UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN FREEDOM DEFENSE INITIATIVE, PAMELA GELLER, and ROBERT SPENCER,

Plaintiffs,

v.

Case 2:10-cv-12134
HON. DENISE PAGE HOOD

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION ("SMART"); GARY L. HENDRICKSON, Individually and in his official capacity as Chief Executive of SMART, JOHN HERTEL, Individually and in his official capacity as General Manager of SMART and BETH GIBBONS, individually and in her official Capacity as Marketing Program Manager Of SMART,

Defendants.

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RESPONSE TO PLAINTIFFS'
MOTION TO COMPEL DISCOVERY

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ISSUES PRESENTED

1. Whether a party has waived the attorney-client privilege when it provided discovery of emails that were not confidential and which reflected underlying discoverable facts even though the emails were written by attorneys.

2. Whether an *in camera* review of documents is appropriate by the Court when the matter is a non-jury matter and the Court is the fact-finder in the case.

STATEMENT OF MOST CONTROLLING AND APPROPRIATE AUTHORITY

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (SMART) is an instrumentality of the State of Michigan established by Michigan Public Act 204 of 1967. In this and every regard, it is a governmental entity. Its mission-critical purpose, pursuant to the Act, is to operate public mass transportation through the four southeastern-most counties in Michigan (Wayne, Oakland, Macomb and Monroe Counties).

Incidental to SMART's provision of public transportation, as this Court is well aware from prior hearings, SMART sells advertising on the interior and exterior of its transit vehicles for the purpose of enhancing revenue in support of its mission-critical purpose. The sale of advertising is conducted by SMART's exclusive agent, CBS Outdoor, Inc. ("CBS"), pursuant to an agreement established in a contract executed in February of 2009. (**Exhibit A,** in pertinent part).

The contract includes a provision at Section 5.07(B), "Restriction on Content", which prohibits certain advertising as follows:

> In order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience, [CBS] shall not allow the following content:
>
> (1) ***Political or political campaign advertising.***
>
> (2) Advertising promoting the sale of alcohol or tobacco.
>
> (3) Advertising that is false, misleading, or deceptive.
>
> (4) ***Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.***
>
> (5) Advertising that is obscene or pornographic; or in advocacy of imminent lawlessness or unlawful violent action.

The Contract further sets forth, in Section 5.07(C), "Review of Advertising Content," the process for the review of advertising material to determine if potential violations of the Restriction on Content policy are present, is as follows:

> **Before displaying any advertising, exhibit material, or announcement which Contractor [CBS] believes may be in violation of Section 5.07.B, "Restriction on Content", Contractor shall first submit the material to SMART for review.** SMART shall make the final determination as to all violations of Section 5.07.B.

(**Exhibit A**, emphasis added).

Throughout the term of the contract, SMART has actively enforced this policy and has rejected all advertising that was referred to it for decision and that violated the Authority's content policy. For example, SMART has consistently rejected proposed advertisements deemed to violate the policy which were political (**Exhibit B**), as well as advertisements in advocacy of violence. (**Exhibit C**).

On or about May 12, 2010, Plaintiff Geller contacted the CBS sales manager, Robert Hawkins, requesting the posting of advertisements on SMART buses. The advertisement proposed by Appellants states "Fatwa on your head? Is your family or community threatening you? LEAVING ISLAM? Got questions? Get answers! *RefugefromIslam.com*". (**Exhibit D**).

The advertisement was referred to SMART's Marketing Department, particularly Beth Gibbons, for a determination as to whether the ad violated the content policy. Ms. Gibbons reviewed the proposed advertisement and discussed it with the Department Director. The discussion focused on the application of the content policy to the proposed advertisement. As part of the review process, and with the approval of her supervisor, Elizabeth Dryden, Ms. Gibbons also requested a legal opinion concerning the ad from the office of SMART's General Counsel.

The Marketing Department had previously requested legal opinions concerning other advertisements including the Pinckney Pro-Life advertisement referred to above, a "Red Dead Redemption" advertisement (concerning the publication of a videogame), and an advertisement by DetroitCOR.org, which Plaintiffs have referred to in this lawsuit as the "atheist advertisement."

The consultation between the Marketing Department and the Office of the General Counsel, both in the manner in which they requested review, as well as the actual review of the attorneys was withheld in this matter as attorney-client privileged. Analysis and work performed by the attorney at the request of their clients, and further at the request of SMART's General Counsel by outside attorneys, is absolutely privileged.

SMART's General Counsel did reach a conclusion about the application of the content policy to these particular advertisements, and provided that conclusion to the Marketing Department. Because the conclusions themselves were intended to help form the basis of a decision that was to be conveyed to CBS, the conclusions were not considered confidential, and therefore not covered by the attorney-client privilege.

Plaintiffs sent discovery in this matter requesting information concerning the decisions made through the application of the content policy to this ad and any other ad that had been reviewed against the content policy. In the spirit of full discovery, and because the conclusions conveyed by General Counsel to the Marketing Department were not considered confidential, and further because the documents represented underlying facts in this matter, the emails were provided to counsel for the Plaintiffs in this matter.

At the request of Plaintiffs' counsel, and in accordance with the Federal Court Rules, Defendants prepared and provided a privilege log listing the documents that represented

protected analyses and mental impressions of the attorneys, as well as confidential and privileged information conveyed by and between SMART personnel and SMART's General Counsel. In addition, the log listed documents that included analyses by outside counsel, ZAUSMER, KAUFMAN, AUGUST, TAYLER AND CALDWELL, P.C., and that were conducted at the request of SMART's General Counsel, analyses which contained the mental impressions of outside counsel as well. It is these documents that were asserted to be attorney-client privileged and therefore withheld.

As the Court knows, this case has already been decided, at the preliminary injunction stage, by the Sixth Circuit Court of Appeals. Its opinion (**Exhibit E**) sets forth the issues in this particular case. The issues that this Court will be called upon to decide are:

A. Whether SMART's advertising space represents a non-public forum for purposes of constitutional analysis;

B. Whether SMART's content policy, given the type of forum maintained, is a constitutional exercise of SMART's power;

C. Whether Plaintiffs' ad is a *political* ad that is appropriately restricted by the policy; and

D. Whether Plaintiffs' ad *is likely to hold a person or group of persons up to scorn and ridicule* as prohibited by SMART's content policy.

Each of these issues has already been decided by the Sixth Circuit Court of Appeals when it determined that Plaintiffs did not have a likelihood of success on the merits and remanded the matter to this Court for further proceedings consistent with its opinion.

The only issues in this case are SMART's actual decision on Plaintiff's advertisement, and whether that decision was constitutional and appropriate under its content policy. All of the facts concerning those issues, *including the decisions themselves*, have been provided in vast written discovery as well as several depositions of SMART personnel. Plaintiffs now seek to

conduct an improper inquiry into the confidential communications between SMART personnel and its lawyers and into the analyses and mental impressions contained in the attorney-client privileged documentation. Discovery in this matter has demonstrated that the facts have not changed since the Sixth Circuit Court of Appeals decided this matter.

Plaintiffs should not be able to invade the attorney-client privilege and the mental impressions of attorneys in this fashion when doing so would reveal no further facts upon which a decision can be based in this matter, and further where Plaintiffs can show no rational reason to invade an inviolate privilege.

THE ATTORNEY-CLIENT PRIVILEGE

The United States Supreme Court, in *Upjohn Co v United States*, 449 US 383 (1981), recognized the importance of the attorney-client privilege within the corporate (or governmental) environment. Therein, writing for the court, Justice Rehnquist wrote:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. WIGMORE, EVIDENCE §2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v United States*, 445 US 40, 51 (1980):
>
> "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."
>
> And in *Fisher v United States*, 425 US 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the court, *see Hunt v Blackburn*, 128 US 464, 470 (1888)(privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn, at 389. "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn,* at 390 (emphasis added).

In his concurrence, Chief Justice Burger proposed a usable rule:

> [A]s a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject, and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; **(b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.**

Upjohn, at 403 (BURGER, CJ, concurring in part and concurring in the judgment) (emphasis added)

The attorney-client privilege, as old as it is, is as important as any confidential communication privilege that exists. If SMART personnel cannot rely on their conversations with its General Counsel and outside counsel as being privileged, SMART cannot fully analyze and reach conclusions on significant legal issues. Piercing the privilege in this case would put SMART on notice that it could not adequately investigate potential legal issues without the fear that information provided to counsel and information concerning counsel's analysis and research could be discovered by the adverse party. Such a violation of the privilege would be tantamount to determining that there is no privilege at all.

NO PRIVILEGE HAS BEEN WAIVED: THE EMAILS PROVIDED IN DISCOVERY REPRESENT CONCLUSIONS THAT WERE NOT CONFIDENTIAL IN NATURE AND WHICH REPRESENTED DISCOVERABLE FACTS.

Plaintiffs attach to their motion to compel a number of emails that were produced in discovery and that had been either copied to attorneys and/or authored by attorneys in the Office of the General Counsel. Plaintiffs argue that because emails authored by attorneys have been provided, the privilege has been waived. Plaintiffs then argue that all emails written by attorneys and all communications between those attorneys and their clients are consequently discoverable. Such a superficial analysis fails to reflect that not all communications between attorneys and their client are covered by the privilege.

Defense counsel is aware of the scope of the privilege and aware that it does not cover communications that are not confidential. *American Standard, Inc. v Pfizer, Inc.*, 828 F.2d 734, 746 (Fed. Cir. 1987). Further, the privilege does not protect underlying facts (such as, the fact of the decisions made). *White v United States Catholic Conference*, 1998 WL 429842 at *1 (D.D.C. May 22, 1998); *In re Six Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992).

With respect to the emails produced, those produced reflect *conclusions* that became the basis for *decisions* made concerning the application of the content policy to particular advertisements. Because the *decisions* made were conveyed, and in fact intended to be conveyed, to CBS Outdoor, Inc., these communications by counsel to the Marketing Department were not intended to be confidential.

Further, these *conclusions* reflect underlying facts at issue in this particular litigation: i.e., how SMART applied its content policy to particular advertisements. The attorney-client privilege does not protect underlying material facts, and therefore, upon review, counsel determined that these particular communications were not privileged communications. In fact,

none of the documents provided represent privileged information, and therefore, no waiver of privilege can reasonably be argued. Providing non-confidential information in discovery does not waive attorney-client privilege. *American Standard, supra*.

The communications that the Plaintiffs seek to compel in this particular matter (**Exhibit F**) do not represent *decisions* on the application of the policy to particular ads, but rather represent the mental impressions, analyses, and interim discussions by and between the attorneys themselves (who in the case of Avery Gordon and Anthony Chubb are also employees of the client), and also with their clients in the Marketing Department and/or General Manager's office. None of these communications represents or conveys a final decision or application of the policy to a particular advertisement or otherwise. In that regard, not only are they protected by the attorney-client privilege, but they are irrelevant to any of the issues in this matter.

Plaintiffs are entitled to know the decisions that have been made in order to determine whether the policy has been applied consistently. Plaintiffs are not entitled to know the underlying research, analyses, and mental processes of the attorneys in assisting their client to come to those decisions.

What is being sought is disclosure of attorney-to-attorney communications and communications in collaboration between the Marketing Department, the Office of the General Counsel, and other members of SMART, the client. None of that is discoverable.

AN *IN CAMERA* REVIEW OF THE PRIVILEGED DOCUMENTS WOULD BE INAPPROPRIATE IN THIS CASE

As part of the relief requested in Plaintiffs' Motion to Compel, the Plaintiffs request an *in camera* review of the documents by this Court. As noted above, the requested documents are exempt from disclosure not only by privilege, but also because they are not relevant to deciding the issues before the Court. Moreover, what Plaintiffs' fail to advise this Court in making such a

request is that *the Court is the fact finder* in this matter. This is a bench trial case in which Judge Hood will be expected to hear the facts and determine the case in accordance with the Sixth Circuit Court of Appeals' analysis. If this Court were to evaluate and see non-discoverable documents, it would be called upon to make a decision in light of and with knowledge of information it could not appropriately see in deciding this case.

Even if this pretrial motion is referred to a magistrate under Fed. R. Civ P. 72, any decision of the magistrate is reviewable by Judge Hood upon objections filed by either party. The Court could not avoid reviewing and deciding the appropriateness of the discovery of these documents, and such a review could affect this Court's role as fact-finder in this matter.

As such, an *in camera* review of the documents would be inappropriate in this particular case.

WHEREFORE, Defendants respectfully request that this Court deny Plaintiffs' Motion to Compel, protect the attorney-client privilege between SMART and its attorneys, and further award them costs and attorneys' fees wrongfully incurred.

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Dated: July 3, 2013

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by the method(s) indicated below on July 3, 2013.

_____ U.S. Mail
_____ Hand Delivered
_____ Overnight Delivery Service
__X__ Electronic Notification Via the Court's CM/ECF System
_____ FAX
_____ UPS
_____ E-Mail

_____
ANDREA GORDON