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Via E-File

The Honorable Judge Kevin M. Miller
Otter Tail County Courthouse
121 West Junius Avenue, #310
Fergus Falls, Minnesota 56537

Re: *Craig and Marie Stevenson v. Sean Stevenson et al.*
Court File No.: 56-CV-20-2928

Dear Judge Miller:

Pursuant to Minn. Gen. R. Prac. 115.11, Plaintiffs Craig and Marie Stevenson request leave to file a motion for reconsideration of the December 21, 2021, order denying their motions to compel on the basis that the common-interest doctrine applies.

At this stage, Defendants have generally refused to produce documents and information about *pre-litigation communications* they had with each other, despite clear evidence from third-party subpoenas showing that these communications occurred, particularly around key dates in this case. Problematically, confusion about the common-interest doctrine pervades the Court's decision. As discussed below, this appears to stem from the Court's adoption of inaccurately attributed misquotations of the law that were included in Defendants' motion papers.

More importantly, the Court's order does not address the recent, *precedential* opinion of *Energy Policy Advocates v. Ellison*, 963 N.W.2d 485 (Minn. Ct. App. June 1, 2021), *rev. granted* (Minn. Aug. 10, 2021), cited by Plaintiffs. In that case, the Court of Appeals repeatedly stated that the common-interest doctrine is not recognized in Minnesota. ("The common-interest doctrine might be considered a 'professional standard' if it were recognized by law, but—as respondents concede—it has not been recognized in Minnesota." *Id.* at 501. "Respondents urge this court to recognize the common-interest doctrine for the first time, but we decline the invitation to do so." *Id.* "Because the common-interest doctrine is not recognized in Minnesota…" *Id.* "Even if the common-interest doctrine were recognized in Minnesota…" *Id.*) Plaintiffs have attached a copy of the case for the Court's convenience.

Defendants asserted—incorrectly—in their briefs that *Energy Policy Advocates* is "unpublished," an apparent attempt to downplay its precedential effect. If there was any question about the binding, precedential effect of *Energy Policy Advocates*, it was resolved on July 16, 2021, when the Court of Appeals issued an order denying a motion to stay the precedential effect and affirming the Court of Appeals opinion was precedential on June 1, 2021. For the Court's benefit, a copy of this order is also attached.

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In direct contradiction to *Energy Policy Advocates*, the Court's December 21, 2021, order denying Plaintiffs' motions to compel incorrectly stated that the common-interest doctrine applies. For this legal conclusion, the Court included a quote that the Court attributed as the holding of *In re Lawrence*, 954 N.W.2d 597, 604 (Minn. Ct. App. 2020), *rev. denied* (Minn. Mar. 16, 2021). (Order at 13, ¶ 7b.) However, the quote is not in that case, and the case does not even involve the common-interest privilege.

It appears this Court's quote was not a quote from a Minnesota case, but from a portion of Defendants' briefing, which attributed the quote to *Lawrence*. So in addition to all Defendants incorrectly claiming that *Energy Policy Advocates* was "unpublished," Defendant Lisa Stevenson, in her opposition memo, went further and claimed *In re Lawrence*, 954 N.W.2d 597, 604 (Minn. Ct. App. 2020), *rev. denied* (Minn. Mar. 16, 2021), applies to the common-interest doctrine writing: "Conversations amongst joint defendants are privileged and as such the subject of those conversations will not be disclosed." This sentence was then quoted by the Court as having come directly from the *Lawrence* decision and supporting a conclusion that the common interest doctrine applied. (Order at 13.) But the quote is not in the *Lawrence* decision. It was not the holding of *Lawrence*, and *Lawrence* does not involve application of the common interest doctrine, as Defendants led the Court to believe.

Lawrence applies solely to the application of attorney-client privilege in joint client situations. At no point did it address—or even casually mention—the common-interest doctrine. It does not contain those words. But this Court cited *Lawrence* as applying the common-interest doctrine, which Defendants are using to shield *pre-litigation communications* between co-defendants—a result not supported by *Lawrence* and contradictory to established case law.

Importantly, Plaintiffs are not seeking discovery of communications protected by the attorney-client privilege, which would be protected by *Lawrence*. Plaintiffs are seeking discovery of communications between the co-defendants from *before litigation began*—none of which are covered by the attorney-client privilege and which are discoverable in accordance with *Energy Policy Advocates*.

Discovery of pre-litigation communications between the parties is expressly controlled by *Energy Policy Advocates*. Minnesota does not—and never has—recognized the common-interest doctrine. The binding, precedential case of *Energy Policy Advocates* needs to be addressed by this Court and a new order issued in accordance with the law.

Plaintiffs therefore request leave to file a motion for reconsideration to address and correct the inaccurate application of law on the common-interest doctrine and because the Court's decision was palpably wrong.

Very truly yours,



Matthew J. Schaap

Enclosures