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Plaintiff(s): GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROU, on behalf of themselves and those similarly situated,

v.

Defendant(s): STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR BILL RITTER, MARK J. ANDERSON and SARA R. ALT, in their official capacities only.

Case Number: 2010CV1589

Div. & Ctrm.: 6

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to Colo. R. Civ. P. 23, Plaintiffs moves for Class Certification.

Plaintiffs brought this suit on behalf of members of Colorado Public Employees' Retirement Association ("PERA") who are challenging the newly-passed amendments to PERA which reduce the guaranteed annual increase to their pension benefits.

The Amended Complaint alleges that the new law is unconstitutional because it impairs these retirees' contractual rights to receive pension benefits at the levels promised them when they became eligible to retire or when they actually retired. Plaintiffs allege that once a right to pension has vested, both the United States and Colorado Constitutions bar any reduction in pension benefits at the promised levels. From 1994 until now, state law has guaranteed annual pension adjustments, either through a cost of living adjustment (COLA) or by way of a guaranteed 3.5% yearly increase. The Colorado Supreme Court has repeatedly held that once a public employee is eligible for retirement his or her pension becomes vested, and these pension benefits may not be diminished thereafter. Further, in a 2004 formal Opinion, then-Attorney General Ken Salazar acknowledged that "[w]hen a PERA member retires from active service and begins receiving a pension, the member's pension becomes a vested contractual obligation of the pension program that is not subject to unilateral change of any type by the General Assembly. "

Plaintiffs allege that, as a result of the newly-imposed 2% cap on the COLA, retirees will lose millions of dollars in promised benefits. For example, a public employee who retired in 2002 and who was eligible for $2,772 a month (the average PERA benefit in 2008) will lose more than $165,000 in promised benefits during the next twenty years.

Denver Public School ("DPS") retirees are also included in the suit as their pension plan became part of PERA on January 1 of this year. The new law eliminates the guaranteed 3.25% annual increase owed to them.

Plaintiffs move for Class Certification consisting of all persons in the following categories:

CLASS DEFINITION:[1]

(1) All PERA members who were receiving or may receive pension benefits from PERA on or after March 1, 2010, and (a) who are not in the DPS Division and became eligible to retire or retired between March 1, 1994 and February 28, 2010, inclusive; or (b) who are in the DPS Division and became eligible to retire or retired between January 1, 1974 and February 28, 2010, inclusive; or

(2) All individuals who were receiving or may receive pension benefits from PERA on or after March 1, 2010 because they were, are or will be "qualified survivors" of individuals described in subparagraph (1) above; or

(3) All individuals who as of March 1, 2010 were receiving pension benefits from PERA because they were "qualified survivors" of (a) PERA members who died between March 1, 1994 and February 28, 2010, inclusive; or (b) DPSRS members who died between January 1, 1974 and December 31, 2009, inclusive, before they became eligible to retire.

A "qualified survivor" is an individual who attains eligibility for benefits from PERA or DPSRS due to death of a PERA or DPSRS member.

Plaintiffs propose two subgroups: one subclass for PERA members, beneficiaries and qualified survivors in the DPS Division and one subclass for PERA members, beneficiaries and qualified survivors from the other divisions.

As we explain below, the proposed Class meets the requirements of Rule 23.

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[1] The fact that this definition varies slightly from the one appearing in Plaintiffs' Amended Complaint is no impediment to this Court certifying the class as Plaintiffs now propose it in their motion. Colorado Cross-Disability Coalition v. Taco Bell Corp., 184 F.R.D. 354, 357 (D. Colo. 1999) (rejecting defendant's argument that plaintiffs' are bound by the class definition in their complaint, as opposed to the modified class definition proposed in their class certification motion); see also Wiesfeld v. Sun Chemical Corp., 84 Fed. Appx. 257, 258-59 (3d Cir. 2004) (approving district court analyzing the class definition in plaintiffs' class certification motion, as opposed to the class definition in plaintiffs' complaint) citing Robidoux v. Celani, 987 F.2d 931, 937 (2d Cir.1993) (noting a court "is not bound by the class definition proposed in the complaint").

I. STATEMENT OF FACTS

Plaintiff Gary R. Justus is a Colorado resident who worked for more than 29 years for the Denver Public Schools ("DPS") before retiring in 2003. Until December 31, 2009, he received his pension through the Denver Public Schools Retirement System ("DPSRS"). On January 1, 2010, DPSRS became part of the Public Employees' Retirement Association of Colorado ("PERA"). Since then, Mr. Justus is receiving his pension benefits from PERA. Amended Complaint, ¶ 1.

Plaintiff Kathleen Hopkins is a Colorado resident who worked approximately 15 years for the State of Colorado before retiring in July 2001. Ms. Hopkins currently receives pension benefits from PERA. Id. at ¶ 2.

Plaintiff Eugene Halaas worked over 27 years as a judge for the State of Colorado before retiring in 1999. Judge Halaas currently receives pension benefits from PERA. Id. at ¶ 3.

Plaintiff Lisa Silva-Derou is a current employee of the Colorado Department of Public Health and Environment and an active PERA member. As of February 28, 2010, Ms. Silva-Derou was eligible to receive a full service pension benefit from PERA because she had met PERA's age and service requirements. Id. at ¶ 4.

The benefits administered by PERA are funded by contributions from every participating public employee and the governmental entities that employ them. PERA members are required by law to contribute at least 8% of their wages to PERA. By making the requisite contributions to PERA and attaining the age and service credit required for retirement, public employees acquire vested rights to their pensions. Id. at ¶¶ 29-30.

Prior to March 1, 1994, the law pertaining to PERA provided that "cost of living increases in retirement benefits and survivor benefits shall be made only upon approval by the

general assembly." Id. at ¶ 33 (quoting Colo. Rev. Stat. § 24-51-1101 (1992)). In 1993, the Legislature amended the PERA statute, such that on or after March 1, 1994, annual COLA increases were automatic and no longer dependent on yearly approval by the General Assembly. Id. at ¶ 29 (citing H.B. 93-1324, § 7 (1993)).

As a consequence of this change in the law, from 1994 through 2000, pension benefits of PERA retirees were automatically adjusted upward by a COLA formula specified in the statute and which yielded the following yearly percentage increases:

Year	**Increase**
1994	2.82%
1995	2.53%
1996	2.84%
1997	2.91%
1998	2.22%
1999	1.34%
2000	2.23%

Id. at ¶ 35. In 2000, the Legislature amended the PERA statute again, replacing the annual variable COLA adjustment with a guaranteed 3.5% annual increase effective March 1, 2001. Id. at ¶ 35 (citing Laws 2000, Ch. 186, § 7; Colo. Rev. Stat. § 24-51-1002 (2009)).

DPSRS has provided some form of guaranteed annual adjustment in pension benefits since 1974, when it instituted a non-compounding 2% yearly increase. Id. at ¶ 38. In 1981, DPSRS increased the annual pension adjustment to 3.0% (non-compounding); in 1985, DPSRS raised the yearly adjustment to 3.25% (non-compounding); and in 2000, DPSRS began compounding the interest. Id. at ¶ 39. When DPSRS became part of PERA in 2010, PERA

assumed DPSRS' obligation to provide the guaranteed 3.25% (compounded) annual increase for DPS Subclass Members. Id. at ¶ 40 (citing Colo. Rev. Stat. § 24-51-1732 (effective January 1, 2010)).

II. LEGAL ARGUMENT

A. Class Certification Standards

"The basic purpose of a class action is to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit." Mountain States Tel. & Tel. Co. v. District Court, 778 P.2d 667, 671 (Colo. 1989). Thus, such actions are favored, and C.R.C.P. 23 should be liberally construed to advance these policies. Farmers Ins. Exch. v. Benzing, 206 P.3d 812, 818 (Colo. 2009). Even in a "doubtful case ... any error, if there is to be one, should be committed in favor of allowing a class action." Eisenberg v. Gagnon, 766 F. 2d 770, 785 (3d Cir. 1985), cert. denied, 474 U.S. 946 (1985).[2]

"A plaintiff seeking class certification bears the burden of demonstrating, by a preponderance of the evidence, that the requirements of C.R.C.P. 23 have been met." Patterson 2010 WL 547644, at *4. "C.R.C.P. 23(a) establishes four prerequisites to the maintenance of a class action: (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 class representatives are typical of the claims or defenses of the class; and (4) the class representatives will fairly and adequately protect the interests of the class." Id. "If these prerequisites are

[2] "Because C.R.C.P. 23 is almost identical to Fed.R.Civ.P. 23, [courts] may look to case law regarding the federal rule for guidance in interpreting the state rule." Patterson v. BP America Production Co., __ P.3d ___, 2010 WL 547644, at *4 (Colo. App. Feb. 18, 2010) (citing LaBerenz v. American Family Mut. Ins. Co., 181 P.3d 328, 333 (Colo. App. 2007)).

satisfied, then the plaintiff must show that the class meets the requirements of one of the subsections of C.R.C.P. 23(b)." Id.

"In making a Rule 23 determination, a court does not inquire into the merits of the lawsuit." LaBerenz, 181 P.3d at 334 (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974)). In deciding whether to grant class certification, the Court should also bear in mind the purposes underlying the class certification rule: remedying widespread policies or practices that violate legal or contractual obligations; striking a balance between the efficiency of resolving the claims of many individuals in one action, and the interests of such individuals in pursuing their claims separately. See General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979) ("the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion")).

As we explain, because Plaintiffs' lawsuit meets all four requirements of Rule 23(a) and at least one provision of Rule 23(b), the Court should grant the motion to certify the class.

B. This Action Satisfies All Prerequisites Of Rule 23(a).

1. Numerosity

"A party seeking class certification is required to establish by competent evidence that the class is sufficiently large to render joinder impracticable." LaBerenz, 181 P.3d at 334 (citing Kniffin v. Colo. W. Dev. Co., 622 P.2d 586, 592 (Colo. App. 1980)). "The actual size of the defined class is a significant factor in such determination, and mere speculation as to size is insufficient." Id. "However, the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 382 (D. Colo. 1993). The description of the class must be "sufficiently definite

so that it is administratively feasible for the court to determine whether a particular individual is a member." Id. at 382. "[T]he difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable." Newberg on Class Actions § 3:5, at 247 (4th ed. 2002) (quoted in Jackson v. Unocal Corp., __ P.3d __, 2009 WL 2182603 at *11 (Colo. App. 2009)).

"The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." Gen. Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980); LaBerenz, 181 P.3d at 334.

"In determining whether the numerosity requirement is met, a court may consider reasonable inferences that can be drawn from the facts before it." LaBerenz, 181 P.3d at 335. "In that regard, the numerosity requirement is satisfied where the exact size of the class is unknown but general knowledge and common sense indicate that it is large." Id. (citations omitted).

According to PERA's website, there were 81,248 benefit recipients in 2008. See http://www.copera.org/PERA/about/overview.stm (last visited March 22, 2010). There were 6,186 retired members in the DPSRS as of December 31, 2008. See DPSRS Comprehensive Financial Report (2008), p. 67 (excerpts appended as Exhibit 1 to Declaration of Richard Rosenblatt, filed herewith). A large proportion of these participants retired between March 1, 1994 and February 28, 2010, the relevant period for the claims of the putative Class. In addition, there are presumably thousands of participants who retired since 2008 and thousands of more were eligible to retire as of February 29, 2009.

Clearly, Plaintiffs have satisfied numerosity. See Kuhn v. State Dept. of Revenue of State of Colorado, 817 P.2d 101, 105 (Colo. 1991) (numerosity satisfied with class of over 10,000 people).

2. Commonality

"'The second prerequisite to class certification is that there must be issues of law or fact common to the class.'" LaBerenz, 181 F.3d at 338; Joseph v. Gen. Motors Corp., 109 F.R.D. 635, 639 (D. Colo. 1986). "This does not mean, however, that every issue must be common to the class." Id. (citation omitted). "It is to be recognized that there may be varying fact situations among individual members of the class and this is all right as long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory." Joseph, 109 F.R.D. at 639-40 (citation omitted).

Here, the proposed Class Members share a common interest in establishing that Defendants violated both the Colorado and United States Constitutions by reducing the annual guaranteed upward adjustment (3.5% or 3.25%) in their pension benefits. Rosenblatt Decl., ¶¶ 3-4. The putative Class Members are participants in PERA, and none of them has been treated differently than any other. "Plaintiffs' interests do not conflict with the classes' interests because their entitlement to relief, even if for different amounts, depends on a shared victory over [the Defendants] on the liability issue." Reyher v. State Farm Mut. Auto. Ins. Co., __ P.3d __, 2009 WL 4981898 at *11 (Colo. App. Dec. 24, 2009) (finding adequacy requirement met). Thus, the commonality requirement is met. See Thrope v. Ohio, 173 F.R.D. 483, 488 (S.D. Ohio 1997) (if there were no class action, a "lawsuit filed by any member of the putative class would require resolution of the same legal issue.").

Because the legal basis giving rise to the vested rights for those who retired under DSPRS is different than those Class members who have always received benefits through PERA, Plaintiffs have proposed the creation of separate subclasses, one for the DPS members and another subclass for all other PERA members. See LaBerenz, 181 P.2d at 333 ("court may utilize its powers under C.R.C.P. 23(c)(4) on its own initiative to create subclasses, where appropriate.").

3. Typicality

Pursuant to C.R.C.P. 23(a)(3)

> "[t]ypicality requires that the class representative claims be typical of the class and that the class claims are encompassed by the named plaintiffs' claims. This requirement is usually met "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented ... irrespective of varying fact patterns which underlie individual claims."

Ammons v. Am. Family Mut. Ins. Co., 897 P.2d 860, 863 (Colo. App. 1985) (quoting 1 H. Newberg, *Newberg on Class Actions* § 3-13, at 3-77 (3d ed.1992)). "However, if the named plaintiffs have considerations that are unique and which may be dispositive, class certification may be denied." Ammons, 897 P.2d at 863; Armstrong v. Chicago Park Dist., 117 F.R.D. 623, 629 (N.D. Ill. 1987) ("a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members" (quoting E. Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).

Here, there is no doubt that Plaintiffs can satisfy the typicality requirement. Plaintiffs are typical retirees. Rosenblatt Decl., ¶¶ 3-4. Defendants injured them and the Class in the same way by reducing their guaranteed annual pension increases. In re American Med. Sys. Inc., 75 F.3d 1069, 1082 (6th Cir. 1996) ("Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct."). Plaintiffs' injuries are the

same as were suffered by the other members of the Class. Finally, the legal theories advanced by the Plaintiffs and the rest of the class are the same, namely, whether these cuts violate U.S. and Colorado Constitutions. In sum, as go the claims of Plaintiffs, so go the claims of the proposed class.

4. Adequacy of Representation by Plaintiffs

C.R.C.P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class [adequacy of representation]." "A class representative cannot have interests antagonistic to the class." Steiner v. Ideal Basic Industries, Inc., 127 F.R.D. 192, 194 (D. Colo. 1987). The adequacy requirement "also requires this court to determine whether plaintiffs' attorneys are qualified, experienced and able to conduct the proposed litigation." Id. at 195.

The interests of the named Plaintiffs are not antagonistic to the interests of the members of the proposed Plaintiff Class. As discussed above, like the other Class Members, Plaintiffs share a common interest in establishing that the Defendants wrongfully denied them vested annual increases to their pensions. There is no conflict between the Plaintiffs and the members of the putative class in the pending litigation, and Plaintiffs have expressed their intent to vigorously represent all members of the class. Rosenblatt Decl., ¶¶ 3-4.

As for the adequacy of proposed class counsel, the undersigned attorneys are well versed and experienced in class actions, labor and Constitutional law, and public sector retirement benefit class actions.

William T. Payne

Mr. Payne is likely more experienced than any other attorney in the nation in representing retirees in welfare benefit class actions, having litigated nearly hundred such cases during his

career.[3] See Resume of William T. Payne, attached to Rosenblatt Decl. as Exhibit 2. Mr. Payne serves as Chairperson of the Subcommittee for Benefit Claims and Individual Rights within the American Bar Association's ("ABA's") Labor and Employment Law Section, and is a Charter Fellow of the American College of Employee Benefits Counsel.[4] Mr. Payne frequently lectures on labor and employment law topics at educational conferences.[5] He has also authored several

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[3] Mr. Payne's retiree health benefit reported cases include (but are not limited to) UAW v. GM, 2006 WL 334283 (E.D.Mich. Feb. 13, 2006), later proceedings, 2006 WL 891151 (E.D.Mich. March 31, 2006) and 235 F.R.D. 383 (E.D.Mich. 2006), aff'd, 497 F.3d 615 (6th Cir. 2007); UAW v. Ford Motor Co., 2006 U.S. Dist. LEXIS 70471 (E.D.Mich. July 13, 2006), aff'd, 497 F.3d 615 (6th Cir. 2007); Moore v. Rohm & Haas, 446 F.3d 643 (6th Cir. 2006), later proceedings, 497 F.Supp.2d 855 (N.D.Ohio 2007); IUE-CWA v. GM, 238 F.R.D.583 (E.D.Mich. 2006); Chapman v. ACF Indus., 430 F.Supp. 2d 570 (S.D.W.Va. 2006); ACF Industries v. Chapman, 2004 U.S. Dist. LEXIS 27245 (E.D.Mo. 2004); Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991); Asarco v. United Steelworkers of America, 2005 U.S. Dist. LEXIS 20873 (D.Ariz. 2005); Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984), on remand, 114 F.R.D.587, 675 F.Supp. 1254 (E.D.Wash. 1986); Crown Cork & Seal v. United Steelworkers of America, 32 E.B.C. 1950, 2004 U.S. Dist. LEXIS 760 (W.D.Pa. 2004); Keffer v. H.K. Porter Co., 872 F.2d 60 (4th Cir. 1989), affirming, 110 CCH Lab. Cases ¶10,878 (S.D.W.Va. April 19, 1988); Mamula v. Satralloy, 578 F.Supp. 563 (S.D.Ohio 1983); Mioni v. Bessemer Cement Co., 4 E.B.C. 2390 (W.D.Pa. 1983), later decision, 120 LRRM 2818 (W.D.Pa. 1984), and 6 E.B.C. 2677, 123 LRRM 2492 (W.D.Pa. 1985), later decision, 700 F.Supp. 267 (W.D.Pa. 1988); Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986); Rexam, Inc. v. United Steelworkers of America, 31 E.B.C. 2562 (D.Minn. 2003), later proceedings, 2005 WL 2318957 (D.Minn. 2005); Senn v. United Dominion, 951 F.2d 806 (7th Cir. 1992), petition for rehearing denied, 962 F.2d 655 (1992), cert. denied, 509 U.S. 903 (1993); Shultz v. Teledyne, 657 F.Supp. 289 (W.D.Pa. 1987); Smith v. ABS Industries, 890 F.2d 841 (6th Cir. 1989); Steelworkers v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988); Steelworkers v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987).

[4] To become a Fellow of the College, an attorney must have practiced in the field of employee benefits for at least 20 years, must have engaged in writing and speaking activities in the field, and must have provided exceptionally high-quality professional services to clients, bar and public.

[5] Among these conferences are the ABA's ERISA Basics, ERISA Litigation, and annual Benefits Committee meetings, as well as conferences sponsored by the AFL-CIO Lawyers' Coordinating Committee and the National Employment Law Association.

articles on retirement benefit topics[6] and has served as both a Contributing Author and Chapter Editor of Employee Benefits Law (BNA Books), authored by the ABA Labor Section's Benefits Committee.

The Sixth Circuit, after reviewing Mr. Payne's credentials, observed:

> In view of Payne's background, both classes would have been hard pressed to find someone with greater "experience in handling class actions ... and claims of the type asserted in the action" or an attorney with more "knowledge of the applicable law."

UAW v. GM, 497 F.3d 615, 628 (6th Cir. 2007) (quoting Fed.R.Civ.P. 23(g)(1)(C)(i)); Bailey v. AK Steel Corp, 2008 WL 553764 at *3 (S.D. Ohio Feb. 28, 2009) (referring to Payne as "one of the nation's leading ERISA welfare benefits litigators"). Along with Stephen Pincus and John Stember, Mr. Payne is currently litigating three cases challenging cuts to retirement benefits for state employees in New Hampshire and Massachusetts. See American Federation of Teachers – New Hampshire v. New Hampshire, 09-E-0290 (Merrimack Superior Court, New Hampshire); State Employees Association of New Hampshire v. New Hampshire, 09-E-0286 (Merrimack Superior Court, New Hampshire); Professional Firefighters of Massachusetts v. Patrick, 09-2785 (D. Mass.).

Stephen M. Pincus

Stephen M. Pincus concentrates his practice on representing retirees in nationwide class action lawsuits involving cuts to pension and retiree health benefits. Resume of Stephen M.

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[6] "Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits," 10 The Labor Lawyer 91 (1994); "Enjoining Employers Pending Arbitration," 3 Ind.Rel.L.J. 169 (1979); "Retiree Health Benefits: Sixth Circuit Deals the Retirees Out," 14 The Labor Lawyer 475 (1999) (with Steven J. Sacher); "Protecting Rights to Early Retirement Benefits," 2 Employee Rights Quarterly 58 (2001); "Battling for Benefits," Trial (December 2005) (with J. Stember and S. Pincus); "Union-Negotiated Lifetime Retiree Health Benefits: Promise Or Illusion," 9 Marquette Elder's Advisor 319 (2008) (with Pamina Ewing); and "The Legal Implications of Reducing Public Sector Retiree Health Benefits," 50 Municipal Lawyer 15 (September/October 2009) (with Stephen M. Pincus).

Pincus, attached to Rosenblatt Decl. as Exhibit 3. He served as a Robert M. Cover Fellow in Public Interest Law at Yale Law School and as the first law clerk to the Honorable Janet Bond Arterton of the United States District Court for the District of Connecticut. In addition, with William Payne, he has authored articles on litigating retiree health benefit cases. See "Battling for Benefits," Trial (December 2005) (with W. Payne and J. Stember); "The Legal Implications of Reducing Public Sector Retiree Health Benefits," Municipal Lawyer (Sept./Oct. 2009) (with W. Payne).

John Stember

John Stember is founding partner in the firm Stember Feinstein Doyle & Payne, LLC. Mr. Stember has been practicing law since 1976 and has litigated retiree health class actions since 1993. He has brought class actions involving retirement benefits s on behalf of former members of the United Steelworkers of America (USW); the United Food and Commercial Workers Union ("UFCW"); the Paper, Allied-Industrial, Chemical & Energy Workers ("PACE"); the International Brotherhood of Electrical Workers ("IBEW"), and the United Electrical Workers ("UE"). He was most recently involved in several rounds of litigation, spanning more than five years, involving the restructuring of retiree health benefits in the American auto industry, where Mr. Payne, he and SFD&P represented retired United Automobile Workers from GM, Ford, and Chrysler. See Resume of John Stember, attached to Rosenblatt Decl. as Exhibit 4.

Richard Rosenblatt

Richard Rosenblatt is one of Colorado's leading labor law attorneys. Mr. Rosenblatt, a long-time member of the Colorado bar, has extensive experience in federal and state court litigation. He is the founding member of the law firm of Richard Rosenblatt and Associates

L.L.C., a firm that represents unions and individual employees and retirees in Colorado as well as throughout the United States. *See* Resume of Richard Rosenblatt, attached to Rosenblatt Decl. as Exhibit 5.

C. This Action Satisfies the Standard for Class Certification Under Rule 23(b).

"[P]laintiffs seeking class certification must also show by a preponderance of evidence that one of the requirements of C.R.C.P. 23(b) is satisfied." Reyher, 2009 WL 4981898, at *11. Having demonstrated that they meet all four Rule 23(a) requirements, Plaintiffs will now show that class certification is also appropriate under Rule 23(b).

a. Rules 23(b)(2) requirements are satisfied.

A class action may be maintained under C.R.C.P. 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Class certification is proper under Rule 23(b)(2) where the representative plaintiffs are "seeking a judicial declaration that the statutory provisions and implementing regulations are unconstitutional." Whiteside v. Smith, 67 P.3d 1240, 1244 n.5 (Colo. 2003). Where a plaintiff's claim for damages can be characterized as incidental to the primary injunctive relief being sought, courts will allow certification of damages claims. Jahn ex. rel Jahn v. ORCR, Inc., 92 P.3d 984, 990 n.9 (Colo. 2004) (citing Goebel v. Colo. Dep't of Justice, 764 P.2d 785, 795 (Colo. 1988)).

As demonstrated above, Defendants have acted on grounds generally applicable to the entire putative class. Under these circumstances, final injunctive relief and/or corresponding declaratory relief for the class as a whole is appropriate. Indeed, these are the principal remedies that Plaintiffs seek here.

In their Amended Complaint, Plaintiffs have asked the Court to enjoin Defendants from reducing the annual increase to Class Members' pensions, and declare that Defendants must reinstate the guaranteed 3.5% and 3.25% annual increases due the Plaintiffs. Plainly, Plaintiffs meet the Rule 23(b)(2) requirements.

b. This action also satisfies the standard for class certification under Rule 23(b)(1).

C.R.C.P. 23(b)(1) defines two related types of class actions designed to prevent prejudice to parties arising from potential multiple suits involving the same subject matter. Rule 23(b)(1) provides that an action may be maintained as a class action where:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class, or
>
> (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest.

The class action satisfies the requirements of C.R.C.P.23(b)(1)(A). According to the United States Supreme Court, Fed.R.Civ.P. 23(b)(1)(A) "takes in cases where the party is obligated by law to treat the members of the class alike . . . or where the party must treat all alike as a matter of practical necessity . . ." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). In cases where plaintiffs seek a determination of the Constitutionality of a statute that is applicable to all class members, certification under Rule 23(b)(1) is also proper. See Bolt v. Arapahoe County School Dist. No. Six, 898 P.2d 525, 530 (Colo. 1995).

III. CONCLUSION

For the reasons stated above, the Court should certify this case as an appropriate class action.

Respectfully submitted on the 27th day of April, 2010.

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