DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 **GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and ROBERT P. LAIRD, on behalf of themselves and those similarly situated,** *Plaintiffs.* v. **STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and MARYANN MOTZA, in their official capacities only,** *Defendants.*	 **COURT USE ONLY**
	Case No.: **2010CV1589** Division: 209
ORDER	

This matter comes before the Court on a variety of motions. The Court has reviewed these motions, related pleadings, and all other legally relevant material; is fully advised on the matter and makes the following findings and Order.

This case arises from the passage of Senate Bill 10-001 (the "Bill"), signed into law by Governor Ritter on February 23, 2010. The Bill was designed to allay PERA's severe underfunding. It modifies employee/employer contributions, places a cap on cost of living increases for retirees, creates new contributions for working retirees, and increases the age and service requirements of certain groups of employees before they are eligible to receive retirement benefits. Specific to the issues in this case, Sections 19 and 20 modify the cost of living adjustments ("COLA") received by Plaintiffs. Depending on the sub class to which a specific

Plaintiff belongs, the COLAs were modified from a guaranteed annual increase of 3.25% or 3.5% to an annual increase to be calculated under a different formula and capped at 2%.

Plaintiffs request judicial declarations finding Sections 19 and 20 of Senate Bill 10-001 in violation of the Contract clause of the Colorado Constitution (Claim I); Article V, § 48 of the Colorado Constitution (Claim II – which was dismissed on September 14, 2010); and the Contract (Claim III), Takings (Claim IV), and Substantive Due Process (Claim V) Clauses of the United States Constitution. In addition, Plaintiffs seek relief pursuant to 42 U.S.C. § 1983 against the individual defendants in their official capacities for violations of the Contract (Claim VI), Takings (Claim VII) and Substantive Due Process (Claim VIII) Clauses of the United States Constitution.

Statutorily created in 1931 to provide retirement and other benefit services to state employees, the Public Employees' Retirement Association ("PERA") now serves employees of more than 400 government agencies and public entities and over 440,000 public employees. PERA acts as a substitute for social security for most of its members and is pre-funded by working members and their employers with the amount of contribution defined by statute. C.R.S. § 24-51-401, et seq. (2010). When a member retires, their monthly base benefit is calculated using the member's age at retirement, years of service, and their highest average salary (which also has its own calculation). C.R.S. § 24-51-602-603 (2010).

Much of Plaintiffs' argument in their First Amended Class Action Complaint is based upon the assumption that a base pension and an increasing COLA are both protected by the Contract Clause in both the Colorado and United States Constitutions. In that vein, Plaintiffs' argue that a public pension benefits vest when an employee becomes eligible to retire, that annual increases in the cost of living are a part of that vested right and consequently, Senate Bill 10-001 which modified the COLA formula violates the rights of the class. Plaintiff argues that "[b]y making the requisite contributions to PERA and attaining the age and service credit required for retirement, public employees acquire a vested right to their pensions." (Plfs.' First Am. Compl., 6 ¶ 30.) Included in this vested pension right is the cost of living adjustment,

because such rights were guaranteed by PERA and DPSRS since 1994 and 1969 respectively – to increase annually. (Id. ¶31.)

Defendants claim that, "[t]hat this is not a case of the state abrogating contracts to save money and to balance the budget." (Defs.' Opp. to Plfs.' Mtn. for Summ. J., 4.) "Senate Bill 10-001 did not take any money from the PERA pension system. Rather, it increased contributions to the PERA pension system and reduced present COLA payments in order to create a larger pool of investable funds and thus provide for a sustainable pension benefits in the future." (Id.) Furthermore, Defendants claim that a cost of living adjustment can be distinguished from a base pension, which is constitutionally protected. Instead, Defendants maintain that the COLA is in name a modifiable number and that Plaintiffs' cannot prove a clear and unmistakable right to a non-adjusting COLA exists (it was modified at many times during Plaintiffs' retirement); it follows then that 10-001 was not inconsistent with Plaintiffs' reasonable expectation; and, given the global economic catastrophe, that the downward COLA adjustment was not unreasonable, unnecessary, or not for a legitimate public purpose. *See In re Estate of DeWitt*, 54 P.3d 849, 853 (Colo. 2002).

The Court first addresses Plaintiffs' Revised Motion for Leave to File Second Amended Complaint. Plaintiffs mischaracterize the nature of this motion. Plaintiffs filed their initial complaint in February of 2010 and in April of that year filed their class certification premised on Kathleen Hopkins as a class representative. Various amended complaints were filed. The case came at issue on October 21, 2010. On November 19, 2010 Plaintiffs sought leave to file a Second Amended complaint to substitute Robert Laird, Jr. for Lisa Silver Derou. At a case management conference on March 3, 3011 the Court granted that motion and accepted the November 19, 2010 Second Amended Complaint, memorializing that ruling in a March 10, 2011 order. That is the operative complaint. After the deadline for amendment of pleadings, Plaintiffs filed their request for a third amended complaint which they incorrectly characterize as a Revised Motion for Leave to File Second Amended Complaint. It is clear to the Court that this is, in truth, a transparent effort to avoid disclosure and utilization of Ms. Hopkins statements as they were expressed to the retiree organization SavePERACOLA and which may arguably be problematic for Plaintiffs. It is simply too late for this tactic. Before the Court are various motions for

summary judgment and Ms. Hopkins, as a class representative, has been the subject of Defendants' efforts for gather documents and utilize them in specific arguments and analysis along with the details surrounding her benefits, employment and other information that is clearly relevant. Plaintiffs cannot be allowed to avoid disclosure and document production already underway and subvert protracted efforts to brief significant issues by dropping Ms. Hopkins as a class representative at this date, thereby effectively shielding her expressions and opinions. Neither justice nor C.R.C.P. 15 (a) requires that result. It is prejudicial to Defendants to allow substitution of a class representative after a series of amended complaints, a class certification motion, resolution of motions to dismiss, answers, exchange of initial disclosures, requests for production of documents and responses, preparation for a deposition and full preparation for and briefing of dueling motions for summary judgment, which include significant information about and from Ms. Hopkins. The case is set for trial within months. The Court finds that no good cause exists for Plaintiffs request and that granting it at this time would impede the management of the case and unduly prejudices Defendants. Attempting to shield Hopkins's statements would not be in the interest of justice.

Moreover, much of what other "amendments" Plaintiffs seek has been mooted by the Court's acceptance of the November 19, 2010 amended complaint and the joint motion to substitute Governors and current PERA board members. Plaintiffs provide no good cause for the late request to add Meredith Williams and Defendants are correct when they point out that his addition would not change or alter potential remedies against PERA. Plaintiffs' Motion is denied in its entirety.

Plaintiffs' Motion to Strike from Defendants' Opposition to Plaintiffs' Revised Motion for Leave to File Second Amended Complaint Defendants' Citation to and Use of an Inadvertently Disclosed E-Mail is also denied. Simply put, the Court finds that this communication is <u>not</u> privileged and in fact should have been produced in response to PERA's January 21, 2011 requests for production. C.R.C.P. 26 (a) (1). It should also have been produced in response to the March 11, 2011 Motion to Compel and notably, Plaintiffs did not ever produce a privilege log in support of their contention. It is relevant, likely to lead to discovery of admissible evidence and certainly, on its face, not subject to a claim of attorney client privilege.

Nor does the communication meet the test for the common interest privilege exception to waiver of the attorney-client privilege. *Black v. Sw.Water Conservation Dist.,* 74 P.3d 462, 469 (Colo. App. 2003). The Court also finds that even if there were a privilege attached to the document, this particular inadvertent disclosure waives the privilege based on the application of the five part test articulated in *Floyd v. Coors* Brewing *Co.*, 952 P.2d 797, 808-09 (Colo. App. 1997), *rev'd on other grounds,* 978 P.2d 633 (Colo. 1999). There was no genuine precaution taken to protect the e-mail and it was not part of a massive document production. The disclosure is a bell already rung in the true sense of that phrase and there was no immediate effort to seek remedial measures. The Court also finds that considerations of fairness dictate this result because great prejudice to the truth seeking effort would occur. The motion to strike is denied.

State Defendants' Motion to File Documents Under Seal In connection with State Defendants' Joinder in PERA Defendants' Response to Plaintiffs' Revised Motion to File Second Amended Complaint is rendered moot by the above orders of this Court.

Defendants' Motion to Compel Documents Responsive to PERA's First Request for Production of Documents is granted. The Court has examined the document requests directed at each named Plaintiff and finds that all of these requests are relevant to the subject matter and is reasonable calculated to lead to the discovery of admissible evidence. C.R.C.P. 26 (b) (1).

Plaintiffs' privilege objections are without merit and Plaintiffs failed to produce a privilege log necessary to support such a position. Again, this Court finds that communications with SavePERACOLA and other third parties waive any privilege and the common interest privilege, upon which Plaintiffs rely, does not apply. In the case of SavePERACOLA, the Court agrees with Defendants that even if the organization has now become a co-client of Plaintiffs' attorneys it is a third party to the attorney-client relationship with Plaintiffs. Moreover, creation of this particular promotion and fundraising vehicle, designed in part to communicate with putative class members and others, coupled with affording it the benefit of the common legal interest doctrine would extend that doctrine irrationally and subvert the real purpose of the doctrine. The Court also agrees that nothing alleged here truly implicates the work product doctrine and equally inapplicable is the notion that disclosure would genuinely impact First

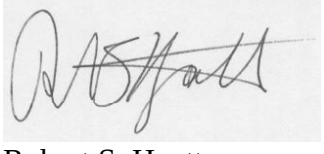
Amendment rights by subjecting associational members to objective fear of threats, harassment or reprisal which would affect the members physical well-being, political activity or economic interest. *In re GlaxoSmithKline PLC*, 732 N.W. 2d 257, 271 (Minn. 2007).

Finally, in granting the motion in its entirety, the Court notes yet again that no privilege log was ever provided by Plaintiffs.

Plaintiffs' Motion for Partial Summary Judgment is denied. The purpose of a C.R.C.P. Rule 56 motion for summary judgment is to prevent the unnecessary expense associated with a trial when the outcome can be settled purely as a matter of law. *See* Morlan v. Durland Trust Co., 127 Colo 5, 252 P.2d 98 (Colo. 1952); Peterson v. Halsted, 829 P.2d 373 (Colo. 1992). Summary judgment is a drastic remedy and should not be granted unless it is apparent that no genuine issue of material fact exists. *See* McCormick v. Diamond Shamrock Corp., 175 Colo. 406, 487 P.2d 1333 (Colo. 1971). The standard for issuance of summary judgment dictates that judgment shall be rendered in favor of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). A genuine issue of material fact exists only if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Andersen v. Lindenbaum*, 160 P.3d 237 (Colo. 2007). The moving party has the burden to demonstrate the absence of a triable issue, and any doubts as to the existence of such an issue must be resolved against that party. *See Primock v. Hamilton*, 452 P.2d 375, 378 (Colo. 1969). Plaintiffs have not met their burden with regard to such a motion. The Court is aware that Defendants have a pending Motion for Summary Judgment which recently came at issue and that ruling will be provided separately.

Done this 20th day of June, 2011.

By the Court,



Robert S. Hyatt
District Court Judge