DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROUS, on behalf of Themselves and those similarly situated v. **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.	**▲ COURT USE ONLY ▲** Case No. 2010cv1589 Division/Courtroom: 6 Judge Robert S. Hyatt
Attorneys for Defendants PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, MARK J. ANDERSON and SARA R. ALT, in their official capacities only: Daniel M. Reilly, # 11468, dreilly@rplaw.com Eric Fisher, # 27275, efisher@rplaw.com Jason M. Lynch, # 39130, jlynch@rplaw.com Lindsay A. Unruh, # 35890, lunruh@rplaw.com Caleb Durling, # 39253, cdurling@rplaw.com Reilly Pozner LLP 511 Sixteenth Street, Suite 700 Denver, Colorado 80202 Phone Number: 303-893-6100 Fax Number: 303-893-6110 Mark G. Grueskin, # 14621, mgrueskin@ir-law.com Edward T. Ramey, # 6748, eramey@ir-law.com Kara Veitch, # 32227, kveitch@ir-law.com Isaacson Rosenbaum P.C. 1001 Seventeenth Street, Suite 1800 Denver, Colorado 80202 Phone Number: 303-292-5656 Fax Number: 303-292-3152	
PERA DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT	

Defendants Colorado Public Employees' Retirement Association ("PERA"), Mark J. Anderson, and Sara R. Alt (collectively, the "PERA Defendants"), respectfully submit this reply in support of their motion to dismiss six of the eight claims, and subsection F of the prayer for relief, in Plaintiffs' First Amended Class Action Complaint (the "Complaint").[1]

INTRODUCTION

Plaintiffs make three significant concessions in their Response: (1) their second claim for relief under Article V, § 38 of the Colorado Constitution fails as a matter of law and should be dismissed; (2) money damages are unavailable under their three § 1983 claims; and (3) they seek only prospective declaratory relief. Plaintiffs, however, continue to pursue impermissible claims under the Takings and Substantive Due Process Clauses of the United States Constitution as well as three meritless 42 U.S.C. § 1983 claims. For the reasons stated in the PERA Defendants' Motion to Dismiss and this Reply, the Court should dismiss these claims and focus this dispute on whether the Colorado General Assembly's latest modification to the cost-of-living adjustment satisfies the Contract Clauses of the Colorado and United States Constitutions.

As to Plaintiffs' Claim IV alleging a violation of the *federal* Takings Clause, the United States Supreme Court has repeatedly held that the Takings Clause is compensatory, not prohibitory, and thus cannot be used as a basis to declare Senate Bill 10-001 unconstitutional. In addition, the government's adjustment of economic benefits and burdens for the common good has been repeatedly found not to be a compensable taking. The narrow exception to this rule is where a specific interest in a specific fund of private money is taken by the government for its

[1] The PERA Defendants are authorized to state that the Office of the Attorney General, representing Governor Ritter and the State of Colorado, join the PERA Defendants' arguments as to all claims. The PERA Defendants likewise join in the additional arguments raised in the Attorney General's reply in support of motion to dismiss.

general use. No such circumstance exists here because Plaintiffs do not assert that money they contributed to PERA has been taken, or that Senate Bill 10-001 required them to pay any money in their possession. Rather, Senate Bill 10-001 simply adjusted the COLA formula (among other changes) to preserve funds within PERA to ensure that current and future retirees will receive their pension benefits.

Plaintiffs, in their Response, contradict the allegations of their Complaint and assert that the property right being taken is not money, but rather their purported contract right to an unchangeable COLA formula. Resp. at 9-10, 12. Plaintiffs' change in position does not avoid the failing of their Takings Clause claim because where, as here, a takings claim is premised on a contract to which the government is a party, the proper claim is under the Contracts Clause.

As to Claim V alleging a substantive due process violation under the United States Constitution, because pension benefits are not "fundamental rights," the Court need only find any rational basis for the General Assembly to have enacted Senate Bill 10-001. The allegations in Plaintiffs' Complaint, and Plaintiffs' express recognition that the General Assembly sought to facilitate a "healthy pension system" through Senate Bill 10-001, establishes that a rational basis exists for the legislation and defeats Plaintiffs' substantive due process claim. Plaintiffs' view that there were other options available to the General Assembly is not only incorrect, but does nothing to diminish the necessary conclusion that the General Assembly had a rational basis to pass Senate Bill 10-001.

As to Plaintiffs' 42 U.S.C. § 1983 claim under the Contracts Clause (Claim VI), Plaintiffs offer no basis for this Court to ignore binding precedent of the Colorado Court of Appeals in *Kilbourn v. Fire & Police Pension Ass'n*, 971 P.2d 284 (Colo. App. 1998). That the Ninth Circuit came to a different conclusion from *Kilbourn* (and numerous other courts) does nothing

to save Plaintiffs' claim. As to Plaintiffs' other § 1983 claims (VII and VIII) premised on the Takings and Substantive Due Process Clauses of the United States Constitution, Plaintiffs do not contest that such claims fail if the Court dismisses their underlying claims. Finally, and significantly, Plaintiffs have clarified that they are only seeking prospective injunctive relief and not monetary damages under C.R.S. § 13-51-112. Resp. at 18.

COLA BACKGROUND

The PERA Defendants' opening brief provides critical, uncontested data establishing that the General Assembly and the DPSRS continually modified their respective COLA formulas over the last 40 years. *See* PERA Defs.' Mot. to Dismiss at 4-12. Plaintiffs do not refute such facts in their Response, but instead assert that the COLA formulas that happened to be in place in 2009, for the first time, became fixed and unchangeable for the rest of their lives. Plaintiffs' position contradicts the inherent nature and purpose of a cost of living *adjustment* and ignores 40 years of history establishing the changeable nature of the COLA.

Also, contrary to Plaintiffs' view that COLA benefits may not be taken away from retirees, in 2001 not only did the General Assembly change the COLA from variable to fixed, it eliminated a "banking" provision that had previously protected pension benefits against high inflation. Under the 1994-2000 statute, were a retiree to experience several years of sub-3.5% inflation, the difference between the actual COLA paid and 3.5% was "banked." C.R.S. § 24-51-1002 (1994-2000). Had there then been a year with inflation over 3.5%, the COLA the next year would not have been capped at 3.5%, but could have risen above 3.5% based on how much the retiree had "banked."[2] *See id.* The Legislature's 2001 termination of this "banking" system

[2] For example, if a retiree had received a COLA for four years during 1994-2000, and the first three years were 2.5%, and in the fourth year inflation had risen to 6.5%, the retirees' COLA

eliminated retirees' accumulated, "banked" inflation protection—which was significant considering the many years of sub-3.5% inflation in the late-1990s. Despite these material changes to the COLA, there were no claims that the COLA formula was unchangeable or that the elimination of the "banking" system was unconstitutional.

As to the COLA provided by DPSRS, Plaintiffs ignore that DPS retirees experienced four different COLA formulas prior to joining PERA on January 1, 2010: 2% noncompounding, 3% non-compounding, 3.25% non-compounding, and 3.25% compounding. *See* Mot. to Dismiss at 9-10. This variability undermines Plaintiffs' view that the DPSRS COLA formula that happened to be in place when DPSRS joined PERA became unmodifiable for the lifetime of DPS retirees.[3]

PLAINTIFFS SET FORTH AN INCORRECT STANDARD OF REVIEW

PERA Defendants stated the standards for dismissing a complaint for failure to state a claim under C.R.C.P. 12(b)(5). *See* Mot. to Dismiss at 12. Two points bear further clarification based on Plaintiffs' misstatements of this well-settled law. First, the Court is not limited to the four corners of the complaint, but may consider documents referred to in the complaint but not attached to it, like the Pew Report here, *see Walsenburg Sand & Gravel Co. of Walsenburg v. City Council*, 160 P.3d 297, 299 (Colo. App. 2007) (cited in Resp. at 8), and may take judicial notice of legislative history of a statute. *See Phillips v. Bell*, No. 08-1420, 2010 WL 517629, at *9 (10th Cir. Feb. 12, 2010) (relying on legislative history to reverse trial court's denial of motion to dismiss); Mot. to Dismiss at 11 n.20.

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would not have been capped at 3.5%, but would have risen to 6.5% because it would be 3.5% plus the three 1.0% inflation COLAs which had been "banked" in the three previous years.

[3] As it relates to DPSRS, Plaintiffs' statement that members have always contributed 8% is incorrect. Resp. at 3. Prior to 1995, DPSRS employees contributed 6% of salary toward their retirement, a figure that was raised to 7% for some employees from 1995 to 1998, before increasing again to 8% for all employees effective July 1, 1998.

Second, Plaintiffs appear to argue that there is a general, "notice-only" standard under C.R.C.P. 12(b)(5). Plaintiffs' purported rule is contrary to the cases they cite. *See City of Colo. Springs v. Andersen Mahon Enters., LLP*, --- P.3d ---, No. 09CA1087, 2010 WL 1238873, at *2 (Colo. App. Apr. 1, 2010) (affirming trial court's dismissal of takings claim for failure to state a cognizable legal claim) (cited and quoted in Resp. at 7). The "notice" analysis under C.R.C.P. 12(b)(5) is only relevant when a defendant bases a motion to dismiss on the ground that the complaint lacks particularity and includes insufficient facts. *See Grizzell v. Hartman Enters., Inc.*, 68 P.3d 551, 553, 555 (Colo. App. 2003) (discussing notice rule when trial court ruled that plaintiff "fail[ed] to allege facts sufficient to support a finding" and "fail[ed] to allege facts supporting a claim"; affirming dismissal of one claim for "failure to state a claim"); *Shockley v. Georgetown Valley Water & Sanitation Dist.*, 548 P.2d 928, 929 (Colo. App. 1976) (discussing notice rule when trial court dismissed claim "based on a perceived absence of particularity in the complaint as to legal relationships between the defendants"), *cited in Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo. App. 2007); *State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, --- P.3d ---, 2009 WL 4981891, at *2 (Colo. App. Dec. 24, 2009) (discussing notice where question was whether "the allegations were sufficiently particular to satisfy Rule 9(b)'s requirements") (cited in Resp. at 8).

Here, PERA Defendants are not criticizing the particularity of the Complaint, but that Plaintiffs have raised six claims that fail as a matter of law (regardless of whether PERA Defendants have notice of the claims). Plaintiffs' notice-only rule also fails because it would lead to the absurd result that any claim, no matter how legally improper, would survive a motion to dismiss. *See* Resp. at 8. If applied here, for example, Plaintiffs' Claim II, which put PERA Defendants on "notice" but is legally baseless (as Plaintiffs concede), would survive a motion to

dismiss. Plaintiffs' suggested "notice" standard contradicts the express language of Rule 12(b)(5), is contrary to Colorado case law, and should be rejected.

ARGUMENT

I. Plaintiffs' Takings Claim (Claim IV), Brought Solely Under the United States Constitution, Fails Whether Plaintiffs' Alleged Property Right Is Money or a Contractual Right to a Particular COLA Formula

A. Plaintiffs' Takings Claim Under the United States Constitution Cannot Support a Claim for Injunctive Relief

Contrary to Plaintiffs' assertion that only courts from the Federal Circuit hold that the Takings Clause of the United States Constitution is compensatory and not prohibitory, multiple United States Supreme Court cases adopt such rule, including one case listing the numerous precedents reaching this same conclusion:

> As [the Takings Clause] language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297, n.40 (1981); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893); *United States v. Jones*, 109 U.S. 513, 518 (1883). This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987) (emphasis in original); *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005) ("As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'") (quoting *First English*, 482 U.S. at 314-15); *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (explaining that the Takings Clause "presupposes what the government intends to do is otherwise constitutional"); *id.* at 554 (Breyer, J., dissenting) ("As

this language suggests, at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good.") (emphasis in original); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) ("The [Takings Clause] 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'") (quoting *First English*, 482 U.S. at 314).[4]

Moreover, Plaintiffs' criticism of the Federal Circuit is misplaced because, in analyzing takings issues, decisions of the Court of Federal Claims and the Court of Appeals for the Federal Circuit are particularly persuasive because those courts have special expertise in takings law. The Court of Federal Claims is the trial court with exclusive jurisdiction over almost all Takings Clause claims against the United States seeking more than $10,000. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1); *E. Enters.*, 524 U.S. at 520; Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 312 (2007) ("By virtue of the large number of takings claims handled by [the Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit] and the federal nature of the defendant, their takings jurisprudence is more fully evolved than in other courts and has had nationwide influence.").

Plaintiffs also provide no explanation for their suggestion that *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), can overrule numerous *United States* Supreme Court decisions and that "this Court has the power to declare SB 10-001 to be unconstitutional" under the

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[4] *Accord* Johnathan Sullivan, Comment, Eastern Enterprises v. Apfel*: How* Lochner *Got It Right*, 60 Ohio St. L.J. 1103, 1124-25 (1999) ("Traditionally, and on its face, the Takings Clause does not seem to deny the government the ability to do any act. It simply says that Congress cannot perform specific acts (takings) without 'just compensation.' . . . The Takings Clause is thus a conditional device, not a prohibitory one.") (footnotes omitted); *id.* at 1126 ("[T]he Takings Clause simply does not empower the Court to strike down any legislation.").

Takings Clause of the *United States* Constitution—the only basis for Plaintiffs' Takings Clause claim. Resp. at 11.[5]

Finally, contrary to Plaintiffs' contention, *State Department of Highways v. Interstate-Denver West*, 791 P.2d 1119, 1120 (Colo. 1990), does not address the suitability of resolving a takings claim on a motion to dismiss. Resp. at 9. In *Interstate-Denver West*, the Colorado Supreme Court simply reinstated a trial court's finding that the loss of a road entry to eminent domain was *not* a compensable loss under the takings clause. 791 P.2d at 1123.

B. Plaintiffs May Not Premise Their Takings Claims on Their Purported Contract Right to a Particular COLA Formula

Plaintiffs allege in their Complaint that their Takings Clause claim is premised on their position that SB 10-001 effectuated *a taking of Plaintiffs' money*:

- "Due to the 2% cap on the new COLA formula, Plaintiffs and Class Members will receive pensions in amounts that will be substantially less than the amount specified by law when their pension rights vested or when they actually retired." Compl. ¶ 50.

- "As a result of Defendants' application of Senate Bill 10-001, this hypothetical 'average' retiree will lose more than $165,000 in benefits over the next twenty years." *Id.* at ¶ 52.

- "Because Sections 19 and 20 of Senate Bill 10-001 diminish the vested, pension benefits of PERA members without just compensation, Defendants have violated the Takings Clause of the Constitution of the United States." *Id.* at ¶ 76.

[5] Plaintiffs also cite to a Rhode Island federal district court for their view that the Takings Clause may be used to pursue constitutional challenges to legislative actions. Resp. at 12. Plaintiffs omit from their citation that the First Circuit *reversed* the trial court's ruling and held that no Takings Claim existed as a matter of law where the statute terminated pension benefits going forward but "does not purport to reclaim any benefits actually paid." *See Nat'l Educ. Ass'n-R.I. ex rel. Scigulinksy v. Retirement Bd.*, 172 F.3d 22, 29-30 (1st Cir. 1999) (reversing *Nat'l Educ. Ass'n-R.I. ex rel. Scigulinksy v. Retirement Bd.*, 890 F. Supp. 1143 (D.R.I. 1995)). In the other case cited by Plaintiffs, the Ninth Circuit affirmed the district court's grant of summary judgment rejecting a Takings Clause claim. *See San Diego Police Officers' Ass'n v. Aguirre*, No. 05-CV-1581(POR), 2005 WL 3180000, at *9 (S.D. Cal. Nov. 5, 2005), *aff'd in part, rev'd in part sub nom. San Diego Officers' Ass'n v. San Diego City Employees' Retirement Sys.*, 568 F.3d 725, 730 (9th Cir. 2009).

Plaintiffs, in their Response, now assert that the "taking" they allege is not of money but of Plaintiffs' "contractual rights to a government pension." Resp. at 12. Plaintiffs' change in position does nothing to save their takings claim because it will not lie where the property right alleged to have been taken arises from a contract with the government. Such a claim is properly pursued as a breach of contract claim or, in this case, a claim for violations of the federal and state Contracts Clauses.

"Although rights existing independently of a contract may be brought pursuant to a takings claim, when a contract between a private party and the Government creates the property right subject to a Fifth Amendment claim, the proper remedy for infringement lies in contract, not taking." *Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724, 738 (Fed. Cl. 2008) (citation omitted); *Castle v. United States*, 301 F.3d 1328, 1341-42 (Fed. Cir. 2002) (dismissing takings claim because "plaintiffs retained the full range of remedies associated with any contractual property right they possessed"); *Home Sav. of Am., F.S.B. v. United States*, 51 Fed. Cl. 487, 494-95 (Fed. Cl. 2002) ("Interference with contract rights generally gives rise to a breach [of contract] claim because the parties' rights emanate from the contract, and not from a 'taking' for public use."); *cf. B&B Trucking, Inc. v. U.S. Postal Serv.,* 406 F.3d 766, 769 (6th Cir. 2005) (affirming dismissal from district court and holding that Court of Federal Claims had jurisdiction because plaintiff's takings claim for alleged taking of contract right was properly construed as an action based in contract).[6]

[6] This case is not like those where the government reaches into the contractual relationship between two private parties and appropriates the rights of one of the parties for public use. *See*, *e.g.*, *Home Sav. of Am.*, 51 Fed. Cl. at 494-95 (citation omitted) ("the government is only liable for a taking if it uses its power to appropriate a contract for public use-i.e., if it steps into the shoes of one of the contracting parties").

In *Tamerlane*, for example, the plaintiffs alleged that the Emergency Low Income Housing Preservation Act of 1987 and the Housing and Community Development Act of 1992 constituted a taking of their property by terminating plaintiffs' ability to exercise their contractual prepayment rights in loan contracts with the federal government. 80 Fed. Cl. at 726-27. The *Tamerlane* court granted the government's motion to dismiss the plaintiffs' takings claims because the plaintiffs "have not alleged any facts to suggest that the property rights underlying their claims exist independently of their contracts with the Government." *Id.* at 738. The court held that "[b]ecause plaintiffs' contractual rights arise from and were created by the bilateral contracts that plaintiffs entered into with the Government, plaintiffs' remedies lie in breach of contract claims." *Id.*

Here, the core of Plaintiffs' Complaint is that they have a statutory pension contract that Senate Bill 10-001 breached by changing the COLA formula. Resp. at 12 ("the taking here involves the impairment of contractual rights to a government pension . . . ."). Plaintiffs pursue their alleged contract right by claiming that it is protected by the Contracts Clauses of the United States and Colorado Constitutions. *See* Compl. ¶¶ 22-24, 54-64, 68-71; Resp. at 9-11. Although the PERA Defendants strongly disagree with Plaintiffs' view that they possess a property right to an unchangeable COLA formula, the Court need not reach such issue here because Plaintiffs do not allege the taking of any property interest independent of their alleged contract right. *See Tamerlane*, 80 Fed. Cl. at 737-38; *Home Sav. of Am.,* 51 Fed. Cl. at 494-95.[7]

[7] There is no support in Colorado law for the proposition that a specific COLA formula in a public pension is a cognizable property interest under the Takings Clause. On the other hand, there is ample federal precedent that adjustments, or even outright cancellations, of analogous federal benefits are not cognizable property interests under the federal Takings Clause. *See, e.g.*, *Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985) ("the government here is not required to continue to provide a particular COLA benefit"); *Nat'l Treasury Employees Union v. Devine*, 591 F. Supp. 1143, 1149 (D.D.C. 1984) (granting motion to dismiss, concluding that

C. Even if the Takings Clause Could Be Used to Challenge the Constitutionality of Senate Bill 10-001, an Alleged *Withholding* of Money that Readjusts Economic Benefits and Burdens Is Not a Compensable Taking

As set forth in Defendants' Motion to Dismiss, the United States Supreme Court in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and numerous other courts, have held that the alleged taking of money by a governmental act which readjusts economics benefits and burdens for the common good is not a compensable claim under the Takings Clause. *See* Mot. to Dismiss at 17-19.

Courts also stress that where, as here, the government takes no money for its general use, a Takings Clause claim will not lie. In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), for example, trustees of a multiemployer pension fund brought an action challenging the constitutionality of withdrawal liability provisions of Multiemployer Pension Plan Amendments Act of 1980. The Supreme Court found that there was no taking because "the United States has taken nothing for its own use . . . That the statutory withdrawal liability will . . . redound to the benefit of pension trust does not justify a holding that the provision violates the Takings Clause . . . ." *Id.* at 224. The Court concluded:

> [U]nder the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.

Congress did not intend for retirees to have a property right in a COLA formula at the time of their retirement because it "would bind the government into an entitlement obligation that could be forever increased by an unmodifiable formula").

Id. at 225 (citation omitted); *see also Adams v. United States*, No. 00-447 C, 2003 WL 22339164, at *8 (Fed. Cl. Aug. 11, 2003) (rejecting argument that the government's failure to pay overtime to federal workers was a taking because "the government did not appropriate plaintiffs' money for its own purpose"; "even if an obligation to pay money can be considered property, no property was here seized for public use. In other words, nothing was really 'taken' from plaintiffs for the [use] of the public—at best, proceeds simply were not paid."); *Centennial State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc.*, 615 F. Supp. 1063, 1066 (D. Colo. 1985) (rejecting a Takings Clause challenge because the interest "to avoid liability for further contributions" to a pension fund was not property and, even if it was, "adjustments in economic benefits and burdens to promote the common good do not constitute a taking under the fifth amendment").

A narrow exception applies to situations where the government has taken a specific fund of private money for *its general use* that is unrelated and out-of-proportion to the source of money taken. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Supreme Court found, "under the narrow circumstances of this case," the two fees assessed were "not merely 'adjust[ing] the benefits and burdens of economic life to promote the common good'" but rather were a "forced contribution to general governmental revenues, and is not reasonably related to the costs of using the courts." *Id.* at 163-64 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). In *Webb's*, there were two statutes assessing fees against a sum of money deposited by private parties with the court registry as an interpleader while creditors resolved their claims' priorities. *Id.* at 163-64.

Courts after *Webb's Fabulous Pharmacies*, including the United States Supreme Court, have recognized its narrow application and did not apply it where no money was taken by the

government for its general use. *See Sperry Corp.*, 493 U.S. at 62 n.8 *(*rejecting a Takings Clause claim premised on a 2% fee imposed on awards by the Iran Claims Tribunal used to fund the Tribunal; distinguishing *Webb's* because the government there "failed to discern any justification for the deduction of the interest other than the bare transfer of private property to the county"). Likewise, in granting a motion to dismiss a Takings Clause claim, the Federal Circuit concluded that a "government-imposed payment of money cannot result in a compensable taking" where the government assessed $2.25 billion from domestic utilities to create a fund to pay for cleanup at uranium enrichment facilities. *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 32, 41 & n.11 (Fed. Cl. 2000) (finding "*Webb's* is distinguishable from the instant case because in *Webb's*, a specific property interest was at stake—the actual interest accruing on a specific, separately identifiable fund held in a court's registry."); *see also Swisher Int'l, Inc. v. Johanns,* No. 3:05-cv-871-J16-TEM, 2007 WL 4200816, at *1, *8 & n.14 (M.D. Fla. Nov. 27, 2007) (granting motion to dismiss a Takings Clause challenge to a statute that paid tobacco growers subsidies from a $10 billion trust funded by tobacco manufacturers and importers; rejecting the plaintiff's analogy to *Webb's* because the "assessment is still more akin to the imposition of a financial burden than it is to the specific interest accruing on a specific fund like the one at issue in *Webb*."), *aff'd sub nom. Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1057 (11th Cir. 2008).

In *Kirk*, the Colorado Supreme Court discussed both *Sperry* and *Webb's* and determined that a statute fit within the *Webb's* exception because it required a private party to pay to the State's *general fund* 33% of a specific sum awarded as exemplary damages. 818 P.2d at 272. Contrary to Plaintiffs' overbroad reading of *Kirk*, it does not support their takings claim because Senate Bill 10-001 does not require any retiree to pay any money, much less to the general fund of the State of Colorado. Recognizing the narrow holding of *Kirk*, the Colorado Court of

Appeals found a similar provision to be *constitutional* because the 25% fee to be deducted from a worker's compensation award was paid not into the State's general fund, but into a Subsequent Injury Fund. *See Moland v. Indus. Claim Appeals Office*, 111 P.3d 507, 509-10 (Colo. App. 2004) (acknowledging *Kirk* but concluding that C.R.S. § 8-43-304 does not violate the Takings Clause of the state and federal constitutions).[8]

Consistent with *Kirk*, *Moland* and the many cases cited above, the general rule of *Sperry* applies here because the General Assembly has not appropriated any private money for the State of Colorado's general use. Rather, Senate Bill 10-001 simply readjusts economic benefits and burdens for the common good so that funds are *preserved* by PERA to ensure that retirement pension benefits will be available for current and future retirees.

D. A Law Review Article on Procedural Due Process and State *Contracts Clause* Cases Do Not Apply to a Question of the Federal Takings Clause

Plaintiffs' takings argument also fails because it is premised on a law review article and two Colorado cases (improperly termed as "controlling") that have nothing to do with *Takings Clause* claims. First, Professor Reich's article, *The New Property*, 73 Yale L.J. 733 (1964), concerns *procedural due process*, not the Takings Clause, a fact confirmed by its citation in the case law, including a seminal United States Supreme Court case about procedural due process. *See Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (holding that *procedural due process*

[8] In *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1381 (Fed. Cir. 2001) (cited in Resp. at 12), a trial court found that the government's seizure as part of a criminal investigation of $41,000 from a specific fund effected a taking. That holding is consistent with the distinction between the *Sperry* rule and *Webb's* narrow exception.

entitles welfare recipients to a post-termination hearing).[9] Procedural due process is irrelevant to a Takings Clause analysis, and thus Reich's article is irrelevant here.

Plaintiffs also rely on *Police Pension & Relief Board v. McPhail*, 139 Colo. 330, 338 P.2d 694 (1959), and *Police Pension & Relief Board v. Bills*, 148 Colo. 383, 366 P.2d 581 (1961), despite the fact that those cases involved the *Contracts Clause* of the *Colorado* Constitution and *not* the federal or state Takings Clause. Plaintiffs' out-of-context reliance on Contract Clause cases confirms PERA Defendants' position that this case is about one central issue—the state and federal Contracts Clauses—and that Plaintiffs have no legal support for their other claims.

Though now is not the time for an extensive analysis of *Bills* and *McPhail* because Plaintiffs' Contract Clause claims are not subject to this motion, Plaintiffs' mischaracterizations of those cases warrant a brief response. As an initial matter, *Bills* and *McPhail* are irrelevant to *federal* Contracts Clause jurisprudence (Claim III), which includes a three-part balancing test that considers whether (1) the impairment is substantial, (2) if there was a legitimate public purpose, and (3) reasonableness and necessity. *See, e.g., Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367-73 (2d Cir. 2006) (applying federal Contracts Clause test and finding that a state-imposed freeze of public employees' COLA was proper because of dire city finances; "The New York legislature had a legitimate public purpose in passing the Act and its wage freeze power. It

[9] *See also Winston v. City of New York*, 759 F.2d 242, 244, 250 (2d Cir. 1985) (quoting *The New Property* and finding that an automatic pension forfeiture provision affecting public school teachers dismissed for misconduct violated *procedural due process* by failing to provide the teachers with a hearing); *Martinez v. Ibarra*, 759 F. Supp. 664, 667 (D. Colo. 1991) (citing *The New Property* as cited in *Goldberg v. Kelly* to support the proposition that "[p]ublic entitlements have long been recognized as property to be protected by due process" in the context of determining whether a newly adopted Medicaid screening method violated *procedural due process*).

is not disputed that Buffalo was suffering at the time, and continues to suffer, a fiscal crisis. The state legislature passed the Act to address specifically the City's financial problems.").

As to Plaintiffs' Colorado Contracts Clause claim (Claim I), the pension benefits at issue and the facts of *Bills* and *McPhail* materially differ from those present here. Not only was the nature of the right in *Bills* and *McPhail* substantially different—an escalator clause that had not changed for 37 years versus a COLA formula that has changed repeatedly—but the act complained of was dramatically different—the *termination* of all rights to an escalation in salary versus the *retention* of the COLA benefit at a modified level with the potential for restoration, and an ultimate increase, in the COLA. The *Bills* and *McPhail* cases also differ materially from the situation here because there was no actuarial necessity for the voter-approved elimination of the escalator clause and no evidence that the plans faced financial ruin. *See Bills*, 148 Colo. at 391, 366 P.2d at 584-85.

Here, in contrast, Senate Bill 10-001 was premised on the uncontested, actuarial need to remedy the critical underfunding of the PERA and DPS trust accounts. Contrary to Plaintiffs' apparent view, the fifty-year old *Bills* and *McPhail* cases do not answer the question of whether the General Assembly's latest change to a COLA formula complies with the Colorado Contracts Clause.

III. Plaintiffs' Substantive Due Process Claim Should Be Dismissed Because Senate Bill 10-001 Bears a Rational Relationship to a Legitimate Governmental Interest

A. A Particular COLA Formula Is Not a Fundamental Right Guaranteed by the United States Constitution

Fundamental liberty or property interests are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21

(1997) (internal quotation marks and citations omitted). However, where as here, "no fundamental right is implicated, the legislation is subject to evaluation for substantive due process purposes pursuant to the rational basis test, requiring the state to demonstrate that the legislation bears some reasonable relationship to a legitimate governmental interest." *People v. Young*, 859 P.2d 814, 818 (Colo. 1993).

The fundamental rights protected by substantive due process are created by the United States Constitution, not state law. *See* Mot. to Dismiss at 19-20. There is no explicit or implicit guarantee in the Constitution of a right to receive a specific COLA, or to receive pension benefits at all. *See id.* at 20-21. PERA Defendants cite to cases squarely on point in which courts have found that *public pension benefits are not fundamental rights*, and do not resemble an individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life. *Id.* Tellingly, Plaintiffs fail to mention, let alone distinguish, the cases cited and discussed in PERA Defendants' Motion to Dismiss on this proposition.

Plaintiffs' heavy reliance on *Mayborg v. City of St. Bernard*, No. 1:04-CV-00249, 2006 WL 3803393 (S.D. Ohio Nov. 22, 2006), reflects the weakness of their substantive due process argument. The *Mayborg* opinion is an unpublished federal district court decision that has never been cited by another court because it confuses procedural due process with substantive due process. The two cases on which *Mayborg* relies to find that there was a fundamental *substantive* due process right for retirees in their subsidized health care benefits are both *procedural* due process cases. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 535 (1985) (describing case as "what pretermination process must be accorded a public employee who can be discharged only for cause"); *Ramsey v. Bd. of Educ.*, 844 F.2d 1268, 1273-74 (6th Cir. 1988) (determining that teacher whose accumulated sick days were eliminated by the school

board did not have a procedural due process property interest in those eliminated days). It is well settled that property interests under procedural due process are considerably broader than the narrow group of fundamental rights protected by substantive due process. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring) ("While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution.") (citation omitted).[10] *Mayborg* thus has no application to Plaintiffs' Substantive Due Process claim.

Next, Plaintiffs' proposed analogy between pension benefits and tenured employment is devoid of authority. *See* Resp. at 13-14. Moreover, Plaintiffs mischaracterize *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979) as broadly holding that "the substantive due process doctrine protects aspects of public employment . . . ." Resp. at 13. Contrary to Plaintiffs' description, the *Harrah* court stressed that a public employee did *not* have a substantive due process right to tenured employment because:

> [T]here is no claim that the interest entitled to protection as a matter of substantive due process was anything resembling "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life."

440 U.S. at 198 (citation omitted). *Harrah* simply required that a state entity not act arbitrarily and capriciously when making retention decisions about tenured public employees.

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[10] The actual issue in *Mayborg*, whether public retirees' health benefits are vested contractual benefits, has been litigated in Colorado and it has been found that such benefits are *not* subject to vesting, further confirming *Mayborg*'s lack of precedential value. *See Colo. Springs Firefighter Ass'n, Local 5 v. City of Colo. Springs*, 784 P.2d 766, 772 (Colo. 1989) ("Each of these factors contributes to our conclusion that the health plan benefits provided for here are not pension benefits which are subject to vesting.").

Plaintiffs also fail to recognize that *Harrah*, and the other cases involving public employment on which Plaintiffs erroneously rely, involve an *executive decision* reviewed under an arbitrary and capricious standard—not *legislative action* as is present here. Resp. at 14 (citing *Harrington v. Harris*, 118 F.3d 359, 369 (5th Cir. 1997) (reviewing executive action of merit pay raises for tenured public employees under arbitrary and capricious standard); *Moore v. Warwick Pub. Sch. Dist. No. 29*, 794 F.2d 322, 329 (8th Cir. 1986) (reviewing executive action of terminating public employee under arbitrary and capricious standard); *Brenna v. So. Colo. State College*, 589 F.2d 475, 476 (10th Cir. 1978) (reviewing executive action of terminating tenured public employee under arbitrary and capricious standard); *St. Louis Teachers Union v. Bd. of Educ.*, 652 F. Supp. 425, 435-36 (E.D. Mo. 1987) (reviewing executive action of performance evaluations of tenured public employees under arbitrary and capricious standard)).

When discussing substantive due process standards, "[i]t is crucial to keep in mind the distinction between legislative acts and non-legislative or executive acts." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 n.1 (3d Cir. 2000) (Alito, J.). Legislative actions are reviewed under the rational basis test. Mot. to Dismiss at 19. Thus, Plaintiffs' analogy between tenured employment and pension benefits is not only devoid of authority, but fails because challenges to executive decisions apply an "arbitrary and capricious" standard that has no application to a legislative act by the Colorado General Assembly.

B. Accepting the Allegations in the Complaint as True, There Was a Rational Basis for the General Assembly to Have Enacted Senate Bill 10-001

"Whether challenged legislation bears a reasonable relationship to a legitimate governmental interest is a *question of law*," *People v. Zinn*, 843 P.2d 1351, 1354 (Colo. 1993) (emphasis added), and "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be

conceived to be true by the governmental decision maker." *Am. Canine Found. v. City of Aurora, Colo.*, 618 F. Supp. 2d 1271, 1278 (D. Colo. 2009) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). For rational basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (quoting *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). The Tenth Circuit likewise explained:

> In fact, this Court is *obligated* to seek out other conceivable reasons for validating [a statute]. Thus, this court must independently consider whether there is any conceivable rational basis for the classification, regardless of whether the reason ultimately relied on is provided by the parties or the court. This determination is a legal question which need not be based on any evidence or empirical data.

Teigen v. Renfrow, 511 F.3d 1072, 1084 (10th Cir. 2007) (quotation marks and internal citations omitted); *see also Fed. Commc'ns Comm'n*, 508 U.S. at 315 ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.").

Colorado state courts ruling on the rational basis of statutes in substantive due process and equal protection cases simply examine the statutory language and perhaps legislative history to confirm that a rational basis exists for the statute. *See, e.g.*, *Young*, 859 P.2d at 818-19 (finding rational basis based on examination of statutory language); *People v. Smith*, 848 P.2d 365, 369 (Colo. 1993) (finding rational basis although legislative history was silent); *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1216-17 (Colo. App. 2009) (reviewing purpose of legislation and legislative history to find rational basis); *People v. Oglethorpe*, 87 P.3d 129, 134 (Colo. App. 2003) (finding rational basis based on General Assembly's findings); *Collins v. Jaquez*, 15 P.3d 299, 303-04 (Colo. App. 2000) (finding rational basis based on federal precedent and statutory

language); *Dove Valley Bus. Park Assocs., Ltd. v. Bd. of County Comm'rs*, 923 P.2d 242, 249-50 (Colo. App. 1995) (applying presumption of constitutionality and finding rational basis based on purpose of statutory scheme).[11]

Thus, the Court must independently consider whether there is any conceivable rational basis for the General Assembly's passage of Senate Bill 10-001, a statute aimed at ensuring that retirees and public employees now and in the future will receive a pension. That basis is self evident. In addition, the Plaintiffs have conceded such fact by (1) alleging in their Complaint that Senate Bill 10-001 and the changes it made to the pension system are designed to address PERA's unfunded liabilities (Compl. ¶¶ 43-47); and (2) by agreeing in their Response that "the government has an interest in a healthy pension system." Resp. at 14. Plaintiffs' acknowledgment that there is a rational basis for the statute—a healthy pension system—ends the inquiry and defeats Plaintiffs' Substantive Due Process claim. Ignoring the wealth of case law cited in PERA Defendants' Motion, Plaintiffs claim that there is no rational basis for the statute because they believe other options existed. *Id.* at 14. Plaintiffs' suppositions (which are incorrect) and second guessing of the General Assembly do nothing to support their Substantive Due Process claim. *See* Mot. to Dismiss at 23-24 (citing cases holding that disagreement with a legislative decision does not establish a lack of rational basis).[12]

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[11] The rational basis review for substantive due process and equal protection is the same. *See Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) ("[B]ecause a substantive due process analysis proceeds along the same lines as an equal protection analysis, our equal protection discussion sufficiently addresses both claims [as to rational basis].").

[12] Applying the modified COLA only prospectively to future retirees, as Plaintiffs suggest, does nothing to resolve the present day financial crisis. Resp. at 14. Furthermore, Plaintiffs' proposal to switch current workers to a defined contribution plan would *make things worse, not better*, because current workers' contributions would be segregated into individual retirement accounts and there would be no inflow of funds into the defined benefit fund from which current retirees are receiving their pension benefits. *Id.*

In addition to the legal failings of Plaintiffs' takings and substantive due process theories, the Court should dismiss such claims because, when faced with several potentially relevant constitutional provisions, "courts should invoke the one that treats most directly the right asserted." *Parella v. Ret. Bd. of Rhode Island Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989) and *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996) (en banc)); *see also Conn v. Gabbert*, 526 U.S. 286, 292 (1999) ("We have held that where another provision of the Constitution 'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and 'not the more generalized notion of substantive due process.'") (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989) (internal quotation marks omitted).

Here, Plaintiffs emphasize that the claim they are asserting "involves the impairment of contractual rights to a government pension." Resp. at 12. *Parella* thus provides another basis for the Court to dismiss Plaintiffs' impermissible takings and substantive due process claims and focus this dispute on whether the General Assembly's modification of the COLA formula is consistent with the Contracts Clauses of the Colorado and United States Constitutions.

IV. Plaintiffs Fail to State Claims Under 42 U.S.C. § 1983 for Violations of the Contracts, Takings, and Substantive Due Process Clauses (Claims VI to VIII)

Plaintiffs have agreed to dismiss that portion of their § 1983 claims (found in subsection F of the prayer for relief) that seek money damages. The Court should dismiss Claims VI to VIII in their entirety.

A. A Section 1983 Claim Cannot Be Based on an Alleged Violation of the Contracts Clause

Plaintiffs have done nothing to avoid the rule stated in *Kilbourn v. Fire & Police Pension Ass'n*, 971 P.2d 284 (Colo. App. 1998) that "a violation of the Contracts Clause does not give

rise to a § 1983 cause of action." *Id.* at 288. Plaintiffs argue that *Kilbourn* was wrongly decided and should be overruled because a Ninth Circuit decision, *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003), reached a different conclusion. Resp. at 16. However, Plaintiffs' only critique of *Kilbourn* is that it lacks analysis, yet the two cases on which *Southern California Gas* relies in its own short reasoning—*Carter v. Greenhow*, 114 U.S. 317 (1885) and *Dennis v. Higgins*, 498 U.S. 439 (1991)—are the *same two cases* on which *Kilbourn* relied in reaching its conclusion. *See Kilbourn*, 971 P.2d at 288 (citing *Dennis* and *Carter*). Thus, Plaintiffs' critique of *Kilbourn* applies with equal force to *Southern California Gas*.

Further, other courts have reached the same, sensible conclusion as *Kilbourn* that the Contracts Clause, like the Supremacy Clause, does not give rise to a section 1983 violation. *See* Mot. to Dismiss at 26 (citing *Am. Fed'n of State, County, & Mun. Employees, Local 2957 v. City of Benton, Arkansas*, No. 4:04-CV-492 (RSW), 2005 WL 2244257, at *7 (E.D. Ark. Aug. 2, 2005); *Andrews v. Anne Arundel County, Maryland*, 931 F. Supp. 1255, 1267 & n.14 (D. Md. 1996)).

B. Plaintiffs' Section 1983 Claim Based on Alleged Violations of the Takings Clause (Claim VII) and Substantive Due Process Clause (Claim VIII) Should Be Dismissed Because Plaintiffs' Underlying Claims Fail as a Matter of Law

As explained above and in the opening brief, Plaintiffs have failed to state a cognizable claim under the Takings and Substantive Due Process Clauses. Accordingly, Plaintiffs' section 1983 claims based on alleged violations of the Takings and Substantive Due Process Clauses should be dismissed. *See* Mot. to Dismiss at 26.

V. Plaintiffs Seek Only Prospective Declaratory Relief

While the PERA Defendants defer to the State Defendants to respond substantively as to Plaintiffs' characterization of immunity law, PERA Defendants note that Plaintiffs have made

clear that they "are seeking only prospective injunctive or declaratory relief to remedy an ongoing violation of the United States Constitution." Resp. at 18; *see also* Resp. at 17 (seeking to avoid sovereign immunity bar on monetary relief by claiming that such doctrine allows "declaratory judgment actions"). Plaintiffs thus effectively concede that a declaratory judgment action under C.R.S. § 13-51-112, with the added remedy of monetary damages, is impermissible. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (reversing monetary award in a declaratory judgment action because "this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State").

The Court should thus dismiss subsection F of Plaintiffs' prayer for relief requesting the Court "[a]ward Plaintiffs and the Class monetary damages (plus interest), pursuant to Colo. Rev. Stat. § 13-51-112 and/or 42 U.S.C. 1983, to make them whole for any loss and to restore them to the positions they would have been in but for the improper application of Sections 19 and 20 of Senate Bill 10-001 by Defendants." Compl. at p. 14.

CONCLUSION

The PERA Defendants respectfully request that the Court dismiss with prejudice Plaintiffs' second, fourth, fifth, sixth, seventh, and eighth claims, and subsection F of the prayer for relief, in their First Amended Complaint.

Respectfully submitted this 23rd day of June, 2010.

s/Daniel M. Reilly
Daniel M. Reilly
Eric Fisher
Jason M. Lynch
Lindsay A. Unruh
Caleb Durling
REILLY POZNER LLP
511 Sixteenth Street, Ste. 700
Denver, CO 80202
dreilly@rplaw.com
efisher@rplaw.com
jlynch@rplaw.com
lunruh@rplaw.com
cdurling@rplaw.com

s/Mark G. Grueskin
Mark G. Grueskin
Edward T. Ramey
Kara Veitch
ISAACSON ROSENBAUM P.C.
1001 Seventeenth Street, Ste. 1800
Denver, CO 80202
mgrueskin@ir-law.com
eramey@ir-law.com
kveitch@ir-law.com

ATTORNEYS FOR DEFENDANTS PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, MARK J. ANDERSON, AND SARA R. ALT, in their official capacities only

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2010, a true and accurate copy of the foregoing PERA Defendants' Reply in Support of Motion to Dismiss First Amended Class Action Complaint was served via Lexis-Nexis File & Serve on the following individuals:

Richard Rosenblatt
Richard Rosenblatt & Associates, LLC
8085 E. Prentice Ave.
Greenwood Village, CO 80111
rrosenblatt@cwa-union.org

William T. Payne
Stephen M. Pincus
John Stember
Stember Feinstein Doyle & Payne, LLC
Allegheny Bldg. 17th Floor
Pittsburgh, PA 15219
wpayne@stemberfeinstein.com
spincus@stemberfeinstein.com
jstember@stemberfeinstein.com

John W. Suthers
Maurice G. Knaizer
William V. Allen
Megan Paris Rundlet
Attorney General's Office
State of Colorado
1525 Sherman St. 7th Floor
Denver, CO 80203

s/Janie Cohen

Pursuant to C.R.C.P. 121, Section 1-26, a printed copy of this document with original signatures will be maintained by Reilly Pozner LLP and made available for inspection upon request.