



contribution paid from wages from the participants in the TPAF, has violated constitutionally protected contract and property rights; violated due process as protected by the New Jersey Constitution and United States Constitution; violated the Balanced Budget and Uniformity of Taxation Clauses in the New Jersey Constitution; violated State laws mandating funding by the State as prescribed by the State actuary; violated the Internal Revenue Code and State statutes by diverting monies owed to the TPAF to the general budget and by taking monies from the TPAF, thus violating the requirements for status of the TPAF as a “qualified” plan and thereby jeopardizing the TPAF and the tax status of employee contributions and benefits; violated an agreement entered into with the IRS to proscribe diversion of, and taking of, monies belonging to and of the public pension; and violated the New Jersey and United States Constitutions by the unlawful taking and impairment of property. Plaintiffs also seek a declaration that Defendants breached their fiduciary and statutory duties.

#### PARTIES

1. Plaintiff New Jersey Education Association (hereinafter, “NJEA”), located at 180 West State Street, Trenton, New Jersey 08625, is an association which represents the professional and economic interests of approximately 127,000 active and 16,000 retired employees of school districts in the State of New Jersey, and whose membership constitutes the vast majority of participants in the Teachers’ Pension and Annuity Fund (the “TPAF”).

2. Plaintiff Fred Aug, residing at 36 Mathes Avenue, Pompton Lakes, New Jersey 07742, is a retired member of the TPAF with 35 years service credit at his retirement.

3. Plaintiff Jacqui Greadington, residing at 102 Burchard Avenue, East Orange, New Jersey 07017, is a member of the TPAF with more than 28 years service credit.

4. Plaintiff Martha Liebman, residing at 94 Kino Boulevard, Mercerville, New Jersey

08619, is a retired member of the TPAF with 36½ years service credit at her retirement.

5. Plaintiff Diane Swaim, residing at 105 Edwards Avenue, Belford, New Jersey 07718, is a member of the TPAF with 31½ years service credit.

6. Plaintiff Dennis Testa, residing at 825 Lee Court, River Vale, New Jersey 07675, is a retired member of the TPAF with more than 30½ years service credit at his retirement.

7. Plaintiff Susan Wintermute, residing at 27 East Mountain Road, Hillsborough, New Jersey 08844, is a member of the TPAF with more than 13½ years service credit.

8. Defendant State of New Jersey is a body politic which has established the TPAF as a fiduciary entity charged with the duty to administer, invest and pay the dedicated funds and monies which constitute retirement benefits, which has the obligation by law to pay employer contributions, and which has the duty to provide funding so as to ensure the plan's fiscal and financial soundness and to guarantee non-forfeitable benefits.

9. Defendant John McCormac ("McCormac"), as Treasurer of the State of New Jersey, is a Trustee of the TPAF pursuant to N.J.S. 18A:66-56(a) and is required by law, and fiduciary duties, to make contributions to the TPAF in the amount determined by the State actuary, from the general revenues.

10. Defendant New Jersey State Senate ( the "Senate"), a body politic of the State of New Jersey, is required to draft, pass and present bills, including appropriations bills, to the Governor for his signature in order for bills to become laws.

11. Defendant New Jersey State General Assembly (the "Assembly"), a body politic of the State of New Jersey, is required to draft, pass and present bills, including appropriations bills, to the Governor for his signature in order for bills to become laws.

12. Collectively, Defendants Senate and Assembly constitute the Legislature.

## FACTUAL ALLEGATIONS

13. The Teachers' Retirement Fund was originally established in 1896 by P.L. 1896, c.332, for the purpose of both providing retirement benefits to education workers, and to insure that the benefits would be properly funded so as to guarantee that the benefits would be available when the employees retired. In 1919, the Teachers Retirement Fund was renamed and became the TPAF, has continued without interruption or cessation ever since, and is governed under N.J.S. 18A:66-1 et. seq. and certain related laws.

14. The TPAF is funded by contributions from both the wages of the employees and the general revenues of the State, as employer.

15. The TPAF is a "defined benefit" plan, meaning that retirees are paid a specific benefit based on their final average salary and total years of service, not based on contributions or returns on investments. Therefore, a certain amount of funds must be available for benefits no matter what funding methodology, actuarial assumptions, rate of return on investments, or amortization periods are utilized.

16. Since its inception, the TPAF has been maintained on an actuarial reserve basis, meaning that funding of benefits is paid into a dedicated trust over the period of the participants' career expectancies so as to provide security for the ultimate payment of benefits. Contribution rates are based upon commonly accepted actuarial assumptions as to, *inter alia*, future rates of investment return on the funds, future salary increases, and mortality rates. These actuarial standards were designed and intended solely to ensure the financial integrity of the system and to adequately fund both present and future benefits.

17. Under State law, the vested members of the TPAF have a "non-forfeitable right" to their pensions. A non-forfeitable right is an entitlement to the vested pension benefit and

formula, which cannot be eliminated or reduced, and which is legally enforceable. Further, State law prohibits the reduction of pension benefits.

18. N.J.S. 18A:66-33 explicitly pronounces that the State of New Jersey has mandated “obligations” to fully fund the TPAF in the amount as stated by the actuary. Under that law, the State is absolutely required to make a contribution, in the amount determined by the actuary, when the TPAF is underfunded (does not have a surplus or excess of assets over liabilities). The State is not required to make a contribution when the TPAF is overfunded (the assets exceed the liabilities). Similarly, if the TPAF is overfunded, the employee contribution rate is 3% of their salary, but the contribution rate increases to 5% if the TPAF is underfunded. That is, the contribution requirements of the State and the employees operate in tandem.

19. N.J.S. 18A:66-33 further provides that the TPAF’s Board of Trustees “shall” submit to the Governor an estimate, based on the Board of Trustees’ actuary’s certified report, of the amount necessary to meet the mandatory fiscal obligations of the State to the TPAF for that year. The Legislature is then required by law to appropriate such amount, and the Treasurer is required to pay the appropriated funds into the TPAF from the general revenues of the State.

20. In addition, N.J.S. 18A:66-18 requires the Board of Trustees’ actuary to annually compute the “normal contribution,” that is, the amount of contributions that is necessary for the State to pay into the TPAF for that year, based on a computation of the services rendered by the participants. It is this amount that the actuary certifies as the obligation of the Trustees to seek appropriation, and as the obligation of the Legislature to fund.

21. For the budget year 2004, the Board of Trustees’ actuary, per its statutory duties, certified that the Defendants were obligated and mandated by law to contribute \$484,424,537.00 to the TPAF, in order to meet Defendants’ obligations and liability, according to the funding

methodology adopted by the State, and resulting from the fact that the TPAF no longer has a surplus or excess assets and is underfunded.

22. For the budget year 2004, despite the actuary's certification, and the absolute mandate of State law, Defendant McCormac failed to submit to the Legislature the request for the monies certified by the actuary, thereby disregarding his legal obligation to do so.

23. On July 1, 2003, the Legislature enacted, and the Governor signed, appropriations legislation for the budget year 2004, entitled "P.L. 2003, Chapter 122."

24. P.L. 2003, Chapter 122 appropriates **\$0.00** to the TPAF for the budget year 2004, despite the certification of the actuary and the requirements of the law.

25. Thus Defendants have ignored the report of the actuary by failing or refusing to make any contribution to the TPAF for the budget year 2004, thereby failing to properly and adequately fund the TPAF, as required by law and by their fiduciary obligations. At the same time, the Defendants mandated to the local school boards to increase the employees' contributions from their wages from 3% to 5%, pursuant to the exact same law that the Defendants disregarded and violated by failing or refusing to make the contributions mandated for the State.

26. By failing or refusing to fund the TPAF in the amounts required by law, the Defendants are depriving the TPAF of the contributions necessary for maintaining the TPAF on an actuarial reserve basis, are preventing the TPAF from earning investment returns and interest on the required but unpaid contributions, and are jeopardizing the soundness of the TPAF.

27. By failing to make the mandated contribution, the State not only violated the law requiring its contribution, but also renders it significantly more likely that the employees' contribution rate remains at 5% rather than 3% because, in part, the TPAF is deprived of monies which, with return on those monies, would return it to, and remain at, an overfunded status, and

instead will cause it to remain at, and more likely to remain at, an underfunded status.

28. Because the employees' contribution rate has increased at the same time that the State has failed to make any its of its statutorily mandated contribution, the employees are suffering an unlawful increase in their share of the funding obligation of the TPAF without any increase in, or enhancement of, the benefits. As a result, the Defendants are taking property from the employees and violating the State laws prohibiting reductions in benefits as well as protections against impairment of contract and taking of property.

29. The Defendants' failure to make the required contribution to the TPAF this year while requiring the members to contribute the additional 2% is unfair and inequitable.

30. In addition, the funding of the TPAF has historically and statutorily been by contributions from both the State (or employers) and the employees, based upon the recognition that both the State and the employees have an obligation to fund the plan as set forth by law. By failing or refusing to fund the TPAF in the amount as directed by the actuary, the State is violating its historic and legal obligations, while still requiring the employees to contribute the entire amount imposed on them by law, violating the employees' contract, due process, and property rights.

31. Because the Defendants imposed on the employees their obligation to pay increased contributions due to the underfunded status of the TPAF, while simultaneously failing to make their own contribution as mandated by the same law, the Defendants should either be required to make their mandated contribution or to set the employees' contribution rate at 3%.

32. The failure of the Defendants to properly and adequately fund the TPAF is not reasonable, necessary or legal, and is in fact unreasonable, unnecessary and illegal.

33. The failure of the Defendants to properly and adequately fund the TPAF does not bear

a rational relationship to the fiscal integrity or actuarial soundness of the TPAF, will result in significant actuarial losses which will seriously jeopardize the defined benefits guaranteed by the TPAF, undermines the fiscal integrity of the plans, and violates the legally enforceable rights of the employees.

34. The failure of Defendants to properly and adequately fund the TPAF does not promote the needs of, or protection for, the TPAF, and is not for the benefit of the participants.

COUNT ONE  
IMPAIRMENT OF CONTRACTS

35. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 34.

36. Article IV, Section 7, Paragraph 3 of the New Jersey Constitution provides that “The Legislature shall not pass any ... law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made.”

37. Article I, Section 10 of the United States Constitution provides that “[N]o state ... shall ... pass any ... law impairing the obligation of contracts. . . .”

38. Under trust law applicable to pension funds, and under N.J.S. 18A:66-1 *et. seq.*, the accumulated assets of the public pension systems and their economic enhancement exist for the sole and exclusive benefit of the retirees and the participants of those systems, and shall not be reduced.

39. Pension benefits paid under the TPAF are promises made by the State, relied upon by prospective and current and past employees, are paid for by deductions from the employees’ wages, are deferred compensation in which contributing participants, vested participants and retirees, have a non-forfeitable right. All of these provisions and doctrines, along with the non-

forfeitable right to the pension benefit, establish, create and constitute a legally enforceable contract.

40. The failure of Defendants to fund the TPAF in the amount certified by the actuary, in violation of the law, violates the contract and the contractual rights of contributing participants, vested participants, and retirees who are members and beneficiaries of the TPAF, in violation of Article IV, Section 7, Paragraph 3 of the New Jersey Constitution and Article I, Section 10 of the Constitution of the United States.

COUNT TWO  
BREACH OF TRUST AND FIDUCIARY DUTY

41. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 40.

42. Under fiduciary doctrine of law, applicable to pension funds, the Defendants have a fiduciary duty to adhere to the law, to provide adequate funding, and not to divert or use monies otherwise due to and available for the TPAF for other uses, including the general operation of the State.

43. Defendants have statutory and common law fiduciary obligations to the TPAF and to the contributing members, vested members, and retirees, to abide by the laws which mandate funding of the TPAF by Defendants, to provide adequate funding to ensure the fiscal and actuarial soundness and integrity of the systems, and to treat the employees/contributors fairly and without favoritism to themselves (Defendants).

44. As a trustee of the TPAF, the State Treasurer has a fiduciary obligation to abide by and follow the laws of the State regarding protecting the integrity and financial soundness of the pension systems, and not to benefit the State at the expense of, and losses to, the employee-

contributors.

45. The actuary to the TPAF is required to recommend actuarial tables for adoption by the TPAF's Boards of Trustees. Upon information and belief, Defendant McCormac, acting in his executive capacity as the State Treasurer and member of the Governor's cabinet, recommended, permitted, advised, and/or influenced the State to fail to properly fund the TPAF in the amount certified by the actuary and thus required by law.

46. Defendant McCormac violated his duties and responsibilities as a trustee of the TPAF and breached his fiduciary obligations.

47. Furthermore, Defendants Senate and Assembly have a fiduciary and statutory obligation to appropriate to the TPAF funding in the amount of the required contribution, as certified by the actuary.

48. Defendants Senate and Assembly violated their fiduciary obligations in failing to appropriate any and all such funds.

COUNT THREE  
PROCEDURAL AND SUBSTANTIVE DUE PROCESS

49. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 48.

50. The Defendants' actions in failing to properly and adequately fund the TPAF are not rationally related to, and in fact are contrary to, the statutory and historic purpose of the funds to provide pension benefits to beneficiaries and members and to maintain the actuarial soundness and fiscal integrity of the pension funds.

51. By requiring the participants to increase their contributions while the Treasurer and State utterly fail to make the contributions required by law of them, the Defendants have violated

the due process rights and property rights of the participants.

52. Through the failure to properly fund the TPAF, Defendants deprive individual Plaintiffs and other similarly situated member-beneficiaries of the TPAF of their liberty and property without due process of law in violation of Article I, Paragraphs 1 and 20 of the New Jersey Constitution, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

COUNT FOUR  
IMPERMISSIBLE TAKING

53. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 52.

54. Historically, and by statutory requirements, and by contractual obligation, employee contributions have never been increased while the State's contribution is decreased or not made in violation of State laws mandating such contribution.

55. The Defendants' actions in failing to properly and adequately fund the TPAF effectively creates a situation wherein the TPAF employees are making all of the contributions to the TPAF, constitutes an increase in the amount of the total contribution made to the TPAF, which they pay from their wages, without a corresponding increase in benefits, and changes the statutory arrangement whereby each side makes contributions, in violation of State and Federal constitutional guarantees against impairment of contracts, protecting against taking of property, in violation of due process rights.

56. This intentional conduct by Defendants violates Article I, Paragraphs 1 and 20 of the New Jersey Constitution, Article I and the Fifth and Fourteenth Amendments to the Constitution of the United States, and the Due Process clause of the Constitution, and constitutes a violation

of 42 U.S.C. §1983.

COUNT FIVE  
VIOLATION OF N.J.S. 18A:66-1 et. seq.

57. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 56.

58. Defendant McCormac's actions in failing to recommend to the Legislature to provide in the appropriations bill for the contribution to the TPAF in the amount of contribution certified by the actuary to be owed by the State, violates N.J.S. 18A:66-1 et seq.

59. Defendants Senate and Assembly's actions in failing to provide in the appropriations bill for the contribution to the TPAF in the amount of contribution certified by the actuary to be owed by the State, violates N.J.S. 18A:66-1 et seq.

COUNT SIX  
VIOLATION OF ARTICLE VIII, SEC. 2, PAR. 3  
OF THE NEW JERSEY CONSTITUTION.

60. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 59.

61. The Defendants' actions in failing to properly and adequately fund the TPAF has created a debt or liability of the State for the budget year 2004 which has not been offset by an equal appropriation.

62. Thus, the Defendants' actions in failing to properly and adequately fund the TPAF constitute a violation of Article VIII, Section 2, Paragraph 3 of the New Jersey Constitution, which requires that the State's budget be balanced.

COUNT SEVEN  
UNIFORMITY OF TAXATION

63. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 62.

64. The New Jersey Constitution requires that there be uniformity and fairness of taxation amongst similarly situated taxpaying residents and citizens.

65. The increase in contributions to the TPAF imposed by the Defendants upon the employees pursuant to legislative authority, and collected from public employees, while the State fails or refuses to make its mandated contribution from general revenues, reduces the tax obligation of State taxpayers, while increasing the tax liability of the TPAF employees, thereby violating State constitutional guarantees of Uniformity and Fairness of Taxation.

66. By allowing the contributions owed by the State to be improperly used by the State for its general operation budget, and increasing the tax upon the participants in the TPAF, the Defendants are violating fundamental principles of uniformity and fairness of taxation without rational basis or legal authority.

COUNT EIGHT  
VIOLATION OF N.J.S. 43:3C-9.1 ET SEQ. AND THE IRC

67. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 66.

68. The refusal and failure of the Defendants to make the legally required contribution to the TPAF, and using the amount Defendants were obligated to contribute instead for the general budget, constitutes a taking of monies out of the TPAF.

69. Taking of monies out of the TPAF constitutes a violation of the Internal Revenue

Code (“IRC”), and in particular 29 U.S.C. §§ 401, 402, 403, 404, 412 and 415, which are incorporated in N.J.S. 43:3C-9.1 et seq., and violates N.J.S.A.43:3C-9.1.

70. Defendants are further violating the above noted IRC provisions and N.J.S. 43:3C-9.1 et seq. by illegally diverting monies from the TPAF for use as general expenditures for and by the State.

71. By violating the above noted State statute and the incorporated IRC provisions, the Defendants not only violate the State law and the IRC, but also jeopardize the qualified status of the TPAF, and improperly impose tax burdens on the employees.

COUNT NINE  
PROMISSORY ESTOPPEL

72. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1 through 71.

73. Plaintiffs and other participants have relied on, to their detriment, Defendants’ statutory, constitutional, fiduciary and contractual obligations to properly, and adequately, fund the TPAF.

74. By increasing the employees’ contribution, while simultaneously failing to pay the State’s contribution, the Defendants have impaired the contractual and property rights of the employees, without any legal justification, thereby breaching the doctrine of promissory estoppel.

WHEREFORE, Plaintiffs request that judgment be entered:

1. Declaring that Defendants’ actions in failing to properly and adequately fund the TPAF violate the Contract Clauses of the New Jersey Constitution and the United States Constitution and contract rights thereunder.

2. Declaring that Defendants’ actions in failing to properly and adequately fund the TPAF

violate the guarantees of Due Process of Law of the New Jersey Constitution and the Fifth and Fourteenth Amendments to the United State Constitution, and property rights thereunder.

3. Declaring that Defendants' actions in failing to properly and adequately fund the TPAF constitute a breach of the fiduciary obligations owed by Defendants to contributing participants, vested participants, and retirees of the TPAF.

4. Declaring that Defendants' actions in failing to properly and adequately fund the TPAF contravenes the Defendants' statutory and common law duties to administer and fund the TPAF in an actuarially sound and fiscally responsible manner.

5. Declaring that Defendants' actions in failing to properly and adequately fund the TPAF constitute a violation of Article VIII, Section II, Paragraph 3 of the New Jersey Constitution which requires that the State's budget be balanced.

6. Declaring that Defendants' actions in failing to properly and adequately fund the TPAF constitute a violation of the principles of uniformity and fairness of taxation of the New Jersey Constitution.

7. Declaring that Defendants' actions in failing to properly and adequately fund the TPAF constitute a violation of N.J.S. 43:3C-9.1 et seq. and the IRC.

8. Declaring that Defendants' actions in failing to properly and adequately fund the TPAF constitute a breach of the doctrine of promissory estoppel.

9. Directing Defendants' to make a payment into the TPAF in the amount of \$484,424,537.00, or, in the alternative, directing that the employees' contribution be maintained at 3% and not increased.

10. Directing Defendants to pay Plaintiffs' attorneys fees, disbursements and costs pursuant to 42 U.S.C. §1988 or other legal basis.

11. Granting such other relief as the Court deems just and proper.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R.4:5-1(c), Plaintiffs hereby designate Kenneth I. Nowak, Esq. as trial counsel.

ZAZZALI, FAGELLA, NOWAK  
KLEINBAUM & FRIEDMAN  
On Behalf of the New Jersey Education Association,  
Fred Aug, Jacqui Greadington, Martha Liebman,  
Diane Swaim, Dennis Testa and Susan Wintermute

By: \_\_\_\_\_  
Kenneth I. Nowak, Esq.

Dated: December 8, 2003

RULE 4:5-1 CERTIFICATION

I hereby certify that the matter in controversy is not the subject of any other pleading in any court, agency or arbitration proceeding, and no such action is currently contemplated.

I know of no other parties who should be joined in this matter.

By: \_\_\_\_\_  
Kenneth I. Nowak, Esq.

Dated: December 8, 2003