

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>Court Address: 1437 Bannock Street Denver, Colorado 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case No. 2010 CV 1589</p> <p>Division/Courtroom: 6 Judge Robert S. Hyatt</p>
<p>Plaintiffs: GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROU, on behalf of Themselves and those similarly situated</p> <p style="text-align: center;">v.</p> <p>Defendants: STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR BILL RITTER, MARK J. ANDERSON and SARA R. ALT, in their official capacities only.</p>	
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<p>PERA DEFENDANTS' MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT</p>	

Defendants, Colorado Public Employees' Retirement Association ("PERA"), Mark J. Anderson, and Sara R. Alt (jointly the "PERA Defendants"), respectfully request an extension of time to respond to Plaintiffs' Motion for Partial Summary Judgment.

Certification of Conference with Counsel

Pursuant to C.R.C.P. 121, § 1-15(8), counsel for the PERA Defendants consulted with Plaintiffs' counsel and requested that Plaintiffs agree to have the Court set a briefing schedule at the case management conference, which the parties have requested. The PERA Defendants also intend to file a motion for summary judgment and believe a coordinated briefing schedule directed by the Court would be most efficient. Plaintiffs would not agree to this proposal, but are willing to agree to an extension to January 10, 2011 and oppose any later date.

1. A case management order has not yet been entered by the Court. On December 6, 2010, Plaintiffs filed a motion to enter a disputed CMO. Defendants will respond to that motion. One of the issues in dispute in the CMO is Defendants' response date to Plaintiffs' summary judgment motion and the other issue is Plaintiffs' request for a stay of merits discovery.

2. Plaintiffs chose to file a summary judgment motion before disclosures were due, before discovery could begin, and before a case management conference had been scheduled. This decision, combined with their objection to allowing Defendants adequate time to respond to their motion, and while they simultaneously seek to stay merits discovery, seems to be part of Plaintiffs' overall strategy to have ultimate control as to how this case moves forward. Defendants request the opportunity to address these related matters at the case management conference so that the Court may determine a coordinated and efficient process that addresses these interrelated matters.

3. This Court's trial management order states that motions for summary judgment shall be filed no later than 75 days prior to trial. As trial has been set in this case for February 6, 2012, the deadline to file summary judgment motions is thus November 23, 2011, with responses and reply briefs due thereafter. Nonetheless, on November 23, 2010, Plaintiffs filed a Motion for Partial Summary Judgment as to liability on their claim for violation of the Contract Clause of the Colorado Constitution (Count I). Under C.R.C.P. 121(1-15), the PERA Defendants' response to Plaintiffs' motion for summary judgment is presently due on December 13, 2010. Though nothing in the Colorado Rules of Civil Procedure prevents the premature filing of a summary judgment motion, Defendants should be afforded adequate time to respond—particularly to a motion that Plaintiffs claim will effectively resolve this case in either Plaintiffs' or Defendants' favor.

4. The PERA Defendants' request that the Court enter a briefing schedule at the case management conference is inextricably tied to the substantive argument that forms the basis of Plaintiffs' summary judgment motion. In short, Plaintiffs' rely on two Colorado Supreme Court decisions from 1959 and 1961 and claim that: (1) regardless of economic realities, including bankrupting the PERA pension system, the Colorado Contracts Clause is an absolute bar to the General Assembly's ability to modify any type of pension benefit, including a cost of living adjustment; and (2) Colorado courts reject federal Contract Clause jurisprudence and federal (and nationwide) law that considers economic and actuarial realities and thus a "reasonable and necessary" test is irrelevant. Pls.' Mot. for Modified CMO at 2-3.

5. Plaintiffs are mistaken. Colorado follows the same "reasonable and necessary" test as federal courts in judging the constitutionality of legislative acts under the Colorado Contract Clause. See *In re DeWitt*, 54 P.3d 849, 853 (Colo. 2002) (applying federal law to

Colorado Contracts Clause dispute and ruling that “a court should uphold a challenged statute if it is reasonable and appropriately serves a significant and legitimate public purpose when considered against the severity of the contractual impairment”). Under Colorado law as expressed in *DeWitt*, *McPhail*, *Bills*, and federal authority, economic realities, and thus actuarial analysis, is relevant. To properly respond to Plaintiffs’ summary judgment motion, PERA must brief the proper legal test and present material facts showing that Senate Bill 10-001 complies with the Colorado and federal Contract Clauses because:

- (a) Plaintiffs had no contractual right to an unchangeable cost of living adjustment for the rest of their lives;
- (b) Senate Bill 10-001’s changes to the COLA were foreseeable based on the numerous prior changes to the calculation and consistent with the parties reasonable expectation as to the COLA; and
- (c) Even if Senate Bill 10-001 substantially impaired a contract right, it was constitutional because the modification was reasonable and necessary to address the legitimate public purpose of salvaging the financial health of the PERA system.

The *Dewitt* test and Plaintiffs’ motion thus require consideration of actuarial and other material facts, including that Plaintiffs have no lifetime right to the COLA formula in place at their retirement and evidence demonstrating the reasonableness of the General Assembly’s decisions.

6. Though the Court need not, and should not, prejudge the merits of Plaintiffs’ or Defendants’ arguments without the benefit of full briefing, Defendants should be provided adequate time respond to Plaintiffs’ motion. Because the law and arguments necessary to respond to Plaintiffs’ motion are the same to support summary judgment in PERA’s favor, in addition to responding to Plaintiffs’ motion, the PERA Defendants anticipate simultaneously filing a motion for summary judgment on Plaintiffs’ Colorado Contract Clause and federal

Contracts Clause claims, and all other claims for relief. To adequately respond to Plaintiffs' premature filing and brief its own motion, PERA will need adequate time to draft the significant legal argument and gather the actuarial and other evidentiary support for the undisputed material facts—particularly because this case is in its beginning stages with initial disclosures not being exchanged until December 17, 2010.

7. As this Court is aware, over Defendants' objection, Plaintiffs requested and received a trial date in 2012. Despite receiving much of the additional time they desired, Plaintiffs, in their proposed CMO, unreasonably requested a December 22, 2010 deadline for Defendants to respond to what they characterize as the dispositive motion in this case. Plaintiffs now propose a January 10, 2011 deadline.

8. Finally, even ignoring the nature and scope of Plaintiffs' motion and PERA's required response, Plaintiffs' January 10, 2011 proposed deadline is untenable because both Mr. Reilly and Mr. Fisher will be out of the office on vacation from mid-December to the end of the month. The timing of Plaintiffs' filing of their motion (two days prior to Thanksgiving) also conflicted with a Colorado Supreme Court answer brief in another matter, which is due on December 13th, and has impacted PERA counsel's ability to immediately address Plaintiffs' motion after its filing on November 23rd.

9. A suggested form of Order has been filed with this Motion for the Court's convenience.

WHEREFORE, the PERA Defendants respectfully request that the Court enter an order granting an extension of time in which to respond to Plaintiffs' Motion for Partial Summary Judgment and to set a briefing schedule on Plaintiffs' motion, as well as the PERA Defendants' forthcoming motion for summary judgment, at the case management conference.

Respectfully submitted this 13th day of December, 2010.

s/ Eric Fisher

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2010, a true and accurate copy of the foregoing PERA Defendants' Motion for Extension of Time to Respond to Plaintiffs' Motion for Partial Summary Judgment was served via Lexis-Nexis File & Serve on the following individuals:

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