SECOND DIVISION
ANDREWS, P. J.,
MCFADDEN and RAY, JJ.

March 30, 2015

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A14A1557. GOLD et al. v. DEKALB COUNTY SCHOOL DISTRICT et al.

RAY, Judge.

Retired DeKalb County schoolteachers Elaine Ann Gold and Amy Jacobson Shaye appeal from a trial court's order denying their motion for class certification in an action stemming from the DeKalb County School District's 2009 suspension of contributions to a Tax Sheltered Annuity Plan established decades ago as an alternative to the federal Social Security system. For the reasons that follow, we affirm the trial court.

"Plaintiffs have the burden of establishing their right to class certification, and we review the trial court's decision in certifying or refusing to certify a class action for an abuse of discretion." (Citation omitted.) *Rite Aid of Ga., Inc. v. Peacock*, 315

Ga. App. 573, 573 (726 SE2d 577) (2012). Accord *American Debt Foundation, Inc. v. Hodzic*, 312 Ga. App. 806, 808 (720 SE2d 283) (2011) (conclusions of law are reviewed for abuse of discretion). In an appeal from the denial of certification, so long as the trial court's factual findings are not clearly erroneous, this Court must accept them. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 503 (4) (556 SE2d 114) (2001).

In May 1979, the DeKalb County Board of Education (the "Board") passed a resolution (the "1979 Resolution") stating that it intended to withdraw from participation in the federal Social Security System to pursue an alternative employee-benefits plan. Instead, the Board stated that it would budget the same amount required to fund Social Security for retirement contributions through a replacement program, and that the Board would give a two-year notice to the employees before reducing or terminating these funding provisions. The record shows two other, later, Board policies providing for the same two-year notice, the 1982 "Alternative Plan to Social Security" (the "1982 Alternative Plan") and another policy adopted in 2000 (the "2000 Policy").

In 1983, the Board adopted a Tax Sheltered Annuity Plan (the "1983 TSA Plan") establishing and providing retirement benefits in lieu of Social Security. The

1983 TSA Plan's amendment provision provided that "[t]his Plan may be amended or terminated by the Employer at any time. No amendment or termination of the Plan shall reduce or impair the rights of any Participant or his Beneficiary which have already accrued. All Participants shall be treated in the same manner." This plan did not reference the 1979 Resolution or the 1982 Alternative Plan, nor did it discuss notice.

In 1997, the Board adopted a policy addressing its ability to act inconsistently with its own policies ("1997 Policy"), providing that

> [a]ny action of the Board in apparent conflict with provisions of these policies shall constitute a suspension of the operation and effect of that conflicting policy to the extent and for such time as may be required by the action taken by the Board. However, such actions shall not otherwise constitute an amendment of these polices.

The 1983 TSA Plan has been amended several times. Those amendments are silent on the issue of notice. A 2003 amendment provided that "[t]he Employer retains the right, in its sole discretion, to amend or terminate the Plan at any time. No amendment or termination of the Plan shall reduce or impair the rights of any Participant or Beneficiary that have already accrued."

In July 2009, then-Governor Sonny Perdue announced a 3 percent funding cut for all Georgia school districts, with an estimated $16 million to $20 million impact on the DeKalb County School System. The Board recommended a "temporary suspension" of contributions to the TSA Plan, from August 2009 to June 2010, in order to preserve the level of instruction and to retain employees' rate of take-home pay. The Board then issued its 2009 Amendment which indicated that the School District would not make TSA Plan retirement contributions for employees who also participated in two other retirement plans, the Teachers Retirement System of Georgia ("TRS") or the Employees Retirement System of Georgia ("ERS"), in payroll periods beginning after July 31, 2009. On July 27, 2009, the School District then issued an interoffice memorandum addressed to "All DeKalb Employees" notifying them that contributions to the TSA Plan were suspended. Employees also may have received notice through monthly meetings, employee forums, a "Newsflash" sent to employees' e-mail accounts, and from TSA Plan account statements.

The minutes of a DeKalb County Board of Education business meeting held May 10, 2010, the month before TSA contributions were supposed to resume, record that there were proposed revisions to the Board policy dealing with the withholding of funds. The minutes show that then-Board member

> [Jim] Redovian stated that the Board of Education approved the temporary suspension of the Board's Tax Shelter Annuity Plan (TSA) in August 2009. After reviewing the Board's policy on withholding funds, it was determined that the Board *violated its own policy* and now need[s] to correct that action. He went on to say that the current policy states that the Board must provide a two (2) year notice of suspension to all employees before reducing the funding provision of the Alternative Plan to Social Security. Mr. Redovian stated that the policy amendment would eliminate the two (2) year notice. He also stated that the Board is working with the staff to identify funds to correct the error of suspension during the 2009-2010 fiscal year.

(Emphasis supplied.) The School District did not restart contributions as promised in June 2010, and in March 2011, Gold and Shaye sued, raising class action claims including breach of contract, implied covenant of good faith and fair dealing, conversion, and unjust enrichment. In that case, *DeKalb County School District v. Gold*, 318 Ga. App. 633 (734 SE2d 466) (2012) (*Gold I*), we found that all claims except breach of contract and implied covenant of good faith and fair dealing should have been dismissed on sovereign immunity grounds. Id. at 635-641 (1) and 642-645 (2). We also determined that Gold "could possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of relief for breach of a

written contract," such that the trial court did not err in refusing to dismiss those claims. Id. at 645 (2).

In 2013, Gold and Shaye moved for class certification, defining the class as

> All Participants (or their lawfully-designated Beneficiaries) in the De[K]alb County Board of Education TSA Plan who were hired and became actively employed prior to July 30, 2009 and remained actively employed for at least one payroll period after July 30, 2009, and did not receive further contributions to their TSA Plans as a result of the 2009 "suspension" of contributions to the TSA Plan.

The trial court, for reasons that will be discussed more fully below, found that Gold and Shaye had failed to meet the requirements of OCGA § 9-11-23 (a) and (b) (3), and denied certification. Gold and Shaye appealed.

To obtain class certification, the plaintiffs are required to satisfy all four pre-requisites set forth in OCGA § 9-11-23 (a). Further, the plaintiffs here must meet the suitability requirements of OCGA § 9-11-23 (b) (3). OCGA § 9-11-23 provides:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1)The class is so *numerous* that joinder of all members is impracticable; (2)There are questions of law or fact *common* to the class; (3)The claims or defenses of the representative parties are *typical* of the claims or defenses of the class; and (4) The

> representative parties will *fairly and adequately protect the interests* of the class.

(Emphasis supplied.) The failure of any one of the OCGA § 9-11-23 factors is sufficient to defeat class certification. *Diallo v. American InterContinental Univ., Inc*., 301 Ga. App. 299, 306 (3) (687 SE2d 278) (2009). "When necessary, we look to federal as well as Georgia case law for guidance concerning the propriety of a class certification." (Citation omitted.) *Rite Aid*, supra at 574 (1). We recognize that, at times, the trial court's necessarily rigorous analysis required to determine whether a class should be certified "will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, __ U. S.__ (131 S.Ct. 2541, 2551 (II) (A), 180 LEd2d 374) (2011).

1. *Numerosity*. The trial court, noting that the School District "do[es] not dispute that the putative class of thousands of employees satisfies the numerosity requirement for class certification[,]" determined that the plaintiffs had met OCGA § 9-11-23 (a) (1)'s numerosity mandate. As this issue has not been appealed, the trial court's conclusion as to this issue stands.

2. *Commonality and Typicality*. As the United States Supreme Court has recognized,

> the commonality and typicality requirements of Rule 23 (a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

(Citations and punctuation omitted.) *Dukes*, supra at 2551 (II) (A), n. 5. "To be typical, a class representative must possess the same interest and suffer the same injury as the class members." (Punctuation and footnote omitted.) *Deal v. Miller*, 321 Ga. App. 220, 226 (1) (a) (ii) (739 SE2d 487) (2013) (physical precedent only), affirmed *Miller v. Deal*, 295 Ga. 504 (761 SE2d 274) (2014). Further, "any competently crafted class complaint literally raises common questions. . . . Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." (Citations and punctuation omitted.) *Dukes*, supra at 2551 (II) (A). Moreover, class members' claims must turn on a common contention that "is capable of classwide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id.

(a) *Contract Issues*. The trial court determined that the plaintiffs lacked commonality because some were at-will employees, while others had annual employment contracts that provided for the School District to reduce their salary if there were a budget shortfall. The trial court also found that not all class members with contracts were employed under the same contract, and that the plaintiffs failed to establish that the various agreements could be interpreted uniformly among the class.

The named plaintiffs pose common questions and contentions, including whether the 1979 Resolution establishing the two-year notice requirement and/or other Board policies became part of the contract of employment and a part of compensation for services; whether the School District breached a legal duty by failing to give the class two years' advance notice before reducing or terminating TSA funding; and the contention that each class member's claim stems from the School District's discontinuation of TSA contributions in 2009.

On appeal, the plaintiffs posit that the trial court made a legal error because "[n]o individual contract establishes a class member's right to TSA contributions. Instead, those rights are governed by legislative act . . . [and] the Board's legislative acts apply to all class members in the same way[.]" The "legislative acts" to which

plaintiffs refer potentially include the establishment of the retirement plan itself, the 1979 Resolution and like documents, and the 1997 Policy allowing the Board to act inconsistently with its prior actions. The plaintiffs' argument turns on the proposition, thoroughly and adeptly outlined in *Gold I*, that "the legislative acts of the Board establishing a retirement plan for the School District employees *may* become part of the employees' contract of employment." (Emphasis supplied.) *Gold I*, supra at 644 (2). As this Court found in *Gold I*,

> If there are apparent inconsistencies between the specific-notice requirement of the 1979 Resolution, stated Board policies, and the amendment provision of the TSA Plan, a court is required under the rules of contract interpretation to attempt to give meaning to all provisions of the contract and look to the whole contract in arriving at the construction of any part. And in the case sub judice, we cannot say, for purposes of the motion to dismiss, that the specific-notice provisions of the 1979 Resolution would, upon consideration of the entire contract of employment, yield to the amendment provisions of the TSA Plan. Accordingly, we find that Gold and the members of the class *could possibly introduce evidence within the framework of the complaint* sufficient to warrant a grant of relief for breach of a written contract.

(Footnotes and punctuation omitted; emphasis supplied.) Id. at 644-645 (2).

However, the trial court did not analyze the issue before it in light of the possibility that the various Board policies and resolutions could be legislative acts that governed the relationship between the School District and the entire putative class, rather than individual contracts or at-will provisions. Instead, it focused on the issue of contract employees versus at-will employees.

> Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court *can and should* consider the merits of the case *to the degree necessary* to determine whether the requirements of Rule 23 will be satisfied. It is inescapable that in some cases there will be overlap between the demands of Rule 23 (a) and (b) and the question of whether a plaintiff can succeed on the merits.

(Citations and punctuation omitted; emphasis supplied.) *Babineau v. Federal Express Corp*., 576 F.3d 1183, 1190 (III) (11th Cir. 2009). Accord *Diallo*, supra at 301 (1), n. 9 (the "trial court may consider the merits of the action sought to be certified to the degree necessary to determine whether the requirements of OCGA § 9-11-23 are satisfied") (citations and punctuation omitted.)

In this instance, we believe that a consideration of whether the various Board resolutions and policies and the retirement plan itself are legislative acts functioning, essentially, as contracts, could have been a merits analysis legitimately within "the

degree necessary to determine whether the requirements of Rule 23 will be satisfied[.]" (Citation and punctuation omitted.) *Babineau*, supra. However, it is true that in determining the propriety of a class action, "the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the requirements of OCGA § 9-11-23 (a) have been met." (Citation and punctuation omitted.) *Rite Aid*, supra at 574 (1). The trial court conducted such an analysis; thus, we cannot say that the trial court abused its discretion in its choice of analysis. Further, whether individual issues predominate over common issues remains a matter within the sound discretion of the trial court. *Griffin Indus., Inc. v. Green*, 297 Ga. App. 354, 355-356 (2) (677 SE2d 310) (2009) (physical precedent only).[1]

Referring to the trial court's analysis, as it stands, of the potential differences between contract and at-will employees, the plaintiffs argue that the trial court should have created two subclasses – one with annual contracts, and one without. However, although a court may sua sponte designate subclasses, it is not obligated to do so; the

[1] We find no case law where an appellate court reverses a trial court's decision on the basis that the lower court abused its discretion in failing to consider the merits to "the degree necessary" to determine whether the requirements of Rule 23 will be satisfied, nor do the plaintiffs point to any such decisions.

burden was on the plaintiffs to request subclasses below. See *U. S. Parole Commission v. Geraghty*, 445 U. S. 388, 407-408 (V) (100 S.Ct. 1202, 63 LEd2d 479) (1980) (court has no obligation to certify subclasses sua sponte).

(b) *Notice*. The trial court also found no commonality or typicality because the plaintiffs' "common contention" – that the School District breached its own two-year notice policy – would require the court to make individualized determinations regarding notice of the suspension of contributions. The trial court reasoned that the timing and methods of the notice mattered because, although the disputed provisions provided for two years' notice, plaintiffs requested five years of damages (from 2009 to 2013), requiring individual inquiry into when, whether, and how class members got notice of the suspension in order to calculate damages during the relevant time period.

The plaintiffs argue for two different notice periods. The first would run from the alleged breach in August 2009 until August 2011, because they received only five days' notice of the contribution suspensions and a promise that contributions would restart in June 2010. Because the contributions were not restarted as promised in June 2010, plaintiffs contend that there should be a second notice period running from August 2011 to the present given that there was no notice whatsoever of a permanent

cessation of contributions. Essentially, the plaintiffs appear to be seeking damages for two different breaches, as outlined above.

First, the School District has admitted that it failed to provide two years' notice and that a Board member stated that the Board "violated its own policy." Thus, for the proposed initial period of August 2009 to August 2011, we find no need for individual determinations as to the timing or content of the notice, and no bar to commonality or typicality on this issue. Here, common issues of fact and law predominate, as the School District's admitted failure to provide notice may have a direct impact on each class member's effort to establish liability and entitlement to relief. See *Deal*, supra at 223 (1) (a) (i). Also, "[t]he typicality requirement . . . is satisfied upon a showing that the defendant committed the same unlawful acts in the same method against an entire class." (Citation, punctuation, and footnote omitted.) *Liberty Lending Svcs. v. Canada*, 293 Ga. App. 731, 738 (1) (b) (668 SE2d 3) (2008). However, this finding does not mandate reversal, as the plaintiffs must meet all the criteria of OCGA § 9-11-23 (a), and this they have not done, as we discuss further in this opinion.

3. *Adequacy*. The trial court determined that the plaintiffs had failed to meet their burden of showing adequacy because the "Lead Plaintiffs' interests appear to conflict with other School District employees' interests regarding the desired relief[.]"

"The important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class." (Citation, footnote, and punctuation omitted.) Id. at 739 (1) (c). Here, there is no question raised as to the experience or competence of class counsel. The trial court reasoned, rather, that in order to pay the damages plaintiffs seek, the School District or the county might have to resort to furloughs, pay cuts, and layoffs, which could be opposed by current school employees but supported by retirees; increase property taxes, which could be unpopular with workers who lived in DeKalb County but desireable for class members living in other counties; and cut school programs and services, which might be opposed by class members with children in the DeKalb school system, yet favored by those without children in the system. The trial court appeared to base its reasoning primarily on an affidavit from someone who stated that as a current School District employee, DeKalb resident, and parent of children in the school system, she would be "concerned" about potential furloughs, millage rate increases, and cuts to school programs.

While it is true that intraclass conflicts may negate adequacy under OCGA § 9-11-23 (a) (4), such conflicts "must not be speculative[.]" (Citations omitted.) *Allen v. Holiday Universal*, 249 F.R.D. 166, 181 (II) (D) (1) (a) (E.D. Pa. 2008) (hypothetical conflict between former health club members who wanted to recover only money in suit against club and current members who might wish to maintain their memberships did not defeat adequacy). See also *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (III) (A) (4th Cir. 2010) (finding adequacy despite a "conflict [that] rests on the uncertain prediction that this lawsuit will cause [insurance] premiums to increase enough to adversely affect some members of the class"). Based on the record, at this stage of the litigation, any conflict between putative class members appears merely speculative.

The cases cited by the trial court and the School District do not demand a different result. See, e. g., *Jones v. Douglas County*, 262 Ga. 317, 324 (2) (418 SE2d 19) (1992) (finding no adequacy where plaintiffs sought declaratory relief invalidating all street light tax districts where a "significant percentage" of such districts had "originated by petition of lot owners" who were putative class members and who presumably would oppose the invalidation of districts they helped establish); *Broussard v. Meineke Discount Muffler Shops, Inc*., 155 F.3d 331, 338-339 (II) (A)

(4th Cir. 1998) (holding that current franchisees who had an interest in the continued viability of the franchisor had an inherent conflict with former franchisees whose only interest was in the maximization of damages in the context of a class with *no opt-out rights*).

In the instant case, plaintiffs do have opt out rights and may choose to leave the class, should it be certified, if they do not wish to pursue the damages sought.

> [S]hould any fundamental conflict arise, a ready mechanism exists to protect [the class] – the opt-out provision. The opt-out provision in Rule 23 (c) (2) (B) is an important method for determining whether alleged conflicts are real or speculative. It avoids class certification denial for conflicts that are merely conjectural and, if conflicts do exist, resolves them by allowing dissident class members to exclude themselves from the action.

(Citation and punctuation omitted; emphasis omitted.) *Natchitoches Parish Hospital Svc. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D. 253, 268 (III) (B) (4) (ii) (D. Mass. 2008).

4. *OCGA § 9-11-23 (b) (3) Factors*. In addition to the OCGA § 9-11-23 (a) factors of numerosity, commonality, typicality, and adequacy outlined above, a putative class must also satisfy at least one of the factors discussed in OCGA § 9-11-23 (b). The lead plaintiffs propose OCGA § 9-11-23 (b) (3), which provides in pertinent part that

> An action may be maintained as a class action if the prerequisites of subsection (a) of this Code section are satisfied, and, in addition: . . . (3) The court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy.

(Emphasis supplied.) Under Rule 23 (b) (3), an action may be maintained only if "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, __ U. S. __ (133 S.Ct. 1426, 1433 (III), 185 LE2d 515) (2013).

(a) *Predominance*. We begin with an analysis of the trial court's determination that the lead plaintiffs did not satisfy the predominance portion of OCGA § 9-11-23 (b) (3). We note that the predominance element is "even more demanding" than Rule 23 (a)'s commonality requirement because Rule 23 (b) (3) "as an adventuresome innovation, is designed for situations in which class-action treatment is not clearly called for." (Citations and punctuation omitted.) *Comcast*, supra at 1432 (II).

> Before claims can be certified for class adjudication under Rule 23 (b) (3), the plaintiff must show, among other things, that there are questions of law and fact common to the class members which predominate over any individual questions. Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and

> monetary relief. Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23 (b) (3).

(Citations, punctuation, and footnote omitted.) *Rollins, Inc. v. Warren*, 288 Ga. App. 184, 186-187 (1) (653 SE2d 794) (2007).

The trial court determined that the lead plaintiffs' request for damages required individual calculations and thus failed to satisfy the predominance requirement. The lead plaintiffs seek contractual damages on behalf of each class member, including "unlawfully halted contributions [and] lost investment income[.]"

The trial court, relying on, inter alia, testimony from the School District's chief financial officer, found that a calculation of lost investment income would necessarily have to be individualized. The trial court noted that investment income calculations would require individual analysis because each member chose his or her own funds; each fund choice would have different financial gains or losses depending on its performance, the amount invested, and the timing of the investments; and there would have to be an individualized determination of whether class members had transferred their TSA investment accounts.

Here, however, the plaintiffs have not presented a methodology for calculating damages that would account for the above-listed variables on a classwide rather than individual basis, nor have they presented evidence from the company that managed or manages employees' investments as to what information is available and what calculations can be made, or from an expert or any other witness regarding a damages calculation or any mathematical formulae. Although the plaintiffs do provide some guidelines in their appellate brief, these were not addressed below. The plaintiffs only told the trial court that "total damages from lost investment income can be calculated using expert actuaries by reference to the known performance of the investment funds" and that "[o]nce lost funding is established, total damages from lost investment income can be calculated using known, historical performance of investment funds" using an "Excel spreadsheet."

It is true that "minor variations in amount of damages do not destroy a class when the legal issues are common." (Punctuation and footnote omitted.) *Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 325 (3) (683 SE2d 4) (2009). However, the amount of damages does not stand alone and turns on the provision of a methodology or formula for calculating those damages. The plaintiffs have not yet met their burden on this point. Id. at 319.

> [I]n assessing whether to certify a class, the [c]ourt's inquiry is limited to whether or not the proposed methods for computing [investment income] damages are so insubstantial as to amount to no method at all. Plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis. Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification.

(Footnote omitted.) Id. at 325 (3). Here, no methodology, formula, or "easy" mechanical method was presented. As the trial court found, the calculation of investment income or loss during the period where the School District made no contributions also would necessitate individual determinations as to the alternative investment returns that would have occurred if contributions continued. See *Turner v. Talbert*, 2009 WL 2356662, *2-*4 (M. D. La. 2009) (where employee contributions to defined-contribution plan were "frozen"and not transmitted to the plan, court found class certification inappropriate because, inter alia, determining alternate investment returns if the plan had been unfrozen would require individualized calculations). Although our determination might have been different had plaintiffs asked for the

legal rate of interest or presented a methodology capable of classwide calculation,[2] as the record stands now,[3] "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast Corp.*, supra at 1433 (III). We cannot say that the trial court abused its discretion, see *Griffin Indus*., supra.

(b) *Superiority*. Superiority pursuant to OCGA § 9-11-23 (b) (3) requires a showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." A superiority analysis and its efficiency component is "intertwined" with a predominance analysis – when common issues of law or fact are lacking, as in our analysis of investment income in Division 4 (a), above, "class treatment would be either singularly inefficient . . . or unjust." *Jackson v. Motel 6 Multipurpose, Inc*., 130 F.3d 999, 1006 (II) (A), n. 12 (11th Cir. 1997).

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[2] Indeed, the School District acknowledges that it maintains payroll information, including the dates employees were hired, and that if an award were made, it likely could determine how the lost retirement contributions would have been contributed to each of the participants.

[3] Of course, we cannot say that if such alterations were later accomplished, they would necessarily result in certification. See *McEwen v. Digitran Systems, Inc.*, 160 F.R.D. 631, 636 (D. Utah, 1994) (Rule 23 (c) specifically provides for the alteration or amendment of an initial determination regarding class certification prior to a decision on the merits). However, the trial court could have determined that simply calculating the amount of lost TSA retirement *contributions* from the School District – a set percentage of salary, either 6.1 percent or 5.0 percent, depending on the employee – could be susceptible of classwide calculation.

As the named plaintiffs have not satisfied all the requirements of OCGA § 9-11-23 (a) and (b) (3), the trial court did not err in refusing to certify the class.

Judgment affirmed. Phipps, C. J., and McFadden, J., concur specially.

A14A1557. GOLD et al. v. DEKALB COUNTY SCHOOL DISTRICT et al.

MCFADDEN, Judge, concurring specially.

I concur fully but reluctantly. If ever there was a question that ought to be resolved once and for all, it is whether this school district shortchanged these teachers unlawfully. I agree however that the trial court was authorized, as to the three points on which the majority bases its decision to affirm him, to hold that the plaintiffs failed to meet the exacting standards for class certification. I write separately to emphasize that the dialectical process of appeal has narrowed down to three the many objections raised below to certification and that on remand the plaintiffs will have an opportunity to revisit those issues in light of our opinion. Both the majority and I

> contemplate[] the possibility that the plaintiffs here could still . . . establish the existence of a sustainable class. See OCGA § 9-11-23 (c) (1), (d) (both subsections giving trial courts the authority, prior to a decision on the merits, to alter or amend orders regarding class certification or case management); see also *Fuller v. Heartwood 11*, 301 Ga. App. 309 (687 SE2d 287) (2009) (noting absence of fixed deadline in statute or court rules by which class must be certified).

Georgia-Pacific Consumer Products v. Ratner, 295 Ga. 524, 535 (3) (762 SE2d 419) (2014) (Hunstein, J., dissenting).

As to typicality and commonality I agree that there are distinctions among the plaintiffs regarding the two-year notice period. There is no such distinction as to the overlapping two-year periods beginning in August 2009, when the district stopped making contributions, and beginning in June 2010, when the district broke a promise to resume payments. But as to the plaintiffs who contend that their first paycheck in 2010 reflecting that broken promise did not provide notice, there are distinctions regarding various subsequent incidents that arguably did provide notice.

Also as to typicality and commonality, I agree that the district's contention that authority for its challenged conduct is implicit in certain contract language creates a distinction between those plaintiffs with written employment contracts and those without written contracts.

As the majority notes, those issues might be resolved by creating subclasses. See *DL v. District of Columbia*, 713 F3d 120, 129 (II) (D.C. Cir. 2013) ("[R]emand is appropriate so the district court can determine whether subclasses would meet the requirements of Rule 23(a) commonality. . . ."). They also might be resolved by a closer examination of the merits. *Comcast Corp. v. Behrend*, __ U. S. __, __ (III) (A)

(133 SCt 1426, 1433, 185 LE2d 515) (2013) (a determination of whether Rule 23 is satisfied may "require[] inquiry into the merits of the claim."). (As to the contracts, the district did, after all, enjoy a superior bargaining position and did draft them.)

As to preponderance, I agree that the present record supports the trial court's determination that a calculation of lost investment income would be unduly complex. On remand that issue might be addressed by a restructuring of the claim, OCGA § 9-11-15 (a), or by reinforcement of the supporting evidence, *Georgia-Pacific*, 295 Ga. at 535 (3) (Hunstein, J., dissenting), or by bifurcation of the issues of liability and damages. See *Johnson v. Nextel Communications*, 2015 U.S. App. LEXIS 3470, *48 (V) n. 23 (2d Cir. Mar. 4, 2015) ("[I]f damages were the only issue requiring individualized treatment, then bifurcation from classwide liability issues might well provide an expeditious way to conduct the litigation."). "It thus remains to be seen whether this case will move forward as a class action." *Georgia-Pacific*, 295 Ga. at 535 (3) (Hunstein, J., dissenting).

I am authorized to state that Phipps, C. J., joins in this special concurrence.