IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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| FLEET BUSINESS CREDIT CORPORATION,<br><br>Plaintiff/<br>Counter-Defendant,<br><br>vs.<br><br>HILL CITY OIL COMPANY, INC.,<br><br>Defendant/<br>Counter-Plaintiff.<br><br>---<br><br>HILL CITY OIL COMPANY, INC.,<br><br>Third-Party Plaintiff,<br><br>vs.<br><br>MBW ELECTRICAL SOLUTIONS, INC.,<br><br>Third-Party Defendant. | ) | No. 01-02417 MaV |

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ORDER GRANTING IN PART AND DENYING IN PART
FLEET BUSINESS CREDIT CORPORATION'S MOTION FOR PROTECTIVE ORDER

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Before the court is the motion of Fleet Business Credit Corporation for a protective order, filed November 1, 2002, claiming attorney-client privilege for documents it insists were inadvertently disclosed to Hill City Oil Company. Fleet asks the court to compel Hill City to return the documents and to issue a protective order preventing Hill City from utilizing information

contained in the documents. Hill City timely responded, arguing that attorney-client privilege does not even apply to the documents in question, and that, even if it does, Fleet's disclosure, whether inadvertent or merely careless, has waived such privilege. The motion was referred to the United States Magistrate Judge for a determination.

## BACKGROUND

The underlying facts of this contract dispute are detailed in this court's previous orders. *See, e.g.,* Order Denying Pl.'s Mot. for Protective Ord. and Finding Sua Sponte Def.'s Subpoena Duces Tecum Invalid, *Fleet Business Credit Corp. v. Hill City Oil Co., Inc.*, Civil Case No. 01-2417 (W.D. Tenn., July 26, 2001). The following allegations are relevant to this motion.

Hill City contracted with Entergy Systems and Service (now called "ESI") for lighting services at various properties owned by Hill City. ESI agreed to provide, install, and maintain the lighting, and, in return, Hill City agreed to make monthly payments to ESI for the service. ESI assigned to Fleet its right to receive Hill City's monthly payments. ESI subsequently filed for Chapter 11 bankruptcy reorganization. For some time, Fleet performed the lighting services for Hill City and accepted Hill City's payments. Fleet then delegated its performance to a third party, MBW Electrical Solutions ("MBW"). When Hill City refused to accept

**MBW's performance and refused to make further payments to Fleet, this litigation ensued.**

**Discovery commenced, and, in the course of a massive document production, Fleet claims, its counsel, through an outside litigation support provider, inadvertently produced to Hill City's counsel nine documents totaling about thirty pages. As to these nine documents, Fleet asserts attorney-client privilege, demands their return, and seeks to prevent Hill City from utilizing the information they contain.**

**ANALYSIS**

**Federal jurisdiction of this breach of contract and unjust enrichment case is based on diversity. In diversity cases, where state law provides the "rule of decision," state law governs issues of privilege. FED. R. EVID. 501. *See also Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). Although the parties have not expressly indicated which state's law applies, it appears that Tennessee law will govern based on the choice of law clause in the contracts at issue. Tennessee law therefore also controls the privilege analysis. A Tennessee court, however, may rely upon federal common law in its analysis, *see, e.g., Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn. Ct. App. 1985) (analogizing Tennessee Rule 26.03 to Federal Rule 23(c) and looking to interpretations of the federal rule), and, in the absence of**

applicable Tennessee law, a federal court sitting in a diversity case must "fashion a rule of decision that the Tennessee Supreme Court would most likely adopt." *Royal Surplus Lines Ins. v. Sofamor Danek Group, Inc.*, 190 F.R.D. 463, 484 (W.D. Tenn. 1998).

The pivotal issues as to each document in this case are whether the document is privileged in the first place and, if so, whether Fleet's inadvertent disclosure waived the privilege.

The attorney-client privilege in Tennessee has been codified as follows:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

Tenn. Code Ann. § 23-3-105 (1994). This statute is an embodiment of the common law principles of the privilege. *See* 21 Tenn. Juris. Privileged Communications § 3. The Tennessee Supreme Court has held the privilege "excludes all communications, and all facts that come to the attorney in the confidence of the relationship." *Johnson v. Patterson*, 81 Tenn. 626, 649 (1884). The requirements for the privilege to apply are:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his

> client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*Humpreys, Hucheson & Moseley v. Donovan*, 568 F. Supp. 161, 175 (M.D.TN. 1983)(construing the Tennessee statute).

A party seeking a protective order under Rule 26(c) must give "specific examples of harm and not mere conclusory allegations." *Loveall*, 694 S.W.2d at 939. In addition, under both Tennessee and federal discovery rules, the party asserting a privilege must "make the claim expressly and describe . . . things not produced or disclosed in a manner sufficient to assess the applicability of the privilege protection." TENN. R. CIV. PRO. 26.02(5); FED. R. CIV. PRO. 26(b)(5). The burden is on the person claiming attorney-client privilege to establish the existence of the privilege. *U.S. v. Dakota*, 197 F.3d 821, 825 (6th Cir. 2002) (applying federal common law). The present situation is somewhat unique in that Hill City has had the opportunity to review in full the documents in question and is not limited to Fleet's description of the document in assessing the applicability of the attorney-client privilege.

"The attorney-client privilege is not absolute, nor does it cover all communications between a client and his or her attorney." *Boyd v. Comdata Network, Inc.*, 2002 WL 772803, *4 (Tenn. Ct. App. 2002). For the attorney-client privilege to apply, the

**communication must have been made in the confidence of the attorney-client relationship. *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992). In other words, the client must have intended that the communication remain confidential, *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992); *Hazlett v. Bryant*, 192 Tenn. 251, 258-59 (Tenn. 1951), and the communication must "involve the subject matter of the representation," *Boyd v. Comdata Network, Inc.*, 2002 WL 772803, *4 (Tenn. Ct. App. 2002) (citing *Smith County Educ. Ass'n v. Anderson*, 676 S.W. 2d 328, 333 (Tenn. 1984)); *Bryan,* 848 S.W.2d at 80.**

**The scope of the privilege includes all client communications to the attorney. *Smith County Educ. Ass'n v. Anderson*, 676 S.W. 2d 328, 333 (Tenn. 1984). Attorney communications to the client are also protected, but only to the extent that they are "specifically based upon a client's confidential communication or would otherwise, if disclosed, directly or indirectly reveal the substance or tenor of a confidential communication." *Bryan,* 848 S.W.2d at 80.**

**The attorney-client privilege "belongs to the client" and only the client may waive it. *Smith County*, 676 S.W. 2d at 333. The attorney-client privilege may be waived by the client by voluntarily disclosing confidential information to, or discussing it in the presence of, third parties, *Smith County,* 676 S.W. 2d at**

333 (citing *Hazlett v. Bryant*, 192 Tenn. 251, 257 (Tenn. 1951)), and/or by publishing the information to the public, *Hazlett,* 192 Tenn. at 259.

To determine if a privilege is waived by inadvertent disclosure of documents, the majority of federal courts generally apply a balancing test on a case-by-case basis.[1] *Briggs & Stratton Corp. v. Concrete Sales and Services*, 176 F.R.D. 695, 699 (M.D. Ga. 1997). The factors to consider include: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error, (3) the scope of the production; (4) the extent of the disclosure, and (5) overriding issues of fairness. *In re Copper Market Anti-trust Litigation*, 200 F.R.D. 213, 222 (S.D.N.Y. 2001).

Here, Fleet took the necessary precautions to ensure that privileged documents were not produced. This was a production of a large volume of documents, over 16,000 pages. Screening mechanisms were established by Fleet. Fleet's team of three attorneys and one paralegal reviewed each document, isolated responsive, privileged documents, and tagged the remaining documents with pre-printed tabs indicating they were to be copied.

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[1] Neither side has cited any Tennessee cases dealing with inadvertent production of documents and waiver of the attorney-client privilege. The court therefore looks to federal law for guidance.

**An outside copy and production service was retained to make the copies and number the documents. The copy service made two sets of copies of the unprotected documents and delivered one set directly to Hill City's counsel in June of 2002, with Fleet's permission without further review by Fleet's counsel. When Fleet's counsel discovered the unintended production of privileged documents in late September of 2002, Fleet moved quickly, within days, to rectify the situation. Only 30 pages of the 16,000 pages of documents produced are at issue, a relatively small, but acceptable margin of error. After considering the precautions taken, the margin of error, and the quick action by Fleet, the court finds that the inadvertent production of documents claimed to be privileged does not amount to waiver of the privilege.**

**The only remaining issue then is whether the documents at issue are in fact privileged, and this must be determined by a document-by-document analysis.[2]**

**A. Document No. 1: FBCC/Hill City Doc. No. 002706-2714**

**Fleet describes this document as a nine-page memorandum to Fleet from Sachnoff & Weaver, Ltd. dated July 9, 1999, . . . [which] reviews the relationship between Fleet and Entergy and outlines a strategy for the newly-filed Entergy bankruptcy case."**

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[2] **The court declines an *in camera* inspection and finds information in briefs sufficient to make a decision.**

**(Mem. in Supp. of Fleet Business Credit, LLC's Mot. for Protective Ord. at 5.) Richard Smolev, an attorney at the law firm of Sachnoff and Waver, Ltd., sent the memorandum to Fleet. (*Id.*) Smolev served as Fleet's outside counsel on matters related to the Fleet-ESI relationship. Fleet asserts the attorney-client privilege to this document and alleges that disclosure of this document will harm Fleet because "Hill City undoubtedly will attempt to use [it] as a basis for seeking to compel production of other privileged documents." (*Id.* at 9.) Hill City argues that the document is not privileged because there is no evidence that Fleet "sought legal rather than business advice" and no evidence that the document "originated in confidence." (Hill City Oil Co.'s Mem. in Supp. of Its Resp. to Fleet Business Credit Corp.'s Mot. for Protective Ord. at 5.) Hill City concedes that the document may be privileged nevertheless. (*Id.* at 2.)**

**This document is protected by the attorney-client privilege. Smolev's firm advised Fleet in the Fleet/Entergy relationship, and this document involves the subject matter of Smolev's representation of Fleet. Hill City acknowledges that the document discusses possible customer damages and the effect of Entergy's bankruptcy on Fleet's contracts. (Hill City Oil Co.'s Mem. in Supp. of Its Resp. to Fleet Business Credit Corp.'s Mot. for Protective Ord. at 7.) While the description of the document does**

not explicitly state that Fleet sought legal advice, it is implicit in the description that legal advice in terms of a strategy for dealing with the Entergy bankruptcy was provided presumably at the client's request; a corporation would generally not retain outside legal counsel to advise it on bankruptcy matters as part of its normal business operations. In addition, the document was clearly intended to be confidential as evidenced by the notation "Attorney-Client Privilege/Work Product" at the top of the memorandum. (Mem. in Supp. of Fleet Business Credit, LLC's Mot. for Protective Ord. at 5.)

The pre-litigation dissemination by Debby Poling of MBW to Fleet's customers of another letter from Smolev to Ray Ratleff at Fleet, dated November 3, 1999, does not waive the privilege as to all communications from Smolev to Fleet concerning Entergy's bankruptcy. The November 3, 1999, letter was specifically intended to provide "advice on how to respond to customers who had Master Service Agreements or Lighting Supplemental Service Contracts with ESI that have been assigned to Fleet Business Credit Corporation (FBCC) and who now assert that the contracts are in default or can be terminated due to ESI's bankrupcy." While some of the same issues were addressed by Smolev in both communications to Fleet, Smolev and Fleet both intended the information in the November 3, 1999, to be revealed to third parties. The pre-litigation

**disclosure of Smolev's November 3, 1999 letter only waives the privilege as to that document, not for all communications on the same subject. *See In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 469 (S.D.N.Y. 1996).**

**Fleet's motion for a protective order as to Document No. 1 is granted.**

**B. Document No. 2: FBCC/Hill City Doc. No.004963**

**Fleet describes the second document at issue as a "one-page fax transmission sheet from Jeff Mihalik of Fleet to Richard Smolev . . . ask[ing] Mr. Smolev to review and comment on another document that is not attached." (Mem. in Supp. of Fleet Business Credit, LLC's Mot. for Protective Ord. at 6.) Jeff Mihalik was or is a vice-president at Fleet, and, as previously stated, Smolev was Fleet's outside counsel.**

**As to this document, Fleet has failed to satisfy the court that the attorney-client privilege applies. Fleet has not explained whether the one-page facsimile communicated any facts to Smolev for the purpose of obtaining legal advice, nor that the one-page fax was intended to be confidential. *Bryan*, 848 S.W.2d at 80. This one-page facsimile could merely be a cover sheet transmitting another document. Cover letters that do not disclose privileged matters are not protected by the attorney-client privilege. *Foseco International Limited v. Fireline, Inc.* 546 F. Supp. 22, 24 (N.D.**

**Ohio 1982). Because Fleet has failed to carry its burden of establishing the existence of the attorney-client privilege as to this document, Fleet's motion for a protective order governing Document No. 2 is denied.**

**C. Document No. 3: FBCC/Hill City Doc. No. 012156-12160**

**The third document at issue is a "five-page fax transmission sheet from Jeffrey W. Bell, an in-house attorney at Fleet, to Richard Smolev, dated August 12, 1998, transmitting a proposed letter draft that they had discussed." (*Id.*) Unlike the previous document, which appears to be merely a one-page cover letter, this is a five-page communication between two attorneys: Fleet's in-house counsel and Fleet's outside counsel. It is highly unlikely that a five-page transmission is merely a cover sheet. The draft letter, which the court interprets to be part of the five-page facsimile, follows or confirms a previous discussion. The letter and discussion both concern Fleet's relationship with Entergy. There is no indication that anyone else received this communication. From the brief description, the court infers the purpose of the communication was to receive legal advice on the draft letter. This document is protected by the attorney-client privilege, and Fleet's motion for a protective order for Document No. 3 is granted.**

**D. Document No. 4: FBCC/Hill City Doc. No. 021614-12620**

**Fleet describes this document as a "seven-page, September 29, 1998 fax transmission from Mr. Smolev to Mr. Bell of a draft document containing hand-written notes of Mr. Smolev." (Mem. in Supp. of Fleet Business Credit, LLC's Mot. for Protective Ord. at 6.) According to Fleet, this document includes Smolev' hand-written comments to a draft of an agreement between Fleet and Entergy." (*Id.* at 7.)**

**Hill City argues that Document No. 4 is not protected by the attorney-client privilege because the handwriting is Bell's, not Smolev's. (Hill City Oil Co.'s Mem. in Supp. of its Resp. to Fleet Business Credit Corp.'s Mot. for Protective Ord. at 9.) The court fails to see the relevance of this argument inasmuch as both Bell and Smolev are attorneys. The pertinent issue is not who wrote on the document, but rather who was involved in the information exchange, when, and why. See *Royal Surplus,* 190 F.R.D. at 493 (emphasizing the critical factors of "who" and "when"). The document involves the subject matter of Smolev's representation of Fleet; Smolev's firm advised Fleet in the Fleet/Entergy relationship; and the annotated document is an agreement between Fleet and Entergy. Intent of confidentiality can be inferred from the identities of the sender and recipient: the document was exchanged between in-house counsel for Fleet and outside counsel**

**for Fleet. This communication is protected by the attorney-client privilege,[3] and Fleet's motion for a protective order for Document No. 4 is granted.**

**E. Document Nos. 5, 6, 7, and 8: FBCC/Hill City Doc. Nos. 014599-14600, 014609, 014628-14629, and 014802**

**Fleet identifies Document No. 5 as a "chain of email communications transmitted on August 15, 2000 from Mark Holmes (a Fleet vice president) to Stuart Schwartz (a Fleet vice president) and Mr. Bell, concerning questions raised by Fleet's outside attorneys regarding apparent errors in documentation related to Fleet's relationship with Entergy. The August 15, 2002 e-mails contained in the chain are all to and from Fleet personnel/attorneys." (Mem. in Supp. of Fleet Business Credit, LLC's Mot. for Protective Ord. at 6.) Document Nos. 6, 7, and 8 contain all or part of the same communication. (*Id.*) As stated previously, Bell was an in-house attorney with Fleet.**

**Hill City disagrees with Fleet's description of the documents. Hill City insists that the e-mail originated with Madeleine Areguin of Fleet and was sent to Tom McGlinch of Fleet, who then forwarded it to Mark Holmes, who then forwarded it to Jeff Bell, who then replied to Mark Holmes regarding issues on various documents. Hill**

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[3] **It appears, from the nature of this document, that a protective order might also be justified on the basis of work product. Because Fleet did not argue that doctrine in its motion, however, its applicability is not analyzed here.**

**City argues that the documents are not privileged as attorney-client communications because Fleet has adduced no evidence that the communication was made for purposes of securing legal advice.**

**Fleet has failed to carry its burden of proving the elements necessary to cloak these communications with the attorney-client privilege. Fleet has not provided a basis for its assertion that Bell's advice was being sought. "[S]imply copying corporate counsel on communications will not automatically cloak the document with privilege. There must be some explanation as to how the communication was for the purpose of securing legal advice." *Royal Surplus*, 190 F.R.D. at 477. Further, in light of the fact that the e-mail circulated among Fleet personnel, it is impossible to discern whether the Fleet e-mail authors expected the communication to remain confidential. Accordingly, Fleet's motion for a protective order governing Document Nos. 5, 6, 7, and 8 is denied.**

**F. Document No. 9: FBCC/Hill City Doc. No. 014802**

**Fleet identifies this last document as a one-page internal Fleet e-mail communication dated March 13, 2000, concerning Mr. Bell's comments on a draft agreement. (Mem. in Supp. of Fleet Business Credit, LLC's Mot. for Protective Ord. at 6.) Fleet asserts that Bell sent the e-mail to Mike Holmes, a Fleet vice-president, concerning Bell's revision of an agreement in accordance with Holmes' comments. (*Id.* at 7.)**

**Hill City disputes the description of this document as well. Hill City agrees that Bell authored the e-mail, but points out that the e-mail does not indicate that Holmes was the only original recipient. Holmes replied to the e-mail and included Mr. Schwartz, Mr. Duerr, Mr. Mihalik and Mr. Bell in his reply.**

**Hill City first argues that Fleet has adduced no evidence showing the e-mail was made for the purpose of providing legal advice. (Hill City Oil Co.'s Mem. in Supp. of its Resp. to Fleet Business Credit Corp.'s Mot. for Protective Ord. at 11.) Fleet City, however, explains that the purpose of the e-mail was to communicate changes to an agreement in accordance with Holmes' comments. A corporate attorney's contract revisions, made at the behest of a corporate employee, are the subject matter of corporate counsel's representation and are privileged. *Schneider v. Troxel Mfg. Co.*, 1988 Tenn. App. LEXIS 797, *14 (Tenn. Ct. App. 1988) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). The purpose of the e-mail is self-evident, particularly in light of the fact that Hill City has read the entire e-mail, and no other evidence is necessary to establish its purpose.**

**The test of whether an attorney's communication to the client is protected is whether the communication, if disclosed, would directly or indirectly reveal the substance or tenor of a confidential communication. *Bryan,* 848 S.W.2d at 80. Here, based**

on Fleet's explanation of the purpose of the e-mail's subject matter, it appears from the description that Bell wrote the e-mail in furtherance of his duties as Fleet's in-house counsel and disclosure would reveal Holmes' communications to Bell. Accordingly, it is privileged.

With regard to whether including other recipients on the e-mail in addition to Bell waived the privilege, only Fleet employees were recipients: Mr. Holmes, a Fleet vice-president; Mr. Schwartz, a Fleet vice-president; Mr. Mihalik, a Fleet vice-president; and Mr. Duerr, a Fleet employee. The attorney-client privilege extends to communications between and among insiders who are discussing the legal matter for which they sought legal advice. *See Royal Surplus,* 190 F.R.D. at 497 (applying Tennessee law to find privilege for a communication between two insiders of separate corporations "regarding plans to discuss strategy" with one of the corporations' in-house counsel). The Supreme Court made clear in *Upjohn Co. v. United States,* 449 U.S. 383 (1981), that communications in the corporate context between an attorney and the corporations' employees were privileged when the communications concerned matters within the scope of the employee's duties and were needed to supply a basis for legal advice relating to the subject matter of the communication. While Fleet has not adduced any evidence of the roles of the other recepients of the e-mail,

the court notes that Schwartz, Mihalik, and Durr are listed on Fleet's privilege log as authors of other communications to which Fleet has asserted the attorney-client privilege. (Mem. in Supp. of Fleet Business Credit, LLC's Mot. for Protective Ord., Ex. 1, Landis Aff., Ex. A.)

Hill City's argument that nobody can identify all of the ultimate email recipients is without merit. The same may be said of any communication. Mere speculation that a client might have forwarded a privileged e-mail to an outsider is not enough to create a waiver. Thus, Fleet's motion for a protective order for Document No. 9 is granted.

CONCLUSION

In summary, Fleet's assertion of attorney-client privilege is upheld for Document Nos. 1, 3, 4, and 9. Fleet's motion for a protective order is granted as to these documents. Hill City is instructed to return these documents to Fleet within ten (10) days of this order. Hill City is further instructed to make no use of the information these documents contain.

Fleet's assertion of attorney-client privilege is insufficient for Documents 2, 5, 6, 7, and 8, and, as to these documents, Fleet's motion for a protective order is denied.

IT IS SO ORDERED this 5th day of December, 2002.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE