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November 11, 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 pursuant to the Court's November 7, 2011 text Order and in response to Plaintiffs' letter dated October 21, 2011 (Dkt. No. 83). The issue relates to documents withheld based on Plaintiffs' claims that the documents are shielded from discovery.

First, we believe it is appropriate for the Court to have some context with respect to Plaintiffs' recent disclosure. On October 20, 2011, Plaintiffs' counsel sent a letter that included two (2) additional documents which counsel now apparently believes are not protected by either the attorney-client privilege or work-product doctrine. The letter and documents are included as **Exhibit "1."**

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The first document, YOD000959, was previously produced (YOD000575), but the handwritten note was redacted. The basis for this redaction apparently was counsel's good faith belief that the handwritten portion contained "Attorney Work-Product". *See* Exhibit "A" to Defendants' October 6, 2011 letter at p. 5, No. 27 (Dkt. No. 82).[1] As the Court is aware, the attorney work-product, as codified in F.R.C.P. Rule 26(b)(3), protects documents that are prepared in anticipation of litigation and/or for trial. Simply by reading the handwritten note, however, it is hard to understand any basis for Plaintiffs' counsel to even initially withhold this document. Nothing in the writing remotely relates to the work-product doctrine. *See e.g., United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (a document is prepared "in anticipation of litigation" if, "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.").

The second recently disclosed document, YOD000958, is an undated letter from one of the Plaintiffs to another party. Although it is impossible to determine for sure based on the

[1] The entry indicates that the handwritten note was written on April 17, 2008.

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privilege log provided by Plaintiffs, we believe this letter is entry number 2 on Plaintiffs' privilege log. *See id.* at p. 1, No. 2. The basis for initially withholding this document was apparently the attorney-client privilege. Even assuming that the other requirements for the privilege to apply were met, it is unclear how anyone, let alone professional counsel, could construe this document as being privileged because it does not seek or convey any legal advice.

We bring these two documents to the Court's attention because it appears that Plaintiffs' counsel was over-inclusive when making privilege determinations in the past. This heightens the need for Defendants' request that the Court conduct an *in camera* review of the documents withheld by Plaintiffs' counsel. Obviously, since Plaintiffs' counsel has refused to disclose the documents, we are at a distinct disadvantage in attempting to evaluate whether any of the listed documents have been properly withheld, even assuming that there may be some legitimate basis for withholding them at all.

With respect to whether the documents should properly be shielded from disclosure, it is Plaintiffs' position, as set forth in their October 21, 2011 letter that the attorney-client privilege or work-product doctrine applies to the listed documents. As explained herein, Defendants disagree that the documents should be protected from disclosure.

Although Plaintiffs' counsel has provided a "Consulting Agreement," the agreement itself raises new and not insubstantial questions about whether the listed documents have been properly withheld. First, after receiving the agreement, we attempted to obtain additional information from counsel. Specifically, we sought clarification about when the Consulting Agreement was drafted and when the agreement was executed by Mrs. Fisher. In response to our request for this information, we were presented with an unclear, evasive, and somewhat troubling response from counsel. These communications are included as **"Exhibit 2."**

The troublesome part is that the Consulting Agreement is dated "As of October 27, 2008" and the text of the agreement reads: "You have already begun to render services to Counsel in connection with the Project, as of October 27, 2008."[2] So what we are unable to determine, which we believe is relevant to the issue before the Court, is when this agreement was actually entered into. Unfortunately, and understanding the limited information we have been provided by counsel, it appears possible, just as Mr. Hirschhorn suggests in his responsive e-mail, that the

[2] Defendants also note that the Consulting Agreement – of uncertain origin – alone has little or no probative value with respect to this issue. Plaintiffs should be required to produce admissible evidence to the Court with respect to this agreement. In addition, Mrs. Fisher's expectations about the conversations (and/or notes) are really irrelevant for determining whether a privileged/protection applies. If there could be a privilege, at least with respect to communications, that privilege belongs to Plaintiffs and it is each of the Plaintiffs' expectations and their understanding with respect to each communication that is relevant in determining whether a privilege might apply. Frankly, Defendants submit that Plaintiffs have failed to carry their burden of "proving" that a privilege or protection exists for any of these documents. *See In re: Grand Jury Subpoenas dated Jan. 20, 1998*, 995 F. Supp. 332, 334 (E.D.N.Y. 1998).

agreement was "created after the fact to bolster [Plaintiffs'] submission to the Court". *See* Exhibit 2. Despite Plaintiffs' counsel's refusal to provide a straightforward answer to our inquiries, we believe that the facts underlying an agreement between Mrs. Fisher and Plaintiffs' attorneys, which counsel contends should be interpreted to shield otherwise discoverable information from disclosure, are relevant to the issue before the Court. In light of this, Defendants ask that the Court require Plaintiffs' counsel to provide this relevant information.

Another aspect relating to the Consulting Agreement that leads to additional (and concerning) questions is that it appears any relationship between Plaintiffs' counsel and, at least, Mrs. Fisher began no earlier than October 27, 2008. *See* Dkt. No. 83 at p. 2. Assuming, without agreeing that such a relationship existed as of that date and that the listed documents could be shielded from discovery because of that relationship, Defendants still fail to see how many of the withheld documents can be shielded from discovery. That is, all but four (4) of the listed documents are either undated or dated prior to October 27, 2008. Thus, even assuming that the Consulting Agreement could appropriately shield some of the listed documents from disclosure, it is not seen how the remaining documents may be properly withheld on that basis. Some of the documents are dated in 2006 and 2007, more than two (2) years before this litigation was initiated.[3] Is it really Plaintiffs' position that communications (and notes) from years before the litigation was commenced are protected from disclosure based on the attorney-client privilege, the attorney work-product doctrine, and/or an agreement that may or may not have been conceived of and executed in October 2008? Defendants submit that this seems highly unlikely and, given Plaintiffs' counsel's representation about when Mrs. Fisher began her consulting relationship with their firm, Defendants request that Court order Plaintiffs to turn over all of the documents which are either undated or dated before October 27, 2008.

Finally, with respect to the legal merits of Plaintiffs' letter, there are certain salient facts that are important and which, contrary to counsel's repeated assertions (the "attorney-client privilege and attorney work-product doctrine *clearly* apply here" and with respect to Mr. Fisher,

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[3] To the extent that Plaintiffs will make the argument, heretofore not made, that the earlier dated communications/documents relate to legal matters the Plaintiffs had with the town predating this particular lawsuit, Defendants note that absolutely no evidence or even any reasoning whatsoever has been provided why the Plaintiffs could not communicate directly with their local counsel with respect to these issues or why the Fishers needed to be involved at all. Moreover, a consulting agreement for those documents has not been provided [and, one would assume, if Plaintiffs' counsel had one, they would have provided it to the Court]. It must be remembered that the general rule in our legal system is for relevant material to be disclosed during discovery. Privileges shielding disclosure are frowned upon and such protections are to be used sparingly, only to effectuate the specific goals safeguarded by the privilege or protection. *See e.g., United States v. Mejia*, 655 F.3d 126 (2d Cir. 2011) ("to balance this protection of confidentiality with the competing value of public disclosure, however, courts 'apply the privilege 'only where necessary to achieve its purpose'' and 'construe the privilege narrowly because it renders relevant information undiscoverable.'") (citations omitted). And, in part because of this general rule facilitating full disclosure, neither the attorney-client privilege, nor the attorney work product, is absolute, even when these protections actually do apply.

although he did not sign the agreement, "*there can be no dispute* that the attorney-client privilege and attorney work-product privilege apply to communications with him as well") (emphasis added), lead to a different conclusion.[4] First, neither of the Fishers are attorneys. Second, the Fishers *apparently* have had a relationship (not an attorney-client or other legally protected relationship) with the Plaintiffs for several years before this litigation was commenced and, more than likely, well before the litigation was even conceived. Third, with all due respect to Plaintiffs' counsel's representations about Plaintiffs' expectations that communications with the Fishers would be kept confidential, these representations are utterly insufficient to demonstrate, as the law requires, that the Plaintiffs had a reasonable expectation of privacy in the communications (and/or notes?),[5] which was *necessary* for Plaintiffs to obtain informed legal advice. *See e.g., Allied Ir. Banks, p.l.c. v. Bank of Am., N.A.*, 240 F.R.D. 96, 104 (S.D.N.Y. 2007). Fourth, despite all of the writings from Plaintiffs' counsel on this subject, it is not clear that the Plaintiffs had any expectation or understanding that the Fishers were acting on behalf of their attorneys or that the Plaintiffs believed that all of their communications with the Fishers would somehow be protected from disclosure. Fifth, nothing provided by Plaintiffs' counsel demonstrates that the Fishers' involvement was indispensible in order for Plaintiffs to receive representation from counsel.

The cases relied on by the Plaintiffs are not persuasive and/or dispositive on this point. For example, in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), the Second Circuit was dealing with a accountant that it determined based on the facts before the Court was "necessary" in order to facilitate the attorney's representation in a complex tax litigation. In essence the Court analogized the accountant to an interpreter necessary to facilitate the attorney-client relationship. *Kovel*, 296 F.2d at 922.[6] The Second Circuit has subsequently explained that the

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[4] It is also appropriate to note that while counsel now claims they "did not mean to suggest" that Plaintiffs did not "have the burden of establishing that the communications between the Fishers, on the one hand, and Plaintiffs and/or their counsel . . . on the other hand, are protected . . ," the September 23, 2011 letter seemed rather unequivocal on this point – "any such review is premature and [ ] Defendants should *first* be required to *prove* – which they cannot – that there is no privilege that attaches to our communications with the Fishers." *See* Dkt. No. 81 (emphasis added). In addition, Plaintiffs' counsel continues to *incorrectly* refer to the documents listed on the privilege log as "communications" and seems to indicate that these are legally privileged communications, when, in fact, nearly half of the listed documents are notes and not communications at all.

[5] It also bears mentioning that most people have an expectation of privacy in even casual office conversations they may have. The simple fact that one subjectively believes the listener can be trusted not to "gossip," should not, Defendants submit, be sufficient to shield otherwise discoverable materials from disclosure.

[6] *See also, NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 139 (N.D.N.Y 2007) (contrary to counsel's representation, the Court found that the disclosure was not to just a mere "volunteer or titular advisor of NVIXM, [but instead, to] the supreme authority of all things NXIVM" and therefore, the disclosure was consistent with maintaining the privilege); *Hudson Ins. Co. v. Oppenheim*, 2010 NY Slip Op 2871, 1 (1st Dep't 2010) (documents were prepared by a consultant assisting with a forensic accounting analysis in preparation for earlier related litigation). None of the cases cited by Plaintiffs' counsel shields the types

extension of the privilege is limited. *See e.g., United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) (finding that communications with a third-party investment banker, while necessary for the attorney to gain information and to better advise his client, were not privileged); *Eprova v. Gnosis S.p.A.*, 07-civ-5898, 2010 U.S. Dist. LEXIS 101215, at *5-6 (S.D.N.Y. Sept. 24, 2010) (citing *Ackert*, 169 F.3d at 139, and explaining that "when an attorney seeks out a third party to *provide information rather than to act as a translator for client communications*, the communications between the attorney and the third party are *not privileged*.) (emphasis added).

In this case, as it relates to the Fishers, there is absolutely no evidence that they satisfy the standards necessary for a privilege or protection to be maintained over the documents listed on the privileged log. Accordingly, Defendants submit that the documents should be disclosed or, at a minimum, that Plaintiffs should be required to produce competent admissible evidence substantiating the privilege or protection ***and*** the documents should be turned over for an *in camera* inspection by the Court.

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

Respectfully submitted,

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MJL:lmg
Attachments
cc: Proskauer Rose LLP
The Becket Fund for Religious Liberty

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of documents at issue in this case. Defendants have also found no authority supporting Plaintiffs' position.