LEMIRE JOHNSON, LLC
Attorneys at Law
2534 Route 9, P.O. Box 2485, Malta, NY 12020
518.899.5700 ~ 518.793.9005
Fax 518.899.5487
www.lemirejohnsonlaw.com

October 6, 2011

VIA ELECTRONIC FILING

Hon. George H. Lowe, U.S.M.J.
U.S.D.C. Northern District of New York
Northern District of New York
Syracuse, New York 13261

Re: *Yoder, et al. v. Town of Morristown, et al.*
Civil Case No.: 09-cv-0007 (TJM/GHL)

Dear Magistrate Lowe:

We write in response to Plaintiffs' status letter filed with Court on September 23, 2011 (Dkt. No. 81). Two issues were raised in that letter: (1) questions relating to Defendants' document production; and (2) issues relating to documents Plaintiffs held back based on a claim that the documents were shielded from discovery. Each of these issues is addressed below.

With respect to the first issue, we have advised Plaintiffs' counsel that our client has not held back responsive documents based on relevance objections. It is our understanding that this issue has been fully resolved.

Regarding the second issue, Plaintiffs' counsel is correct in stating that Defendants object to their claim that certain documents are protected by the attorney-client privilege and/or the work-product doctrine. Although this issue was previously raised by Defendants, the parties agreed to table these discussions while settlement discussions were on-going. Since those discussions did not result in a resolution of the litigation, it is again appropriate to address this issue.

There are nineteen (19) different entries listed on the Plaintiffs' privilege log reflecting notes or communications involving *non-lawyer third parties* David Fisher and Marianne Fisher. A copy of the Plaintiffs' privileged log, reflecting those entries, is attached as **Exhibit "A"**. Understanding that the parties had different views on this subject, we recently suggested that Plaintiffs' counsel provide the documents to the Court for an *in camera* inspection. Plaintiffs refused. In their September 23, 2011 letter Plaintiffs' counsel advised the Court that such a review was premature and "that Defendants should first be

required to prove – which they cannot – that there is no privilege that attaches to" the communications.[1] We disagree; in fact, the law requires just the opposite.

The Plaintiffs bear the burden of "proving" that a privilege or protection exists, not Defendants. *See In re: Grand Jury Subpoenas dated Jan. 20, 1998*, 995 F. Supp. 332, 334 (E.D.N.Y. 1998) (explaining that a privilege is an exception to the general rule of disclosure and the party asserting the privilege "bears the burden of establishing the existence of a privilege and its applicability to a particular case.); *see also*, *Curto v. Medical World Communs., Inc.*, 03-cv-6327, 2011 U.S. Dist. LEXIS 53228 at *11 (E.D.N.Y. May 11, 2011) (the party invoking the privilege bears the burden of proving the facts upon which the claim is based). Generally "'the privilege applies only to communications between lawyer and client,' and communications that include third parties . . . enjoy no privilege." *Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ.*, 09-cv-4675, 2011 U.S. Dist. LEXIS 67388 at *3 (E.D.N.Y. June 22, 2011). Only in rare instances is the privilege extended to include third parties. In order for this to occur "*the person asserting the privilege* must first demonstrate that the client had a reasonable expectation of privacy to the communication at issue, and then 'must establish that disclosure to the third party . . . was necessary for the client to obtain informed legal advice.'" *Id.* at *3-4 (explaining that "[t]he necessity element means more than just useful and convenient, but rather requires that the involvement of the third party be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communication.") (citations omitted and emphasis added).

Although Plaintiffs' counsel characterizes the Fishers as "consultants," there is no indication that the Fishers were ever retained by Plaintiffs' counsel or Plaintiffs in any capacity.[2] Instead, it appears that the Fishers are simply individuals who have "over the years" become friendly with the Amish community in general and who perhaps Plaintiffs' counsel may have used as a convenient intermediary. These facts, even if true, do not render communications between the Fishers and Plaintiffs (or even Plaintiffs' attorneys) privileged because Plaintiffs have not shown that there was an expectation of privacy for each communication ***and*** that the involvement of the Fishers was indispensible to the representation.[3] *See Allied Ir. Banks, p.l.c. v. Bank of Am., N.A.*, 240 F.R.D. 96, 104 (S.D.N.Y. 2007) (explaining that "where the third party's presence is merely 'useful' but not

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[1] It is not clear from the privilege log that the documents held back are even communications. Most of the documents appear to be notes taken by the Fishers at some unknown time.

[2] In addition, contrary to Plaintiffs' representation, the Fishers do not reside in Morristowm community and they were in fact involved with the Amish community well before any litigation with respect to these issues arose.

[3] Plaintiffs' counsel contends that the Fishers were necessary in part because they are unable to communicate with their clients using e-mail or the phone, however, they provide no explanation why mailing letters, visiting the clients themselves or using local counsel, such as, Mr. Ballan, would not have accomplished the same end, while preserving the attorney client privilege status of such communications.

'necessary,' the privilege is lost); *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) (noting that "a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client"). Thus, unless Plaintiffs can demonstrate, *with competent evidence*, that the documents should be shielded from disclosure, it is respectfully submitted that the Court should compel production. As we offered to Plaintiffs' counsel, if the Court believes that *in camera* review would assist in making a determination with respect to whether the documents should be disclosed, Defendants do not object to such a procedure.

Thank you for your consideration. We are available at the Court's convenience to discuss these matters further.

Respectfully,

LEMIRE JOHNSON, LLC

s/Mark J. Lemire

Mark J. Lemire (105814)
mjl@lemirejohnsonlaw.com

MJL/ek
cc: Proskauer Rose LLP
The Becket Fund for Religious Liberty