MICHAEL P. GOGGIN
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Legal Department

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June 14, 2000

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 991946-TP (ITC^DeltaCom Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to ITC^DeltaCom Communications, Inc.'s Motion for Protective Order, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin
Michael P. Goggin
(DL)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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CERTIFICATE OF SERVICE
DOCKET NO. 991946-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail 14th day of June, 2000 to the following:

Diana Caldwell
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
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Tallahassee, FL 32399-0850

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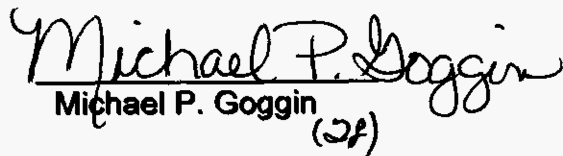
Represents ITC^DeltaCom



Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In Re:	
Complaint of ITC^DeltaCom Communications, Inc. Against BellSouth Telecommunications, Inc. for Breach of Interconnection Terms, and Request for Immediate Relief	Docket No. 991946-TP Filed: June 14, 2000

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO ITC^DELTACOM COMMUNICATIONS, INC.'S MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully opposes the Motion for Protective Order filed by ITC^DeltaCom Communications, Inc. ("DeltaCom") in response to BellSouth's request to depose Tom Mullis and James Wilkerson, both of whom were involved in negotiating for DeltaCom the interconnection agreement at issue. DeltaCom's Motion seeks to delay the taking of any depositions for a month and seeks to prevent BellSouth from deposing Mr. Mullis altogether. DeltaCom's motion is misguided and should be summarily rejected.

II. DISCUSSION

A. Timing of The Depositions

In its motion, DeltaCom seeks a protective order to prevent BellSouth from taking any depositions until after DeltaCom's "Motion for Summary Final Order" has been resolved by the Commission, or, at the very least, until sometime after July 10, 2000. DeltaCom Motion at 3.

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The fact that DeltaCom has filed what is in effect a motion for summary judgment does not preclude BellSouth from obtaining discovery. DeltaCom appears to acknowledge as much, since, coincident with its filing for summary judgment, it requested that the Commission continue the proceedings and stay the filing of testimony and the taking of discovery. The Commission has not granted DeltaCom's request, and thus the parties remain obligated to adhere to the Scheduling Order in this case, including the deadlines for filing testimony and completing discovery. Furthermore, BellSouth is entitled to discovery to establish additional evidence that may be used in opposition to DeltaCom's summary judgment motion, which is most likely the reason that DeltaCom has so vigorously opposed BellSouth's attempts to depose Mr. Mullis and Mr. Wilkerson.

Although DeltaCom claims that it has "attempted to work in good faith" with BellSouth in scheduling the depositions, the facts do not bear this out. BellSouth proposed two different weeks in June for Mr. Mullis' and Mr. Wilkerson's depositions and even offered to travel to Birmingham, Alabama, in order to facilitate the taking of the depositions. DeltaCom has rejected BellSouth's proposal, even though it does not claim that Mr. Mullis or Mr. Wilkerson are unavailable during the weeks in question. Instead, DeltaCom has simply insisted that no depositions should take place until after July 10, 2000.

It is not clear what is magical about the July 10, 2000 date, although DeltaCom suggests that depositions should not be taken until "after direct and rebuttal testimony have been filed." DeltaCom Motion at 3. However, DeltaCom's position that no depositions should be conducted until after the filing of testimony makes no sense.

First, even though Mr. Mullis was involved in negotiating the interconnection agreement and executed the agreement and all applicable amendments on behalf of DeltaCom, DeltaCom apparently does not intend to call Mr. Mullis as a witness. Thus, the date for Mr. Mullis' deposition has nothing to do with when prefiled testimony is filed.

Second, there is no merit to DeltaCom's claim that taking depositions prior to the filing of prefiled testimony would be "unduly burdensome" because, according to DeltaCom, "BellSouth, on information and belief, would reserve its right to recall the ITC^DeltaCom deponents for a future date after the rebuttal is filed ...." DeltaCom Motion at 2, ¶ 4. This argument is a red herring enveloped in a smoke screen because BellSouth has no desire to take depositions more than once and has never told DeltaCom otherwise. BellSouth intends to depose Mr. Mullis and Mr. Wilkerson only once and, provided they answer the questions asked of them, cannot foresee seeking to depose them a second time, regardless of what might or might not be said in DeltaCom's pre-filed rebuttal testimony.

BellSouth has repeatedly advised DeltaCom of its desire to take these two depositions sooner rather than later because of potential scheduling conflicts in July and August. The BellSouth attorneys involved in this case also are involved in Docket No. 990649, the first phase of which is scheduled for hearings the week of July 17, 2000. Two of BellSouth's attorneys in this case also are involved in the arbitration proceedings with AT&T and MCI WorldCom that are currently pending in several states in BellSouth's region, some hearings in which are expected to be held in July and August. Delaying the depositions of Mr. Mullis and Mr. Wilkerson until sometime in July and

August will only make it more difficult to find a mutually convenient time to conduct these depositions, which may be part of DeltaCom's strategy.

BellSouth recognizes that scheduling depositions can be an arduous task given the schedules of the witnesses and lawyers involved. However, DeltaCom does not and cannot seriously contend that neither Mr. Wilkerson nor Mr. Mullis is available at any time during the month of June to give a deposition. Absent a showing that these witnesses are unavailable, there is no basis for DeltaCom's request for protective order.

B. The Deposition of Mr. Mullis.

DeltaCom seeks to prevent BellSouth from deposing Mr. Mullis because he: (1) is "not a proposed witness; (2) is an officer of DeltaCom; and (3) is the company's general counsel which, according to DeltaCom, makes most or all the information sought by BellSouth from Mr. Mullis ... protected by the attorney-client privilege and/or constitutes work-product." DeltaCom Motion at 2, ¶ 3. None of these arguments constitutes grounds for a protective order.

First, the fact that DeltaCom has elected not to call Mr. Mullis as a witness is irrelevant. Under the Florida Rules of Civil Procedure, BellSouth is entitled to depose any individual who has information concerning "any matter, not privileged, that is relevant to the subject matter of the pending action...." Rule 1.280(b)(1). BellSouth is not precluded from deposing Mr. Mullis simply because DeltaCom has decided as a strategic matter not to have him testify. A party cannot shield itself from discovery simply by electing not to call as witnesses those individuals with information harmful to its case. Nothing under Florida law would support such an absurd result.

Second, the fact that Mr. Mullis is an officer of DeltaCom also does not immunize him from being deposed. While BellSouth is respectful of Mr. Mullis' status as an officer of DeltaCom and has no desire to harass either DeltaCom or Mr. Mullis, Mr. Mullis is a fact witness who has information relevant to the issues in this case. Mr. Mullis was involved in negotiating the interconnection agreement executed by the parties in March 1997, the interpretation of which is at the heart of this case. Mr. Mullis signed the interconnection agreement on behalf of DeltaCom in March 1997 and also signed the August 1997 amendment, which substituted a reciprocal compensation provision for the bill and keep arrangement to which the parties had originally agreed. Before the August 1997 amendment took effect, and before Mr. Mullis even signed the August 1997 amendment on DeltaCom's behalf, BellSouth sent Mr. Mullis a letter advising DeltaCom of BellSouth's position that Internet traffic is interstate in nature and not subject to the payment of reciprocal compensation. Mr. Mullis' understanding of BellSouth's letter and his recollection of the negotiation and execution of the agreement are clearly relevant to the issues in this case, and such facts do not suddenly and magically become undiscoverable simply by virtue of Mr. Mullis' status as an officer.[1]

Third, although BellSouth has no interest in impinging upon any privileged communications between Mr. Mullis and his client, the fact that Mr. Mullis is a lawyer

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[1] BellSouth seeks to depose Mr. Mullis because he has personal knowledge of the facts at issue in this case, not because of his position with DeltaCom. This should be contrasted with DeltaCom's recently expressed desire to depose two BellSouth's officers, Charles Morgan and Margaret Greene. Neither Mr. Morgan nor Ms. Greene had anything to do with this case, and in fact Mr. Morgan was not even employed by BellSouth at the time the interconnection agreement or the August 1997 amendment was executed. As reflected in a June 8, 2000 letter from DeltaCom, a copy of which is attached, DeltaCom has not articulated any legitimate basis for deposing either Mr. Morgan or Ms. Greene, but simply seeks to do so an attempt to get BellSouth to agree not to depose Mr. Mullis. See, Letter of Nanette S. Edwards to Bennett Ross dated June 8, 2000 (Attached as Exhibit A). Such tactics are completely inappropriate and should not be condoned by this Commission.

does not automatically shield him from discovery. Under Florida law, only those communications that actually fall under the attorney-client privilege are protected. *See Home Insurance Co. v. Advanced Machine Co.*, 443 So.2d 165 (Fla. Ct. App. 1983). The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients. *See American Tobacco Co. v. State*, 697 So.2d 1249 (Fla. Ct. App. 1997). As a result, the privilege does not protect communications by an attorney when the attorney is not communicating as a lawyer, such as when a corporate attorney gives business rather than legal advice. *See, e.g., Southern Bell Telephone & Telegraph Co. v. Deason*, 632 Sp.2d 1377, 1382 (Fla. 1994) (because "a corporation relies upon its attorney for business advice more than the natural person" and to prevent "corporate attorneys from being used as shields to thwart discovery," claims of attorney-client privilege "in the corporate context will be subjected to a heightened level of scrutiny").

A good example is *Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.*, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. 1996) (Attached as Exhibit B). In that case, the plaintiff filed a breach of contract action and sought to question the in-house attorney who negotiated on the defendant's behalf the contractual provisions at issue. The defendant objected on grounds of the attorney-client privilege. The federal district court overruled this objection, holding that the communications were not privileged because "[a]s a negotiator of behalf of management, [the in-house attorney] was acting in a business capacity." *Id.* at *11.

Here, Mr. Mullis was involved in negotiating the original interconnection agreement on behalf of DeltaCom, executed both the agreement and all applicable

amendments on behalf of DeltaCom, and was sent a letter by BellSouth that is directly relevant to evaluating the parties' intent concerning the payment of reciprocal compensation. That such matters are not privileged could not be more clear.[2]

BellSouth is sensitive to DeltaCom's desire to protect any privileged communications between Mr. Mullis and his client, and BellSouth will do its best to refrain from asking Mr. Mullis any questions that would cause him to divulge privileged communications. However, based upon DeltaCom's prior stance in similar cases elsewhere, it seems likely that DeltaCom will take a relatively expansive view of the attorney-client privilege and may seek to prevent Mr. Mullis from testifying at his deposition about any communications he had with anyone at DeltaCom (or even with Mr. Wilkerson, who is not even a DeltaCom employee). As a result, BellSouth agrees with DeltaCom that having "a special discovery master or referee" present may facilitate the deposition of Mr. Mullis.

III. CONCLUSION

For the foregoing reasons, DeltaCom's motion for a protective order should be denied, and BellSouth should be permitted to depose Mr. Mullis and Mr. Wilkerson at a mutually convenient time without regard to the arbitrary deadlines proposed by DeltaCom.

---

[2] DeltaCom's claim that Mr. Mullis' deposition is somehow shielded by the work-product doctrine is absurd. DeltaCom Motion at 2, ¶ 3. The work-product doctrine only applies to "the discovery of documents and tangible things otherwise discoverable ... prepared in anticipation of litigation or for trial ...." Rule 1.280(b)(3). Here, BellSouth is seeking to depose Mr. Mullis and not seeking the production of "documents or other tangible things." Furthermore, the facts upon which BellSouth seeks discovery occurred in 1997, more than two years before this complaint was brought, which makes it exceeding unlikely that DeltaCom would ever be able to satisfy the "in anticipation of litigation" requirement.

Respectfully submitted this 14th day of June, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

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215948

EXHIBIT A

4092 South Memorial Parkway ▶ Huntsville, AL 35802 ▶ 1-256-382-3900

June 8, 2000

VIA FACSIMILE: (404) 658-9022

Mr. Bennett Ross
General Attorney
BellSouth Telecommunications, Inc.
675 W. Peachtree Street
Atlanta, Georgia 30375-0793

RE: Docket No. 991946-TP – Complaint of ITC^DeltaCom Communications, Inc., v. BellSouth Telecommunications, Inc., for Breach of Interconnection Terms, and Request for Immediate Relief

Dear Mr. Ross:

This letter is in response to your letter dated June 1, 2000. Due to various conflicts and to provide adequate opportunity for scheduling we would propose that all depositions occur during the week of July 11th. Please check on the availability of Mr. Buck Alford, Mr. Ernest Bush, Ms. Pinky Reichert, Mr. Bob Cunningham, and Ms. Susan Claytor for the week of July 11th or anytime thereafter. We will make Mr. Wilkerson available that week. I will also check to see if this week is convenient for the Florida staff assigned to this case. If this week is not convenient for either you or the Florida staff, the weeks of July 17th, 24th, August 1st and August 7th, with a few days excepted, are acceptable to ITC^DeltaCom. While I understand that the Florida cost case is set for the week of July 17th, certainly, we will work with you, if you wish, to get in the depositions after that hearing is concluded in this case. Or, in the alternative, ITC^DeltaCom is willing to agree to extend the deadlines for filing testimony and even continuing the hearing for a later date this year.

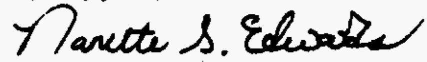
ITC^DeltaCom objects to the deposition of Mr. Mullis. As you know Mr. Mullis is the General Counsel of ITC^DeltaCom. To-date, neither BellSouth nor ITC^DeltaCom has deposed any officers of the other company. Mr. Mullis did not negotiate the Fourth Amendment which is the subject of this dispute. As General Counsel, his knowledge will be subject to attorney client privilege and/or work product. To the extent you continue to insist on taking the deposition of Mr. Mullis, then ITC^DeltaCom believes it is appropriate to take the depositions of Mr. Charles Morgan and Ms. Margaret Green, the respective heads of the Legal and Regulatory departments at BellSouth and whom we believe would have information similar to that expected to be elicited from Mr. Mullis.

In your letter you state that there are two officers that ITC^DeltaCom has requested to depose and that one of them was not employed by BellSouth at the time the interconnection agreement was signed. As for your claim of harassment, we find this puzzling given that you have noticed Mr. Mullis* the General Counsel and an officer of ITC^DeltaCom for deposition. Nevertheless, I do not see why BellSouth would object to ITC^DeltaCom deposing an officer of BellSouth who has knowledge of BellSouth's position on the issue of reciprocal compensation for ISP traffic when BellSouth has filed a notice to depose an officer of ITC^DeltaCom who has not pre-filed testimony in any case before any state Public Service Commission. Moreover, unlike Mr. Mullis, Mr. Alford, Mr. Bush, Ms. Reichert, Mr. Cunningham, and Ms. Claytor have all been mentioned in previous litigation on the issue of reciprocal compensation, so I do not believe that BellSouth is or should be surprised that these individuals would be called for a deposition. To the extent, BellSouth objects to ITC^DeltaCom calling any of these witnesses on the basis that these witnesses are officers, ITC^DeltaCom reserves the right to object to BellSouth deposing Mr. Mullis on that same basis.

* Our attempt to schedule these depositions is without waiving ITC^DeltaCom's position that Mr. Mullis is not a proper deponent.

Please contact me at your convenience to discuss this matter further.

Very truly yours,



Nanette S. Edwards
Regulatory Attorney

cc: Diana Caldwell, Esq.
Andy Bertron, Esq.

EXHIBIT B

3RD CASE of Level 1 printed in FULL format.

GEORGIA-PACIFIC CORPORATION, Plaintiff, - against - GAF ROOFING MANUFACTURING CORPORATION and G-I HOLDINGS, INC., Defendants.

93 Civ. 5125 (RPP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 671

January 24, 1996, Dated

January 25, 1996, FILED

CORE TERMS: environmental, attorney-client, negotiator, deposition, in-house, negotiations, memorandum, proposed agreement, negotiating, conversation, negotiated, advice, recommendation, planned, audit, necessary to achieve, legal advice, on-going, staff, purchase agreement, indemnification, disclosure, remediate, straight, handle, senior, cancel, carve, mill

COUNSEL: [*1] APPEARANCES:

Counsel for Plaintiff: Shearman & Sterling, New York, NY, BY: Joseph T. McLaughlin, Esq., Alan Goudiss, Esq.

Counsel for Defendants: Weil, Gotshal & Manges, New York, NY, BY: Joseph Allerhand, Esq., Otto Obermaier, Esq., Allan Dinkoff, Esq.

JUDGES: Robert P. Patterson, Jr., U.S.D.J.

OPINIONBY: Robert P. Patterson, Jr.

OPINION: OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

In this breach of contract action, plaintiff Georgia-Pacific Corporation ("GP") moves to compel answers to certain deposition questions addressed to Michael D. Scott, the negotiator of the environmental provisions of the contract and in-house environmental counsel for defendants GAF Roofing Manufacturing Corporation and G-I Holdings, Inc. (collectively, "GAF"). GAF opposes on the grounds of attorney-client privilege.

The contract involved the sale to GAF of GP properties and other assets related to GP's roofing business. The general issue raised by this motion is whether testimony of in-house counsel can be compelled if he acted as negotiator of terms and provisions of a contract or whether defendants may invoke the attorney-client privilege.

In February 1993, or possibly, January 1993, GAF [*2] asked Mr. Scott to review a proposed asset purchase agreement and related documents provided by GP and comment on the environmental issues raised by the proposed agreement. (Deposition of Michael D. Scott ("Scott Dep.") at 41.) On March 12, 1993, Mr. Scott met with Kathy Rhyne and Ronald Allen, GP's environmental lawyers, to discuss the environmental provisions (id. at 101), and during the week March 15 to March 19, 1993, Mr. Scott served as a negotiator for GAF with respect to various environmental issues relating to the proposed transaction (id. at 149-152). During that period, Mr. Scott told Carl Eckardt, a senior GAF executive, and Barry Kirshner and Barry Simon, in-house counsel for GAF, prior to execution, that the environmental provisions of the proposed contract might not cover certain types of claims that would come up during an environmental audit and were "unusual" in nature. (Id. at 578-85.) n1 Mr. Scott made recommendations to Eckardt, Kirshner, and Simon as to how he might go about negotiating the agreement and negotiating changes in the contract. (Id. at 591-92.)

n1 During depositions, questions on this subject were answered by Mr. Scott with the stipulation that the answers would not constitute waiver of GAF's right to assert the attorney-client privilege with respect to other inquiries.

[*3]

GP and GAF signed an asset purchase agreement dated March 19, 1993 (the "Agreement") (id. at 218-219) calling for a closing no later than July 31, 1993. Mr. Scott was present at the execution of the Agreement and had reviewed its disclosure schedule. (Id. at 219-220.)

The Agreement contained several attachments, including a to-be-entered-into form of the Environmental Remediation and Indemnification Agreement (the "Environmental Agreement") pursuant to which GP would agree to remediate and assume liability for, to the extent not remediated as defined in the contract, various existing environmental conditions to be listed in an exhibit entitled "Schedule 1." Prior to the execution of the Agreement, GP provided GAF "with [a] proposed Schedule 1 to the [Environmental Agreement] listing Existing Conditions identified as a result of Seller's Environmental Audit that... Seller agrees to rectify as that term in defined in that agreement." (Agreement P 5.15(c)). Pursuant to the Agreement, GAF was then to conduct its own environmental audit of the properties and within 65 days propose "any additions to Seller's proposed Schedule 1 based on Buyer's Environmental Audit or Seller's [*4] Environmental Audit Update." (Id.) Upon receipt of GAF's proposed additions, the parties were to negotiate, in good faith, from the perspective of a reasonably prudent site operator and identify those additional items for Schedule 1 that required "corrective measures or other action to achieve substantial compliance with applicable Environmental Laws." (Id.) The prior execution of the Environmental Agreement with an agreed-on Schedule 1 was a condition of closing.

After execution of the Agreement, Mr. Scott notified GP of GAF's proposed environmental audit pursuant to Section 5.15 of the Agreement. (Scott Dep. pp. 331-332.) In April and May 1993, Mr. Scott requested that GP agree that an issue relating to the detection of a hazardous substance, trichloroethylene ("TCE"), in subterranean well water in a well adjacent to or on GP's felt mill property in Franklin, Ohio, be carved out from the Environmental Agreement with the provision that GP not be required to do anything to remediate the condition until and unless regulatory agencies were to require it. (Id. at 565-568.) GAF took the position through Mr. Scott that either this "carve out" provision or a "straight indemnification" [*5] provision should be used to eliminated from the asset purchase this problem for GAF. (Id. at 621-622.) GP was opposed to both of these alternatives.

On June 7, 1993, Mr. Scott again met with Ms. Rhyne and Mr. Allen. He testified that in light of certain flexibility evidenced by GP, he attempted to signal to GP that if the parties could get agreement on all the other issues, he would be prepared to work within GAF to support a solution of the TCE issue. (Id. at 762.) Mr. Scott stated, however, that the issue "ultimately would have to be resolved by Earl and Van Meter" (id.) and indicated that he did not have a particular solution in mind (id. at 765). Mr. Scott testified that he reported to Mr. Eckardt what had occurred at the meeting on June 7, 1993. (Id. at 800.) Mr. Scott and Mr. Allen thereafter spoke periodically and planned another meeting for July 19 or July 20, 1993 in order to finalize their discussions on environmental matters. (Id. at 849.) On July 19, 1993, however, GAF terminated the Agreement (id. at 852-853) and the planned meeting never took place. (Id. at 849.)

On July 23, 1993, GP commenced this action. Mr. Scott was deposed on [*6] April 27 and 28, 1995. On May 31, 1995, GP wrote the Court seeking an order to compel him to answer questions and to produce his diaries. GAF opposed the motion as premature and argued that the defense's repeated objections were justified on the basis of attorney-client privilege. After the Court cautioned that the attorney-client privilege would not apply if Mr. Scott were acting in a business capacity, the parties agreed to continue Mr. Scott's deposition and try to resolve those issues without the Court's assistance. On October 30 and 31, 1995, Mr. Scott's deposition continued. On December 4, 1995, GP wrote the Court requesting an order compelling Mr. Scott to testify in three areas:

1. What recommendations, if any, did Mr. Scott make to the GAF negotiators of the Agreement in February-March 1993 as to how the provisions of the proposed agreement could be changed and the impact of such changes on the proposed provisions. Scott Dep. at 591-593.

2. Whether, after his June 7, 1993 meeting with GP, Mr. Scott made a recommendation to anyone in GAF's senior management that they should consider options other than "straight indemnification" or "carve out" as a negotiating strategy. [*7] (Id. at 795-798.)

3. Whether Mr. Eckardt asked Mr. Scott to cancel Mr. Scott's planned meeting for July 19 or July 20, 1993 with Mr. Allen of GP.

The Court held a conference in response to this letter on December 19, 1995 and ordered Mr. Scott to comply with plaintiff's third request, i.e. to testify as to whether he had been ordered by Mr. Eckardt to cancel his scheduled meeting with Mr. Allen. (Transcript, December 19, 1995, at 13-19.) The Court asked the parties to submit briefs on the other issues. Those briefs

were submitted on January 5, 1996.

Discussion

New York law governs the attorney-client privilege in a diversity case such as this. Fed. R. Evid. 501; Agreement § 10.2 (New York Choice of Law provision); *Drimmer v. Appleton, 628 F. Supp. 1249, 1250 (S.D.N.Y. 1986);* Note *Funding Corp. v. Bobian Investment Co., 1995 U.S. Dist. LEXIS 16605, 1995 WL 662402* (S.D.N.Y., 1995). Under § 4503(a) of the New York Civil Practice Law and Rules ("CPLR"), the attorney-client privilege may be invoked with respect to "evidence of a confidential communication between the attorney ...and the client in the course of professional employment." CPLR § 4503(a). "The burden is on a party claiming the protection [*8] of the privilege to establish those facts that are the essential elements of the privilege relationship." *von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987)*, cert. denied, *481 U.S. 1015, 95 L. Ed. 2d 498, 107 S. Ct. 1891 (1987).*

The New York Court of Appeals has made it clear that the scope of the attorney-client privilege "is limited to that which is necessary to achieve its purpose." *Rossi v. Blue Cross, and Blue Shield of Greater New York, 73 N.Y.2d 588, 592, 540 N.E.2d 703, 705, 542 N.Y.S.2d 508, 510 (N.Y. 1989).*

Rossi involved an internal memorandum from Edward Blaney, a lawyer employed by Blue Cross' on its counsel's staff. The memorandum was sent to Blue Cross medical director with copies indicated to its general counsel and vice president of professional affairs. Its contents referred to (1) conversations between Blaney and plaintiff's attorney regarding a possible defamation suit based on a rejection form used by Blue Cross which included the statement: "Your contract does not cover procedures which are experimental or whose effectiveness is not generally recognized by an appropriate governmental agency"; (2) conversations between Blaney [*9] and the FDA regarding plaintiff's NMR Imaging System; (3) Blaney's understanding of Blue Cross's NMR reimbursement policy and his understanding of new language that was going to be used to deny NMR claims; (4) Blaney's opinion and advice regarding the rejection language of the form; and (5) a request for the medical director's comments. *Rossi, 542 N.Y.S.2d at 509.*

Where the communication in issue--as in this case--is from an in-house attorney to management, difficult fact specific questions are involved. See *Abel v. Merrill Lynch & Co., Inc., 1993 U.S. Dist. LEXIS 1213, 1993 WL 33348*, *3 (S.D.N.Y., 1993) (corporation not entitled to assert privilege in suit for civil rights violations by funneling all information concerning potential terminations in its work force to in-house counsel and then claiming that the data in the in-house counsel's files is privileged). In Rossi, the Court of Appeals observed that

staff attorneys may serve as company officers with mixed business-legal responsibility; whether or not officers, their day-to-day involvement may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a [*10] particular problem but with them, as part of an on-going, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose (*Matter of Priest v. Hennessy, 51 N.Y.2d at 68, 431 N.Y.S.2d 511, 409 N.E.2d 983; Matter of Jacqueline F., 47 N.Y.2d at 219, 417 N.Y.S.2d 884, 391 N.E.2d 967*), the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure (see Simon, The Attorney-Client Privilege as Applied to Corporations, *65 Yale L.J., 953, 970-73* [1956]; 5 Weinstein-Korn-Miller, N.Y. Civ. Prac. P 4503.06).

Rossi, 508 N.Y.S.2d at 510.

The court then proceeded to weigh the facts relating to the genesis of the memorandum and found that Mr. Blaney was "exercising a lawyer's traditional function in counseling his client." (*Id. at 511.)*

It is a general rule that "courts will not recognize the privilege when the attorney is acting...as a business advisor...." 5 Weinstein New York Civil Practice, § 4503.04 (1995). In Cooper-Rutter Associates, [*11] Inc. v. Anchor Nat. Life Ins. Co., the Second Department citing Rossi held that two handwritten memoranda prepared by "an individual who was both in-house counsel and corporate secretary to one of the defendants" were not shielded by the privilege. Although, the two memoranda dealt with "both the business and legal aspects of the defendant's on-going negotiations with plaintiff with respect to the business transaction out of which the underlying lawsuit ultimately arose", the documents were "not primarily of a legal character" and "expressed substantial non-legal concerns." *Cooper-Rutter Associates, Inc. v. Anchor Nat. Life Ins. Co., 168 A.D.2d 663, 563 N.Y.S.2d 491* (N.Y.A.D. 2 Dept., 1990); *Rossi, 542 N.Y.S.2d at 510.*

Applying the reasoning in Rossi to Mr. Scott's role in March 1993, it is clear that Mr. Scott was not "exercis-

ing a lawyer's traditional function. *Rossi, 542 N.Y.S.2d at 511.* The record indicates that Mr. Scott was asked to review GP's proposed agreement with respect to the environmental provisions. He then negotiated the environmental provisions of the agreement, and after execution of the agreement, he served as negotiator of the matters to be [*12] included in Schedule 1. As a negotiator on behalf of management, Mr. Scott was acting in a business capacity. Note *Funding Corp. v. Bobian Investment Corp., 1995 U.S. Dist. LEXIS 16605, 1995 WL 66402; People v. Lifrieri, 157 Misc. 2d 598, 604, 597 N.Y.S.2d 580, 584-85 (Sup. Ct. N.Y. Co. 1993).* Mr. Scott's deposition testimony demonstrates that he recognized that the proposed contract would not protect GAF on certain environmental matters. Mr. Scott's discussion with management concerning these issues was prior to the Agreement being entered into and not in the context of imminent litigation.

Since Mr. Scott negotiated the environmental terms of the Agreement, GP is entitled to know what environmental matters he determined would not be covered in the proposed agreement; the extent to which they were covered in the provisions he negotiated in the Agreement; and whether Scott advised GAF management of the degree to which his negotiations had left GAF protected and unprotected. Only by such testimony can it be determined whether GAF, as a matter of business judgment, agreed to assume certain environmental risks when it entered the Agreement.

The deposition of Mr. Scott (Exs. A and B to GAF's memorandum in [*13] opposition) reveals that Mr. Scott was acting as a negotiator of the environmental provisions for GAF. The environmental provisions were substantive provisions. Mr. Scott's averment that he rendered legal advice to management, although considered, does not overcome the nature of his role in the transaction as revealed by his deposition. *von Bulow by Auersperg v. von Bulow, 811 F.2d at 146* (affidavit consisting of conclusory and ipse dixit assertions insufficient to sustain privilege). Accordingly, Mr. Scott is ordered to answer questions pertaining to the matters within the scope of plaintiff's first request.

By June 1993, the parties had evidently met an impasse about how to handle the fact that there was some evidence of TCE in a well on or under the GP felt mill in Franklin, Ohio. Mr. Scott testified that at the June 7, 1993 meeting with Ms. Rhyne and Mr. Allen "...[they] had made very good progress on the other issues and that assuming that GP was willing to grant the sorts of concessions that [he] thought [he] heard Ron and Kathy say they were prepared to at least consider, that all options would be open and that [he] would work with [his] management to achieve [*14] a mutually acceptable resolution to the problem, which of course, could take one of many forms." (Id. at 765.) Despite Mr. Scott's testimony, GAF counsel would not allow questions about whether he then advised management about the negotiating options that were open to them or about any advice the witness gave to Carl Eckardt thereafter with respect to how to handle environmental issues. (Id. at 795-799.)

It seems clear Mr. Scott acted as a negotiator of the terms of Schedule 1 and that his conversation with Eckardt as regards the status of the negotiations, the tradeoffs that Mr. Scott perceived GP was willing to make, and GAF's options, involved business judgments of environmental risks. Such reporting of developments in negotiations, if divorced from legal advice, is not protected by the privilege under New York law. *Note Funding Corp. v. Bobian Investment Co., 1995 U.S. Dist. LEXIS 16605, 1995 WL 662402* *4 Accordingly, Mr. Scott is directed to answer the questions raised in plaintiff's second request.

IT IS SO ORDERED.

Dated: New York, New York
January 24, 1996

Robert P. Patterson, Jr.

U.S.D.J.