Plan. And the pension trust fund would be adversely affected by the invalidation of the Plan Choice Rate, as explained above in Part II. Similarly, past legislatures, including the 2013 Legislature, relied on the funds generated by the Plan Choice Rate when making decisions about how to shore up the pension trust fund and thereby meet the State's obligation to its retired DB Plan employees. The combination of Plaintiffs unexplainable delay in bringing their claim, even though they were presumptively aware of their rights, with the resulting prejudice to the State and individual DB Plan members renders their claim barred by laches and the State entitled to judgment as a matter of law.

III. DECLARATORY RELIEF MAY NOT BE GRANTED BECAUSE ALL INTERESTED PERSONS HAVE NOT BEEN MADE PARTIES.

A party, when seeking declaratory relief, "shall" join as parties "all persons . . . who have or claim any interest which would be affected by the declaration." Mont. Code Ann. § 27-8-301. The Act therefore "requires joinder of all parties who may be prejudiced by the outcome of a declaratory judgment action." *Henneman Farms v. Mont. Dept. of Health and Env. Sciences*, 1994 Mont. Dist. LEXIS 212 (1st Jud. Dist.,

J. Honzel). Here there are thousands of additional parties who have a very strong interest in the outcome of this case: all members of the DB Plan, both current and retired.

The relief sought by Plaintiffs--an end to the Plan Choice Rate and recovery of all prior Plan Choice Rate contributions with any gains--will substantially reduce the DB Plan pension trust fund's capitalization and thereby directly affect the ability of the pension trust fund to provide full benefits to retirees. The Plan Choice Rate was implemented to defray the impact of the DC Plan on the DB Plan's actuarial liability. Ex. 1A to Vladic Decl; Ex. 2B to Symons Decl. at 2. To undo this necessary funding and provide past contributions and gains to DC Plan and ORP participants would have negative consequences for the DB Plan, including: decreasing the system's assets; increasing the unfunded actuarial liability; decreasing the funded ratio; and possibly decreasing the Guaranteed Annual Benefit Adjustment. Ex. 2D to Symons Decl. (Cheiron letter to MPERA). As Plaintiffs have failed to join all interested parties that would be prejudiced by an adverse outcome, namely DB Plan participants, declaratory relief is precluded. *See Henneman Farms* (dismissing case for failure to join a Hutterite colony that "will certainly be prejudiced, as the Colony stands to lose its [discharge] permit," even though the state agency that issued the permit was a defendant).

IV. EVEN IF THIS COURT CONSIDERS PLAINTIFFS' COMPLAINT AT THIS LATE STAGE, PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS ON THE MERITS.

Plaintiffs made a choice. This choice placed them in a defined contribution plan, as opposed to a defined benefit plan. And plaintiffs knew, or should have known, the ramifications of this choice, such as the risk of losing money, the inability to benefit from

the pension trust fund . . . and the effect of the Plan Choice Rate. Plaintiffs chose to accept these consequences, presumable because they believed they would obtain greater retirement benefits as a result of investment income.

Nevertheless Plaintiffs claim that the law somehow treats them unequally. In fact, Plaintiffs want the Court to intervene in order to protect them from their own investment mistakes. This falls far short of a viable equal protection claim for several reasons as detailed below.

At the outset, this Court must "start with the presumption that all legislative enactments comply with Montana's Constitution." *Bean v. State*, 2008 MT 67, ¶ 12, 342 Mont. 85, 179 P.3d 524 (citation omitted). Plaintiffs bear "the burden of establishing the statute's unconstitutionality beyond a reasonable doubt." *Id.* This Court must also construe the challenged statute "narrowly to avoid a finding of unconstitutionality, and . . . resolve any questions of constitutionality in favor of the statute." *Id.* To meet this substantial burden, a party must initially demonstrate: (1) the state has adopted a classification; (2) that affects two or more similarly situated groups; (3) in an unequal manner. *Powell v. State Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877.

A. State Action Is Lacking Because Plaintiffs Elected Into the Defined Contribution Plan They Now Criticize as Unequal.

The protections afforded by the Equal Protection Clause extend only to "state action." *In re Will of Cram*, 186 Mont. 37, 42, 606 P.2d 145, 148-49 (1980). In other words, it must be the state that has "adopted" the classification. *See Powell*, ¶ 22. Generally the "state action" inquiry is undertaken when a private entity is accused of

discrimination, and the court then analyzes whether "the state in any of its manifestations has been found to have become involved in such conduct to a significant extent." *In re Will of Cram*, 186 Mont. 37 at 43, 606 P.2d 145 at 149 (citations omitted); *see also United States v. Morrison*, 529 U.S. 598, 621 (the Equal Protection Clause applies to "State action exclusively, and not to any action of private individuals.") (citation omitted).

Here the issue more straightforward: did the State "adopt a classification" by authorizing the DC Plan and the ORP as alternatives to the DB Plan? The answer is no. The classification here was created, not by the State, although the State defined the plans and provided the opportunity to choose, but by private individuals. Plaintiffs are not in a defined contribution plan because of some immutable characteristic, such as their race, sex or age. *Compare to Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 24, 352 Mont. 46, 214 P.3d 1248 (firefighter age limitation determined to be unconstitutionally discriminatory). They are enrolled in a defined contribution plan, and thus subject to the rules of that particular plan, because they chose to enroll in the plan during the twelve-month election period.

In fact, Plaintiffs were automatically placed in the DB Plan when hired, and had they failed to take any action during the election period they would have, by default, remained in the DB Plan. It was thus Plaintiffs who "adopted" the defined contribution plan and attending classification, not the State. As such, Plaintiffs' equal protection claim fails at the start.

B. The Equal Protection Claim Also Fails Because Members of the Defined Benefit and Defined Contribution Plans Do Not Constitute Similarly Situated Classes.

A law "does not violate the right to equal protection simply because it benefits a particular class." *Bean v. State*, 2008 MT 67, ¶ 13, 342 Mont. 85, 179 P.3d 524. In fact, a law "may impose different treatment upon differing groups or classes of people." *Id.* Therefore an equal protection challenge will fail "if the groups at issue do not constitute similarly situated classes." *Id.*

Here the law creates different types of retirement plans. In *Bean*, the Supreme Court considered whether a statute that "restructured the retirement system for Guard firefighters by creating one class of firefighters hired on or after October 1, 2001, and one class consisting of all Guard firefighters hired before that date" created similarly situated classes. *Id.*, ¶ 17. The Court determined it did not, but instead created "two dissimilar classes of firefighters." *Id.* (citation omitted); *see also Powell v. State Fund*, 2000 MT 321, ¶ 26, 302 Mont. 518, 15 P.3d 877 ("[t]hese differences [between caregivers] justify treating the family member caregiver differently from the non-family member caregiver and for limiting payment to the family member caregiver."). Thus the statute was upheld, even though it created "an inequitable situation." *Id.*, ¶ 19.

The Legislature's choice to create a defined contribution plan as an alternative to the (previously universal) defined benefit plan is likewise constitutional because it does not create similarly situated classes. In fact, the classes here are even less similar that the hiring-date classes analyzed in *Bean*. The retirement system does not merely place some employees into the DB plan and others into a defined contribution plan based on their

hiring date. It instead provides alternative plans, each with its own retirement system. These systems are quite different and cannot be thought of in any sense as "similarly situated." The DC Plan and ORP each create an individual retirement account where the employees choose how they want to invest their retirement savings, whereas the DB Plan provides a certain pension payment upon retirement, but does not allow for any control, or ownership, over the investment of the retirement funds. *See* Statement of Facts above. The retirement system is thus composed of three "dissimilar classes of [retirement plan members]." *Bean*, ¶ 17.

Importantly, as discussed above in detail, employees elect which plan they wish to participate in. Thus the employees that are in the DC and ORP plans are there by choice, not a statutorily determined factor such as their age or hiring date. This is analogous to the State employee health plans. Employees must elect one of two types of health plans each year, now titled the "choice" and "classic" plans[10]. Each health plan provides different services, and has different deductibles and coverage formulas. Though both health plans are provided by the State, the insureds are not similarly situated for purpose of equal protection because they have elected to be in different plans.

The differences between the defined contribution and defined benefit plans also do not create an "inequitable situation," unlike the laws at issue in *Powell* and *Bean*. Every qualified employee had the equal right to choose. Merely because Plaintiffs chose to take a risk with their retirement benefits does not mean the State treated them unequally. A

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[10] *See* http://benefits.mt.gov/pages/1.files/ac.book.2014.employees.online.pdf.

law "may impose different treatment upon differing groups or classes of people." *Bean*, ¶ 13. It is in no way clear that one retirement plan is better than the other, as was the case with the two plans at issue in *Bean*--otherwise why would Plaintiffs have voluntarily joined a defined contribution plan in the first place? Instead, like the two State health plans, the different retirement plans each have distinct advantages and disadvantages.

A person who elects to join the DC plan or ORP gains investment control over their retirement account. If they are vested when they terminate employment (after five years), then they are entitled to withdraw or roll over their entire account, including the funds contributed by the employer. Mont. Code Ann. § 19-3-2116(2). It therefore may be more lucrative for eligible employees who suspect they will not work long enough to meet the retirement qualifications under the DB Plan to join the DC Plan so that, after five years of service, they will be entitled to all of the funds in their retirement account including the employer contributions. On the negative side, if the employee makes poor investment decisions or the market plunges close to his or her retirement date, he or she may end up with a significantly decreased account balance.

Employees who choose to stay with the DB plan, on the other hand, gain the certainty of a defined benefit upon retirement, but lose the ability to control the investment. They do not own an individual plan. Instead the employees' contributions, as well as the employer's, are directed to the DB Plan's pension trust fund. Mont. Code Ann. § 19-3-316. If DB Plan employees terminate prior to meeting age and service requirements and seek a refund, they are only entitled to reimbursement of their accumulated contributions. Mont. Code Ann. § 19-2-602. The employer's contributions

remain in the DB Plan pension trust fund and will be used to provide benefits to qualifying retirees.

Plaintiffs' allegation that funds are contributed by the employer to the employee in the DB Plan is thus incorrect. *See* Am. Compl., ¶¶ 10, 23. Likewise the contributions made under the Plan Choice Rate do not benefit individual DB Plan members' accounts, because DB Plan members do not have individual accounts. Instead the Plan Choice Rate directs contributions to the DB Plan pension trust fund in general. The only contributions that directly fund *individual* retirement accounts are the contributions made to DC Plan and ORP members. Mont. Code Ann. § 19-3-2116.

Plaintiffs are also incorrect that the Plan Choice Rate is "withheld from" DC Plan and ORP participants, or that they are "required to contribute" to the DB Plan. Am. Compl., ¶¶ 5, 26. No funds of Plaintiffs are contributed to the DB Plan pension trust fund. Instead the law directs a percentage of employer funds (i.e. funds of the State, University System or local governments) to the DB Plan based on the number of employees participating in the defined contribution plan and the salaries of those employees. This percentage is not withheld from defined contribution plan participants because it was never allocated to them in the first place, but to the DB Plan. Thus, when new employees choose their retirement plans, they know that if they elect into the DC Plan or ORP, they will contribute 7.9% of their salary each month to their individual account and their employer will contribute an additional 4.19% (DC Plan) or 4.49% (ORP). This does not result in inequality and is in fact necessary in order to ensure the actuarial soundness of the retirement system.

If Plaintiffs truly wished to be treated equally to all employees in the DB Plan, they would be seeking the same *retirement benefit* from the government employer, as opposed to the same *contribution rate*. Plaintiffs, however, will not make this argument because it exposes the folly of their analysis: equalization of the benefits payable to a DC participant would demonstrate the inherent differences not only between the DC and the DB Plans, but between every DC participant because of personal investment decisions. This is exactly why classes are required to be similarly situated for an equal protection challenge to move forward.

In sum, the different retirement plan options are just that--different plans with different schemes. Because members of the plans are not similarly situated or treated unequally, Plaintiffs' equal protection claim must fail.

C. The Plan Choice Rate Meets Rational Basis.

Even if Plaintiffs' claim did not fall short as to each of the three preliminary requirements discussed above, the law easily survives judicial review. An equal protection claim regarding the receipt of retirement benefits is subject to rational basis review, the lowest level. *Jaksha*, ¶ 19 (applying rational basis review to retirement plan challenge). "The rational basis test requires a law to be rationally related to a legitimate government interest." *Rohlfs v. Klemenhagen*, 2009 MT 440, ¶ 31, 354 Mont. 133, 227 P.3d 42 (citation omitted). "Under the rational basis test, it is the *challenger's burden* to show the law is not rationally related to a legitimate government interest." *Id.*, ¶ 26 (emphasis added); *accord Big Sky Colony v. Montana Dep't of Labor & Indus.*, 2012 MT 320, ¶ 65, 368 Mont. 66, 291 P.3d 1231.

"What a court may think as to the wisdom or expediency of the legislation is beside the question and does not go to the constitutionality of a statute." *Id.* In the absence of an affirmative showing that no valid reason existed behind the law, the Legislature's choice is not to be disturbed. *Id.* Importantly, "[t]he purpose of the legislation does not have to appear on the face of the legislation or in the legislative history. It may be *any possible purpose* of which the court can conceive." *Id.* (emphasis added).

The Plan Choice Rate is intended to ensure the actuarial soundness of the DB Plan. This rationale is more than merely a legitimate state interest--it is mandated by Montana's Constitution. Article VIII, section 15(1) requires that the public retirement system "be funded on an actuarially sound basis."[11] The actuarial analysis undertaken at the time the Legislature was considering providing a defined contribution plan option cautioned that, in order to offset the lack of contributions that would otherwise come from the employees' participation in the DB Plan, a certain percentage of funds would need to be provided to the pension trust fund for each employee in a defined contribution plan. Ex. 2A to Symons Decl. at III-6 to III-7; Ex. 2B to Symons Decl. at 2 (acknowledging "the purpose of the PCR is to maintain adequate funding of the DBRP Unfunded Actuarial Liability").

[11] As explained previously, this constitutional requirement does not apply to the defined contribution plans which do not guarantee a certain level of benefit and thus have no associated actuarial liability.

The Plan Choice Rate is the result of these actuarial recommendations regarding maintaining adequate funding of the DB Plan, and therefore directly related to the legitimate (indeed compelling) state interest of ensuring the actuarial soundness of the retirement plan. *See* Ex. 1A to Vladic Decl. at 3 (Plan Choice Rate intended "to pay for past unfunded liability obligations and to compensate the DB plan for increased DB plan costs resulting from PERS members selecting the DC plan."). This is more than sufficient to meet rational basis. Summary judgment should be granted for the Defendants as to the equal protection claim.

V. THE PLAN CHOICE RATE LIKEWISE DOES NOT VIOLATE DUE PROCESS.

Plaintiffs' due process claim fails for similar reasons as their equal protection claim. At the outset, it is not clear whether Plaintiffs are alleging a procedural or substantive due process claim. The Montana Supreme Court has explained the difference between these two components of due process:

> The process requirement necessary to satisfy procedural due process comes into play only after a showing that a property or liberty interest exists. ISC *Distributors, Inc. v. Trevor* (1995), 273 Mont. 185, 191, 903 P.2d 170, 173. Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action. *Englin v. Bd. of County Com'rs*, 2002 MT 115, ¶ 14, 310 Mont. 1, 48 P.3d 39.

Walters v. Flathead Concrete Prods., 2011 MT 45, ¶ 21, 359 Mont. 346, 249 P.3d 913 (*quoting State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517).

A. Procedural Due Process Is Not Applicable Because Plaintiffs Have No Property Interest in the Employer's Contribution Beyond What Is Provided by Statute.

For a procedural due process claim to proceed, the party must demonstrate "a property interest in a particular benefit" and a "legitimate claim of entitlement" to that property interest or benefit, as opposed to an "abstract need or desire for it" or a "unilateral expectation." *ISC Distribs. v. Trevor*, 273 Mont. 185, 191, 903 P.2d 170, 173 (1995) (citations and quotations omitted). "Whether such claim of entitlement exists . . . is determined by reference to state law." *Id.* (citation and quotations omitted). While the typical property claim is based upon "specific statutory or contractual provisions," it may also be based upon "rules or mutually explicit understandings." *Id.*, 273 Mont. 185, 191-92, 903 P.2d 170, 174 (citations and quotations omitted).

Here, a procedural due process claim fails at this initial threshold. The Plan Choice Rate is a statutory provision that has allocated State and local government funds to the DB Plan pension trust fund since the inception of the DC Plan and ORP. And Plaintiffs were provided educational materials during their election years that explicitly informed them about the Plan Choice Rate and its effect. Plaintiffs have no property interest or "legitimate claim of entitlement" in these specifically allocated funds.

Plaintiffs are factually and legally incorrect that the Plan Choice Rate requires "*participants* to contribute to the DB Plan." Am. Compl. at ¶ 26 (emphasis added). It is the employer's contribution, not the employee's, that is subject to the Plan Choice Rate. *See* Mont. Code Ann. § 19-3-2117(2) (directing the allocation of "the *employer's* contributions," including the "plan choice rate," for DC Plan participants) (emphasis added); Mont. Code Ann. § 19-21-214(2) (similarly directing the allocation of the "the

employer's contribution" for ORP participants) (emphasis added). Any procedural due process claim must therefore be denied.

B. Substantive Due Process Is Not Violated Because the Plan Choice Rate Is Directly Related to Ensuring the Actuarial Soundness of the DB Plan.

"Substantive due process primarily examines underlying substantive rights . . . ." *State v. Egdorf*, 2003 MT 264, ¶ 19, 317 Mont. 436, 77 P.3d 517. Here the only "substantive right" Plaintiffs claim the law infringes is the right to equal protection of the laws. As discussed above, the Plan Choice Rate does not violate equal protection and thus Plaintiff have no claim under substantive due process.

Even if analyzed, a judicial review of a substantive due process claim is essentially rational basis review: a statute "must be reasonably related to a permissible legislative objective." *Egdorf*, ¶ 21. The reasonable relationship requirement means in both substantive due process and equal protection contexts "that the [statute] will be upheld if it has any rational basis." *Bieber v. Broadwater County*, 232 Mont. 487, 491, 759 P.2d 145, 148 (1988) (citation omitted).

In *Walters*, the Court determined that a workers' compensation law directing the majority of death benefits to dependents, as opposed to non-dependents such as parents, met this substantial due process standard where "out of available resources, the Legislature logically directed wage loss benefits to those persons who depended upon them . . . ." *Id.*, ¶ 34. Likewise in *Egdorf*, the Court determined that a three-year statute of limitations for violation of misdemeanor fish and game offenses laws was reasonably

related to the permissible objective of preserving the state's wildlife where fish and game investigations often took more than one year to complete. *Id.*, ¶¶ 21-27.

Here the objective of the Plan Choice Rate--to ensure the actuarial soundness of the DB Plan--is even more important than allocating limited resources (*Walters*) or preserving the State's wildlife (*Egdorf*). It is a constitutionally-required objective. In order to maintain actuarial soundness of the DB Plan while allowing a defined contribution alternative, "the Legislature logically directed" to the pension trust fund a portion of the employer contribution for those employees choosing to participate in a defined contribution plan. The Plan Choice Rate, "accordingly, does not violate principles of substantive due process." *Egdorf*, ¶ 27.

CONCLUSION

For the above-stated reasons the State is entitled to judgment as a matter of law, and summary judgment should be granted for the State.

Respectfully submitted this 28th day of March, 2014.

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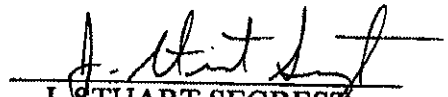
By: 
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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