

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007-1312

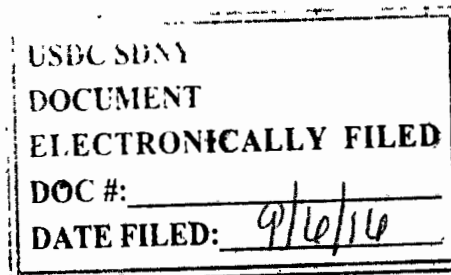
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

212-805-0194

September 6, 2016

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Re: Chrise Fletcher v. ABM Building Value, et al., 14 Civ. 4712 (NRB)

Dear Ms. Morrison:

We have received and reviewed your letter dated August 29, 2016. Although this Court has no difficulty with the general propositions that parties are entitled to make motions regardless of the Court's view of their viability and that the sanctions regime exists to control the making of unwarranted motions, there is a recognized limit to the filing of motions to reargue. That limit should be kept in mind prior to filing any additional motion seeking to compel discovery in this case.

That being said, this Court has reviewed the recent correspondence of the parties and reached the conclusion (prior to receiving your August 29 letter) that the Affidavit of Clay Adams dated July 11, 2016 (the "Affidavit"), does not adequately establish the basis for defendants' invocation of attorney-client privilege. Specifically, it does not foreclose the possibility that, despite the presence of a lawyer, ABM Industries Incorporated's three-member Termination Review Committee ("TRC") was performing a business function in reviewing plaintiff's termination. "Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected," and the "mere fact that in-house counsel is present at a meeting" or on an e-mail chain "does not shield otherwise unprivileged communications from disclosure." Neuder v. Battelle Pac. Nw. Nat. Lab., 194 F.R.D. 289, 292-93 (D.D.C. 2000).

Here, the Affidavit states that an operations manager's decision to discharge a staff or management employee is submitted to the TRC prior to termination and that the TRC then "provides attorney-client privileged advice concerning any risks associated with the termination." Affidavit ¶ 5. Given the presence of two nonlawyers on the TRC and the absence of information in the Affidavit concerning the kinds of "risks" the TRC evaluated, we cannot say at this juncture

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that the privilege has been established. This observation should not be understood as a holding that the privilege does not apply to the TRC's communications, but rather as the Court's recognition that further exploration of that issue, and that issue alone, is necessary.

Accordingly, plaintiff may conduct a deposition of a representative of the TRC for the sole purpose of ascertaining whether the privilege applies, *i.e.*, whether the TRC's role is limited to providing legal advice or whether it provides business advice in the ordinary course. This deposition should be conducted promptly upon counsel's return to this jurisdiction.

Very truly yours,

A handwritten signature in black ink, appearing to read "Naomi Reice Buchwald", written in a cursive style.

Naomi Reice Buchwald
United States District Judge