

**IN THE OREGON TAX COURT
REGULAR DIVISION
Senior Deferral Tax**

DONA L. KLINGER,) **Case No. 5113**

Plaintiff,)

v.)

STATE OF OREGON,)
DEPARTMENT OF REVENUE,)
State of Oregon,)

Defendants)

**PLAINTIFF'S REPLY TO DEFENDANT'S MOTION
TO DISMISS, MOTION TO STRIKE, AND MOTION
TO REQUIRE AN AMENDED COMPLAINT**

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In Propria Persona

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STATE OF OREGON, DEPARTMENT OF REVENUE, State of Oregon,)	PLAINTIFF’S REPLY TO DEFENDANT’S MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION TO REQUIRE AN AMENDED COMPLAINT
Defendants)	

Plaintiff objects to Defendant’s September 5, 2012 Motions to Dismiss, Motion to Strike and Motion to Require an Amended Complaint. Plaintiff disagrees with the legal contentions stated in Defendant’s Motions and to the legal contentions listed on the Table of Contents submitted with Defendant’s brief. Rather than follow the topics in the order raised by Defendant, plaintiff will first address the issues of Jurisdiction raised by Defendants. This Reply is not a substitute for a Trial Brief to be offered with supporting evidence at trial on the merits, following appropriate discovery.

PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION ISSUES RAISED BY DEFENDANTS:

1. Court has no jurisdiction over tort claims and related claims for relief (II-A, p. 11);
2. Court has no jurisdiction over successive tax years affected by Defendants’ 2011 actions (through Declaratory Judgment or injunctive relief)(III-A and B, pp.12-14);
3. Court cannot issue orders binding the department to act contrary to statutory amendments enacted in House Bill 2543 (2011) (III-B, p 13); and
4. Court has no authority or jurisdiction to compel an audit (III-C, p. 14).

A. Jurisdiction over Tort Claims and Related Claims for Relief:

The Oregon Tax Court is a court of general jurisdiction, without limited, special or inferior jurisdiction under ORS 305.405(1). The Tax Court “has the same powers of a circuit court” according to ORS 305.405(2) and “may exercise all ordinary and extraordinary legal, equitable and provisional remedies available in the circuit courts,” according to ORS 305.405(3).

ORS 305.410(1) states that the tax court “shall be the sole, exclusive and final judicial authority for the hearing and determination of *all questions of law and fact arising under the tax laws of this state.*” ORS 305.410(1) (Emphasis added.) The remaining subparagraphs (a) through (o) of that section specify those matters excluded from Tax Court jurisdiction. Tort claims arising out of the wrongful actions of the Department of Revenue, in its administration of the Oregon tax laws, are not on the list.

The case of *Sanok v. Grimes*, 294 Or 684, 662 P2d 693 (1983) is instructive, although it involves a situation that was distinctly different than the instant case. The alleged tort feasons in *Sanok* were the Klamath County assessor and several county appraisers, and the Department of Revenue was not a named defendant. Here, the Department of Revenue is a named defendant and is the perpetrator of the alleged wrongs against Plaintiff. *Sanok* sought to establish liability based on “factual allegations that were relevant only to the tort claims and not to the tax claims.” (See: *Sanok*, Part IV, “This Plaintiff’s Claims”) In the present case, the wrongful acts relate fully to tax laws of the State of Oregon and to the administration of those laws by the Department of Revenue. In Footnote 21, the *Sanok* court stated:

“Because ‘[a]ll proceedings before the [tax] court . . . shall be tried without a jury . . . ORS 305.425(1), claims such as torts where there is a right to jury trial are not normally within the jurisdiction of the tax court.

“Since in allocating tax court jurisdiction we try to avoid ‘split jurisdiction,’ *Jarvill, supra* text at n.4, 289 Or at 167, 613 P2s 1, a *tort claim which arose out of the same facts as a tax claim* might conceivably be adjudicated together with the tax claim. . . .” (Emphasis added.)

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The *Sanok* Court, discussing “Tax-Court Jurisdiction” in Section III of the decision, cited the 1980 case of *Jarvill v. City of Eugene*, 289 Or 157, 164, 613 P2d 1, *cert. den.* 449 U.S. 1013, 101 S. Ct. 572, 66 L. Ed 2d 472, and stated:

“(5) Where jurisdiction is neither expressly included nor excluded, ORS 305.410(1) provides generally for jurisdiction over cases ‘arising under the tax laws of this state,’ a term not defined.”
* * *

“(8) Jurisdiction over a unified case should not be split between the tax court and another court. *Jarvill, supra*, 289 Or at 167, 613 P2d 1.”

Tax Court Jurisdiction over damages arising out of the tax laws is nowhere expressly excluded. The instant case is a “unified case” that “should not be split between the tax court and another court.” The Tax Court has, under the *Sanok* decision cited by Defendants, the statutory authority to decide all issues brought before it in Plaintiff’s Amended Complaint, including the tort claim for damages.

B. Jurisdiction over successive tax years affected by the Defendants’ 2011 actions:

The issue concerning future tax years was raised by the Defendant’s September 1, 2011 denial which stated that Plaintiff must pay the taxes for 2011-2012 and all years after that. Plaintiff had no other option but to contest that language in the Amended Complaint. The relief sought in Plaintiff’s Declaratory Relief action, if granted by the Court, would impact the subsequent tax years. *Fisher Broadcasting v. Department of Revenue*, 321 Or 341, 898 P2d 1333 (1995). (Whether an earlier administrative determination in tax cases should be given preclusive effect for subsequent years depends on formality of determination and other listed factors.)

C. Orders and Judgments consistent with the Court’s findings when statute has been invalidated and declared Void:

The Tax Court has the jurisdiction to decide all issues involving Oregon Tax Laws, including the

power of Judicial Review of those Department decisions and actions found to be abuses of discretion. *ADC Kentrox v. Department of Revenue*, 19 OTR 91 (2006). The Court may invalidate statutes that are unconstitutionally vague or that violate constitutional rights, and may properly issue appropriate and consistent orders.

D. Court's Authority to Request a Secretary of State Audit of Dedicated Fund at Treasury:

The statutes concerning Secretary of State audits (ORS 297.110 and 297.120) suggest that any Oregon citizen may request an audit where suspicions arise that public funds have been misused. Thus, The Court would be equally able to request an audit in the interests of justice, on the basis of credible evidence presented at trial that establishes a Breach of Fiduciary Duty.

II. RESPONSE TO MOTION TO DISMISS:

A. Allegation that Complaint Fails to State Facts Sufficient to Constitute a Claim:

Counsel asserts on Page 1 of Defendant's Motion to Dismiss that Plaintiff failed to state facts sufficient to constitute a claim, *because* Plaintiff fails to meet eligibility requirements imposed by House Bill 2543 (2011), *the very statutes that Plaintiff seeks to have declared unconstitutional and void.*

First, Defendant appears to argue that if Plaintiff does not meet the eligibility requirements that were imposed by 2011 Legislation (House Bill 2543) she has no standing to bring this action contesting the validity, constitutionality, or the improper retroactive application of 2011 statutory amendments. Next, Defendant erroneously states that Plaintiff filed a claim for deferral in 2011, for the 2011-2012 property taxes, at a time when the new statute required five years occupancy of the Homestead prior to the April 15th date of the year in which the claim was filed.

Defendant's argument that "plaintiff failed to meet the eligibility requirements imposed by House Bill 2543 (2011)" ignores the issues raised in Plaintiff's Complaint: that House Bill 2543 (2011) should not be retroactively applied to plaintiff, a previously approved tax deferral participant; and that specific sections set forth in the complaint, in House Bill 2543 (2011), should be declared unconstitutional and void.

B. Misstatement of Facts Concerning Filing Date of Plaintiff's Initial Claim For Property Tax Deferral:

Defendant's argument (Item I-A) that plaintiff filed a claim for deferral in 2011 for the 2011-2012 property tax year **is just plain wrong**. Plaintiff's one and only claim for a property tax deferral was personally delivered to the Polk County Assessor on April 15, 2008 (Ex. 2, Amended Complaint). April 15th is the last day allowed by statute for the filing of a claim in any calendar year. Annual claims, or applications for deferral, are not required of participants who have already been approved by the Department. Therefore, Plaintiff filed no claim in 2009, 2010, or 2011, because the Department determined on June 6, 2008 (Ex. 3, Amended Complaint) that she and her property were eligible, under ORS 311.670 (2007).

The Department's pamphlet "2012 Oregon Property Tax Deferral for Disabled and Senior Citizens" (Rev.12-11) provided to prospective applicants states at page 4:

"Do I need to apply for deferral each year?"

"No. You only need to apply for the deferral once. However, you will be required to recertify your eligibility every two years."

Department pamphlet "2008 Oregon Property Tax Deferral for Disabled and Senior Citizens," distributed to prospective applicants (Revised September, 2007), stated, at page 3:

“Do I need to apply for deferral each year?”

“No. You only need to apply for the deferral once, unless your spouse dies . . . Once your application is approved, the Department of Revenue will pay your 2008-2009 property taxes that are due November 15 **and all future taxes as long as you remain eligible.**” (Emphasis added.)”

ORS 311.668 (1) (a) (2007), in effect when Plaintiff applied and was approved for tax deferral, stated:

“Subject to ORS 311.670 (Property entitled to deferral), an individual . . . may elect to defer the property taxes on their homestead by filing a claim for deferral with the county assessor after January 1 and on or before April 15 of the first year in which deferral is claimed . . .”

The Recertification Application is part of the Department’s procedure to verify continuing income and asset eligibility and continued occupancy of the homestead. A Recertification Application **is not a claim** for tax deferral. The 2011 Recertification Application form is an administrative tool. In 2011 it was used to determine how many senior participants or what segment of them could be eliminated from the program to save money. Several eligibility standards were arbitrarily changed, options chosen by the legislature.

Among other changes in the Property Tax Deferral Act, buried in Section 24, subparagraph (3) of House Bill 2543 (2011), following the sections relating to property tax deferrals, where few tax deferral participants would notice, was the additional provision that:

“A claim for an initial year of deferral, or for continued deferral, under ORS 311.666 to 311.701 *may not be filed on or after April 16, 2021, and deferral may not be granted* for a property tax year beginning after July 1, 2021.” (Emphasis added.)

[House Bill 2543 (2011) apparently eliminated the entire tax deferral program as of 2021.]

The Department brochure, “2008 Oregon Property Tax Deferral for Disabled and Senior Citizens,” (September 2007), specifically advised new applicants, on page 4:

“What if I have a reverse mortgage?”

“Having a reverse mortgage does not prevent you from qualifying for the deferral program. The money you receive from the reverse mortgage is not considered ‘income’ for deferral qualification.”

Relying upon the Department’s representations, Plaintiff obtained a Reverse Mortgage in 2009.

Roughly a third of the tax deferral participants were later declared ineligible on the basis of a reverse mortgage, by denials that did not quote the new statutory prohibition. The Department’s June 2011 letter did not mention reverse mortgages. And, ORS 311.700(2) (2011) purporting to prohibit reverse mortgages is so ambiguous as to defy intelligent interpretation.

C. Validity of Written Brochures or Letters from the Department of Revenue:

Defendant contends that the Department’s written statements -- in letters or brochures -- have no validity, since only the statutes control. In reality, whatever state agencies write about rules and laws that affect citizens’ rights and responsibilities become *de facto laws*, in everyday affairs. While these writings do not constitute a part of the State’s statutory contract, the financial ability of Plaintiff and other low income elderly taxpayers to remain in their homes depends upon the accurate and lawful statements of the Department of Revenue.

ORS 306.115(1), giving general supervision authority to the Department of Revenue, states:

“The Department of Revenue shall exercise general supervision and control over the system of property taxation throughout the state. The department may do any act or give any

order to any public officer or employee that the department deems necessary in the administration of the property tax laws so that all properties are taxed or are exempted from taxation according to the statutes and Constitutions of the State of Oregon and of the United States. . . .”

D. Violating of Plaintiff’s Due Process Rights by the Department:

Justice Kenneth O’Connell said, in a specially concurring opinion in *Tupper v. Fairview Hosp. & Training*, 276 Or 657, 556 P2d 1340 (1976) that Justice Hans Linde has “strongly argued that Article I, section 10, represented a state due process clause.” The Chief Justice argued that: “Assuming without deciding that this is so, it seems clear that the two constitutional provisions are the same insofar as each would prohibit the deprivation of the interests specified in the respective federal and Oregon Constitutions without fair procedures generally associated with the term ‘Due Process.’” *Tupper, id.* at 667-68, 556 P2d at 1346 (1976. Section 10 of Article I, of the Oregon Constitution, states:

“No court shall be secret, but justice shall be administered openly and without Purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

Facts relating to Plaintiff’s claim of Violations of Due Process:

Although the property tax deferral program’s eligibility statutes did not change until September 29, 2011 (*See: Enrolled House Bill 2543*, p. 19, Section 32), the Department told participants that the tax deferral laws had changed, and proceeded to deny eligibility for thousands of existing participants on the basis of laws that did not yet exist.

Defendant argues that if Plaintiff does not meet the eligibility requirements imposed by 2011 Legislative Amendments (HB 2543), she may not now bring an action contesting the validity of House Bill 2543 (2011) or allege a violation of her Due Process rights. That assertion is based upon circular

reasoning and a distortion of the facts. Defendant has confused the “Recertification Application” form sent by the Department to twelve thousand participants and a few new applicants demanding return of completed forms by July 25, 2011, with what are the statutorily described “initial claims” for tax deferral that are filed only one time.

Plaintiff’s “Recertification Application” was filed on July 1, 2011 (Ex. 5, Amended Complaint), well in advance of the July 25 deadline set by the 2011 demand letter from Bram Ekstrand, Deferral Program Manager of the Department of Revenue. His demand for the Recertification (Ex. 5, Amended Complaint), said there had been “legislative changes” to the Tax Deferral Program, when in fact no legislative changes were yet in effect. The new legislation, House Bill 2543 (2011) did not become effective until September 29, 2011, almost a month after Ekstrand’s letter, which intentionally misled Plaintiff and thousands of other low-income taxpayers involved in the program.

The significance of these abuses of power by the Dept. is that Plaintiff’s constitutional rights to Due Process under the Fourteenth Amendment of the United States Constitution were willfully and intentionally violated by the Department of Revenue. In *Kent v. Dept. of Revenue*, 9 OTR 356 (1983), the court stated that provision of notice of proposed adjustment and *giving the taxpayer an opportunity to be heard prior to reducing taxpayer’s claim for a refund* is mandatory. The Department’s failure to provide notice and a hearing prior to denial of Plaintiff’s eligibility denied Plaintiff’s procedural due process, in violation of the Fourteenth Amendment to the United States Constitution.

E. Binding Contract Between the State and Plaintiff under ORS 311.666 – 311.701:

Defendant’s assertion that no contract exists between the State of Oregon and Plaintiff has ignored the plain language of the Senior Property Tax Deferral Act, as well as the history of

demographic changes surrounding creation of the program. The plain statutory language of the Act in 2007 reveals legislative commitment to a program that would endure for the balance of participants' lives.

Detailed promises by the state to participants in the tax deferral program represent the “terms” of a binding agreement. Legislative intent in enacting a Property Tax Deferral Program more than forty years ago is obvious from a fair reading of the entire Act. In an era of rapidly rising property values and rents, with the senior population rapidly increasing, it became evident that affordable and accessible housing for seniors was woefully inadequate in Oregon. A property tax deferral program would help low-income seniors to remain in their own homes, while alleviating the need for rental assistance with significantly higher costs for the state. For years, the Oregon property tax deferral was self-supporting. It was never a welfare program for seniors, but was a program of secured loans to senior citizens.

What are the essential elements of a contract?

1. **Agreement:** An agreement is formed when one party accepts the offer of another . . .
2. **Consideration:** Both parties must have provided consideration, i.e., each side must promise to give or do something for the other.
3. **Intention to create legal relations:** The parties must have intended their agreement to have legal consequences. . .
4. **Capacity:** The parties must be legally capable of entering into a contract.
5. **Consent:** The agreement must have been entered into freely. . . .
6. **Legality:** The purpose of the agreement must not be illegal or contrary to public policy.

“A contract which possesses all these requirements is said to be valid. The absence of an essential element will render the contract either void, voidable or unenforceable . . .”

(“Introduction To The Law of Contract” published by Law Teacher. Retrieved from <http://www.lawteacher.net/contract-law/introduction.php>, on 10-16-12.)

Clearly, all the elements of a contract exist: The statutory language of the Act in effect in 2007 and 2008 constitutes the State’s *offer* of a contractual agreement with a qualified, low-income senior citizen. The application (or initial claim) is an “*acceptance*” of the terms offered by the state, and the Department’s written approval is the state’s “*acceptance of the applicant.*” The “*consideration*” of the parties is the state’s payment of the applicant’s annual property taxes in exchange for the taxpayer’s recorded lien. The terms of the loans and the method of repayment are clear. The Act provides that the amounts of each *lien* will be calculated by the Department to cover principle, six-percent simple interest, and recording fees accrued *during the remainder of a participant’s lifetime*, or until the home was sold. The six percent return far exceeds the return on investments by the Oregon Treasurer, who currently reports a return of less than three percent on all investments (See “*Oregon Treasurer’s Annual Report,*” State of Oregon website, 2012).

All loans in the Tax Deferral Program are *secured loans*, with *liens* recorded against the participant’s home. When plaintiff’s first tax loan was made, a lien for \$132,036 was recorded against her home, far in excess of three loans that have been made. *Secured loans* are not gifts, as suggested by counsel. Where else would Government largess involve requiring a recorded security lien for over a hundred thousand dollars from the recipient?

The term “Legislative grace” used by defense counsel to describe the tax deferral program actually originated in the 1940s relative to taxpayers’ burden of proof on claimed tax deductions; it is not at all appropriate in this situation.

Defendant's comparison of the senior tax loans with Welfare Benefits is taken as an intentional insult to Plaintiff and the more than ten thousand seniors still living who applied for the tax deferral program.

Further, if the annual loans were "gifts" to seniors, then federal gift tax implications have been ignored by the state. Instead, participants were told in the Department pamphlet "2008 Oregon Property Tax Deferral for Disabled and Senior Citizens," on page 5, that:

"If you file a federal income tax return and if you itemize deductions on Schedule A, you may deduct the amount of property taxes the department pays to the county for that year. Deferred property taxes are deductible. . . .Interest on the deferred property taxes is deductible as home mortgage interest in the year the interest is paid. . . ."

And if the deferral of taxpayers' property taxes was a Gift, then the Department would not advise taxpayers to claim the annual taxes as a deduction on personal income tax returns.

F. Tests to Determine Whether a Legislative Act is a Valid Contract:

The subject matter covered by a contract is not the "test" of whether it is a contract. The Court will apply the established tests to the credible facts presented at trial, in determining whether a valid contract exists. Contracts relate to a multitude of topics, but the topic of a contract does not determine whether a contract exists.

Oregon has a long and rich history of case law to aid in the analysis of what constitutes a contract, including: *Eckles v. State of Oregon*, 306 Or 380, 760 P2d 846 (1988); *Hughes v. State of Oregon*, 314 Or 1, 838 P2d 1018 (1992), and *Strunk et al. v. PERB et al*, 388 Or____, (2005). These are the major contemporary cases that analyze Statutory Contracts that impact or involve citizens. Plaintiff relies upon these and other cases to show that a binding contract exists between the State and Plaintiff.

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In an era of economic contractions similar to the start of the current Great Recession, the *Strunk* court observed: “The fiscal status of the fund following poor investment performances in 2000, 2001, and 2002 . . . was the primary motivator of the 2003 PERS legislation. *See generally* Or Laws 2003.” The PERS contract existed for years before it was declared in 1973 to be a contract. Judges do not make laws or contracts; they interpret laws, apply laws to the facts and sometimes invalidate laws, once issues are brought to the Court. The Public Employees Retirement System was created by the Oregon legislature in 1945 (Or Laws 1945, Ch. 401), but the PERS contract was not settled until *Taylor v. Multn. Dep. Sherr. Ret. Bd.*, 265 Or 445, 450, 510 P2d 339 (1973).

Oregon’s Senior Property Tax Deferral Program was enacted in 1977, embodied in ORS 311.666 – 311.701. The version in effect in 2007 -- and in 2008 when Plaintiff filed the initial 2008 application and the State accepted it -- is the contract between Plaintiff and the State. The 2011 enactment of House Bill 2543 (2011) so significantly changed the Act that the program for this Plaintiff has been totally abolished.

But, as the *Strunk* Court said, “First it must be determined whether a contract exists.” The Court then divided that question into three component inquiries:

“(1) is there a state contract?, (2) if so, what are its terms?, and (3) what obligation do the terms provide?”

G. Distinctions Between an Impairment of Obligation of Contract and a Breach of Contract with Appropriate Damages:

In *Strunk v. PERB*, *Burt v. PERB*, *Evans v. City of Grants Pass*, *Sartain v. PERB* and *Whitty v. PERB*, 388 Or ____ (2005) the court consolidated five original jurisdiction petitions for review by the

Supreme Court and decided the case *En Banc* on March 8, 2005. The question before the Court was whether implementation of Oregon Laws 2003, sections 2 or 4, chapter 68 (Enrolled House Bill 2004) breached any contract between members of PERS and their employers, including the impairment of contract rights of PERS members under section 21, Article I of the Oregon Constitution, or clause 1, section 10 of Article I of the United States Constitution.

The *Strunk* Court explained the difference between “impairments” and breaches” of contracts:

“We note some considerations from *Eckles* and *Hughes* that guide our analysis in these cases. First, in *Eckles*, this court clarified that the contracts provision of Article 1, Section 21, prohibited the impairment of a contractual *obligation*. *Eckles*, 306 Or at 395. As to the determination whether newer legislation amounts to an impairment of a preexisting statutory contractual obligation, the court focused on whether the legislation would change or eliminate the state’s obligation under that contract. *Id.* At 399-400. By contrast, the court explained that legislation that mandated a breach on the state’s part of such contractual obligation – but did not *contravene* Article I, section 21, although in accordance with that constitutional provision, such legislation ordinarily would require payment of damages resulting from the breach. *Id.* at 400-02.”

In *Hughes v. State of Oregon*, (1992) the Court held that the Petitioners had a contract with the State to receive PERS retirement benefits free from state and local taxation as provided by former ORS 237.201 (1989) (*amended* by Or Laws 1991, ch. 823, sec. 1). The court also held that chapter 823, section 1 “impairs an obligation of that contract in violation of Article I, Section 21 of the Oregon Constitution and, therefore, is a nullity, as it relates to PERS retirement benefits accrued or accruing for work performed *before the effective date of the 1991 legislation*.” (Emphasis added.)

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Justice Van Hoomison, for the *Hughes* court, said:

“We further hold that Oregon Laws 1991, Ch. 823, section 3, breaches Petitioners’ PERS contract insofar as it subjects to state and local taxation PERS retirement benefits . . . rather than impairing any of the obligations of that contract, and therefore section 3 does not violate either the Oregon or United States Constitutions . . .”

The *Hughes* court set out a two-step process for addressing a claim of contract impairment or breach under Article I, section 21:

“First, it must be determined whether a contract exists to which the person asserting an impairment is a party; and, second, it must be determined whether a law of this state has impaired an obligation of that contract. General principles of contract law normally will govern both inquiries, even where the state is alleged to be a party to the contract at issue.”

In *Eckles v. State of Oregon*, 306 Or 380, 760 P2d 846 (1988), Plaintiffs challenged the legislature’s act which ordered surplus funds transferred from the Industrial Accident Fund (IAF) to the General Fund, to avoid a state budget deficit. An employer insured by the State Accident Fund (SAIF) sued the state, contending that the legislation had violated Article I, section 21 of the Oregon Constitution, by impairing the state’s contractual obligation (in an earlier statute) to use the funds only for workers’ compensation purposes.

The Supreme Court in *Eckles* concluded that the part of the legislation that eliminated the state’s obligation to use the surplus funds as specified in the earlier statute constituted an unconstitutional impairment of the contractual obligation. 306 Or at 399. ***The Court further concluded that legislation***

directing the transfer of funds amounted to a mandate that the state breach the contract, Id. at 400, which ordinarily would require payment of damages to SAIF employers resulting from the breach, *Id.* at 402.” (Emphasis added.)

(Case Summary by the Oregon Supreme Court, in *Strunk v. PERB*, at section III, 388 Or ____ (2005).)

In *Oregon State Police Officers’ Assn. v. State of Oregon*, 323 Or 356, 918 P2d 765 (1996), the issue was whether any part of a Ballot Measure impaired an obligation of the PERS contract with public employers in violation of the Contracts Clause of Article I, section 10 of the United States Constitution. The circuit courts held in four consolidated cases that Sections 10, 11 and 12 of Article IX violated the federal Contracts Clause. The Oregon Supreme Court agreed and declared the Sections void. Justice Van Hoomisen, writing for the majority, stated:

“The most basic purpose of the Contracts Clause, as well as the notions of fundamental fairness that transcend the clause itself, point to these simple principles: the state must keep its promises, and it may depart therefrom only for a ***significant and legitimate purpose***. *United States Trust Co.*, 431 U.S. at 26, 97 S. Ct. at 1519-20. No significant and legitimate purpose is present here. The impairment . . . is substantial. We hold that the circuit courts did not err in concluding that Section 10 violates the federal Contracts Clause.” (Emphasis added.)

In *United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977), the Plaintiff challenged a New Jersey statute that repealed a ***statutory covenant*** between New York state and New Jersey (1962) that had limited the ability of both states to subsidize rail passenger transportation. The

suit was brought as one for declaratory relief. The New Jersey Superior Court ruled that the statutory repeal was a reasonable exercise of state police power and that it was not prohibited by the Contract Clause or by its counterpart in the New Jersey constitution. Accordingly, the complaint was dismissed. The New Jersey Supreme Court Affirmed. Plaintiff appealed to the U. S. Supreme Court.

Justice Blackmun, delivering the decision for the U.S. Supreme Court, said:

“During the 12-year period between adoption of the covenant and its repeal, public perception of the importance of mass transit undoubtedly grew because of increased general concern with environment protection and energy conservation. But these concerns were not unknown in 1962 . . . We cannot say that these changes caused the covenant to have substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in light of changed circumstances. We therefore hold that the Contract Clause of the United States Constitution prohibits the retroactive repeal of the 1962 covenant.”

Chief Justice Burger concurred stating:

“In my view, to repeal the 1962 covenant without running afoul of the constitutional prohibition against the impairment of contracts, *the state must demonstrate that the impairment was essential to the achievement of an important state purpose.* . . .” (Emphasis added.)

Plaintiff is entitled to have a trial of her claims for a violation of the obligation of contracts provisions of the federal and state constitutions, and for a Breach of Contract, including damages.

H. Tax Court Power of Judicial Review and authority to Invalidate Statutes and Executive Department Actions:

In this case, the Tax Court is the trier of fact. It also has the duty to review statutes and executive actions to determine whether they are consistent with law. The law is what the Court says it

is. And, as President Bill Clinton once observed, “It depends upon what ‘is’ is.” Defendant has absurdly characterized the relief sought by Plaintiff as Orders that would require the Department to act contrary to statute. Quite the opposite is true.

The Amended Complaint and its attached exhibits show that the Department acted without statutory authority when, on September 1, 2011 it denied Plaintiff’s eligibility, purportedly because she had a reverse mortgage under a new statute, *before that statutory amendments was effective*. What Plaintiff now seeks is the Court’s Judgment that the Department’s untimely, unauthorized and improper denial of September 1, 2011 is invalid and void, thereby returning Plaintiff to active status as a property tax deferral participant. Plaintiff’s eligibility for payment of the 2011-2012 property taxes would properly remain in effect until the April 2012 denial by the Department, a period of time during which the taxes for 2011-2012 were due and payable.

The second denial (on other grounds) was issued to Plaintiff by letter dated April 30, 2012 and postmarked May 1, 2012, (Ex. 8, Amended Complaint). During the intervening seven months between denials, Plaintiff ‘s deferral account should have remained in “active status” because the Department’s September 1 action “deactivating” plaintiff’s account was not authorized by statute. The Department intentionally misled taxpayers in the program. It is within that seven month period that Plaintiff had a right to the state’s payment of the 2011-2012 taxes.

Whether or not the 2011 legislative amendments, which are also the subject of the Amended Complaint, are ultimately found to be constitutional, the Defendant is obligated to pay Plaintiff’s taxes for 2011-2012, absent a procedurally correct denial.

Instead, the Department took a shortcut around the law, hoping no one would notice the dates. The 2011 statutory amendments were not yet in effect when Bram Ekstrand, Deferral Program Manager

at the Department, sent out recertification forms to 12,000 existing participants and new applicants (*see Senior Deferral implementation status report* to the House and Senate Interim Committee Meeting, p. 2, November 17, 2011). Of the thousands of forms sent to existing participants, 1,920 elderly citizens -- or 41% of all denials -- were summarily dropped from the program (*id.*, p. 3).

By letter dated June 30, 2011 (Exhibit 5 to Amended Complaint), Mr. Ekstrand told 12,000 senior property owners, including Plaintiff, that:

“The 2011 Oregon Legislature recently made important changes to the Senior and Disabled Property Tax Deferral program. These changes may affect your program eligibility, beginning November 2011. [The recent “changes” were not yet Oregon law.]

“The changes include:

- Household income limits.
- Personal net worth limit.
- Value of your home.
- Years you’ve lived in your home.
- Proof of homeowner’s insurance.
- Two-year re-certification requirement
- Compound interest rate:
 - Current rate is 6 percent *simple* interest.
 - Beginning November 2011, the rate on deferred property taxes will be 6 percent *compound* interest.

“You must recertify for the 2011-12 tax year by July 25, 2011. . . . We’ll notify you in writing to let you know whether you qualify for the deferral program. . . .”

There was no mention in that June 30th letter of a new statute that might prohibit Reverse Mortgages.

One might ask why the Court should formally invalidate the Department’s September 1, 2011 denial, since a new denial could now be issued (on the basis of the reverse mortgage) which would be procedurally correct. Even if the September 1, 2011 denial is declared invalid as a matter of law, the Department can issue a procedurally correct Denial of plaintiff’s 2011 eligibility due to the reverse mortgage clause in the 2011 legislation. Yet, because there was no proper and valid denial in effect until

May 1, 2012, the Department had a statutory duty to pay the 2011-12 property taxes on Plaintiff's homestead in November of 2011, and it should be so ordered.

Therefore, Plaintiff urges the Judgment of this Court invalidating the improper September 1, 2011 denial, and ordering that the Department pay Plaintiff's 2011-2012 property taxes in full, consistent with applicable statutes. Although one might view the dollar amount as insignificant, to this Plaintiff that payment may well be the difference of whether she loses her home in foreclosure or not for failure to pay the 2011-2012 property taxes as specified in her mortgage contract.

The tripartite structure of Oregon's state government, with three separate branches, like the federal government, was constitutionally designed to provide a balance of power, including Judicial Review to protect citizens from abuses of power and violation of constitutional rights.

Whether the Court holds the Department to the letter of the law by finding that Denials of eligibility made without statutory authority are inconsistent with law may determine whether as a people we hope to remain a nation of law or merely a nation of men, ruled by executives operating without constraint. The Oregon Tax Court has the power to correct abuses of power by the Executive Branch and to issue orders accordingly. *See: Savage v. Munn*, 12 OTR 145 (1992) *aff'd* 317 Or 283, 856 P2d 298 (1993) (Tax Court jurisdiction under ORS 305.410 to determine validity.)

I. Is the Reverse Mortgage Issue Moot? (Because of the 2-year extension of the Effective Date of Prohibition on Reverse Mortgages Extended "solely" for Other Taxpayers):

Defendants' counsel once again argues that the issues relating to Reverse Mortgages became moot because the legislature in 2012 extended the effective date of the 2011 prohibition "*solely*" for those taxpayers who had only one ground for the denial of eligibility. House Bill 4039 enacted in

2012 specifically excluded Plaintiff from the extension. Because Defendant had issued a second denial to Plaintiff, in April of 2012 (on the basis of the new five year prior residency requirement), she was expressly excluded from the two-year extension.

The reverse mortgage prohibition (ORS 311.700(2)) has not been repealed; it has simply been postponed for others. Plaintiff contends that applying the reverse mortgage prohibition to a previously approved participant in the tax deferral program (who was specifically advised by Department pamphlets that having a reverse mortgages would have no effect on eligibility for the tax deferral program) is both unconstitutional and fundamentally unfair. Further, the statutory language purporting to prohibit reverse mortgages is so ambiguous as to defy intelligent interpretation, and should be declared void.

Plaintiff's Amended Complaint seeks an order declaring that the reverse mortgage prohibition amendment, ORS 311.700(2), is a violation of the contract clauses of both the state and federal constitutions, as an impairment of the obligation of contracts. Defendant states that there is no contract. Plaintiff also contends that ORS 311.700(2) is unconstitutionally ambiguous, and impairs the Contract between Plaintiff and the State and should be declared VOID. As long as the reverse mortgage prohibition remains on the books, the issue is **not Moot**

J. Can One Legislative Assembly Bind Successive Legislatures to earlier Commitments?

The *Strunk* Court explained:

“ . . . if certain circumstances are met, ‘one legislature may bind a succeeding legislature to a particular course of action. *Hughes v. State of Oregon*, 314 Or at 13. That proposition

is significant, in part because '[o]rdinarily it is the function of a legislature to make laws and not contracts.' *Campbell et al. v. Aldrich et al.*, 159 Or 208, 213, 79 P2d 257 (1938)."

III. MOTION TO DISMISS COMPLAINT FOR DAMAGES ON THE BASIS OF LACK OF JURISDICTION:

A. Jurisdiction over Tort Claims and Related Claims for Relief:

See Plaintiff's argument above in "Jurisdiction Issues Raised by Defendants" on pages 1-4.

B. Contention that Claim for Damages Fails to State a Claim, Because of Defendant's Allegation that No Contract Existed:

See Plaintiff's arguments above in "Response to Motion to Dismiss" in Sub-paragraphs E through G, on pages 9-17.

IV. MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT:

A. Defendant's contention that "Declaratory and injunctive relief are not appropriate:

Contrary to Defendant's contention, the issues raised by Plaintiff's complaint do not involve future events, but current conditions caused by 2011 and 2012 legislation and by the administration of Oregon's tax laws, and the resulting damages sustained by Plaintiff. Any reference in the Complaint to future consequences arising from the legislature's 2011 amendments are intended to be informational only. As to the Department's use of language denying eligibility for "all tax years after that," Plaintiff seeks only to have the Court invalidate the entire September 1, 2011 Denial.

In Plaintiff's Declaratory Relief Complaint, she seeks a judgment of the Court invalidating House Bill 2543 in its entirety, or in the alternative declaring the specific sections to which Plaintiff has objected to be unconstitutional and void. It is not Plaintiff's intention to seek orders concerning future tax years not at issue in this lawsuit.

As the *Strunk* court explained (2005), “to be justiciable, ‘[t]he controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue.’ *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P1d 1289 (1982).” There is nothing hypothetical about Plaintiff’s case.

B. Court Jurisdiction to seek an audit by the Secretary of State:

See Plaintiff’s Response in Section I, sub-paragraph D, on page 4 above.

V. DEFENDANT’S MOTION TO STRIKE AND TO AMEND:

A. Many of the Amendments to Plaintiff’s Complaint Requested by Defendant Violate the OTC Rules:

OTC Rule 16-B states that:

“Every pleading shall consist of plain and concise statements in paragraphs consecutively numbered throughout the pleading with Arabic numerals, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances and a paragraph may be referred to by number in all succeeding pleadings. Each separate claim or defense shall be separately stated. Within each count alternative theories of recovery shall be identified as separate counts.”

Plaintiff has fully complied with these requirements, except for the last sentence of the above rule, and is willing to amend her Amended Complaint to identify each “theory of recovery” as a separate count.

OTC Rule 16-C states that:

“Inconsistent claims or defenses are not objectionable, and when a party is in doubt as to which of two or more statements of fact is true, the party may allege them in the alternative. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based upon legal grounds, equitable grounds, or upon both legal and equitable grounds. . . .”

Plaintiff is willing to redraft the Amended Complaint, given enough specific direction by Defense Counsel or court staff. She is not willing, however, to omit facts and events that should be considered

by the Court, subject to the evidence presented at trial, in making an informed decision on the merits.

Defendant seeks an order of this Court requiring Plaintiff to “set forth the asserted legal basis for each claim in the body of her complaint,” despite OTC Rule 13-A which states that “Pleadings shall not be combined with or attached to briefs or memoranda.” Plaintiff believes that the appropriate time to debate the legal theories supporting Plaintiff’s claims is at trial and in Trial Briefs presented to the Court and to Counsel at the Trial.

B. Amended Complaint contains a Sequence of Independent Theories of Recovery In Separate Independent Paragraphs:

What may appear at first reading to be repetitions in the Amended Complaint are, instead, a sequence of independent theories of recovery, sometimes seeking different remedies, in independent paragraphs. Paragraphs 12 through 41 are *not* repeats. While not drafted as artfully as an attorney might do, Plaintiff believes her approach was consistent with OTC Rule 16-C.

Lastly, OTC Rule 12-A and B state:

“All pleadings shall be liberally construed with a view of substantial justice” and that the court will “disregard any error, defect, or omission in the pleadings which do not affect the substantial right of the adverse party.”

Plaintiff objects to Defendant’s technical criticisms in light of Plaintiff’s lack of legal expertise in constructing Oregon pleadings. Plaintiff has attempted to systematically cover a complex set of interlocking events, facts and circumstances, changing laws, state and federal constitutions, and various Department violations of Due Process rights. Admittedly, Plaintiff had to go back and outline her own Amended Complaint to be sure that no repetition or omission, had occurred.

Plaintiff has accumulated boxes and dozens of files containing information in her den, and has sorted through those boxes of reports, notes, statutes, Legislative Bills, agency publications, treatises, news articles, Oregon Supreme Court decisions, and Attorney General Opinions. Without access to bound volumes of authorities and statutes, Plaintiff has relied on the Internet for most of the information. Plaintiff is concerned that the Defendant's present demands for more revisions may be intended to make Plaintiff's task simply too difficult to complete.

Plaintiff respectfully requests that the Court disregard any error, defect, or omission in her pleadings which do not affect the substantial rights of the Defendant.

DATED this _____ day of October, 2012

Respectfully submitted,

Dona L. Klinger, Plaintiff
In Propria Persona

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