DISTRICT COURT, DENVER COUNTY, COLORADO

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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.

▲ COURT USE ONLY ▲

Case Number: 2010CV1589

Div. & Ctrm.: 6

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PLAINTIFFS' MOTION FOR MODIFIED CASE MANAGEMENT ORDER

INTRODUCTION

Pursuant to Colo. R. Civ. P. 16(c)(2) and 16(d), Plaintiffs GARY R. JUSTUS, KATHLEEN HOPKINS, and EUGENE HALAAS,[1] by their undersigned counsel, respectfully move this Court for entry of a modified case management order.[2]

Certification of Conference with Counsel: Pursuant to C.R.C.P. 121, §1-15(8), on December 2, 2010, counsel for Plaintiffs conferred with counsel for Defendants regarding the filing of this motion. PERA and State Defendants oppose this motion and believe the Presumptive Case Management Order set forth in C.R.C.P. 16 should apply in its entirety. PERA and State Defendants will file responses to this motion. However, they do not oppose the request for a Case Management Conference.

Plaintiffs have moved for partial summary judgment on Count I of their amended complaint, requesting that the Court find that the provisions of Senate Bill 10-001 decreasing the annual pension increases to the pensions of the Plaintiffs violate the Contract Clause of the Colorado Constitution.

Plaintiffs request that the Court consider this pending summary judgment motion early in the case (with merits discovery being postponed) because (1) Police Pension and Relief Board of the City and County of Denver v. McPhail, 139 Colo. 330 (1959), is directly on point and (2) if the Plaintiffs prevail under McPhail on their Colorado Constitution Contract Clause claim, it will materially advance the litigation and will obviate the need for most of the expected discovery and the filing of dispositive motions on other claims. Liability issues as to Count I can easily be

[1] Plaintiffs have filed an unopposed motion for leave to file a Second Amended Complaint that withdraws Lisa Silva-Derou and adds Robert Laird, Jr., as one of the named plaintiffs.

[2] By separate motion, the parties have requested a Case Management conference.

decided without discovery because – considering the undisputed facts that are a matter of public record -- McPhail and its progeny control. McPhail is either still good law or it is not, and it is distinguishable or it is not. Defendants can easily brief the issue, and it can then be decided, avoiding an enormous expenditure of time, fees and costs by all concerned.

BACKGROUND

Plaintiffs and the Class they represent (collectively, "Retirees"), which is comprised of approximately 50,000 retired Colorado public sector employees, claim that they were promised certain specified pension benefits, including an annual cost-of-living adjustment ("COLA"), in exchange for their service.

Retirees are members of the Public Employees Retirement Association of Colorado ("PERA"). PERA includes former public school teachers, retired state judges, retired police officers, and other retired state, county and local government workers who were employed in the various sectors of Colorado government. Retirees worked in public service for many years, often at lower wages than they could have earned in the private sector. Throughout their working lives, they made contributions to Colorado's Retirement Systems required by state law, expecting in exchange that they would receive in return a retirement package that included specified COLA benefits.

Retirees claim in Count I of their lawsuit (and in the pending summary judgment motion) that -- under well-established Colorado case law -- they acquired rights to certain pension benefits (including an annual COLA) in effect under the law when they became eligible to retire. McPhail, supra; Police Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383 (1961). They further claim that, contrary to this controlling precedent, the Colorado

Legislature in 2010 enacted Senate Bill 10-001 (the "2010 Pension Legislation"), which reduced the promised pension benefits by permanently scaling back the annual COLA.

Plaintiffs commenced this lawsuit on February 26, 2010, three days after Governor Ritter signed the 2010 Pension Legislation into law. Plaintiffs filed a First Amended Complaint on March 18, 2010, adding George Halaas and Lisa Silva-Derou as plaintiffs. The First Amended Complaint includes eight counts, including counts alleging violations of the Contract Clause (Claim I) and Article V, § 48 (Claim II) of the Colorado Constitution, and counts alleging violations of the Contract (Claim III), Takings (Claim IV), and Due Process (Claim V) Clauses of the United States Constitution. The First Amended Complaint also requests injunctive relief and money damages (including under 42 U.S.C. § 1983) against the individual Defendants for violations of the Contract (Claim VI), Takings (Claim VII) and Due Process (Claim VIII) Clauses of the United States Constitution.

Plaintiffs moved for Class Certification on April 27, 2010. Shortly thereafter, Defendants filed a motion to stay briefing on class certification until completion of class discovery, which the Court granted by Order dated July 7, 2010.[3]

On May 10, 2010, Defendants filed motions to dismiss the First Amended Complaint and, tellingly, Count I was *not* among the counts that Defendants sought to dismiss. Plaintiffs opposed the motions as to all counts except for Count II, and also conceded that the request for monetary damages against state officials under 42 U.S.C. § 1983 could be dismissed. On

[3] In its July 7, 2010 Order, the Court stated: "Further class certification briefing is stayed until after class discovery is complete," and "[c]lass discovery will commence after this Court has entered a case management order addressing the scope and timing of class discovery." As shown in their Proposed Modified Case Management Order filed herewith, the parties agree upon a schedule for class discovery and for briefing the class certification motion.

September 14, 2010, the Court denied Defendants' Motions to Dismiss, except as to the parts of the First Amended Complaint that Plaintiffs admitted should be dismissed. On November 19, Plaintiffs filed an unopposed motion for leave to amend the complaint to (1) withdraw Lisa Silva-Derou and add Robert Laird, Jr. as a named plaintiff, (2) remove Count II as well as the claims for monetary damages against state officials under 42 U.S.C. § 1983, and (3) correct the numbering of the paragraphs.

Pursuant to Colo. R. Civ. P. 16(b) and (c), the parties have conferred as to the contents of a Case Management Order, and have reached agreement as to much of the contents (as shown in their Proposed Modified Case Management Order filed herewith). However, they disagree as to whether the pending summary judgment motion on Count I can be decided early, and whether resources (including expert fees) that would otherwise be expended on merits discovery should be conserved pending a decision on that motion.[4] Plaintiffs filed their motion as to liability on Count I on November 23, 2010, and applying the Court rules on the timing of responses to dispositive motions, they propose that Defendants' opposition be due on December 22, 2010, and that their reply be due on January 8, 2011.

Defendants take the position that all merits discovery (including expenditures as to experts) should proceed without restriction immediately. Further, Defendants contend that *they should not even have to respond to the pending summary judgment motion***,** as it should be filed "not later than 75 days before trial (November 23, 2011)," and then "[t]he requirements of C.R.C.P. 121(1-15) concerning the time for filing and responding to motions shall be

[4] Recognizing that the trial date, if necessary, is scheduled to begin on February 6, 2012, Plaintiffs have proposed to begin merits discovery in July 1, 2011 if a decision has not issued on its dispositive motion by that time.

followed..." See Defendants' position in section 9(b), p. 4, in Proposed Modified Case Management Order filed herewith.[5]

ARGUMENT

Although there do not appear to be published Colorado state courts describing the standards to follow in considering a deferral of merits discovery pending a decision on a dispositive motion, recently Colorado's federal District Court provided guidance by providing five factors for consideration: (1) the non-moving party's interests in proceeding expeditiously with the civil action (2) the burden on the moving party in going forward; (3) the convenience to the court; (4) the interests of non-parties; and (5) the public interest. Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co., 2010 WL 3155508 (D. Colo. Aug. 9, 2010) (Exhibit A hereto) (citing String Cheese Incident, LLC v. Stylus Shows, Inc., 2006 WL 894955, *2 (D.Colo. March 30, 2006). These factors provide a clear basis to consider Plaintiff's motion to stay merits discovery pending resolution of the dispositive motion and should be applied here.

These factors weigh in favor of deferring merits discovery here: (1) Deferring merits discovery will likely not delay a trial in this case as it is not scheduled until February 2012; (2) Plaintiffs will be prejudiced if they are required to engage in discovery when the granting of their motion for partial summary judgment will render such discovery totally unnecessary; (3) the Court may conserve its own resources by not having to supervise unnecessary discovery; (4) many government workers would not be required to devote time required to respond to Plaintiffs' discovery requests; and (5) the members of PERA who are not putative class members

[5] Defendants want to modify the Case Management Order by making the last day that a party can file a dispositive motion, the date that it files its response to the pending dispositive motion.

(which include nearly all active members) have an interest to not have their limited pension funds spent on enriching PERA's attorneys to engage in what could be unnecessary discovery.

In Colorado Cross-Disability Coalition, the federal district court considered whether to defer discovery pending a dispositive motion. In agreeing to proceed in this fashion, the Court observed: "The court agrees that in this case it is sensible to determine the threshold issues of subject matter jurisdiction before putting the parties through the process and expense of discovery." Id. at *2; Chavous v. Dist. of Columbia Financial Responsibility and Management Assistance Authority, 201 F.R.D. 1, 5 (D.D.C. 2001) (deferral of discovery warranted where plaintiff's motion for summary judgment or defendant's motion to dismiss would dispose of case).

The same reasoning applies here: Plaintiffs' pending motion for summary judgment as to liability on Count I should be decided early, while discovery on the merits is deferred. This makes sense because the other counts -- alleging violations of the U.S. Constitution's Contract Clause (Claim III), Takings Clause (Claim IV), and Due Process Clause (Claim V) – will likely be moot or easily resolved if Plaintiffs prevail on Count I, thus saving all parties the expense of pursuing the extensive discovery that would be required in connection with the federal Constitutional claims. There is no valid basis for Defendants' request to *avoid even responding* to the summary judgment motion and plowing ahead with unrestricted merits and expert discovery when the Court's early decision on the pending motion can avoid this needless expenditure of resources.

More specifically, under well-established case law interpreting the Contract Clause of the Colorado Constitution (upon which Count I is based), Retirees acquired vested rights to a

package of pension benefits, including the annual COLA in effect under the law when they became eligible to retire. And unlike the counts based on the U.S. Constitution, the claim under Count I (based on the Colorado Contract Clause) does not allow for a defense of "compelling economic necessity." Rather, as to Count I, if the right to the particular pension package is a vested contractual benefit, and it cannot be impaired -- no matter what economic or social justification the public entity offers.

As discussed at pp. 11-16 of Plaintiffs' 11/23/10 Motion For Partial Summary Judgment ("Plaintiffs' 11/23/10 MSJ"), the McPhail Court considered whether Denver's repeal of an "escalator clause" in a city charter and ordinance, which promised post-retirement increases equal to one-half of any future wage increases, violated the state's Contract Clause. Finding that the repeal of the "escalator clause" did indeed contravene Colorado's Contract Clause, the Court held that contributory pensions were not gratuities, but were contractual in nature. McPhail, 139 Colo. at 340-42. The McPhail Court then went on to find that the escalator clause in the Charter and Ordinance of the City and County of Denver "specifically provided that if plaintiffs fulfilled all conditions they would receive a pension *which would be subject to increase* … based upon the salary of the rank which they occupied as of the date of retirement. It would be unjust and contrary to our basic notions concerning the validity of contracts to hold that this provision could be changed by the lawmakers." Id. at 344 (emph. added). McPhail thus holds that public pension benefits (including the COLA component) may not be reduced *for any reason* once plaintiffs attain eligibility for their pension or retire.

McPhail is still good law. See Police Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383, 38 (1961) (citing McPhail) (emphasis added) ("retirement rights

[upon retiring or becoming eligible to retire] thereupon become a vested contractual obligation, *not subject to a unilateral change of any type whatsoever*."); see also Ken Salazar's Attorney General Formal Opinion No. 05-04, pp. 2-3, discussed at pp. 13 to 14 of Plaintiffs' 11/23/10 MSJ, stating as to PERA members who had *retired or fulfilled all of the requirements for the pension*: "Once a PERA member fulfills all the statutory requirements for a pension benefit, retires and begins receiving a pension, *the member's fully vested pension right cannot be reduced by the General Assembly.*" Id. (emphasis. added) (citing McPhail).

This analysis as to Count I – the state Contract Clause claim brought by persons who had fulfilled all of the requirements for a pension and whose fully vested pension rights simply "cannot be reduced by the General Assembly" -- contrasts with the standards that govern the other counts of the complaint. Under the test for judging whether there is a claim under the *federal* Contract Clause (upon which Count III is based), for example, the Court must first determine whether there has been a substantial impairment of a contractual right to a pension, but even if there has been such impairment, the legislation nonetheless survives a constitutional attack if the "impairment is ... justified as 'reasonable and necessary to serve an important public purpose.'" Koster v. City of Davenport, Iowa, 183 F.3d 762, 766 (8th Cir. 1999) (quoting Honeywell, Inc. v. Minn. Life and Health Ins. Guar. Assoc., 110 F.3d 547, 551 (8th Cir. 1997) (en banc), quoting Parella v. Retirement Bd. of the R.I. Employees' Retirement Sys., 173 F.3d 46, 59 (1st Cir. 1999); see also U.S. Trust Co. v. N.J., 431 U.S. 1, 25 (1977). This is also true under the Takings Clause claim. Parella, 173 F.3d at 58-59 (applying same test for federal Contract and Takings Clauses)

As to the federal Takings Clause (Claim IV), it is also significant that courts have observed that such claims typically require a factual development and entail difficult "conceptual, theoretical and practical issues." State Dep't of Highways v. Interstate-Denver West, 791 P.2d 1119, 1120 (Colo. 1990)). These courts have repeatedly found that in order to determine whether the government has acted "fairly and reasonably," a court must engage in a detailed 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 remanding for further findings); see also 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." Emph. added); 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 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"). See discussion at pp. 5-9 of Plaintiffs' 7/8/10 Sur-Reply In Opposition To Defendants' Motions To Dismiss The First Amended Complaint.

Again, this "fact-intensive" evaluation – while required for resolution of Count IV (the Takings Clause claim) – is not necessary as to Count I, which is governed by McPhail and its progeny.

In sum, if Plaintiffs prevail on their claim under Colorado's Contract Clause, this expensive and time-consuming discovery on the federal Constitutional claims will likely be avoided. Similarly, if the Court (on a cross-motion for summary judgment by the Defendants, for example) determined that Plaintiffs did not have a vested right to receive COLA at the levels in effect when they retired, judgment could likely be entered *against* the Plaintiffs on all counts. And if Defendants (or Plaintiffs) were to disagree with such grant of summary judgment on Count I, they could of course seek an expedited interlocutory appeal.

Significantly, this is a case about limited resources – those claimed by PERA and those lost by the retirees. Should Plaintiffs motion be granted, there is a better opportunity for all parties to save some of those limited resources they have at their disposal. Nor is Defendant harmed by deferring discovery. Should the Court deny Plaintiffs' summary judgment motion or not decide it prior to July 1, Defendants will still have a full opportunity to engage in the discovery that is believes is necessary before a February 6, 2012 trial date.

Given the efficiency of having Count I decided early in the case, Plaintiffs have proposed the following modified discovery schedule: Class discovery should commence immediately and be completed by April 15, 2011. Merits discovery (including expert discovery, if any) shall be deferred until the Court rules on Plaintiffs' November 23, 2010 motion for partial summary

judgment, but shall commence no later than July 1, 2010. Should the Court rule prior to July 1, 2010 on Plaintiffs' summary judgment motion, the parties will then meet and confer and submit a modification to this Case Management Order.

CONCLUSION

Because a decision on Count I will likely avoid the need for extensive discovery and enormous expenditure of resources by the Court and parties, the Court should issue Plaintiffs' proposed CMO, under which a summary judgment decision on Count I will be decided before the Court and parties expend resources unnecessarily.

Dated: December 6, 2010

By: _s/Richard Rosenblatt_____
Richard Rosenblatt, Esq.
Richard Rosenblatt & Associates, LLC

Slip Copy, 2010 WL 3155508 (D.Colo.)
(Cite as: 2010 WL 3155508 (D.Colo.))

United States District Court,
D. Colorado.
COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation, Anita Hansen, Robert Sirowitz, Joshua Stapen, Robin Stephens, and Benjamin Hernandez, Plaintiffs,
v.
ABERCROMBIE & FITCH CO., Abercrombie & Fitch Stores, Inc. and J.M. Hollister LLC, d/b/a Hollister CO., Defendants.
Civil Action No. 09-cv-02757-WYD-KMT.

Aug. 9, 2010.

Kevin William Williams, Carrie Ann Lucas, Colorado Cross-Disability Coalition, Amy Farr Robertson, Fox & Robertson, P.C ., Denver, CO, Bill Lann Lee, Julia Campins, Lewis, Feinberg, Lee, Renaker & Jackson, P.C., Oakland, CA, for Plaintiffs.

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ORDER

KATHLEEN M. TAFOYA, United States Magistrate Judge.

*1 This matter is before the court on the "Unopposed **Motion** to **Stay Discovery** and Scheduling Order **Pending** Resolution of Defendants' **Motion** to **Dismiss**" (Doc. No. 61, filed August 6, 2010).

Plaintiffs filed their "Second Amended and Class Action Complaint" on May 12, 2010. (Doc. No. 34.) On May 26, 2010, Defendants filed a Motion to Dismiss for Lack of Standing pursuant to Fed.R.Civ.P. 12(b)(1). (Doc. No. 35.) The Motion to Dismiss is presently pending before Chief District Judge Wiley Y. Daniel. Defendants now move for a **stay** of **discovery** and a **stay** of the Scheduling Order **pending** resolution of Defendants' **Motion** to **Dismiss**.

The underlying principle in determination of whether to grant or deny a stay clearly is that "[t]he right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Com'n v. Chilcott Portfolio Management, Inc.*, 713 F.2d 1477, 1484 (10th Cir.1983) (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir.1971)). In other words, stays of the normal proceedings of a court matter should be the exception rather than the rule. As a result, stays of all discovery are generally disfavored in this District. *Chavez v. Young Am. Ins. Co.*, No. 06-cv-02419-PSF-BNB, 2007 WL 683973, at *2 (D.Colo. Mar. 2,2007) (citation omitted). However, a stay may be appropriate in certain circumstances. The Court weighs several factors when evaluating the propriety of a stay. *See String Cheese Incident, LLC v. Stylus Show, Inc.*, No. 02-cv-01934-LTB-PAC, 2006 WL 894955, at * 2 (D.Colo. Mar. 30, 2006) (describing five-part test). The Court considers (1) the interest of Plaintiff; (2) the burden on Defendants in going forward; (3) the Court's convenience; (4) the interest of nonparties; and (5) the public interest in general. *Id.* Here, these factors weigh in favor of the entry of a stay.

A motion to stay discovery pending determination of a dispositive motion is an appropriate exercise of this court's discretion. *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936). The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. *Kansas City Southern Ry. Co. v. United States*, 282 U.S. 760, 763 (1931). Moreover, lack of subject matter jurisdiction may be asserted at any time by the court either at the trial or appellate level, and that has been done on innumerable occasions at all levels of the federal judiciary. *Ruhrgas AG v. Marathon Oil Co .*, 526 U.S. 574, 583 (1999). A Rule 12(b)(1) challenge is usually among the first issues resolved by a district court because if it must dismiss the complaint for lack of subject matter jurisdiction, the accompa-

nying defenses and objections become moot and do not need to be determined by the judge. *Id.*

*2 In this case, there is no prejudice to any party by granting a **stay**; in fact, the parties jointly request that the court **stay** the **discovery** process **pending** resolution of the **Motion** to **Dismiss**. The court agrees that in this case it is sensible to determine the threshold issues of subject matter jurisdiction before putting the parties through the process and expense of discovery. The court also considers its own convenience, the interests of non-parties, and the public interest in general. None of these factors prompt the court to reach a different result. Therefore, it is

ORDERED that the "Unopposed **Motion** to **Stay Discovery** and Scheduling Order **Pending** Resolution of Defendants' **Motion** to **Dismiss**" (Doc. No. 61) is GRANTED. Discovery and the deadlines set in Scheduling Order are stayed pending ruling on Defendants' Motion to Dismiss. The parties shall file a joint status report within ten days of the district court's ruling on the Motion to Dismiss if any portion of the action remains pending.

D.Colo.,2010.
Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co.
Slip Copy, 2010 WL 3155508 (D.Colo.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of December, 2010, a true and correct copy of **PLAINTIFFS' MOTION FOR MODIFIED CASE MANAGEMENT ORDER, EXHIBIT A, CERTIFICATE OF COMPLIANCE WITH RULE 16 and PROPOSED CASE MANAGEMENT ORDER,** was e-filed via LexisNexis™ File & Serve that will electronically notify and serve all registered, interested parties to the case including the following:

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s/Richard Rosenblatt
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