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April 22, 2010

By ECF

The Honorable Neal P. McCurn
Senior U.S. District Court Judge
U.S. District Court for the Northern District of New York
Syracuse, New York 13261

Re: *Yoder, et al. v. Town of Morristown, et al.*, No. 09-cv-00007

Dear Judge McCurn:

We represent the Plaintiffs in the above-referenced action and write in response to Defendants' letter dated April 20, 2010. (*See* Docket No. 57). In that letter, Defendants request that the Court consider an unauthenticated email from a regional New York State employee (the "email") in connection with their motion to dismiss pursuant to Fed. R. Civ. P. 12 or in the alternative join the State of New York as a Defendant pursuant to Fed. R. Civ. P. 19 or 20. For the reasons set forth below, we respectfully submit that the Court should not consider the email.

First, we note that the email is outside the pleadings and need not be considered in connection with the pending motion. *See, e.g., Dourlain v. United States/IRS*, 5:06-CV-424 (NAM/DEP), 2008 WL 4605958 at *2 (N.D.N.Y. 2008).

Second, Defendants offer no proof of the relevance of the email to the pending motion. That is because there is none. Even if the email actually did reflect the State's "position," that would not make the State a necessary party for purposes of Rule 19 or a proper one under Rule 20. It is well-established that a non-party is *not* a necessary party merely because the non-party has some interest in the outcome of a case. *See, e.g., Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 387 (2d Cir. 2006).

Third, even if the State's "position" mattered to the pending motion, there is no evidence that the email represents *the State's* position, as opposed to one civil servant's opinion.

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Finally, even though the email is irrelevant to the pending motion, it bears mention that the email emphasizes that all code enforcement officers should “avoid any type of discrimination with regard to . . . administration and enforcement of the New York State Uniform Fire Prevention and Building Code.”

We thank the Court for its consideration.

Respectfully submitted,



Eric C. Rassbach
National Litigation Director

cc: Jacinda H. Conboy, Esq. (by ECF)