UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MAURA O'NEILL, as administrator of the Estate of Madelyn E. Linsenmeir, Plaintiff, v. CITY OF SPRINGFIELD, *et al.* Defendants.	C.A. No. 20-30036-MGM Leave to File Granted on February 3, 2023

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY CONCERNING THE DISCIPLINARY AGREEMENT BETWEEN DEFENDANTS ZANAZANIAN AND CITY OF SPRINGFIELD

In its opposition, the City of Springfield does not offer any support for its claims of privilege over its communications with adverse parties. Nor does it contest any of the facts set forth by the Estate. Among other things, the City does not deny that it concealed from Madelyn's family *three* separate investigations into her mistreatment while in SPD custody, as well as the resulting disciplinary proceedings. And, contrary to the City's position in the deposition, Springfield now abandons its claim of privilege or other discovery protection for settlement communications. *Compare* Opp. (D.E. 113), *with* McFadden Decl. Ex. V (Mahoney Tr.) at 20:18-21:18.

Forced to pivot, the City's new principal argument is an assertion that it had a "common interest" in its negotiations with Zanazanian and the Union. That cannot be correct. The only

evidence in the record is that the City was adverse to Zanazanian and the Union during that negotiation. *See* McFadden Decl. Ex. V (Mahoney Tr.) at 17:20-18:9.

Where the City has failed to make any colorable claim of privilege, the Court can order these documents produced now, without *in camera* review. The Estate's motion to compel should therefore be allowed, and the requested documents and testimony should be provided forthwith.

A. The City has failed to support its claim of privilege.

As explained in the Estate's opening brief, the City bears the burden "to establish the existence and applicability of the privilege." *See Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991). "The burden of showing that documents are privileged rests with the party asserting the privilege," and "[i]t is clear beyond hope of contradiction that the party seeking to invoke the attorney-client privilege must carry the devoir of persuasion to show that it applies to a particular communication and has not been waived." *In re Grand Jury Subpoena*, 662 F.3d 65, 69, 71 (1st Cir. 2011). Consequently, "the assertion of privilege . . . must also be accompanied by sufficient information to allow the court to rule intelligently on the privilege claim." *Marx*, 929 F.2d at 12.

Here, the City's opposition provides no factual foundation for any privilege over the documents and information at issue. The City's opposition includes excerpts from its privilege log.[1] But those entries only demonstrate the *absence* of privilege, including by showing that the communications were exchanged between the adverse negotiating parties or were directed to messengers (like Captain Tarpey) relaying information between them. *See* Mem. in Support of Mot. (D.E. 110) at 11, 12, 16, 17 (explaining implications of the log entries).

[1] The privilege log entries in the opposition appear to be excerpts from the City's full log, which the Estate submitted as Exhibit W (D.E. 111-23) to the declaration in support of this motion.

The City counters that the parties to the negotiation shared a "common interest." "The common-interest doctrine . . . is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002) (internal quotations omitted). However, to invoke the doctrine, the City would have to prove that it shared with the third party an "identical (or nearly identical) legal interest as opposed to a merely similar interest." *See FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000). Here, the City has not identified or proven any such common interest in the disciplinary negotiation, and the record shows the opposite: the City expressly testified that it was "adverse" to both Zanazanian and the Union during the negotiation of the disciplinary agreement. *See* McFadden Decl. Ex. V (Mahoney Tr.) at 17:20-18:9. Indeed, the agreement itself states that the parties were on track for "litigation" *against each other* and negotiated the agreement to resolve their own "dispute." *See id.* Ex. X (agreement).

Lastly, the City's citation to *Sony Electronics v. Soundview Technologies*, 217 F.R.D. 104 (D. Conn. 2002), is inapposite.[2] That was a patent litigation, where Soundview had sent a letter to Sony and other companies threatening litigation for alleged patent infringement. *See Sony*, 217 F.R.D. at 108 (D. Conn. 2002). The court found that Sony had a common interest with the other companies in defending against the threat. *See id.* There was no adversity between Sony and the other companies, and certainly nothing approaching the adversity inherent in a municipality's pursuit of disciplinary charges against a police officer. *Cf. id.* And although the City points out that the court in *Sony* did not require in-house counsel to testify about privileged matters, *see* 217

[2] None of the other cases cited by the City provide any support for their "common interest" argument. *See* Opp (D.E. 113) at 5. Neither *S.E.C. v. Morelli*, 143 F.R.D. 42 (S.D.N.Y. 1992) nor *Bays v. Theran*, 418 Mass. 685 (1994) even address the common interest doctrine, and *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28-29 (1st Cir. 1989) held that that the joint defense privilege was *not* available under the facts of that case.

F.R.D. at 110, that misses the point: here, the City has not established that its communications with adverse parties were ever privileged to begin with. The motion to compel should be allowed.

B. Records used to educate or refresh a Rule 30(b)(6) witness are discoverable.

As set forth in the Estate's motion, even if the City had established a privilege over some of its records (which it has not), certain of the records are discoverable because they were used to refresh or educate the City's 30(b)(6) designee regarding the subjects for which he was designated to testify on behalf of the City. *See* Mem. (D.E. 110) at 17-20. This is true under any of the three prevailing standards employed by courts to address this question. *See id.* (citing *Adidas America, Inc. v. TRB Acquisitions LLC*, 324 F.R.D. 389 (D. Or. 2017) and *Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75 (D. Mass. 2007)). In its opposition, the City declines to engage with any of those standards, and instead attempts to rely on *Derderian v. Polaroid Corp.*, 121 F.R.D. 13 (D. Mass. 1988). *See* Opp. (D.E. 113) at 6. But *Derderian* had nothing to do with the discovery of documents used to educate or refresh a 30(b)(6) witness – rather, in that case, an individual deponent had reviewed her own privileged notes. *See id.* at 14-15.

If anything, *Derderian* supports disclosure of these records. The court in *Derderian* acknowledged that it had discretion to order the disclosure of the notes "in the interests of justice." *See id.* at 15-17. Ultimately, the court declined to order disclosure because "[t]he notes presumably [were] of meetings and communications which the [deponent] has had with agents and/or employees of [the moving party]," such that the moving party had "full access to those agents and/or employees in order to obtain evidence respecting the meetings and communications." *See id.* at 17. Here, in contrast, the documents are not records of communications with agents of the Estate or members of Madelyn's family. The Estate has no access to the negotiations between the City, Zanazanian, and the Union beyond the communications that the City refuses to produce.

That is because the City concealed the pendency of these investigations and disciplinary matters from Madelyn's family, thereby precluding their participation – all facts the City does not contest. *Compare* Mem. (D.E. 110) at 5-10, *with* Opp. (D.E. 113). The City's investigations and the resulting disciplinary proceedings are directly relevant to the Estate's claims. *See Bordanaro v. McLeod*, 871 F.2d 1151, 1166-67 (1st Cir. 1989). The only way that the Estate can understand what occurred, and effectively "test or challenge" the City's testimony about those events, is to review the requested records. *See Adidas*, 324 F.R.D. at 398; *see also Heron*, 244 F.R.D. at 78. The "interests of justice" surely demand their production now. *See Heron*, 244 F.R.D. at 78.

Lastly, the City acknowledges that these records were "used to prepare" attorney Mahoney for his deposition as the City's 30(b)(6) designee, Opp. (D.E. 113) at 6, but simultaneously makes a conclusory assertion in a parenthetical that they were not used to refresh his recollection. *See id.* at 7. Yet, as in *Heron*, "it is clear that the preparation which [the witness] undertook *prior* to the deposition . . . was for that very purpose." *See* 244 F.R.D. at 77. The City offers no other explantion for how attorney Mahoney could have used the documents "in preparation for [his] deposition." *See* Ex. V (Mahoney Dep.) at 41:9-24. And in all events, to the extent this issue is relevant at all in the 30(b)(6) context, the question would be whether the records were used to refresh *the City's* knowledge, and that is presumed for records reviewed by the designee to prepare for his or her testimony. *See Adidas*, 324 F.R.D. at 399.

CONCLUSION

For all the foregoing reasons, and those included with the motion and supporting memorandum, the Estate respectfully requests that its motion to compel be allowed, and the requested documents and testimony be produced forthwith.

February 3, 2023

Respectfully submitted,

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