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November 15, 2011

By Electronic Filing

The Honorable George H. Lowe
United States Magistrate Judge
U.S. District Court for the Northern District of New York
P.O. Box 7346
Syracuse, New York 13261-7346

Re: *Yoder, et al. v. Town of Morristown, et al.*, Civil Case No.: 09-cv-00007 (NPM/GHL)

Dear Judge Lowe:

We, along with the Becket Fund for Religious Liberty, represent Plaintiffs in the above-referenced matter. We write in response to Defendants' November 11, 2011 letter to your Honor concerning their challenge to Plaintiffs' privilege log and, in particular, the communications with Marianne and David Fisher (the "Fisher Documents"). Defendants' latest missive is rife with factual misrepresentations and inconsistent legal assertions, none of which alter the fact that the Fisher Documents are not discoverable.

Defendants first contend, on the one hand, that the Consulting Agreement by and between Proskauer and Marianne Fisher is "troublesome" because they do not know when "this agreement was actually entered into." On the other hand, Defendants claim that the Consulting Agreement "has little or no probative value with respect to this issue." Defendants are wrong on both accounts. Although a consulting agreement is not required to protect documents from disclosure on the grounds of privilege and/or work product (*see* Plaintiffs' October 21, 2011 letter to The Honorable George H. Lowe at n.3), that such an agreement was entered into is certainly probative of the fact that Plaintiffs had an expectation of privacy when speaking with the Fishers. Moreover, Defendants' assertion that I "suggest[ed] . . . that the agreement was 'created after the fact to bolster [Plaintiffs'] submission to the Court'" is, it hardly need be said, incorrect. To the contrary, in my October 26, 2011 email that Mr. Lemire refers to (and which is attached to his November 11, 2011 letter to Your Honor), I stated: "If, by your questions, you are insinuating that the Consulting Agreement was created after the fact to bolster our submission to the Court, that is both incorrect and inappropriate." As we explained to Defendants in our October 26, 2011 email, the Consulting Agreement "was finalized in or around the commencement of this litigation."[1]

Second, Defendants' attack on certain undated documents and documents dated prior to October 27, 2008 as being inappropriately withheld should be rejected because, as explained in our October 21, 2011 letter to the Court, the attorney-client privilege and/or attorney work product doctrine apply equally to communications by and between Plaintiffs, Steve Ballan, Esq. and the Fishers. As Defendants are well aware, Mr. Ballan is Plaintiffs' defense attorney in

[1] Although we are unable to say with certainty the exact date on which Ms. Fisher signed the Consulting Agreement, our records show that the Consulting Agreement was initially prepared in October 2008.

connection with criminal actions concerning building code citations issued to Plaintiffs prior to the start of this litigation.[2]

Lastly, Defendants' conclusory assertions suggesting that Plaintiffs have not met their burden all should be rejected because: (i) whether or not the Fishers are attorneys is completely irrelevant since, as discussed in our previous submissions to the Court, the Fishers were retained by counsel and Plaintiffs had an expectation that the Fisher Documents would be immune from disclosure; (ii) contrary to Defendants' assertions, it is the very fact that the Fishers had a preexisting relationship with Plaintiffs that made them appropriate consultants to use in this litigation; (iii) Defendants fail to provide any reason why Plaintiffs' representations concerning the Fisher Documents are insufficient;[3] and (iv) Defendants' assertion that Plaintiffs have not established why the Fishers are "indispensible" is legally irrelevant and factually inaccurate for the reasons stated in our prior correspondence.

In short, Plaintiffs respectfully request that the Court conclude that the communications contained in the Fisher Documents are protected by the attorney-client privilege and/or the attorney work product doctrine.[4]

We are prepared to answer any questions the Court may have for us before or during the conference call scheduled for November 29, 2011 at 10:30 a.m.

Respectfully,

Russell L. Hirschhorn

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[2] Defendants' contention that Plaintiffs have not previously offered any evidence concerning the privileged nature of Plaintiffs' communications with Steve Ballan, Esq. is plainly wrong. Our October 21, 2011 letter to Your Honor provided such evidence with respect to communications by and between "Plaintiffs and/or their counsel (*i.e.*, my firm, the Becket Fund and *Steve Ballan, Plaintiffs' counsel for purposes of defending against the prosecution initiated by defendant Morristown*)." (Emphasis added.)

[3] If the Court believes it would be useful, we are prepared to obtain affidavits from all Plaintiffs to further support the representations made in our prior correspondence. We note, however, that in order to do so, we would need to make use of the Fishers and/or make a trip to Morristown to see our clients. In either event, we expect that it would take several weeks to obtain such affidavits.

[4] There is no basis for Defendants' suggestion that our recent production of two documents somehow "heightens the need for Defendants' request that the Court conduct an *in camera* review of the documents withheld." To the contrary, Plaintiffs' production of these documents demonstrates their good-faith attempt to narrow the issues for decision. It is hardly evidence that Plaintiffs' privilege determinations have not been made with care.

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