DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202 Telephone (720) 865-8301	
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.	**▲ COURT USE ONLY ▲** Case Number: 2010CV1589 Div. & Ctrm.: 6
Richard Rosenblatt Richard Rosenblatt & Associates, LLC Address: 8085 East Prentice Avenue Greenwood Village, CO 80111 Phone Number: (303) 721-7399 x 11 FAX Number: (720) 528-1220 E-mail: rrosenblatt@cwa-union.org Atty. Reg. #: 15813 William T. Payne * Stephen M. Pincus * John Stember * Stember Feinstein Doyle Payne & Cordes, LLC Allegheny Building, 17th Floor Pittsburgh, PA 15219 P: (412) 281-8400 F: (412) 281-1007 wpayne@stemberfeinstein.com spincus@stemberfeinstein.com jstember@stemberfeinstein.com *Admitted via *pro hac vice*	

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED COMPLAINT

Plaintiffs submit this Sur-reply in response to new arguments raised by Defendants[1] in their reply briefs in support of their motions to dismiss Plaintiffs' Takings Clause claim. Because of the complexity and importance of the issues raised by the parties' briefing, Plaintiffs also respectfully request oral argument on Defendants' motions to dismiss.

A. Plaintiffs Have Made Out A Claim Under The Takings Clauses Because Defendants Have Taken Their "Property."

In Section I.B of their Reply Brief, the PERA Defendants argue that a claim under the Takings Clause will not lie "where the property right alleged to have been taken arises from a contract with the government," citing several cases in support of this assertion.[2] However, as discussed below, much of the case law that Defendants rely on has no bearing here because they involve contracts between private parties or between a private party and a governmental entity, not vested property rights created by state statute. In addition, Defendants' point fails when one examines the precise character of the property that Defendants have taken from Plaintiffs by eliminating the COLA.

As explained in Plaintiffs' principal brief, by statute and operation of contract, each class member owns an income stream that is to continue flowing for life. Most class members have been receiving monthly income from this stream for years. This income

[1] Since the state Defendants have adopted the arguments advanced in the reply brief of the PERA Defendants, we will, where appropriate, refer to them collectively as "Defendants."

[2] PERA Defendants argue that the Takings Clause is compensatory and not prohibitory, a point of little consequence given that the Court has the power to strike down Senate Bill 10-001 under the federal and state Contracts Clauses, which Defendants have not moved to dismiss. In any case, the Colorado Supreme Court has found that courts do have the power to declare statutes unconstitutional pursuant to the Takings Clause. Kirk v. Denver Publishing Co., 818 P.2d 262, 264 (Colo. 1991).

stream came with a statutory guarantee of an established annual increase to compensate for the effects of inflation. Before Senate Bill 10-001, by this time of year, class members would already have received their annual guaranteed upward adjustment of 3.5%. The amendment cut this off for this year and reduced it for future years, thereby diminishing the income stream earned and previously enjoyed by each class member. Defendants took away a benefit that was earned and was promised, ostensibly to address a shortfall that Defendants themselves help create by ignoring the advice of their own auditors and failing to properly fund class members' pensions.

In the face of these facts, Defendants argue that Plaintiffs have not lost any "property" cognizable under the Takings Clause. Property interests emanate from state law, and the Defendants take too narrow a view of what a property interest can be. The Colorado Supreme Court has explained:

> The term "property" includes a multiplicity of interests and is commonly used to denote everything that is the subject of ownership, whether tangible or intangible, as well as those rights and interests which have value to the owner. *See Black's Law Dictionary* 1095 (5th ed. 1979). **The concept of property, therefore, encompasses those enforceable contractual rights that traditionally have been recognized as choses in action.**

Baker v. Young, 798 P.2d 889, 893 (Colo. 1990) (emphasis added); see also Rosane v. Senger, 149 P.2d 373, 375 (Colo. 1944) (the term "property" includes a "legal right to damage for an injury"); United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (Takings Clause is addressed to "every sort of interest the citizen may possess"); Florida Rock Industries, 18 F.3d

at 1572 n.32 (property interests "are about as diverse as the human mind can conceive").

Under Colorado law, class members have a property right in their pensions, Police Pension and Relief Bd. of City and County of Denver v. McPhail, 139 Colo. 330, 342

(1959), which include the yearly pension increase that has been guaranteed by operation of statute.[3] Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383, 388-89 (1961).

Defendants suggest that because the right to an annual pension adjustment is also a term of class members' employment contracts and cognizable under the Contract Clause, this somehow diminishes class members' claims under the Taking Clause. Defendants ignore the wealth of Colorado authority discussed in Plaintiffs' opening brief, including McPhail, 139 Colo. at 342, which holds that the diminution of pension benefits violate the Colorado Contracts Clause and Takings Clause,[4] and other cases holding that such diminution violates the federal Contracts Clause.[5] See PERA Reply, pp.8-12.

---

[3] Defendants surely would not argue that Plaintiffs suffered no loss of property if, at retirement, they gave Plaintiffs the actuarial value of their income stream in a lump sum, but then proceeded to take back the amount attributable to the value of the yearly increases. In substance, this is precisely what happened here.

[4] While Plaintiffs here have only pled a claim under the federal Takings Clause, the analysis is the same under the Colorado and federal Takings Clauses for the purposes here. E-470 Public Highway Authority v. Revenig, 91 P.3d 1038, 1045 n.10 (Colo. 2004) (quotation omitted) ("Although the language of article II, section 15 of our constitution differs from its federal counterpart, we have considered decisions of the United States Supreme Court construing the federal takings clause as a guide in determining what constitutes a taking."); Animas Valley Sand and Gravel, Inc. v. Bd. of County Com'rs of County of La Plata, 38 P.3d 59, 64 (Colo. 2001) (citation omitted) ("Other than this specific additional coverage [under the Colorado takings clause], this court has interpreted the Colorado takings clause as consistent with the federal clause.").

[5] While the claims at issue in these cases were fundamentally contractual, plaintiffs there and here derived their property interest from statute and from contract, and even purely contractual rights are cognizable under the Takings Clause. See Parella v. Retirement Bd. of Rhode Island Employees' Retirement System, 173 F.3d 46, 58-59 (1st Cir. 1999) ("The facts here require us to consider whether plaintiffs had the requisite property right to support a Takings Clause claim by analyzing their claim under the Contract Clause.").

"Property rights normally do arise out of contract, but not every contract creates a property right." Lim v. Central DuPage Hosp., 871 F.2d 644, 648 (7th Cir. 1989). The cases relied upon by PERA Defendants involved ordinary commercial contracts between private entities and the government that do not rise to the level of establishing a separate property right, including Tamerlane Ltd v. U.S., 80 Fed. Cl. 724 (Fed. Cl. 2008) (promissory notes); Castle v. U.S., 301 F.3d 1328 (Fed. Cir. 2002) (contract involving acquisition of thrift); Home Sav. of Am., F.S.B. v. U.S., 51 Fed. Cl. 487 (Fed. Cl. 2002) (contracts involving acquisition of bank assets); and B&B Trucking, Inc. v. U.S. Postal Serv., 406 F.3d 766 (6th Cir. 2005) (contract between trucking company and Postal Service to transport mail). As such, these cases have no bearing on situations that involve property rights in a lifetime ***pension*** benefit, as here and as in such cases as McPhail and Bills.

B. Because It Will Be Ultimately Necessary For This Court To Balance All Of The Interests Involved, A Fact-Intensive Analysis, Defendants' Motion to Dismiss The Takings Clause Should Be Denied.

PERA Defendants next argue that Plaintiffs have no claim under the Takings Clause because the "General Assembly has not appropriated any private money for the State of Colorado's general use" but "simply readjusts economic benefits and burdens for the common good." PERA Reply, p. 14. Questions involving "the common good" are fact based: the determination of whether Defendants were justified in appropriating class members' pension benefits for the "common good" is a fact-intensive inquiry. The Supreme Court so recognized in Connolly v. Pension Benefit Guaranty Corp., 475 U.S.

211 (1986), a case discussed in depth in Defendants' Reply Brief.[6] Further, in their opening brief, Plaintiffs cited a number of cases, which Defendants chose not to address, that hold that courts should be loathe to dismiss claims under the Takings Clause, as these typically require fact development and entail difficult "conceptual, theoretical and practical issues."[7] Opp. Brief, pp. 9-10 (quoting State Dep't of Highways v. Interstate-Denver West, 791 P.2d 1119, 1120 (Colo. 1990)).

---

[6] After reviewing this area of the law, the Supreme Court in Connolly concluded: "In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case." 475 U.S. at 224.

[7] PERA Defendants maintain that "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." PERA Reply, p. 7. These courts has repeatedly found that in order to determine whether the government has acted "fairly and reasonably," a court must engage in an inquiry to determine whether there has been a "taking." For example, in Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560 (Fed. Cir. 1994), the court found:

> In addition, then, to a demonstration of loss of economic use to the property owner as a result of the regulatory imposition . . . the trial court must consider: are there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short, has the Government acted in a responsible way, limiting the constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?

Id. at 1571 (reversing dismissal order and remading for further findings); Mildenberger v. U.S., 91 Fed.Cl. 217, 223 (Fed.Cl. 2010) ("Because of the highly fact-intensive nature of the required takings analysis, the court must engage in a thorough examination of the relevant facts in this case"); Resource Investments, Inc. v. U.S., 85 Fed.Cl. 447, 466 (Fed.Cl. 2009) ("due to the 'fact-intensive' nature of takings claims, courts are typically reluctant to decide such claims at the summary judgment stage, preferring to wait for a trial to fully develop the factual record"); Cebe Farms, Ind. v. U.S., 83 Fed.Cl. 491, 497 (Fed.Cl. 2008) ("the 'fact-intensive nature of just compensation jurisprudence...argues

Contrary to the position taken by Defendants, their "public good" justification for their actions does not automatically excuse their actions "from liability. To do so hold would eviscerate the plain language of the Takings Clause, and would be inconsistent with Supreme Court guidance." Florida Rock Industries, 18 F.3d at 1571 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)). "The takings clause already assumes the Government is acting in the public interest: 'nor shall private property be taken *for public use* without just compensation.'" 18 F.3d at 1571 (emphasis in original).

While it is in the "public good" to have a healthy pension system, it is **not** in the "public good" for a government to deny the payment of compensation to its employees.[8] As the Rhode Island Supreme Court ruled in a case where a town failed to pay a town employee for his services, "[a]ssuming that public policy equates the public good . . . we cannot agree that the public good would be served by denying to a public officer that compensation to which he is entitled by law. . ." LaBelle v. Hazard, 160 A.2d 723, 725 (R.I. 1960) (citation omitted). Indeed, allowing such an official repudiation of earned official compensation would be "to sanction the highest type of governmental tyranny." Ace Flying Service, Inc. v. Colorado Dep't of Agriculture, 136 Colo. 19, 22 (1957) (prohibiting the state from entering into contracts, receiving the services and then arbitrarily repudiating the contract); George & Lynch, Inc. v. State, 197 A.2d 734, 736 (Del. 1964) (state's failure to pay contractor for work performed "would ascribe to the General Assembly an intent to profit the State at the expense of its citizens."). It will be

---

against precipitous grants of summary judgment'"); International Indus. Park, Inc. v. U.S., 80 Fed.Cl. 522, 527 (Fed.Cl. 2008) ("Special care is required when addressing summary judgment motions in takings cases, due to their fact-intensive nature").

[8] Pension benefits "represent a form of deferred compensation for services rendered." In re Marriage of Gallo, 752 P.2d 47, 51 (Colo. 1988).

ultimately necessary for this Court to balance all of interests involved – the general public, PERA and the putative Class Members -- to ensure that the government is not obligating "`some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Connolly, 475 U.S. at 227 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). However, the Court should not perform this analysis until after the parties have had an opportunity to develop the factual record.

Further, Defendants continue to maintain that the state has not invaded any specific, identifiable property interest of Plaintiffs. To the contrary, the reduction of Plaintiffs' promised pension benefits is akin to the unlawful takings in Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998), in which the State of Texas kept the interest earned on lawyer trust accounts (IOLTA), and in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), where state law permitted the clerk of each county court to take money deposited by litigants with the court (e.g., in interpleader cases) and invest them in interest-bearing accounts and keep the interest earned. As in these cases, Defendants have invaded a specific, identifiable property interest -- here, PERA's trust accounts -- which Class Members contributed to and which were set up to sustain them throughout retirement.

The cases cited by PERA Defendants are simply not on point as they do not involve a taking of a specific fund of monies, but rather involves user fees, taxes, and the like:

- U.S. v. Sperry Corp., 493 U.S. 52 (1989), involved a 2% "user fee" intended to reimburse the United States for its costs in connection with the Iran-United States Claims Tribunal. The Supreme Court rejected the claim that this was a taking, explaining that the subject

deductions "are not so clearly excessive as to belie their purported character as user fees. This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee." Id. at 62.

- In Connolly, the Court found "that the imposition of withdrawal liability does not constitute a compensable taking under the Fifth Amendment." Id. at 225.

- In Adams v. United States, 2003 WL 22339164 (Fed. Cl. Aug. 11, 2003), the plaintiffs alleged they were owed overtime under the Federal Labor Standards Act, while the defendants believed that plaintiffs were exempt. Unlike here, Adams did not involve benefits guaranteed by statute that the state reduced or eliminated. Rather, "the government did not appropriate plaintiffs' money for its own purpose. Instead, it simply did not pay plaintiffs FLSA overtime because it believed plaintiffs' exempt…." Id. at *9 (citing, Adams v. Hinchman, 154 F.3d 420 (D.C.Cir. 1998), *cert. denied,* 526 U.S. 1158 (1999)).

- State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc., 615 F.Supp. 1063 (D. Colo. 1985) concerned contractual rights under a collective bargaining agreement between two private parties. As the court found, "Defendant's only interest is a "purely contract-based 'right' to avoid liability for further contributions to the pension plans in which [it] participates," and that this was in "no way analogous to the type of interests in specific property protected under the takings clause." Id. at 1066 (citations omitted).

- Swisher Intern., Inc. v. Johanns, 2007 WL 4200816 (M.D.Fla. Nov. 27, 2007), which addressed assessments on tobacco product manufacturers made under the Fair and Equitable Tobacco Reform Act of 2004 in connection with the elimination of government price supports. The federal government imposed these assessments in connection with a "buyout" of tobacco farmers that formerly had enjoyed price supports. Concluding that these assessments were not a taking, the court explained that the government's purpose was to generate revenue to pay for a program.

While the court in Swisher[9] and these other cases had the advantage of a developed factual record, this Court has no such record. Once again, Plaintiffs should be permitted to develop a record that will allow the Court to properly determine whether a taking has occurred.

C. Plaintiffs Are Seeking Both Prospective Relief And "Just Compensation" In This Case.

Finally, Defendants assert that Plaintiffs have conceded that "they seek only prospective declaratory relief." PERA Reply, p. 1; see State Reply, p. 4. **This is flat wrong.** Plaintiffs have pled and have not abandoned their claim for monetary damages pursuant to Colo. Rev. Stat. §13-51-113. See First Amended Complaint, Request for Relief, subsection F. Plaintiffs seek "just compensation" for Defendants' violation of the Takings Clause. Plaintiffs' statements in footnote 2 and page 14 of their Opposition Brief were intended solely to clarify that they cannot seek monetary damages **under 42 U.S.C. § 1983**.

Because the State Defendants raised the issue of sovereign immunity on page 4 of their Reply Brief, Plaintiffs will briefly address the doctrine as it relates to the Takings Clause claim (Count IV). In summary form, sovereign immunity "does not protect the government from a Fifth Amendment Takings Claim because the constitutional mandate is `self-executing.'" Hair v. U.S., 350 F.3d 1253, 1257 (Fed. Cir. 2003) (citing U.S. v. Clarke, 445 U.S. 253, 257 (1980)). This principle applies as to both the federal and state

[9] The PERA Defendants characterize Swisher as "granting a motion to dismiss a Takings Clause challenge." PERA Reply, p. 13. To the contrary, however, Swisher involved a motion for **summary judgment**, and the court emphasized that it was ruling based on a developed factual record. Swisher Intern., 2007 WL 4200816, *8.

governments.[10] In Manning v. N.M. Energy, Minerals & Natural Resources Dept., 144 P.3d 87 (N.M. 2006), the New Mexico Supreme Court analyzed whether the Takings Clause under the federal Constitution is self-executing as applied to the states:

> The Takings Clause creates an individual right to the remedy of just compensation. More specifically, as incorporated through the Fourteenth Amendment, the Takings Clause mandates that states have made, at the time of the taking, "reasonable, certain and adequate provision for obtaining compensation." Williamson County Reg'l Planning Comm'n, 473 U.S. at 194, 105 S.Ct. 3108 (citations and internal quotation marks omitted). See generally Seamon, supra, at 1108 (stating that a taking without a procedure for obtaining compensation violates the due process right found in Section 1 of the Fourteenth Amendment (citing Reich, 513 U.S. at 109, 115 S.Ct. 547)). This is the remedy intended by the Framers of the Constitution, and the remedy thereafter applied to the states through Section 1 of the Fourteenth Amendment.
>
> These factors lead us to conclude that the Takings Clause is self-executing, at least as applied to the states through the Fourteenth Amendment. **We have found no judicial opinion specifically holding that it is not self-executing, and no case has held that to apply the Takings Clause to the states requires congressional action under Section 5 of the Fourteenth Amendment.** The dearth of precedent used to support the State agencies' position speaks in favor of a contrary view. See, e.g., Alden, 527 U.S. 706, 119 S.Ct. 2240.

Id. at 538-539 (emphasis added); see also Vokoun v. City of Lake Oswego, 76 P.3d 677, 684 (Or. App. 2003) (Takings Clause claims under federal and Oregon Constitutions are self-executing); Annicelli v. Town of South Kingstown, 463 A.2d 133 (R.I. 1983).

Because the federal Takings Clause is self-executing, the state's constitutional sovereign immunity is ineffectual.[11] Manning, 144 P.3d at 91 (state's constitutional

---

[10] It does not appear that the Colorado appellate courts have considered the issue of sovereign immunity as it applies to claims under the federal Takings Clause.

[11] Again, Plaintiffs have not pled a claim under the state Takings Clause but the inapplicability of sovereign immunity to such an action would be the same as under the federal Takings Clause. See also Rose v. City of Coalinga, 190 Cal.App.3d 1627, 1633 (1987) (sovereign immunity not applicable to state Takings Clause claim); Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) (stating that Texas Constitution authorizes compensation for destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use); Wisconsin Retired

sovereign immunity does not bar takings claim under federal constitution); Boise Cascade Corp. v. State ex rel. Oregon State Bd. of Forestry, 991 P.2d 563, 566 (Or. App. 1999) (same).

Dated: July 8, 2010

Respectfully submitted,

s/Richard Rosenblatt
Richard Rosenblatt
Richard Rosenblatt & Associates, LLC
Address: 8085 East Prentice Avenue
Greenwood Village, CO 80111
Phone Number: (303) 721-7399 x 11
FAX Number: (720) 528-1220
E-mail: rrosenblatt@cwa-union.org
Atty. Reg. #: 15813

and

William T. Payne *
Stephen M. Pincus *
John Stember *
Stember Feinstein Doyle Payne & Cordes, LLC
Allegheny Building, 17th Floor
Pittsburgh, PA 15219
P: (412) 281-8400 F: (412) 281-1007
wpayne@stemberfeinstein.com
spincus@stemberfeinstein.com
jstember@stemberfeinstein.com

*Admitted *pro hac vice*

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

Teachers Ass'n v. Employee Trust Funds Bd., 558 N.W.2d 83, 95 (Wis. 1997) ("[S]overeign immunity will not bar recovery for a taking, because just compensation following a taking is a 'constitutional necessity rather than a legislative dole.' ") (citations and quotations omitted); Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990) (sovereign immunity not applicable to state constitutional takings claim).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 8th day of July, 2010, a true and correct copy of **PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED COMPLAINT** was e-filed via LexisNexis™ File & Serve that will electronically notify and serve all registered, interested parties to the case including the following:

John W. Suthers, Attorney General
Maurice G. Knaizer, First Asst. Attorney General*
William V. Allen, Senior Asst. Attorney General*
Megan Paris Rundlet, Asst. Attorney General*
ATTORNEY GENERAL-STATE OF COLORADO
1525 Sherman Street, 7th Floor
Denver, CO 80203
P: 303-866-5235 F: 303-866-5671
maurie.knaizer@state.co.us
will.allen@state.co.us
megan.rundlet@state.co.us

*Counsel of Record
ATTORNEYS FOR DEFENDANTS STATE OF COLORADO AND GOVERNOR BILL RITTER

Daniel M. Reilly
Eric Fisher
Jason M. Lynch
Lindsay A. Unruh
Caleb Durling

REILLY POZNER LLP
511 Sixteenth Street, Suite 700
Denver, CO 80202
P: 303-896-6100 F: 303-893-6110
dreilly@rplaw.com
efisher@rplaw.com
jlynch@rplaw.com
lunruh@rplaw.com
cdurling@rplaw.com

Mark G. Grueskin
Edward T. Ramey
Kara Veitch

ISAACSON ROSENBAUM P.C.
1001 17th Street
Suite 1800
Denver, CO 80202
P: 303-292-5656 F: 303-292-3152
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

---

s/Richard Rosenblatt