DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS, JR. and ROBERT P. LAIRD, JR., on behalf of Themselves and those similarly situated v. **Defendants:** 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 No. 2010cv1589 Division/Courtroom: 6 Judge Robert S. Hyatt
Attorneys for Defendants PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF COLORADO, CAROLE WRIGHT and MARYANN MOTZA, in their official capacities only: Daniel M. Reilly, # 11468, dreilly@rplaw.com Eric Fisher, # 27275, efisher@rplaw.com Jason M. Lynch, # 39130, jlynch@rplaw.com Lindsay A. Unruh, # 35890, lunruh@rplaw.com Caleb Durling, # 39253, cdurling@rplaw.com Reilly Pozner LLP 1900 Sixteenth Street, Suite 1700 Denver, Colorado 80202 Phone Number: 303-893-6100 Fax Number: 303-893-6110 Mark G. Grueskin, # 16421, mgrueskin@rothgerber.com Rothgerber Johnson & Lyons LLP 1200 17th Street, Suite 3000 Denver, CO 80202 Phone Number: 303-623-9000 Fax Number: 303-623-9222	
MOTION TO COMPEL DOCUMENTS RESPONSIVE TO PERA'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS	

Defendants Public Employees' Retirement Association of Colorado ("PERA"), Carole Wright, and Maryann Motza (jointly, "PERA" or "PERA Defendants"), submit this Motion to

Compel. In accordance with C.R.C.P. 121 § 1-15(8) and C.R.C.P. 37(a)(2) counsel for PERA certify that they have conferred with counsel for Plaintiffs in a good faith attempt to resolve the issues addressed in this motion but have been unable to resolve such issues without Court intervention.

INTRODUCTION

PERA's ten document requests directed at each named Plaintiff generally seek documents: (1) relating to the cost of living adjustments at the heart of this lawsuit; (2) relevant to class certification, including communications with third-party organizations and entities, as well as putative class members; (3) concerning the solicitation of funds as well as the payment of costs and expenses; (4) exchanged with experts; and (5) supporting Plaintiffs' purported damages. Ex. A. In their February 22, 2011 response, Plaintiffs refused to provide a single document in response to PERA's requests. Ex. B.

Plaintiffs' blanket refusal to produce documents was premised on one or more of the following objections:

(1) the "request . . . will not lead to the discovery to [sic] the production of relevant documents if the Court entertains and grants Plaintiffs' pending motion for summary judgment, and that the Court has not issued an order allowing general discovery";

(2) attorney-client privilege;

(3) work product privilege;

(4) joint prosecution/common interest privilege; and

(5) First Amendment right of association privilege.

Contrary to Plaintiffs' contention that "general discovery" was prohibited until the Court "issue[d] an order allowing general discovery[,]" under Rule 16 merits discovery has been open since December 6, 2010. At the March 3, 2011 case management conference, the Court

confirmed that discovery was open and that the Court would not stay or bifurcate merits discovery from class discovery while summary judgment motions are pending.

On March 10, 2010, one day before this motion to compel was due, Plaintiffs filed a "Revised *Collective* Response" despite PERA's express request that each Plaintiff separately respond so that PERA could determine which documents, if any, were produced by each Plaintiff. Ex. C. Plaintiffs' Revised Collective Response: (1) removed various objections to production based on Plaintiffs' contention that discovery was not open and that merits discovery should be stayed until summary judgment motions were decided; and (2) added blanket privilege assertions to those responses that previously did not include such objections.

Plaintiffs' March 10th response also references various documents that Plaintiffs produced as part of their Rule 26(a)(1) initial disclosures and that PERA previously informed Plaintiffs were deficient. More than one month ago, on February 9, 2011, PERA's counsel requested that Plaintiffs cure numerous deficiencies, including Plaintiffs': (1) apparent failure to produce any documents for two of four named Plaintiffs and only three pages for another; (2) failure to produce documents previously listed in an earlier disclosure filing; and (3) failure to indicate which Plaintiff produced which documents. Ex. D. Plaintiffs ignored PERA's requests and have now included the same deficiencies in their discovery responses. PERA respectfully requests that the Court order Plaintiffs to comply with their production obligations under Rules 26 and 34 and provide complete responses for *each* Plaintiff.

As to Plaintiffs' privilege objections, not only are all unfounded but Plaintiffs have failed to provide a privilege log necessary to support their privilege claims. The attorney-client or work product privileges cannot apply here because no request implicates communications

between privileged persons regarding legal advice or documents created in anticipation of litigation.

The common interest/joint prosecution privilege is not an independent privilege. It is an *exception* to the rule that the attorney-client or work product privileges are waived when information is disclosed to a third party. Where no attorney-client privileged communication exists, the common interest privilege cannot arise. Moreover, the common interest privilege applies only to communications that are part of a common legal strategy with third persons who share a common legal interest. SavePERACOLA is a retiree organization created to solicit funding for this lawsuit and disseminate information to putative class members. Communications shared with SavePERACOLA, or other third parties, waived any privilege.

The First Amendment right of association applies only where a party can establish that the disclosure of documents would have a chilling affect on associational rights. The information that PERA seeks is not the type information that would chill associational rights as such documents would not and cannot implicate harassment or reprisal in any manner.

Plaintiffs' blanket privilege objections are meritless and PERA requests that the Court order Plaintiffs to produce all responsive documents.

ARGUMENT

"[P]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." C.R.C.P. 26(b)(1).

I. Plaintiffs' Revised *Combined* Responses Are Inadequate

A. PERA's Request No. 1 Goes to the Central Issue in this Lawsuit

The central dispute in this case is whether the legislature could modify cost of living adjustments ("COLAs") paid to retirees. Request No. 1 is directed at precisely this issue and seeks to obtain the bases underlying Plaintiffs' claims.

> **Request for Production No. 1**: All Documents supporting or contradicting Your contention that PERA and DPSRS retirees are entitled, respectively, to a 3.5% COLA or 3.25% ARAA, or the COLA or ARAA in place at the time of a retiree's retirement or eligibility for retirement, and that the General Assembly cannot alter, amend, change or modify the timing, amount or any other aspect of retiree' COLAs or ARAAs.
>
> **Response to Request No. 1**: Plaintiffs object to this Request to the extent that the documents are protected under the First Amendment right of association, the attorney/client privilege and work product doctrine. Further, any communications with Save PERA COLA is also protected by the joint prosecution privilege. Subject to and notwithstanding the General Objections, see JUSTUS 0001-0002; 0003;0004-0015; 00016-00092; 0094-00118; 00119-00139; 00140-001144; 00145- 00148; 00149-00156; 00157-00162; 00204-00239; 00268-002982; 00283-00284; 00285 - 00296; 00309; 00313-314;00326; 00349-00360; 00378-00389; 00390-00391; 00394; 00395; 00418 - 00429; 00433 - 00449; 00548 - 00565; 00577-00578; 00579-00584; 00585-00587; 00588-00590;00591-00602;00603;00604-00613;00614-00615;00616-00626;00627-00641;00642-00662; 00663-00664;00665-00680;00681-00692;00782-00784; 00785-00799; 00800-00805; 00806-00820; 00821-00823; 00824-00826; 00827-00829; 00833-00844; 00846-00857; 00885; 00886-00893; 00894-00895; 00896-0897; 00898-00913; 00915-00916; 00917-00918; 00919- 01110; 01111-01112; 01143-01156; 01157-001175.

Based on the Court's March 3, 2011 rejection of Plaintiffs' self-imposed stay of discovery, on March 10, 2011, Plaintiffs filed a "Revised Collective Response" withdrawing their objection that "the Court has not issued an order allowing general discovery." Ex. B at Resp. Nos. 1-5, 8 & 10. Plaintiffs' revised response to Request No. 1 is improper and facially inadequate. PERA requested that *each* Plaintiff respond to the document requests and that Plaintiffs indicate which named plaintiff produced which documents. Ex. A at ¶ 4. Plaintiffs ignored these directions and their obligation to identify the source of their documents. Plaintiffs

instead filed a single, collective response that does not identify which Plaintiff produced which documents, or reveal that some named Plaintiffs produced no documents.

As stated in PERA's February 9, 2011 letter to Plaintiffs' counsel, the documents previously disclosed by Plaintiffs, and now listed en masse here, were deficient in a number of respects including that they did not appear to include any documents for Plaintiffs Hopkins and Laird and only three pages for Plaintiff Haalas, and did not include documents previously listed in their Rule 26(a)(1) disclosures. Ex. D. Plaintiffs must provide all relevant documents from each of the named Plaintiffs including from Hopkins. Hopkins was a plaintiff at the inception of this lawsuit over a year ago, when disclosures were due (December 17, 2010) and after PERA served these production requests (January 21, 2011). All responsive documents in Hopkins' possession are discoverable. Plaintiffs' pending motion to amend to withdraw Hopkins does nothing to change Plaintiffs' discovery obligations and the Court should order all named Plaintiffs to immediately produce all responsive documents in their possession.

B. Request No. 2 Seeks Communications with PERA or DPSRS Regarding Plaintiffs' COLAs

> **Request for Production No. 2**: All Documents You received from or provided to PERA and/or DPSRS which relate to Your COLA and/or ARAA contributions and benefits, including any pre-retirement or retirement communications, monthly contribution statements or receipts, monthly benefit statements or receipts, service credit purchase statements or receipts, retirement checklists, benefit calculations and benefit summaries of any kind.
>
> **Response to Request No. 2**: Plaintiffs object to this Request on the grounds that these documents are within the possession, custody and control of Defendants. Notwithstanding and subject to this Objection, please see various documents identified in response to Request # 1.

Request No. 2 seeks documents provided to or received from PERA or DPSRS concerning retiree contributions and benefits. Plaintiffs are obligated to produce responsive

documents irrespective of whether any of these documents are in the possession, custody or control of Defendants.

II. Plaintiffs' Blanket Assertions of the Attorney-Client, Work Product, Common Interest and First Amendment Privileges Are Unfounded

A. Communications Between Plaintiffs and Third Parties Concerning COLA Benefits Are Not Privileged

Request No. 3 seeks communications between Plaintiffs and *third parties,* including retiree organizations and the General Assembly concerning their COLA benefits or other issues raised in their complaint.

> **Request for Production No. 3**: All Communications related to COLA and/or ARAA benefits for retirees, or other matters raised in Your most recent complaint, including letters, e-mails, notes, minutes, recordings between or among You and any organization, including any union, retiree organization, PERA, DPSRS, Save PERA COLA, Protect PERA Retirees, or the General Assembly (or its members).
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> **Response to Request No. 3**: Plaintiffs object to this request that that any communications between Plaintiffs and any union, retiree organization, Save PERA COLA, and Protect PERA Retirees (or a member of these organizations) are protected under the First Amendment right of association, and the attorney/client privilege and work product doctrine. Further, any communications with Save PERA COLA is also protected by the joint prosecution privilege. Subject to the above objections, see JUSTUS 00095 - 00099; 00862-00868; 00119 - 00122; 00123 - 00129; 00203; 00265.

Plaintiffs admit that Request No. 3 seeks relevant documents, however, they fail to produce documents in response to this request outside of a few referenced disclosure documents. Instead, Plaintiffs' invoke the attorney client, work product, joint prosecution and First Amendment right of association privileges. Plaintiffs' assertions of privilege are without merit.

1. The Attorney-Client Privilege Does Not Apply

The Colorado statutory attorney-client privilege makes confidential "any communication made by the client to [the attorney] or his advice given thereon in the course of professional employment . . . ." Colo. Rev. Stat. § 13-90-107(1)(b). "The attorney-client privilege applies to

confidential matters communicated by or to the client in the course of obtaining counsel, advice, or direction with respect to the client's rights or obligations." *People v. Madera*, 112 P.3d 688, 690 (Colo. 2005). "No blanket privilege for all attorney-client communications exists. Rather, the privilege must be claimed with respect to each specific communication . . . ." *Wesp v. Everson*, 33 P.3d 191, 197 (Colo. 1991). "[S]tatutory privileges must be strictly construed, and the burden of proving that a communication is protected by the attorney-client privilege is upon the person asserting the privilege." *People v. Salazar*, 835 P.2d 592, 594 (Colo. App. 1992).

The attorney-client privilege is inapplicable to the documents requested here. Communications with third-party unions, retiree organization or the General Assembly would not and could not have been made "in the course of obtaining counsel, advice, or direction with respect to" Plaintiffs "rights and obligations" as is necessary to support an assertion of the attorney-client privilege. *See Madera*, 112 P.3d at 690. Under no conceivable scenario would communications between Plaintiffs and the General Assembly or its members relating to retiree' COLA benefits warrant protection under the attorney-client privilege.

It also is not possible that the attorney-client privilege is triggered by communications between Plaintiffs and third-parties SavePERACOLA, Protect PERA Retirees, or any other retiree organization or union regarding COLA benefits. Such communications would not and could have been made between persons within the attorney-client privilege and would not have sought legal advice or direction. The presence of Plaintiffs' counsel on any documents between Plaintiffs and these organizational entities likewise would not implicate the attorney-client privilege because the addition of an attorney to an otherwise non-privileged document does not transform the document into a privileged communication. *See, e.g., Nat'l Farmers Union Prop. & Cas. Co. v. District Court of Denver*, 718 P.2d 1044, 1049 n.3 (Colo. 1986) (A distinction

exists "between protecting disclosure of communications, which are privileged, and protecting disclosure of underlying facts by those who communicated with the attorney, which are not protected by the privilege. The client may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.").

2. The Work Product Doctrine Is Inapplicable

The work product doctrine provides that materials "prepared in anticipation of litigation or for trial" are discoverable "upon a showing that the party seeking discovery has substantial need of the materials . . . and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." C.R.C.P. 26(b)(3). "The purpose of the work product doctrine is to give 'qualified immunity from discovery' to materials prepared in anticipation of litigation or for trial. As such, the work product doctrine does not shield from discovery materials prepared in the ordinary course of business." *Cardenas v. Jerath*, 180 P.3d 415, 421 (Colo. 2008). "The work product privilege exists not to protect a confidential relationship, but to promote fairness in the adversary system by safeguarding the fruits of an attorney's trial preparations, which have been paid for by his client, from being used without cost by his opponent." *Denver Post Corp. v. Univ. of Colo.,* 739 P.2d 874, 881 (Colo. App. 1987). The party asserting immunity from discovery under the work product doctrine bears the burden of establishing that the doctrine applies. *Id.*

The work product doctrine is inapplicable here. Nothing about documents exchanged between Plaintiffs and unions, retiree organizations or the General Assembly implicates documents prepared in anticipation of litigation or trial that contain attorney preparations or mental impressions.

3. Plaintiffs Cannot Rely on the Joint Prosecution/Common Interest Privilege

The joint prosecution privilege, also commonly called the common interest privilege, "is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to third parties." *Black v. Sw. Water Conservation Dist.*, 74 P.3d 462, 469 (Colo. App. 2003). "[T]he doctrine does not encompass otherwise unprivileged facts and does not operate to make unprivileged facts become privileged merely by their incorporation into a communication with an attorney." 15 *Colo. Prac., Crim. Prac. & Proc.* § 19.22 (2d ed. 2010). The common interest privilege applies "only to communications given in confidence and intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy." *Black*, 74 P.3d at 469. The privilege applies only to "[c]ommunications shared with third persons who have a common legal interest with respect to the subject matter." *Id.*

Plaintiffs also refuse to produce documents exchanged with SavePERACOLA claiming joint prosecution privilege. Plaintiffs' counsel recently informed the State Defendants (but not PERA's counsel) that they now represent SavePERACOLA despite the fact that SavePERACOLA is not a party. Plaintiffs' counsel apparently have chosen to represent SavePERACOLA in an attempt to bring SavePERACOLA into the fold of the joint prosecution/common interest privilege. *See* 20 Colo. Law. 225, 226 (Feb. 1991) ("Arguably, a person who is not represented by a lawyer cannot participate as a member in a pooled information arrangement because the basic underpinnings of the confidential attorney-client relationship do not exist."). Irrespective of whether Plaintiffs' counsel represents SavePERACOLA, the common interest privilege is inapplicable here.

First, because the common interest privilege is "not an independent basis for privilege" and Plaintiffs cannot establish that the attorney-client or work product privileges apply here the common interest privilege is inapplicable. *Black*, 74 P.3d at 469. At a minimum, Plaintiffs cannot establish that the privilege applies to communications made between Plaintiffs and SavePERACOLA, or members of SavePERACOLA, because such communications were not made seeking legal advice or direction and were not made in anticipation of litigation or trial.

Further, SavePERACOLA was created by Plaintiff Justus and another DPSRS retiree at the onset of this litigation to (1) solicit funding for this lawsuit, and (2) disseminate information to putative class members thought its website, www.saveperacola.com. This is not the type of "common legal interest" or "joint effort to set up a common legal strategy" courts intended the privilege to cover.

4. Plaintiffs' Reliance on the First Amendment Privilege Is Misplaced Because Production of the Requested Documents Would Not Chill Associational Rights

The First Amendment right of association privilege applies only if Plaintiffs can "demonstrate an objectively reasonable probability that disclosure will chill associational rights, i.e. that disclosure will deter membership due to fears of threats, harassments or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests." *Perry v. Schwarzenegger*, 268 F.R.D. 344, 351 (N.D. Cal. 2010) (citing *In re Motor Fuels*, 207 F. Supp. 2d 1145, 1158 (D. Kan. 2010)). "The evidentiary showing required to demonstrate a reasonable probability of a chill on an association is more than subjective assertions of a fear of reprisal." *In re GlaxoSmithKline PLC.*, 732 N.W.2d 257, 271 (Minn. 2007).

Plaintiffs' reliance on the First Amendment right of association to shield communications is misplaced. Plaintiffs contend that their non-disclosure is permitted because "any communication between Plaintiffs and any union, retiree organization, SavePERACOLA, and Protect PERA Retirees (or a member of these organizations) are protected under the First Amendment right of association . . . ." Ex. C at 5. Plaintiffs have not and cannot show that disclosure of documents between Plaintiffs and SavePERACOLA, Protect PERA Retirees, or other retiree organizations concerning COLA benefits, or other matters raised in Plaintiffs' complaint, would have a chilling affect on associational rights. The information that PERA seeks through its document requests are not the type of information that implicates harassment or reprisal. Moreover, even if Plaintiffs could make a colorable argument that certain documents are subject to the First Amendment right of association privilege, the Court can and should order disclosure of the communications subject to a protective order. *In re GlaxoSmithKline PLC.*, 732 N.W.2d at 271.

The Court should reject Plaintiffs' blanket invocation of inapplicable privileges to withhold plainly relevant documents. Plaintiffs cannot establish that the attorney-client, work product, joint prosecution or First Amendment right of association privileges are implicated by PERA's document requests. PERA respectfully requests that the Court order Plaintiffs to produce documents responsive to Request No. 3.[1]

B. Communications Between Plaintiffs and Other Class Representatives or Putative Class Members Concerning this Lawsuit Are Relevant and Not Privileged

Request No. 4 seeks communications between Plaintiffs and other class representatives or putative class members concerning this lawsuit including any communications disagreeing with Plaintiffs' claims or requested relief.

[1] Plaintiffs assert the same privilege objections in response to Request No. 1. Plaintiffs' objections fail with respect to Request No. 1 for the same reasons they fail for Request No. 3.

> **Request for Production No. 4**: All Documents including letters, flyers, e-mails, phone records, notes, notes of phone calls, phone calls, scripts, advertisements, solicitations, or other documentation, which constitute, relate to a Communication of any kind between or among You, other Plaintiffs, or any putative class member concerning this lawsuit or its subject matter, including all Communications disagreeing with Your claims or Your requested relief.
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> **Response to Request No. 4**: Plaintiffs object to this Request on the grounds that any communications between Plaintiffs and any union, retiree organization, Save PERA COLA, Protect PERA Retirees (or a member of these organizations) are protected under the First Amendment right of association, and the attorney/client privilege and work product doctrine. Further, any communications with Save PERA COLA is also protected by the joint prosecution privilege.

The requested documents are highly relevant because Plaintiffs pursue *only* non opt-out classes under Rule 23(b)(1) and (b)(2). Pls.' Sec. Am. Compl. ¶¶ 16, 20 & 21. Certification is wholly improper for non opt-out classes where, as here, conflicts exist among class members because they have no opportunity to remove themselves from the lawsuit. *Jahn v. OCR, Inc.*, 92 P.3d 984, 989 (Colo. 2004); *Wetzel v. Liberty Mut. Ins. Co.,* 508 F.2d 239, 256 (3d Cir. 1975). Plaintiffs nevertheless have refused to provide a single document in response to PERA's Request No. 4 and instead seek to shield documents based on unfounded privilege assertions, without providing a privilege log.

As noted above, the First Amendment right of association and common interest privileges are inapplicable here. Furthermore, communications between Plaintiffs and other class representatives or putative class members are not protected by the attorney-client privilege. *See Zarate v. Younglove*, 86 F.R.D. 80, 96 (C.D. Cal. 1980) (holding that "[d]efendants may discover all . . . communications" with putative class members "because they are undoubtedly relevant" where plaintiff placed advertisement in newspaper to solicit support for the lawsuit).

Responsive documents likewise are not protected by the work product doctrine. These documents were not created in anticipation of litigation or trial and would not include attorney preparations and mental impressions.

Finally, Plaintiffs' position here is inconsistent with their Rule 26(a)(1) disclosures where Plaintiffs produced two communications from putative class members including one between Plaintiff Justus and SavePERACOLA member, Richard Allen. Exs. E & F. Plaintiffs cannot inconsistently disclose some communications with putative class members and withhold others on unfounded privilege claims.

C. Communications with Organizational Entities and Information Posted on Organizational Entity Websites Are Not Privileged

PERA's Request No. 5 seeks all documents in Plaintiffs' possession or control that reflect communications to or from the organizational entities SavePERACOLA and Protect PERA Retirees, as well as information posted on the savepercola.com and protectperaretirees.com websites.

> **Request for Production No. 5**: All Documents reflecting Communications in Your possession to or from the Save PERA COLA and Protect PERA Retirees organizations, including all e-mails to or from saveperacola.com or protectperaretirees.com or other e-mail addresses for Save PERA COLA and Protect PERA Retirees, and all information posted on the saveperacola.com and protectperaretirees.com websites including all current and prior web page snapshots, postings and replies, letters, articles, press releases and reports.
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> **Response to Request No. 5**: Plaintiffs object to this Request on the grounds that any communications between Plaintiffs and any union, retiree organization, Save PERA COLA, Protect PERA Retirees (or a member of these organizations) are protected under the First Amendment right of association, and the attorney/client privilege and work product doctrine. Further, any communications with Save PERA COLA is also protected by the joint prosecution privilege.

Though conceding the relevancy of the requested documents, Plaintiffs fail to produce any documents in response to Request No. 5 again withholding documents based on a laundry list of inapplicable privileges.

As detailed above, Plaintiffs' reliance on the common interest and First Amendment right of association privileges is misplaced. The inapplicability of the First Amendment right of association privilege is bolstered here because "communications must be private to be privileged

under the First Amendment." *Perry*, 268 F.R.D. at 352. At a minimum, documents or other items posted on the saveperacola.com or protectperaretiree.com websites are not protected by the First Amendment privilege because such documents and communications were disseminated into the public domain thereby negating any assertion of privacy. The First Amendment right of association also "does not cover communications between or among separate organizations." *Id.* To the extent Plaintiffs possess any communications between SavePERACOLA and Protect PERA Retirees, such communications are not protected by the right of association privilege.

Communications between Plaintiffs and SavePERACOLA or Protect PERA Retirees also are not protected by the attorney-client privilege. Any such documents would not contain communications made in confidence between privileged persons for the purposes of seeking legal advice or direction. That Plaintiff Justus or other putative class members are members of SavePERACOLA does nothing to change the inapplicability of the attorney-client privilege because communications between Plaintiffs and putative class members are not protected. *See Zarate*, 86 F.R.D. at 96.

The work product doctrine again is not implicated here. Nothing about documents or communications posted on organizational websites or communications between Plaintiffs or putative class members and these same organizations involve documents created in anticipation of litigation or trial.

D. Documents Concerning Plaintiffs' Fee Arrangements, Lawsuit Costs and Expenses or Solicitation of Funding Are Not Privileged

Requests Nos. 6 and 7 seek documents concerning Plaintiffs' solicitation of funds for this lawsuit, documents related to the payment of lawsuit costs and expenses, and Plaintiffs' fee agreements.

> **Request for Production No. 6**: All Documents which relate to Your solicitations and receipt of funds for this lawsuit, either directly or through any organization, including Save PERA COLA and Protect PERA Retirees.
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> **Response to Request No. 6**: Plaintiffs object to this Request on the grounds that it will not lead to the discovery to the production of relevant documents. Plaintiffs further object that documents relating to the solicitation and receipt are protected under the First Amendment right of association and the attorney/client privilege and work product doctrine. Further, any communications with Save PERA COLA is also protected by the joint prosecution privilege.
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> **Request for Production No. 7**: All Documents reflecting the payment of costs and expenses for this lawsuit, as well as all agreements (oral or written) between You, other Plaintiffs, and/or putative class members, and Your attorneys, experts and/or consultants, and which relate to the costs and expenses incurred in connection with the prosecution of this action.
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> **Response to Request No. 7**: Plaintiffs object to this request on the grounds that it will not lead to the discovery to the production of relevant documents. Plaintiffs further object that documents relating to the solicitation and receipt are protected under the First Amendment right of association and the attorney/client privilege and work product doctrine. Further, any communications with Save PERA COLA is also protected by the joint prosecution privilege.

Plaintiffs have provided no documents responsive to Request Nos. 6 and 7. Plaintiffs' relevancy objection is baseless. As illustrated by the wealth of authority below, Plaintiffs' solicitation of funds, their payment of fees and costs, and fee agreements are relevant and discoverable even when class certification is not requested. In addition, where Plaintiffs seek class certification, the identify of those funding the lawsuit, and details regarding the funding, are directly relevant to typicality and adequacy of representation under C.R.C.P. 23(a)(3) and (4).

Plaintiffs' invocation of various privileged to withhold funding information likewise fails. First, the Colorado Supreme Court has directly addressed whether fee and cost arrangements are privileged and held that they are not:

> *Certain other types of information communicated between attorney and client are also not protected by the privilege and may be discovered. For instance*, an attorney generally may not refuse to answer questions about the identity of a client and *fee arrangements.*

Wesp, 33 P.3d at 199 n.15 (emphasis added). Numerous other courts addressing the issue consistently find that such documents are not covered by the attorney-client privilege. *See, e.g., United States v. Anderson*, 906 F.2d 1485, 1492 (10th Cir. 1990) ("Information regarding the fee arrangement is not normally part of the professional consultation and therefore is not privileged . . . . In other words, while payment of a fee to an attorney is necessary to obtain legal advice, disclosure of the fee arrangement does not inhibit the normal communications necessary for the attorney to act effectively in representing the client."); *Valenti v. Allstate Ins. Co.*, 243 F. Supp. 2d 200, 218 (M.D. Pa. 2003) (holding that "[t]he attorney-client privilege only precludes disclosures of communications between attorney and client and does not protect against disclosures of facts underlying the communication. In general, the facts of legal consultation or employment, client identities, attorney's fees and the scope and nature of employment are not deemed privileged").

The payment and/or receipt of costs and fees likewise are not protected by the attorney-client privilege. *See, e.g., In re Marriage of Schneider*, 831 P.2d 919, 921 (Colo. App. 1992) (discussing attorney-client privilege and noting that "*[s]uch privilege does not extend to the disclosure of the payment of fees*, unless such disclosure would, by its nature, reflect the subject matter of a communication that has not previously been disclosed") (emphasis added); *Klein v. Henry S. Miller Residential Servs., Inc.*, 82 F.R.D. 6, 9 (N.D. Tex. 1978) ("*There is generally no attorney-client privilege as to* the identity of the client, conditions of employment or *matters involving receipt of fees.*") (emphasis added).

Documents that relate to the solicitation of funding for the lawsuit also are not privileged. Any such documents were exchanged between Plaintiffs, SavePERACOLA or Protect PERA Retirees and putative class members and thus do not involve communications made in

confidence, between privileged persons, for the purposes of seeking legal advice. *See Madera*, 112 P.3d at 690.

The common interest privilege does not apply. Even assuming communications with putative class members regarding the solicitation of lawsuit funding are somehow privileged, which they are not, the disclosure of such communications to third-party entities SavePERACOLA and Protect PERA Retirees waives any privilege. Moreover, the common interest privilege does not protect such disclosure because, as previously discussed, use of an organizational entity to solicit money does not meet the common interest privilege requirement that the involved third-party is "part of an on-going and joint effort to set up a common legal strategy." *Black*, 74 P.3d at 469.

The First Amendment right of association likewise does not preclude disclosure of documents concerning solicitation because, as discussed above, this is not the type of case or circumstance that would chill Plaintiffs' associational rights. In a somewhat similar case, the Colorado Supreme Court agreed and ordered the disclosure of a religious organization's donor list finding that such disclosure would not:

> interfere with their right to freedom of expressive association [because] . . . no harm that would befall the donors if their names are revealed, and [religious organization] has made no showing that any harm would result . . . . The first amendment . . . [did] not prohibit the district court from ordering [religious organization] to disclose to the Investors the names of . . . Campaign donors.

Smith v. Dist. Court, 797 P.2d 1244, 1250 (Colo. 1990).

Plaintiffs have not established that any of the requested documents were created in anticipation of litigation or trial and thus the work product doctrine is inapplicable to Request No. 7.

E. Documents Provided to, Created by, Received from or Relied on by Expert Witnesses Are Discoverable

Request No. 8 seeks documents provided to, created by, received from, or relied on by those expert witnesses Plaintiffs intend to call at trial.

> **Request for Production No. 8**: All Documents provided to, created by, received from, or relied on by any expert witness(es) whom You intend to call at trial, including files, notes, and calculations.
>
> **Response to Request No. 8**: Plaintiffs object to this Request on the grounds that it calls for documents protected by the work product privilege or are not discoverable under the Colorado Rules of Civil Procedure. To the extent that this Document Request may be construed as asking for any expert report, any reports of experts who will be used at trial will be provided at such times as will be specified in the Discovery Plan and/or as Ordered by the Court, and in accordance with the Colorado Rules of Civil Procedure.

Through this request PERA is not seeking Plaintiffs' expert reports, which PERA acknowledges are not due until October 7, 2011. Rather, PERA seeks those documents Plaintiffs have forwarded to their retained experts to review and those documents Plaintiffs have in turn received from their experts. Such documents are discoverable under the rules of civil procedure and are not protected by the work product doctrine.

The Court in *Clements v. Davies*, 217 P.3d 912 (Colo. App. 2009), confirmed that such documents are discoverable stating:

> Materials that are reviewed and considered by an expert witness in preparation for testimony at trial are discoverable under C.R.C.P. 26(a)(2). . . . If an opposing party is to determine the extent to which the expert's opinion is shaped or influenced by the version of the facts selected and presented by the counsel retaining the expert, that party must have access to the documents or materials that the expert considers. Without such access, the opposing party will be unable to conduct a full and fair cross-examination of the expert.

Id. at 916-17.

The Colorado Supreme Court also has made clear that C.R.C.P. 26(a)(2) allows "discovery of attorney work product shared with a testifying expert witness, provided the expert

witness considers the work product in forming an opinion." *Gall v. Jamison*, 44 P.3d 233, 240 (Colo. 2002). The court "emphasize[d] that a communication is discoverable even if the expert did not rely on it in forming her opinion; she need only consider the communication in developing her opinion." *Id.* There is nothing Plaintiffs could have provided to or received from a testifying expert that would implicate the work product doctrine.

F. Documents that Support Plaintiffs' Allegations of Damages Are Discoverable

> **Request for Production No. 9**: All Documents relating to the alleged damages, injuries or losses for which You seek compensation from the PERA Defendants for the matters alleged in Your most recent complaint, including any documents prepared by an expert regarding damages.
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> **Response to Request No. 9**: Plaintiffs object to this Request to the extent it is premature in that discovery and analysis is ongoing and all facts on which Plaintiff will ultimately rely to support this claim may not be presently known or identified. Plaintiffs also object to this Document Request to the extent it seeks attorney work product. The documents relating to the losses are for the most part within the possession, custody and control of Defendants. In addition, loss calculations may be the subject of expert reports which will be presented at such time as required by the applicable rules or orders of the Court. Subject to and notwithstanding these objections, Plaintiffs do not currently possess any documents responsive to this Request that are not currently on PERA's website.

This request is not premature and Plaintiffs' statement that they do not possess such documents is inaccurate. A response to this interrogatory does not require Plaintiffs to have calculated a final number as to damages. Rather, Request No. 9 simply asks for documents relating to Plaintiffs' alleged damages.

Plaintiffs have responsive documents because each of Plaintiffs' complaints include calculations of what an average retiree allegedly will "lose . . . in benefits over the next twenty years (Pls.' Sec. Am. Comp. ¶ 55) and some loss calculations are included in the disclosures that Plaintiffs produced on February 3—one and a half months after they were due and after PERA served its Requests for Production. Furthermore, Plaintiff Justus provided "loss" calculations to

the General Assembly during his testimony at hearings for Senate Bill 10-001. PERA is entitled to all such responsive documents.

Plaintiffs also asserted damages in their Rule 26(a)(1) Initial Disclosures as follows: "Lost profits. Defendants possess all of the necessary information to calculate the economic damages incurred by Plaintiffs and the putative class." Ex. G at 5. Plaintiffs now claim that the relevant documents are "currently on PERA's website." Plaintiffs must identify those PERA documents on which they rely. Plaintiffs cannot file a lawsuit, seek damages, and then shift the assessment and calculation of such purported damages to Defendants.

As with each of their other responses, Plaintiffs provide no basis for their assertion of the work product privilege and give no indication as to what documents the privilege purportedly applies.

G. Documents Relating to Plaintiffs' Proposed Alternative Options to Reach Full Funding Within 30 Years Are Discoverable

PERA's Request No. 10 requests documents that identify purported options to reach a 100% funding status without readjusting retiree COLAs.

> **Request for Production No. 10**: All Documents relating to any options that would enable the PERA pension funds to reach 100% funded status within 30 years that does not require modification of retiree' COLAs and/or ARAAs including any actuarial valuations or recommendations to address funding deficiencies.
>
> **Response to Request No. 10**: Plaintiffs object to this request on the grounds that it calls for documents protected by the work product privilege or are not discoverable under the Colorado Rules of Civil Procedure. To the extent that this Document Request may be construed as asking for any expert report, any reports of experts who will be used at trial will be provided at such times as will be specified in the Discovery Plan and/or as Ordered by the Court, and in accordance with the Colorado Rules of Civil Procedure.

Plaintiffs, in their Second Amended Complaint, make the unsupported assertion that "alternatives were available":

> Because Sections 19 and 20 of Senate Bill 10-001 diminish vested pension benefits and because Defendants' actions were neither reasonable nor necessary and because *alternatives were available to Defendants to shore up PERA funding* without breaking the contractual rights of Plaintiffs and the Class, Defendants violated the Contract Clause of the United States Constitution.

Pls.' Sec. Am. Compl. ¶ 70 (emphasis added). Plaintiffs are obligated to produce the documents that formed the basis of this allegation.

Plaintiff Justus testified before the legislature concerning purported alternatives to readjusting the COLA. Any documents compiled, created by Plaintiff Justus supporting his theories, or those of any other Plaintiff, are responsive and discoverable. As explained above, PERA is not seeking expert reports from Plaintiffs. However, to the extent documents that fall under this request were provided to or received by Plaintiffs' testifying experts such documents are subject to discovery and Plaintiffs must turn over the requested documents.

III. Colorado Law Requires that Plaintiffs Provide a Privilege Log to Support Their Claims of Privilege

Colorado law requires that Plaintiffs must produce a detailed privilege log supporting their privilege claims:

> When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

C.R.C.P. 26(b)(5). Applying Rule 26(b)(5) the Colorado Supreme Court explained:

> Under the Rule, when a party wishes to assert privilege in response to a discovery request he or she must notify the party seeking disclosure by providing a privilege log identifying the documents withheld and explaining the privilege claim. The documents must be described in the 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. . . . Consistent with our rule that the claimant of the privilege bears the burden of establishing its applicability, the party asserting the privilege must expend the bulk of the effort by compiling the privilege log.

Alcon v. Spicer, 113 P.3d 735, 742 (Colo. 2005).

In addition to such well-established law, PERA specifically directed Plaintiffs in its document requests to provide a privilege log for those documents they claim are subject to any asserted privileges. Plaintiffs have not provided a privilege log. If Plaintiffs fail to provide a detailed, comprehensive privilege log by their April 1, 2011 deadline to respond to this motion, PERA asks the Court to find that their privilege objections have been waived. *See Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 683 (D. Colo. 2008) (finding "[t]he failure to comply with this rule results in a waiver of the claims of privilege . . . whether under Colorado or federal law").

CONCLUSION

For the reasons discussed above, PERA respectfully requests that the Court order Plaintiffs to produce documents responsive to each of PERA's ten document requests.

Respectfully submitted this 11th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2011, a true and accurate copy of the foregoing PERA Defendants' Motion to Compel Plaintiffs to Respond to PERA's First Request for Production of Documents was served via Lexis-Nexis File & Serve on the following individuals:

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s/ Jane Cohen

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