UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LAWRENCE DILWORTH, WILLIE COCHRAN, CAROLYN REED, and ELBERT DAVIS,	)	
Plaintiffs,	)	No. 2:04- cv-73152
and	)	THE HON. ROBERT H. CLELAND
	)	MAGISTR. JUDGE R. STEVEN WHALEN
THE UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	
v.	)	
CITY OF DETROIT,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY NANCY-ELLEN ZUSMAN AND THE FEDERAL TRANSIT ADMINISTRATION

STATEMENT OF THE ISSUES

When originally filed, this action alleged claims under the Americans with Disabilities Act and the Rehabilitation Act against both the City of Detroit ("City") and the United States Department of Transportation (US DOT). The US DOT was subsequently dismissed pursuant to a stipulated request by the individual plaintiffs and the US DOT. In the motion currently before the Court, the City asserts that during the brief period in which the City and the US DOT were co-defendants, an attorney-client relationship existed between the City and Nancy-Ellen Zusman, Regional Counsel for the Federal Transit Administration ("FTA"), based on a joint defense privilege, and that Ms. Zusman, and the FTA's Office of Chief Counsel, are now precluded from participating in the current litigation, including the ongoing mediation.

The City's argument rests on a misapplication of the case law on the attorney-client privilege and a fundamental misunderstanding of the facts of this case. No attorney-client relationship ever existed between the City and Ms. Zusman, no representative of the United States ever agreed to formulate a joint defense with the City, and no confidential information was ever obtained from the City by Ms. Zusman.

ISSUES AND AUTHORITY

Whether the City of Detroit, the party moving for disqualification, met its burden to demonstrate that the City had a past attorney-client relationship with Nancy-Ellen Zusman, Regional Counsel for the Federal Transit Administration, and that, in the course of that relationship, Ms. Zusman acquired confidential information from the City.

Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882 (6th Cir. 1990)
Reed v. Baxter, 134 F.3d 351 (6th Cir. 1998)

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I. Introduction

For approximately six weeks, from August 17 to October 4, 2004, the City of Detroit ("City") and the United States Department of Transportation ("US DOT") were co-defendants in the instant suit based on the City's alleged failure to maintain the wheelchair lifts on its fixed route bus system in violation of title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. ("ADA"), and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("section 504"). The City asserts that during the brief period in which the City and the US DOT were co-defendants, an attorney-client relationship existed between the City and Nancy-Ellen Zusman, Regional Counsel for the Federal Transit Administration ("FTA"), an agency of the US DOT, based on a joint defense privilege or common interest doctrine,[1] and that Ms. Zusman, and the FTA's Office of Chief Counsel, are now precluded from participating in the current litigation, including the ongoing mediation. The City's argument rests on a misapplication of the law on the attorney-client privilege and a fundamental misunderstanding of the facts of this case. No attorney-client relationship ever existed between the City and Ms. Zusman nor could one have existed given Ms. Zusman's position as a federal government attorney; no representative of the United States ever discussed the possible formulation of a joint defense with the City; and no confidential information was ever obtained or sought from the City by Ms. Zusman.

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[1] The terms "joint defense privilege" and "common interest doctrine (or rule)" are co-extensive. See United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) ("The joint defense privilege, also known as the common interest rule, has been described as 'an extension of the attorney client privilege.'") (internal citation omitted); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (same). The Sixth Circuit appears to have adopted the latter term. See Reed v. Baxter, 134 F.3d 351, 357 (6th Cir. 1998) (defining "common interest doctrine").

The City has failed to meet its burden to prove a joint defense, attorney-client privilege, or any other basis for granting its motion. The City's motion and supporting brief are devoid of any substantive facts to support its allegation that Ms. Zusman and the FTA's Office of Chief Counsel should be disqualified. Neither Andrew Jarvis nor Valerie Colbert-Osamuede, counsel of record for the City, filed a supporting declaration with this Court.[2] Given the City's utter failure to adduce facts from which this Court could evaluate the alleged privilege and conflict, the Court should summarily deny the City's motion. See, e.g., Bogosian v. Bd. of Ed. of Cmty. Sch. Dist., 95 F. Supp. 2d 874, 876 (N.D. Ill. 2000) (the Board's "naked assertion of prejudice, unsupported by affidavits or evidence, is insufficient to carry its burden to show facts necessitating disqualification") (citation omitted).

II. Factual Statement

The individual plaintiffs filed their Complaint in Barnett, et al. v. City of Detroit and U.S. Dep't of Transp., Case No. 04-73152, on August 17, 2004. The individual plaintiffs [hereinafter, the "Dilworth plaintiffs"] alleged that the Detroit Department of Transportation ["DDOT"] violated the ADA and section 504 by operating buses with inoperable wheelchair lifts on its fixed route system and otherwise failing to provide services to individuals with disabilities. The Dilworth plaintiffs further alleged that the US DOT violated the ADA and section 504 by continuing to fund the DDOT bus system, even though the US DOT knew or should have known

[2] In spite of the City's failure to submit factual evidence in support of a motion on which it bears the burden of proof, the United States has filed declarations by Assistant United States Attorney ("AUSA") Peter A. Caplan, counsel of record for the US DOT in the original litigation, and Ms. Zusman, refuting all of the City's unfounded and unsupported allegations.

that the City's fixed route system was not in compliance with federal disability discrimination statutes, and sought to enjoin the US DOT from continued funding of DDOT.[3] See Compl., at Doc. no. 1.

The Department of Justice ("US DOJ") represents federal agencies when, as here, an agency is named as a defendant in a lawsuit. See 28 U.S.C. § 516. This case was assigned to Peter A. Caplan, AUSA for the Eastern District of Michigan. Because the subject matter of the case involved an entity funded by the FTA, an agency within the US DOT, the client agency was the FTA. And, because the action involved DDOT, a transit system located within the FTA's Region V, Regional Counsel Nancy-Ellen Zusman was designated agency counsel. See Declaration of Nancy-Ellen Zusman ["Zusman Decl."], paras. 5-6 (attached hereto as Exhibit 1).

From the outset, AUSA Caplan assumed that he would file a motion to have the US DOT dismissed from the action for lack of jurisdiction. His intention was to assert that neither the ADA nor section 504 afforded the Dilworth plaintiffs a cause of action to compel the US DOT to cut off funding to DDOT. AUSA Caplan was not concerned with the merits of the Dilworth plaintiffs' claims. See Declaration of Peter Caplan ["Caplan Decl."], paras. 2, 11 (attached hereto as Exhibit 2).[4]

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[3] The Dilworth plaintiffs cited no provisions within the ADA, section 504, or elsewhere that would support such a cause of action.

[4] The Dilworth plaintiffs did not have standing to sue the US DOT or FTA to compel the termination of funding to DDOT. The ADA and section 504 provide for private rights of action against public entities or federal fund recipients that engage in proscribed discrimination. 42 U.S.C. § 12133; 29 U.S.C. § 794a; Cannon v. Univ. of Chicago,441 U.S. 677, 703 (1979). Where such private remedies exist, it is well-settled that individuals may not maintain a right action against the federal agencies charged by Congress to effectuate the respective civil rights

The FTA is obligated to determine whether DDOT is in compliance with the ADA. 42 U.S.C. § 12141-12165. Indeed, the FTA requires all grantees to certify they are in compliance with the ADA before grants are approved. See 49 U.S.C. § 5323(n) (requiring US DOT to annually publish certifications and assurances required of FTA grantees). DDOT had previously filed such certifications of ADA compliance. Thus, Ms. Zusman was concerned about the Dilworth plaintiffs' allegations, and, now on notice of potential violations, she sought to obtain additional information about DDOT's fleet of buses. Accordingly, in early September, 2004, Ms. Zusman had several telephone conversations with attorneys for the City regarding DDOT's fleet. Zusman Decl., paras. 3, 9-11. In these discussions, Ms. Zusman inquired about the DDOT bus fleet, and whether buses had working wheelchair lifts.[5] Id., paras. 9-11. DDOT informed her of the number of buses with inoperable wheelchair lifts and its plan to acquire new buses, information that the City was obligated to provide to the US DOT, and subsequently disclosed,

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statutes' anti-discrimination mandates. See, e.g., Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990) (holding that plaintiffs did not have standing to bring claims against federal agencies for non-enforcement of anti-discrimination provisions of civil rights statutes under Title VI, Title IX, and section 504); Gillis v. U.S. Dep't of Health and Human Servs., 759 F.2d 565, 574 (6th Cir. 1985) (observing that statute providing for a private right of action reflected Congress' objective "to provide an alternative avenue of relief for individuals adversely affected by agency inaction, dalliance or backlog" and that "implying a private right of action to compel a federal agency to enforce provisions of an Act . . . would allow individuals to circumvent the procedural limitations of the legislative enactment") (internal citations and quotations omitted). See also Chapin v. Dep't of Justice, 2004 WL 2496749 (D.C. Cir. Nov. 3, 2004) (holding that petitioner could not bring ADA action against Dep't of Justice based on disagreement with the Department's resolution of petitioner's title II complaint).

[5] Ms. Zusman requested only information to which the FTA was entitled as DDOT's grantor agency, responsible for monitoring DDOT's compliance with the ADA. Pursuant to US DOT regulations, the FTA has access to its grantees' records on ADA compliance matters. See, e.g., 49 C.F.R. §§ 18.42(e), 27.121(b) and (c), 27.123(a) and (c).

in detail, in public reports to the Michigan Department of Transportation. Id. Attorneys for the City volunteered that DDOT was experiencing problems with maintenance and difficulties with the union, and that it had plans to increase its demand-responsive service. Id. Ms. Zusman did not inquire about collective bargaining agreements, internal audits, or databases. Id., para. 8. Neither Ms. Zusman nor the City initiated discussions regarding litigation or defense strategy. Id., paras. 8, 13.

During one telephone conversation, the City attorneys informed Ms. Zusman that they were going to meet with the Dilworth plaintiffs to discuss the claims against the City; Ms. Zusman indicated she would like to attend the meeting. Eventually, that meeting was scheduled for September 21, 2004.

Ms. Zusman traveled to Detroit to attend the September 21st meeting with the Dilworth plaintiffs.[6] Zusman Decl., para. 14-18. Ms. Zusman and AUSA Caplan, and the City's attorneys, arrived about fifteen minutes before the other participants. Id. While waiting, they discussed information related to the DDOT fleet, including the number of buses in DDOT's current fleet and expected bus purchases; DDOT's policy permitting disabled and senior riders to travel for free on its fixed-route bus system; DDOT's mechanic per bus ratio; and the possibility

[6] Defendant states that "in September, 2004, Ms. Zusman came to Detroit and with Mr. Caplan . . . participated in 'strategy sessions' with City of Detroit Defense Counsel . . . and with executives from [DDOT]." See Def. Br. at 3. Defendant's statement, by accident or design, is misleading to the extreme. In fact, Ms. Zusman traveled to Detroit only for the September 21st meeting with the Dilworth plaintiffs – not for "strategy sessions" with the City. Defendant's placement of the term "strategy sessions" in quotation marks without attribution is equally misleading. We assume that the City did not intend to indicate to the Court that Ms. Zusman or AUSA Caplan actually used that term with respect to the September 21st meeting.

of increasing the number of excess buses in DDOT's fleet to permit additional substitutions when lifts malfunction. Id. They did not discuss any common defense strategy. Id.

When the Dilworth plaintiffs arrived shortly thereafter, the plaintiffs' counsel and City representatives discussed the *same* issues that were discussed prior to the meeting: the procurement of new low-floor buses, peak service requirements, the size of DDOT's fleet, and the number of DDOT buses that satisfied ADA requirements. In addition, the parties discussed the number of DDOT mechanics dedicated to repairing wheelchair lifts; the number of DDOT mechanics assigned to each DDOT garage; the availability of DDOT floater vans; parts and inventory matters; and other issues of importance to plaintiffs (e.g., matters related to inspections, maintenance, training, fleet requirements, qualification and certification of mechanics, annual ADA plans, the age of DDOT's fleet, past bus purchases, and ADA-related complaints). Also in the course of the meeting, Ms. Zusman informed the parties that the FTA can conduct an audit of a fixed route system to determine whether it is in compliance with the ADA. Id.

After the meeting, Ms. Zusman had no further contact with the City's attorneys except to leave a voice mail message for Ms. Colbert-Osamuede requesting copies of ADA-related complaints submitted to DDOT. Zusman Decl., para. 19.

A week later, on September 29, 2004, the Dilworth plaintiffs and the US DOT filed a stipulation of dismissal, which was signed by the Court on October 4.[7]

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[7] The City's motion alleges that there was, essentially, a "quid pro quo" whereby the Dilworth plaintiffs would dismiss the claims against the FTA if the FTA did a compliance

III. Argument

The burden of establishing the existence of an attorney client privilege rests entirely upon the party asserting the privilege. In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 450 (6th Cir. 1983). "Privileges should be narrowly construed and expansions cautiously extended." United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999) (citing Univ. of Penn. v. EEOC, 493 U.S. 182, 189 (1990)). Where, as here, it is alleged that a prior attorney-client relationship warrants disqualification, the moving party must show that: "(1) a past attorney-client relationship existed between the party seeking disqualification and the attorney it seeks to disqualify; (2) the subject matter of those relationships was/is substantially related; and (3) the attorney acquired confidential information from the party seeking disqualification." Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 889 (6th Cir. 1990). See also, e.g., Evans v. Artek Sys. Corp., 715 F.2d 788, 791-92 (2d Cir. 1983) (requiring high standard of proof from party moving to disqualify and observing that such motions are often interposed for tactical

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review of the bus system, and provided Richard Bernstein, the plaintiffs' counsel, a copy of the draft report before it became a public document. While the connection between this allegation and the motion to disqualify is unclear, the United States wants the record clear that the allegation is patently untrue. Both AUSA Caplan and Ms. Zusman, by declaration, deny any basis for the City's accusation and affirmatively aver that there was no negotiation underlying the stipulated dismissal of the US DOT from this case. As noted above, Ms. Zusman informed all parties at the September 21st meeting that the FTA conducts audits of transit systems to evaluate ADA compliance. Ms. Zusman does not have the authority to initiate such a review nor to make any promises that the FTA would conduct an audit. She further avers that she would not violate US DOT rules prohibiting disclosure of draft documents to the public. AUSA Caplan, who discussed the stipulation of dismissal with Mr. Bernstein, informed him that the decision whether to dismiss the claims against the US DOT was not a negotiation and the Dilworth plaintiffs were not to expect any benefits from dismissing their claims against the US DOT. See Caplan Decl., para. 9; Zusman Decl., paras 23.

reasons). "A decision to disqualify counsel must be based on a factual inquiry . . . which will afford appellate review." S.D. Warren Co. v. Duff-Norton, 302 F. Supp. 2d 762, 767 (W.D. Mich. 2004) (citing Gen. Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704, 710 (6th Cir. 1982)).

The City has not shown, and cannot show, that an attorney-client relationship ever existed between the City and Ms. Zusman nor can the City show that Ms. Zusman ever acquired confidential information from the City. Accordingly, the City's motion fails.

A. No past attorney-client relationship ever existed between Ms. Zusman and the City.

The City cannot show a past attorney-client relationship with Ms. Zusman, an essential element of its disqualification claim. The City relies primarily on a common interest/joint defense argument. However, the lack of clarity in the City's brief, particularly on page 4, leaves the United States unclear as to whether the City is asserting additional theories for disqualification. For example, the City notes that an implied attorney-client relationship can arise when the relationship between the attorney and another person involves "a fiduciary obligation resulting from 'the nature of the work performed and the circumstances under which the confidential information is divulged.'" City of Kalamazoo v. Mich. Disposal Serv. Corp., 125 F. Supp. 2d 219, 231 (W.D. Mich. 2000) (internal citations omitted). It is unclear, however, whether the City is asserting, as an alternate theory, that Ms. Zusman's role as Regional Counsel for the FTA, the grantor agency with respect to the City's federal transit funds, created an implied attorney-client relationship with the City, or whether the City cites the fiduciary obligation rule only as a prelude to its joint defense privilege argument. Given the lack of clarity, the United States will address both theories.

1. Ms. Zusman's role as Regional Counsel for the FTA did not create an implied attorney-client relationship between the City and Ms. Zusman.

The fiduciary obligation rule is inapplicable to this case and cannot form the basis of an implied attorney client relationship between Ms. Zusman and the City. In the civil context, the rule protects lay persons who communicate with an attorney in a mistaken, but not unreasonable, belief that an attorney-client relationship existed and that confidences conveyed to the attorney could not be disclosed. See, e.g., Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319-1320 (7th Cir. 1978) (holding that an implied attorney-client relationship can be found when a lay party submits confidential information to a lawyer with a reasonable belief that the latter is acting as the former's attorney). In this case, all statements were presumably provided by the City's attorneys, or, if provided by DDOT personnel, in the presence of the City's attorneys.[8] Because Ms. Zusman's conversations regarding DDOT matters occurred only with, or in the presence of, the City's attorneys, the dangers addressed by the fiduciary obligation rule are not present.

The nature of Ms. Zusman's work as Regional Counsel for the FTA, and her interactions with the City in that role, are not of a type which would permit even an inference of a fiduciary relationship. As discussed above, in Section II, federal statutes and regulations mandate that transit systems receiving federal award grants and loans comply with certain conditions on the receipt of FTA funding. These conditions, delineated in grant agreements with the transit systems, include compliance with the ADA and section 504. Under the grant agreements and

[8] As noted above, the City has not identified any particular statements underlying its

FTA regulations, the FTA has the right to request factual information from grantees to assist the federal agency in enforcing FTA requirements, and the grantees are obligated to provide the explanation as a condition of receiving federal funds. Ms. Zusman's communications with the City during the period at issue involved purely factual matters related to the City's transit operations and was sought solely in her capacity as the FTA official responsible for ensuring that the City meet its grant-contingent requirements. The City cannot support an argument that FTA Regional Counsel act as fiduciaries for the very entities which they, along with other FTA officials, are responsible for monitoring.[9]

2. There was no joint defense agreement between Ms. Zusman and the City.

"'The joint defense privilege protects communications between an individual and an attorney for another when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'" United States v. Bay State Ambulance and Hospital Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989) (internal citations omitted). Accord Reed, 134 F.3d at 357. "In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived." Bay

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motion for disqualification.

[9] Moreover, as agency counsel for the FTA, Ms. Zusman did not have authority to represent the US DOT's interests in the litigation. Representation of the US DOT, when named as a defendant in a civil action, is statutorily delegated to the US DOJ, and, in this instance, was primarily assigned to AUSA Caplan. As averred in AUSA Caplan's declaration, and discussed further below, the United States' defensive strategy was solely premised on jurisdictional grounds, and the factual information provided to Ms. Zusman was not sought for, or relevant to, the US DOT's litigation strategy. Given these facts, the City could not have reasonably, or

State Ambulance, 874 F.2d at 28 (citations omitted). "[O]ne party's mistaken belief about the existence of a joint defense does not, and cannot, give rise to a joint defense privilege." United States v. Sawyer, 878 F. Supp. 295, 297 (D. Mass 1995) (citing In re Bevill, Bresler & Schulman Asset Mgmt. Corp, 805 F.2d 120, 126 (3d Cir. 1986)).

Applying the privilege test in this case, the City has not shown, and cannot show, the existence of a joint defense agreement between the City and Ms. Zusman, the US DOT or the FTA. The City has not identified any communications allegedly made in the course of a joint defense effort, nor has the City offered anything in the way of an explanation as to the joint defense allegedly agreed upon. And, following on its failure to articulate the alleged joint defense, the City has failed to explain how any statements made by the City to Ms. Zusman could be found to have been designed to further the joint defense effort.[10] Also notable is the absence of any written agreements between the parties evidencing a mutual decision to formulate a joint defense and share confidential information.

(a) The co-defendants did not share a common interest and thus could not formulate a joint defense.

The existence of a joint defense or common interest privilege requires, first and foremost, that the parties involved truly have interests "in common." The Sixth Circuit, in Reed, 134 F.3d

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credibly, believed that Ms. Zusman owed a fiduciary obligation to the City.

[10] Given the City's failure to provide any factual basis for its allegations that Ms. Zusman and/or AUSA Caplan requested or participated in "strategy sessions," the United States can only re-assert that both Ms. Zusman and AUSA Caplan aver by declaration that no discussions touching on strategy ever took place. See Zusman Decl., paras. 8, 13, 15; Caplan Decl., paras. 2, 4, 5, 11.

351, adopted a narrow construction of the common interest requirement, rejecting an assertion of privilege where the parties involved did not share a sufficiently common interest. Reed involved a Title VII challenge by firefighters who sought to depose the city's attorney and two city councilmen about a meeting held with the fire chief and city manager to discuss the alleged discrimination. Id. at 353-54. After concluding that the councilmen were not clients of the city's attorney, the court found that the disparity of interest between the councilmen and the city defeated any attempt to extend the attorney-client privilege to statements made in the councilmen's presence. Id. at 357-58. While the councilmen had an interest in city proceedings in general, they had no decisionmaking authority with respect to the relevant employment matters and the city's liability turned solely on the conduct of the city manager and fire chief. Id. Thus, any statements regarding the employment matter made during the meeting in question were not designed to further a common interest among the meeting participants.

Reed illustrates that the mere alignment of parties on the same side of the docket is insufficient to form the requisite common interest for a joint defense privilege. Other courts have required similarly strict application of this element. See, e.g., FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("The term 'common interest' typically entails an identical (or nearly identical) interest as opposed to merely a similar interest."); United States v. Evans, 113 F.3d 1457 (7th Cir. 1997) (finding disparity of interest between defendant and friend where defendant's inculpatory statements about criminal activity were made in friend's presence, despite claim that the friend, in his capacity as police officer, would be subject to discipline for not having reported the defendant); United States v. Keplinger, 776 F.2d 678, 701 (7th Cir. 1986)

(noting "serious doubts" as to whether corporation and individual defendants shared the requisite "common purpose"); Sawyer, 878 F. Supp. at 297 ("[T]he parties' similar interests and [the attorney's] desire to pursue a 'team effort' are insufficient to show that [the defendant's] communications were made during the course of a joint defense effort."). See also Medcom Holding Co. v. Baxter Travenol Labs., Inc, 689 F. Supp. 841, 845 (N.D. Ill. 1988) ("The privilege arises out of the need for a common defense, as opposed to merely a common problem.").

As in Reed and the other cases cited, it is clear that the US DOT and the City, as co-defendants, did not share a common interest that would support a joint defense privilege. The Dilworth plaintiffs' claim against the US DOT was based on an alleged failure by the FTA to enforce DDOT's compliance with federal disability discrimination laws through the withholding of federal funds. As noted earlier, there is no legal basis for such a claim against the US DOT. See Footnote 4, supra. Thus, the US DOT's defense strategy in this case, from day one, was that, absent a stipulated dismissal, it would move for dismissal on jurisdictional grounds – a strategy not available or applicable to the City in this case. And as explained in AUSA Caplan's declaration, the merits of the Individual Plaintiffs' case against the City were of no relevance to the US DOT's purely legal jurisdictional defenses. Moreover, as discussed in more detail above, the US DOT and FTA require funding recipients to comply with federal disability discrimination laws. The formulation of a joint defense strategy, where at issue are alleged violations of federal law, would be contrary to the US DOT and FTA's statutory authority, and no such agreement could, or would, be forged in such circumstance. See Reed, 134 F.3d at 356 (endorsing a narrow

application of privilege with respect to governmental entities given that such a privilege "stands squarely in conflict with the strong public interest in open and honest government") (citation omitted).

Given the absence of a common interest between the co-defendants, the City cannot show the existence of a joint defense agreement and thus cannot demonstrate a past attorney-client relationship with Ms. Zusman. Accordingly, the City's motion for disqualification fails.

(b) There were no communications made in the course of, or to further, a joint defense effort.

Even in those cases where a common interest can be shown, the party asserting the privilege must also demonstrate that the communications at issue were made in the course of a joint defense effort and that the statements furthered that effort. Bay State Ambulance, 874 F.2d at 28. The City has done neither in this instance. As discussed above, the US DOT's defense strategy throughout the litigation concerned jurisdictional issues only, and any factual statements or information provided by the City to Ms. Zusman could not have been made in the course of a joint defense effort or have been designed to further such an effort. As also explained above, Ms. Zusman's factual inquiries were premised on her role as Regional Counsel for the FTA and her responsibility, in that capacity, to acquire information to ensure that DDOT met its statutory, regulatory, and contractual obligations as a recipient of federal transit funds. And, again, among those obligations was compliance with federal disability discrimination laws. Given the allegations by the Dilworth plaintiffs, neither the US DOT nor the FTA would have an interest in formulating a joint defense based on the merits of the case. Once the litigation was filed, the FTA's interest in, and communications with, the City, were directed toward determining whether

DDOT was in compliance with its statutory, regulatory and contractual obligations.

(c) The City has offered no evidence of a mutual agreement to formulate a joint defense.

Finally, while not dispositive of the issue, the City's failure to produce a formalized joint defense agreement is noteworthy. "In determining whether the particular facts of a case establish the existence of an attorney-client relationship in a joint defense situation, the federal courts rely heavily on the provisions of any written joint defense agreement establishing the rights and duties of the parties and their counsel." City of Kalamazoo, 125 F. Supp. 2d at 232-33 (citing Essex Chem. Corp. v. Hartford Acc. & Indep. Co., 993 F. Supp. 241, 252 (D.N.J. 1998); GTE North, Inc. v. Apache Prod. Co., 914 F. Supp. 1575, 1577 (N.D. Ill. 1996)). During the time period at issue, both the City and the US DOT were represented by experienced counsel, and thus the absence of any written agreement between the parties belies the City's assertion that the parties intended to formulate a joint defense. See Weissman, 195 F.3d at 99 (affirming district court's finding that no joint defense agreement existed where the district court was "influenced in part by the lack of any mention of a [joint defense agreement] in . . . notes taken at the meeting" at issue). See also id. at 99-100 (noting that cooperation between co-defendants does not in itself establish the requisite intention to further a joint defense strategy).

B. Ms. Zusman did not acquire confidential information from the City.

In addition to failing to demonstrate a past attorney-client relationship with Ms. Zusman, the City has also failed to adduce any evidence that Ms. Zusman acquired confidential information from the City, an essential element of an attorney disqualification claim. See, e.g., GTE North, 914 F. Supp. 1575 (holding that absent a direct attorney-client relationship, there is

no presumption that confidential information was exchanged) (citing Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir.1977)). As discussed throughout this brief, Ms. Zusman avers that during the period in question she did not participate in any strategy sessions with the City and was not privy to the thoughts or mental impressions of the City's attorneys. The information provided by the City was purely factual and not confidential.

The City references information it provided to Ms. Zusman regarding "issues pertaining to the DDOT's procedures, collective bargaining agreements, internal audits, databases and other parts of the DDOT's operations," and declares that this information "is and remains critical to the City of Detroit's litigation strategies and defense." Defendant's motion, at ¶ 6. The City has provided no explanation as to how or why this factual information, allegedly acquired from the City by Ms. Zusman, could be considered confidential – the only type of information relevant to the City's disqualification claim. GTE North, 914 F. Supp.at 1580 (holding that absent direct attorney-client relationship, "there must actually have been an exchange of confidential information"). See also Zusman Decl. at ¶ 8 (denying having sought, or received, information on DDOT's collective bargaining agreements, internal audits, databases, or any matter which could be deemed confidential). As detailed in Section II, above, Ms. Zusman traveled to Detroit to attend, with AUSA Caplan, a meeting of all parties on September 21, 2004 – her first and only trip to Detroit regarding the litigation. While Ms. Zusman and AUSA Caplan spoke with the City's counsel for approximately fifteen minutes prior to the start of that meeting, the issues they discussed were the same issues discussed by City representatives and the Dilworth plaintiffs'

counsel during the meeting.[11] Both Ms. Zusman and AUSA Caplan aver that there were no discussions of litigation strategy with the City – neither in the fifteen minutes before the September 21st meeting nor at any other time. Thus, the City's unsupported assertions, in paragraph 5 of its motion, that the September 2004 meeting was a "strategy session" instigated by Ms. Zusman with an "express purpose" to "refine and formulate a the [sic] parties [sic] common 'defense strategy' for both defendants to employ" is both factually inaccurate and misleading.

C. The case law relied upon by the City supports the United States' position that no joint defense agreement existed and no privilege obtained.

The City's argument for a joint defense privilege relies, almost exclusively, on one case, City of Kalamazoo, 125 F. Supp. 2d 219 (W.D. Mich. 2000), and that court's discussion of GTE North, 914 F. Supp. 1575, 1577 (N.D. Ill. 1996). Both cases clearly support the United States' position that there can be no finding of a joint defense agreement, or privilege, in this case.

City of Kalamazoo involved a motion by Brunswick, a defendant corporation, to disqualify Dykema Gossett, counsel for one of the plaintiffs, in a complex multi-plaintiff, multi-defendant CERCLA action, based on Dykema Gossett's role in a prior CERCLA action in which both General Motors, represented by Dykema Gossett, and Brunswick were co-defendants with

[11] Additionally, in October and December, 2004, the City submitted certified reports, required under state law, to the Michigan Department of Transportation ("MDOT"). These reports contained detailed information regarding the City's fleet of buses, including numbers and percentages of buses with working and non-working wheelchair lifts, and described the City's ongoing wheelchair lift problems and proposed plans to purchase buses and otherwise improve services for individuals with disabilities. The MDOT reports are public documents. Thus, none of the information in those reports can be used by the City to support its claim that Ms. Zusman

numerous other alleged polluters. In analyzing whether Dykema Gossett had an attorney-client relationship with Brunswick in the first litigation, the court looked to the detailed joint defense agreement from that litigation, which explicitly regulated the sharing of confidential and privileged information among the members of the Joint Defense Group ("JDG") while still retaining the general rule that an attorney-client relationship did not exist among the members of the JDG. Id. At 224-27, 233-24. While Dykema Gossett represented General Motors, one member of the JDG, it also acted as "common counsel" for the JDG, and, as characterized by the court, "played by far the most central role." Id. The court found that the "position of common counsel . . . clearly presume[d] an attorney-client relationship" with all members of the JDG. Id. This finding rested on a thorough and lengthy analysis of the provisions in the joint defense agreement as they related to the "common counsel" position. Id. at 231-38. The court concluded that "[b]y accepting the position of common counsel . . . the Dykema firm stepped out of its former role of counsel for General Motors only and accepted the responsibility (and the attendant attorney fees) to act on behalf of all Members of the [JDG]." Id. at 236.

GTE North, 914 F. Supp 1575, also turned on an analysis of a prior CERCLA action, in which five co-defendants executed two joint defense agreements (the "Appleton Agreements") governing the activities of the group with respect to determining allocation of the response cost among members, investigating and identifying additional polluters, and pursuing cost recovery against them. Id. at 1577. The Appleton Agreements required that all shared information between members and their counsel be held in strict confidence and that disclosure of such

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acquired confidential information through her factual inquiries about the City's transit system.

confidential information would not constitute waiver of the attorney-client privilege. Id. Ultimately, in related litigation, GTE North filed a cost recovery action against Apache Products Company, and moved to disqualify that company's attorney, who had previously served as counsel for one of the members of the Appleton Group. Id. As in City of Kalamazoo, the court in GTE North found the written agreements in the prior litigation dispositive of the issue, holding that the confidentiality provisions in the agreements, and the participants' admitted discussions of strategy in the course of its relationship, "clearly establish[ed] an intent that shared information would remain protected under the attorney-client privilege." Id. at 1581.

Thus, while the City appears to discuss City of Kalamazoo and GTE North as examples of how an implied joint defense agreement can be inadvertently created through informal cooperation among co-defendants, the facts of those cases, and the courts' analyses, belie any such characterization. Rather, these cases demonstrate that where a party asserts a joint defense privilege, courts will review the allegation carefully and demand a high evidentiary showing from the moving party before overturning the general rule that there is no attorney-client relationship among co-defendants. The City's showing, in this case, falls far short of its evidentiary burden.[12]

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[12] Defendant cites only one case, Contracting and Material Co. v. Steel Co. of Canada, Ltd., 1981 U.S. Dist. Lexis 11700 (E.D. Mich. 1981), as support for its argument that if Ms. Zusman is disqualified from participating in the litigation, the "Office of Counsel for the FTA" is also disqualified. Def. Br. at 11. Defendant's reliance on Contracting and Material is misplaced, however, as that case was superseded by Manning v. Waring, Cox, James, Sklar and Allen, 849 F.2d 222 (6th Cir. 1988). In Manning, the Sixth Circuit established a more "realistic" approach to vicarious disqualification, holding that the presumption of disclosure by an attorney to other members of the firm is rebuttable, and that screening measures can be effective to protect confidences between members of the same firm. See id. at 224. The United States is confident that no attorney-client relationship existed between the City and Ms. Zusman and no confidential

IV. Conclusion

For the foregoing reasons, and based upon the entire record herein, the City's motion to disqualify Nancy-Ellen Zusman and the Office of Counsel for the FTA should be denied.

Respectfully submitted this 8th day of June, 2005.

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information was provided to her, but if the Court were to rule otherwise we would demonstrate that no blanket disqualification is warranted.

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2005, I electronically filed with the Clerk of the Court, using the Electronic Case Management System, the United States' Memorandum of Points and Authorities in Support of the United States' Opposition to Defendant's Motion to Disqualify Nancy-Ellen Zusman and the Federal Transit Administration.

I further certify that copies of this filing were mailed by Federal Express Overnight Delivery to the following non-ECF participants:

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