DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202 Telephone (720) 865-8301	
Plaintiff(s): GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS, JR and ROBERT P. LAIRD, JR, on behalf of themselves and those similarly situated v. **Defendant(s):** STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and MARYANN MOTZA, in their official capacities only.	▲ **COURT USE ONLY** ▲ Case Number: 2010CV1589 Div. & Ctrm.: 6
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RESPONSE TO PERA DEFENDANTS' MOTION TO COMPEL DOCUMENTS RELATING TO PERA'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

I. INTRODUCTION

In their March 11, 2011 Motion to Compel, Defendants ask this Court to require production of several categories of documents. The main thrust of their motion is that Plaintiffs may not withhold under a claim of privilege communications between the Plaintiffs and other class members or between Plaintiffs and Save PERA COLA, a grass-roots retiree organization set up for the very purpose of challenging the cuts to the cost-of-living adjustment formula that are at issue in this litigation.

As will be explained below, such communications are not relevant to the merits of this lawsuit or on issues involving class certification, and their production can in no way lead to discovery of relevant evidence. Further, because the members of Save PERA COLA have reasonable fears of reprisals should their names be made public or disclosed to the Defendants, the requested documents are protected under a privilege protecting the retirees' First Amendment rights to association. In addition, many of these communications are also protected under the attorney-client privilege—even if the Plaintiffs' attorneys were not copied on all of them—and under the work product doctrine.

Further, Defendants' request for documents concerning the funding of this lawsuit and contributions made to Save PERA COLA are utterly irrelevant to merits issues or class certification issues because Plaintiffs' counsel has agreed to represent class members on a wholly contingent basis and have agreed to advance costs, irrespective of any funds provided to them by Save PERA COLA.

II. ARGUMENT

A. PERA Request Nos. 1 and 2.

Defendants argue that they are entitled to know which documents were produced by each Plaintiff. Plaintiff will provide separate responses from each plaintiff shortly. With regard to Request No. 2, Plaintiff will detail which of the documents in response to Request No.1 are also responsive to Request No. 2. As such, the issues regarding Requests Nos. 1 and 2 are now moot.

B. PERA Request No. 3 – Communications between Plaintiffs and Third Parties; Request No. 4 (Communications between Plaintiffs and other Class Representatives or Class Members); and Request No. 5 (Communications with Organization Entities).

1. Introduction.

In Request No. 3, Defendants seek communications regarding the subject matter of this lawsuit between Plaintiffs and other parties, including retiree organizations and the General Assembly, concerning the COLA benefits and other issues raised in the Complaint. In their response, Plaintiffs identified several documents involving communications between a named plaintiff and PERA, DPSRS and/or members of the General Assembly. Plaintiffs will now provide Defendants with separate answers for each Plaintiff for this Request.

In Request No. 4, Defendants seek communications regarding this lawsuit or the subject matter between Plaintiffs and any union and retiree organization. In Request No. 5, Defendants seek communications received from Save PERA COLA, including emails.

As will be explained below, except for documents posted publicly on Save PERA COLA's website, private communications between the Plaintiffs and Save PERA COLA and its

members (who are all putative class members) are protected under the First Amendment, the attorney-client privilege, and the work product privilege.

2. First Amendment Privilege, and Complete Irrelevance of Any Class Member's "Disagreement" With the Lawsuit.

Communications between the Plaintiffs and members of retiree organizations such as Save PERA COLA are protected by the First Amendment right of association. Blumenthal v. Drudge, 186 F.R.D. 236, 245 (D.D.C. 1999) (denying motion to compel membership of legal defense fund after balancing First Amendment right of association against possibility that disclosure would lead to admissible evidence); Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."). Save PERA COLA is a group composed of retired and active employees from all PERA divisions that was founded in 2009 by Richard Allen and named plaintiff Gary Justus for the purpose of responding to proposed cuts to the cost-of-living adjustments. Affidavit of Gary R. Justus ("Justus Aff."), filed herewith as Exhibit 1, ¶ 4. The organization is registered with the Secretary of State. Justus Aff., ¶ 5.

Among their activities for the group, these officers of Save PERA COLA maintain a website to update retirees about this litigation and have asked for donations from interested persons (including class members) to help support the prosecution of this lawsuit. Justus Aff., ¶¶ 6, 13. On behalf of Save PERA COLA, Mr. Justus and Mr. Allen have communicated to class members on fundraising matters and litigation strategy. Justus Aff., ¶ 13. A number of donors

to Save PERA COLA have asked that their names not be disclosed because they fear repercussions from the Defendants. Justus Aff., ¶ 14.

Courts apply a burden-shifting analysis in evaluating assertions of a First Amendment privilege.

> First, the parties asserting the privilege must make a prima facie showing that the privilege applies. To make this showing, defendants must demonstrate an objectively reasonable probability that compelled disclosure will chill associational rights, *i.e.* that disclosure will deter membership due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests. If [the party] make a prima facie showing, the burden shifts to [the other party] to demonstrate a compelling need for the requested information.

In re Motor Fuel Temperature Sales Practices Litig., 707 F. Supp. 2d 1145, 1152-53 (D. Kan. 2010).

As active and retired public employees associating for the purpose of preventing unconstitutional state action, those associated with Save PERA COLA have objectively reasonable concerns about retaliation and harassment following the compelled disclosure of their identities and communications within the group. Active employees and retirees who have returned to government work on a temporary basis have fears that their employment status may be threatened if their names are made public. Further, Save PERA COLA officials believe that if donor names are produced, this will substantially affect their ability to raise funds in the future. Justus Aff., ¶ 16. See Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 462 (1958); Blumenthal v. Drudge, 186 F.R.D. 236, 245 (D.D.C. 1999).

On page 13 of their Brief, Defendants argue that these communications are "highly relevant because Plaintiffs pursue only non opt-out classes under Rule 23(b)(1) and (b)(2)" and certification is wholly improper for non-opt out classes, where there is a potential of a conflict

among class members. Plaintiffs will not address Defendants' objections to class certification here, as the parties have set a schedule for class certification briefing, and after Defendants raise their objections as scheduled in July, Plaintiffs will reply. However, with respect to whether discovery regarding possible conflicts among class members is relevant, courts have consistently held that potential class members' disagreement with the claims or relief sought is not a relevant consideration in certifying the class – even a "non-opt out" class sought under Rule 23(b)(1) and (b)(2).

In Shores v. Publix Super Markets Inc., 1996 WL 407850 (M.D. Fla. Mar. 12, 1996), a group of current and former supermarket employees brought a class action suit alleging sex discrimination in promotions. The case was certified as a hybrid Rule 23(b)(2), wherein class members **could not opt out** of the liability phase but could opt out of the damages phases. The Supermarket presented hundreds of affidavits by female employees who believed that they had not been discriminated against in an attempt to attack plaintiffs' numerosity requirement for class certification. Id. at *3. The District Court held that the possible opposition by these hundreds of women could not defeat class certification:

> The fact that a large number of potential class members are satisfied with the status quo, or are unwilling to come forward, cannot defeat class certification… [P]laintiffs cannot be precluded from asserting their right to be free from discrimination merely because other employees chose not to assert those rights.

Id. (citations omitted). The Court held that the class should be certified, even with significant disagreement concerning the claims and remedies sought. It stated that rather than deny certification on this ground, "any class member may refrain from accepting an award of damages should one be made." Id.; see also Bremiller v. Cleveland Psychiatric Inst., 898 F.Supp. 572,

577 (N.D.Ohio 1995); see also Dawes v. Philadelphia Gas Comm., 421 F.Supp. 806, 813 (E.D.Pa.1976) (certifying 23(b)(2) class).

In another Rule 26(b)(2) non-opt out class action alleging violation of a group's constitutional rights, Sharif by Salahuddin v. New York State Educ. Dept., 127 F.R.D. 84 (S.D.N.Y. 1989), a group of female New York high school students brought suit to enjoin the City from reverting back to its prior system of basing certain scholarships solely on SAT scores. The students alleged that using this sole criterion—rather than taking GPA into account as well—disproportionately impacted females' chances of receiving scholarships. Defendants argued that the class should not be certified because a change in the procedures and criteria would benefit some females at the expense of others, making some potential members of the class opposed to the suit's claims and remedies. The defendants claimed that this opposition should preclude class certification on the grounds that the typicality and adequacy requirements were not met. Id. at 88-89.

The Court rejected defendants' opposition to class certification, explaining that defendants' argument illustrated a misunderstanding of the law. The Court stated that if certain females do not receive scholarships because the criteria are brought in line with the Constitution, the law will not remedy such failure to receive scholarships. Disagreement based on wanting to retain an unlawful status quo "is not a true conflict within the meaning of Rule 23(a)(3)." Id. The Court further held that if all potential members of the class would benefit, the opposition by certain potential members will not destroy typicality or adequacy:

> Indeed, if all members of the proposed class will benefit by the relief sought, individual apathy or preference for the status quo will not defeat the typicality of the plaintiff's claim. *See e.g. Norwalk C.O.R.E. v. Norwalk Redevelopment Agency,* 395 F.2d 920, 937 (2d Cir.1988). As Judge Ward of this district has noted, "[t]he fact that there may be

> conflicting interests within the class because some members of the class may be personally satisfied with the existing system and may prefer to leave the violations of their rights unremedied is simply not dispositive of a determination under Rule 23(a)." *Wilder v. Bernstein,* 499 F.Supp. 980, 993 (S.D.N.Y.1980).

Id.; see also Arthur v. Starrett City Associates, 98 F.R.D. 500, 506 (E.D.N.Y. 1983) ("Some members of the class may personally view Starrett City's alleged violative conduct with apathy or even approval; nonetheless, a potential conflict in the opinions of class members will not defeat a class certification if the claims, defenses, and legal interests asserted by the named representatives will adequately protect the legal rights of the class."); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (certifying 23(b)(2) class even where group of voters opposed suit to set aside election where absentee ballots later determined impermissible); Cottrell v. Virginia Elec. & Power Co., 62 F.R.D. 516, 522 (E.D. Va. 1974) (certifying 23(b)(2) class and rejecting argument that potential plaintiffs might choose to oppose certification of a non-opt out class because of the real possibility that it would result in increased cost of electricity).

3. Attorney-Client Privilege.

In Colorado, the attorney-client privileged is codified at Colo. Rev. Stat. Ann. § 13-90-107:

> (1) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:
>
> …(b) An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

Colo. Rev. Stat. Ann. § 13-90-107(b).

The Supreme Court of Colorado has held that the privilege is intended to promote early access to legal advice, and facilitate open communications between the parties in privilege. Gordon v. Boyles, 9 P.3d 1106, 1123 (Colo. 2000). The attorney-client privilege covers "matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations." Id. "[T]he privilege applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential." Lanari v. People, 827 P.2d 495, 499 (Colo. 1992) (citations omitted).

Here, Plaintiffs' counsel also has an attorney-client relationship with Save PERA COLA. Communications between counsel and their clients – the named plaintiffs and Save PERA COLA—are protected under the attorney-client privilege. Information obtained by the named plaintiffs and Save PERA COLA from their attorneys and provided to other members of Save PERA COLA and/or putative class members is protected under the common interest doctrine, which protects documents and communications made privy to third parties that may otherwise constitute a waiver of the privilege. Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 478 (D. Colo. 1992). "Communications shared with third persons who have a common legal interest with respect to the subject matter thereof will be deemed neither a breach nor a waiver of the confidentiality surrounding the attorney-client relationship." Id. at 476.

In Black v. Sw. Water Conservation Dist., 74 P.3d 462, 469 (Colo. App. 2003), the Court considered whether communications and documents exchanged between various parties were protected by the common interest exception to waiver of attorney-client privilege. In Black, a citizens' group sought documents related to the Animas-La Plata Project (ALP) from the Animas-La Plata Water Conservancy District (ALPWCD) through the Colorado Open Records

Act.[1] The Southwestern Water Conservation District (SWCD) organized the ALPWCD "to secure funds, resources, and operating expertise to manage the water resources." Id. at 465.

The ALPWCD argued that the documents were protected by the attorney-client privilege. Of specific relevance to the instant case, the court considered whether the privilege was waived with regards to documents exchanged between proponents of the ALP, such as the ALPWCD, the SWCD, the State of Colorado, the United States Government, and various Native-American Tribes. Id. at 469. The Court held that the common interest exception applied, and that the documents remained protected by the attorney-client privilege. Id. at 470. The Court found that the SWCD and ALPWCD were both "proponent[s]" of the ALP, and therefore the common interest exception applied. Id.

Communications between potential class members that would be privileged if counsel were present are also protected by the attorney client privilege *even if counsel is not present.* Post v. Killington, Ltd., 262 F.R.D. 393, 399-00 (D. Vt. 2009). In Post, a class of ski lift pass holders brought suit to enjoin new owners of a ski resort to honor their passes. Defendants sought to obtain all documents that evidenced communications between class members, which did not include an attorney as an author or recipient. Id. at 399. The Court rejected Defendant's assertion that if no attorney was the author or recipient of the communications—in effect no attorney was present—then those documents could not be covered under the attorney-client privilege. Id. at 399-400.

> With regard to communications made between pass holders without their attorneys, this Court explained that although "[c]ommunications among passholders are not generally

[1] The Open Records Act requires that all public records shall be open for inspection unless specifically excepted by law. Colo. Rev. Stat. Ann. § 24-72-201. The Act incorporates the common law Attorney-Client privilege. Black, 74 P.3d at 467.

> privileged," they may be withheld when "made specifically for the purpose of facilitating the rendition of legal services to the class." Obviously, then, that communications took place between passholders in the absence of any attorneys does not necessarily preclude application of the attorney-client privilege. Rather, the question is whether the communications were "made specifically for the purpose of facilitating the rendition of legal services to the class."

Id. at 399 (citations omitted). The Court found that all the challenged documents were made "for the purpose of facilitating the rendition of legal services to the class," because they contained either:

> (1) summaries or paraphrasing of advice or information from prospective counsel before trial counsel was retained, (2) summaries or paraphrasing of advice or information from trial counsel once retained, or (3) comments/questions on drafts of litigation documents or other legal issues from classmembers to counsel.

Id.

Similarly, in the instant case, communications between potential members of the class that were made without an attorney as the author or recipient -- but "for the purpose of facilitating the rendition of legal services to the class" -- are still protected by the attorney-client privilege. As noted in Post, this definition includes communications between class members that summarize or paraphrase advice and information from counsel before and after retained, and comments and questions from class members that are eventually shared with counsel.

4. Work Product Doctrine.

Many of the documents Defendants seek are also protected by the work product doctrine, see Colo. R. Civ. P. 26(b)(3), which is similar in some respects to the attorney-client privilege.

> Generally, the attorney-client privilege protects communications between the attorney and the client, and the promotion of such confidences is said to exist for the benefit of the client. On the other hand, the work-product exemption generally applies to "documents and tangible things ... prepared in anticipation of litigation or for trial," C.R.C.P. 26(b)(3), and its goal is to insure the privacy of the attorney from opposing parties and counsel.

Caldwell v. Dist. Court in & for City & County of Denver, 644 P.2d 26, 34 (Colo. 1982) (citations omitted). In determining that documents are protected by the doctrine, the court must look to "whether, in light of the nature of the document and the factual situation in the particular case, the party resisting discovery demonstrates that the document was prepared or obtained in contemplation of specific litigation." Compton v. Safeway, Inc., 169 P.3d 135, 136-37 (Colo. 2007) (citations omitted). Once protected by the work product doctrine, a party can only request the documents if it can show substantial need for the documents, and that it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means when the requested materials are not available by any other source." Cardenas v. Jerath, 180 P.3d 415, 422 (Colo. 2008).

The work-product doctrine's requirement that documents produced in anticipation of litigation is not at all a controversial point in a case like this, where plaintiffs retained counsel specifically to bring suit. But Cf. Compton v. Safeway, Inc., 169 P.3d 135, 137 (Colo. 2007) (self-insured store's claim adjuster's materials not protected by work product because prepared in the ordinary course of business before specific claim arose). Counsel does not have a longstanding relationship with plaintiffs, wherein it provides services in the ordinary course of business. Counsel was retained specifically to assist with the instant litigation, thereby protecting documents prepared for this purpose by the work-product doctrine.

C. Request Nos. 6 and 7 (documents concerning the funding of the lawsuit and the payment of legal fees and costs).

In Requests 6 and 7, Defendants seek documents concerning the funding of this lawsuit and the payment of costs and fees to attorneys. Defendants argue that these documents are

relevant to issues involving typicality and adequacy of representation under C.R.C.P. 23(a)(3) and (4).

The types of documents Defendants now seek have been held to be irrelevant for class certification purposes where, as here, counsel is advancing costs and has accepted the case on a largely contingent basis.

> Precertification inquiries into the named parties' finances or the financial arrangements between the class representatives and their counsel are rarely appropriate, except to obtain information necessary to determine whether the parties and their counsel have the resources to represent the class adequately. Ethics rules permit attorneys to advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter.

In re Intel Corp. Microprocessor Antitrust Litig., 526 F. Supp. 2d 461, 464 (D. Del. 2007), citing Manual for Complex Litigation, Fourth (Federal Judicial Center 2004); see also Sanderson v. Winner, 507 F.2d 477, 479-80 (10th Cir. 1974); Seidman v. Am. Mobile Sys., Inc., 157 F.R.D. 354, 365-66 (E.D. Pa. 1994). Because this information is not relevant to class certification, or any other part of the lawsuit, it is not discoverable.

Defendants cite Wesp v. Everson, 33 P.3d 191, 199, n. 15 (Colo. 1991), to support the proposition that generally the identity and fee arrangement of a client is not protected by the attorney-client privilege. Motion to Compel, at 16-17. Defendants then stretch the actual holding of the case in order to contend that the details concerning Save PERA COLA's fundraising and all documents concerning the costs and expenses of the lawsuit are discoverable. However, the dicta cited in Wesp articulates no such broad rule. The Wesp dicta discusses only the identity and fee arrangements with the client, stating that these matters are usually not

privileged. In the two cases cited by Wesp for this proposition, nothing more than either the **identity** of the client or the **amount** that the client had paid the attorney was being requested.[2]

Plaintiffs readily acknowledge above that Save PERA COLA is a client of the law firms of Stember, Feinstein, Doyle & Payne and Richard Rosenblatt & Associates, LLC. See also Justus Aff., ¶ 10. Furthermore, Save PERA COLA has provided $25,000 to counsel for the purposes of litigating the instant case, Justus Aff., ¶ 10, but irrespective of any amounts received from Save PERA COLA, Counsel has agreed to represent class members on a wholly contingent basis, and have agreed to advance costs. Justus Aff., ¶ 11. Disclosure of these facts satisfy completely what is required under the Wesp dicta cited by Defendants. Anything beyond this is either irrelevant or protected by privilege.

Further, the First Amendment right of association similarly protects Save PERA COLA from disclosing the names of individuals involved with the group or the amounts each have contributed to the group. The First Amendment privilege applies most strongly to groups that take part in political activities or other types of speech typically favored in First Amendment jurisprudence. See In re Motor Fuel Temperature Sales Practices Litig., 707 F. Supp. 2d 1145, 1156 (D. Kan. 2010). Furthermore, the privilege is most often upheld when a party is seeking membership lists and lists of financial contributors. Wilkinson v. F.B.I., 111 F.R.D. 432, 437 (C.D. Cal. 1986); see also State Bd. for Cmty. Colleges & Occupational Educ. v. Olson, 687 P.2d 429, 439 (Colo. 1984) ("'Association,' in the context of First Amendment doctrine, refers to

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[2] See In re Marriage of Schneider, 831 P.2d 919, 921 (Colo. Ct. App. 1992) ("The attorney's testimony here, which was limited to a description of the amounts received by counsel from the father during the time that the father was refusing to pay maintenance or child support, did not implicate any communication privileged under § 13-90-107(1)(b)."); Losavio v. Dist. Court In & For Tenth Judicial Dist., 188 Colo. 127, 133, 533 P.2d 32, 35 (1975) ("Hence, communications which pertain only to the fact of an attorney's employment probably would not be privileged.") (citations omitted).

the medium through which individual members of a group seek to make more effective the expression of their own views.").

Defendants cite Smith v. Dist. Court, Second Judicial Dist., 797 P.2d 1244 (Colo. 1990), as a "somewhat similar case," where the Court held that the First Amendment privilege did not apply. Motion to Compel, at 18. However there are several important distinguishing features between Smith and the instant case. In Smith, the Calvary Church launched a fund-raising campaign to reimburse investors in a residential care facility that went bankrupt and was owned by the Church. Id. at 1245. Donors to the fund-raising effort were regularly identified in church sermons and in publications, and there was no apparent expectation of privacy. Id. at 1245-46. The Church had further announced its intent to publicly reveal the names of all donors in a show of gratitude. Id. at 1250. Donors filed suit alleging fraud and breach of fiduciary duty, and sought an accounting. Under these circumstances, the Court held there was not a First Amendment privilege to withhold the names of the donors.

The Court in Smith held that Defendant could not avail itself of First Amendment protection from divulging the identities of all donors to a fund set up to reimburse creditors of the plaintiff donors to the fund. Id. at 1249. The Court described the act of donating money to a creditor fund in this instance as an "'affiliation' that is tenuous at best… [which] resembles more a 'large business enterprise' than what courts have recognized as a constitutionally protected association." Id. However, even with this "tenuous" association, the Court still balanced the First Amendment rights of the donors with the plaintiffs' need to know the identity of the donors, which was at the heart of the lawsuit. Id. at 1250.

Save PERA COLA is significantly different than the fund-raising association at issue in Smith. Individuals associated with Save PERA COLA are all current or former state employees, and have organized to engage in political activity, political speech, and litigation to protect constitutional rights. Unlike in Smith, they are not a tenuous association of individuals who have little in common other than their donations to the group to protect their own creditors. Their donations to the group reflected the amplification of their shared beliefs and goals with respect to public employment. Furthermore, unlike in Smith where the identities of donors went to the heart of the suit, the identities of individuals associated with Save PERA COLA are irrelevant to any claim or defense of this suit. Finally, in stark contrast to the situation in Smith, Save PERA COLA gave assurances it would attempt to keep participants' names private where these participants feared repercussions. See Justus Aff., ¶¶ 14-15.

D. Request No. 8 (documents sent to or received from experts not yet disclosed).

Defendants seek all documents sent to any expert witness that Plaintiffs intend to call at trial. Plaintiffs agree that Defendants are entitled to this information at the appropriate time, when Plaintiffs have decided which witnesses they intend to call at trial and those witnesses are disclosed.

Here, Plaintiffs have not yet determined what, if any, experts they intend to call at trial. Thus, Plaintiffs cannot produce documents that do not exist. As such, their objections to Request 8 should be sustained.

E. Request No. 9 (documents related to damages).

Defendants seek any documents relating to claimed damages.

To the extent that Plaintiffs possess such documents, Plaintiffs will identify them in their forthcoming individual responses.

To the extent that any expert retained by the Plaintiffs possesses such documents, Plaintiffs have not yet determined what experts they intend to call to trial. See Response to Request No. 8, *supra*. Further, any document provided to a consulting expert is protected by the work product doctrine. See House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 245 (N.D. Iowa 1996) ("Such a consulted-but-never-designated expert might properly be considered to fall under the work product doctrine that protects matters prepared in anticipation of litigation.").

To the extent that Plaintiffs seek calculations performed by counsel in preparation for filing any of the Complaints, such documents are also protected by the work product doctrine.

Further, Defendants possess the ability to make these simple calculations, as evidence by the "COLA Comparison Calculator" on the PERA website.[3] See http://www.copera.org/pera/about/cola.htm.

F. Request No. 10 (alternative funding options).

Defendants seek any documents relating to alternative funding options.

To the extent that Plaintiffs possess such documents, Plaintiffs will identify them in their forthcoming individual responses.

To the extent that any expert retained by the Plaintiffs possesses such documents, Plaintiffs have not yet determined what experts they intend to call to trial. See Response to Request No. 8, *supra*. Further, any document provided to a consulting expert is protected by the

[3] The instructions to use the calculator are the following "To see what impact a 2 percent COLA will have on your PERA benefit, enter your prior month's gross benefit amount into the spreadsheet, which will calculate the annual dollar difference between a 3.5 percent COLA and a 2 percent COLA."

work product doctrine. See House v. Combined Ins. Co. of Am., 168 F.R.D. 236, 245 (N.D. Iowa 1996) ("Such a consulted-but-never-designated expert might properly be considered to fall under the work product doctrine that protects matters prepared in anticipation of litigation.").

G. Privilege Log.

Plaintiffs have provided a privilege log for hundreds of emails to and from Richard Allen, co-founder of Save PERA COLA. They have informed Defendants that they are currently reviewing several hundred additional emails sent to and from the account of saveperacola@gmail.com, and will provide a privilege log "with sufficient detail so that the opposing party, and, if necessary, the trial court can assess the claim of privilege as to each withheld communication." Alcon v. Spicer, 113 P.3d 735, 742 (Colo. 2005).

Dated: April 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of April, 2011, a true and correct copy of **RESPONSE TO PERA DEFENDANTS' MOTION TO COMPEL DOCUMENTS RELATING TO PERA'S FIRST REQUESTFOR PRODUCTION OF DOCUMENTS** 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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