



Issue Date: 18 March 2005

In the Matter of

MARC C. PENESSO
Complainant

v.

LCC INTERNATIONAL, INC.
Respondent

Case No.: 2005 SOX 00016

**ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION TO COMPEL DISCOVERY**

Complainant filed a motion to compel respondent to respond to his document requests and Interrogatories served on January 19, 2005. Respondent opposes the motion, contending that the requested documents are irrelevant, that the discovery is overly burdensome, and that several different privileges to disclosure of the requested discovery apply. My rulings follow seriatim.

General Objections

First, I will address objections which the respondent makes to several of the Discovery Requests.

Respondent objects to requests for documents which concern events occurring more than 90 days prior to the filing of the complaint, contending that they are irrelevant and not likely to lead to admissible evidence. That objection is specious, since the only acts which have to occur within 90 days of the complaint are the retaliatory acts; and even then, since the complaint alleges continuing violations, all of the retaliatory acts do not have to have occurred within 90 days of the complaint.

Respondent also objects to several discovery requests on the ground of harassment. But it appears to me that all of the complainant's requests are designed to elicit useful information which conceivably could lead to the production of admissible evidence.

Document Request 6

Respondent objected to this document request on the grounds of privilege and undue burden. Yet in response to the motion to compel it states that it has neither privileged nor non-

privileged documents which are responsive to this document request. Since respondent now claim there are no responsive documents, what was the basis for the privilege objection? For the objection regarding undue burden?

Document Request 8

In this document request, complainant seeks the production of a report and related documents prepared by a consultant, Kroll, Inc., which was hired by respondent to investigate its Italian operations in response to complainant's allegations of financial mismanagement. Respondent asserts that this document is subject to three privileges: attorney work product, attorney-client and self-evaluation. Respondent claims that Kroll's investigation was initiated by its General Counsel and that Kroll reported only to the General Counsel, and accordingly Kroll's report should be subject to these privileges as if the General Counsel had done the investigation himself.

First, I agree that, in regard to assertions of privilege, Kroll stands in the General Counsel's shoes. As the Supreme Court noted in a decision regarding the attorney work product doctrine, "attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine [attorney work produce privilege] protect material prepared by agents of the attorney as well as those prepared by the attorney himself. *U.S. v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 2170 (1975).

Second, I find that the attorney work product privilege does not apply since the investigation conducted by Kroll was not performed "in anticipation of litigation." *See, e.g.*, Fed. R. Civ. P 26.(b)(3). Although the concept of anticipation of litigation has been interpreted rather broadly, *see, e.g.*, *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), "some possibility of litigation must exist. . . . Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *In re Grand Jury Investigation*, 599 F.2d 1224, 1228 (3d Cir. 1979). In *Grand Jury Investigation*, the investigation by outside counsel which was found to be in anticipation of litigation and thus subject to the attorney work product privilege was preceded by an investigation by an audit committee which "already had uncovered enough evidence to support "a suspicion of illicit payments having been made." *Id.* at 1289. Kroll's investigation is comparable to that of the audit committee. At the time the Kroll investigation was commenced, respondent would have had no reason to believe litigation was inevitable. (In fact, respondent has not contended that the report's findings indicated there was a prospect of litigation.) Accordingly, the attorney work product privilege does not apply to the report of the Kroll investigation. The investigation which the complainant states was to be conducted by respondent's General Counsel after his receipt of the Kroll report (*see Complainant's Motion to Compel* at 4) would be comparable to the outside counsel's investigation in *Grand Jury Investigation* and probably would be subject to the work product privilege.

However, the attorney-client privilege does apply. As was indicated above, Kroll, as respondent's agent working for the General Counsel, stands in the General Counsel's shoes in

regard to asserting the attorney-client privilege; and in light of the Supreme Court's decision in *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S.Ct. 677 (1981), it is clear that had the General Counsel conducted the investigation directly, the results of the investigation including reports of employee interviews would be protected from disclosure by the attorney-client privilege.¹

Accordingly, respondent's objection to Document Request 8 is sustained except for the complainant's own statements to Kroll, which must be produced.

Document Request 11

A temporary protective order is granted to the respondent regarding this document request, since it seems from the very nature of the request that any responsive documents would be protected by the attorney client privilege. Nevertheless, that does not excuse the respondent from preparing a privilege log identifying the documents for which the privilege is being claimed. Respondent shall provide a privilege log responsive to this document request to complainant's counsel not later than March 25th. Complainant may renew its motion regarding respondent's response to this document request after the privilege log is reviewed.

Document Request 12

Based on respondent's statement that there are no nonprivileged documents responsive to this document request, the motion to compel a response to this document request is denied. However, respondent's other objections to this document request are overruled, and if upon further reflection respondent determines that the attorney-client privilege does not apply to otherwise responsive documents, those documents must be turned over to the complainant.

Document Request 13

Respondent's objections to this document request are overruled, and all responsive documents must be produced.

Document Request 16

Respondent's objections to this document request are overruled. Audits of respondent's financial statements for the years in question may indicate the scope of any concerns reported by the complainant as well as the possible financial impact on the respondent if these concerns are corroborated. Responsive documents not already turned over to the complainant must be produced.

¹ Employer asserts the self-evaluation privilege to protect the Kroll report from disclosure. The self-evaluation privilege is recognized by some courts, but most jurisdictions do not. *See Etienne v. Mitre Corp.*, 146 F.R.D. 145, 147 (E.D. Va. 1993). Since I have held that the report is subject to the attorney-client privilege, there is no reason to address whether the self-evaluation privilege should be applied to the Kroll report.

Document Request 17

Respondent states that it will produce the nonprivileged documents responsive to this document request.

Document Request 19

This document request appears to be very narrow, relating to a single payment to one recipient. Although respondent states that it should not have to respond to this document request unless complainant, who now works for a competitor of LCC, agrees to the confidential treatment of respondent's response, it does not appear that the response should involve evidence of a confidential commercial nature. Accordingly, respondent shall provide a complete response to this document request.

Document Request 25

Respondent has agreed to provide the nonprivileged e-mails responsive to this document request. In this regard, respondent should keep in mind that e-mails to or from its General Counsel are not necessarily subject to the attorney-client or work product privileges, and should make sure that any such e-mails being withheld are clearly privileged.

Document Request 32

Respondent raises numerous objections to this document request. First, respondent implies that providing some of the documents responsive to this request would violate Italian law. If so, respondent shall provide a log of such documents akin to a privilege log and provide a **detailed explanation** of why turning over each responsive document would constitute a violation of Italian law.

Respondent also objects that the document request is unlimited in time and scope. Respondent's objection regarding the unlimited time frame of the request is reasonable, and the request is amended to concerns or complaints received since January 1, 2002. The objection to the unlimited scope of the complaints or concerns is overruled.

Interrogatory No. 4

Respondent's objections to his interrogatory are overruled, and respondent shall provide a full and complete response.

Interrogatory No. 12

Subject to complainant's limitation of the period in question, respondent's objection to this interrogatory is overruled, and respondent shall file a full and complete response.

Interrogatory No. 14

It appears that respondent made no attempt to respond to this interrogatory. If Carlo Baravelle still is employed by LCC, respondent has an obligation to ask him to respond to the interrogatory. If he is no longer employed by respondent, respondent must make an attempt to respond. Respondent's response – "LCC does not know of such" – clearly is inadequate. Respondent shall make whatever investigation is necessary to respond to this interrogatory.

Interrogatory No. 17

Respondent's objections to this interrogatory are overruled, and respondent shall provide a full and complete response.

Interrogatory No. 18

Respondent raises numerous objections to this interrogatory. First, respondent implies that responding to this interrogatory would violate Italian law. If so, respondent shall provide a **detailed explanation** of why its response would constitute a violation of Italian law.

Second, respondent states that it should not have to respond to this interrogatory unless complainant, who now works for a competitor of LCC, agrees to the confidential treatment of respondent's response. But it does not appear that the response should involve evidence of a confidential commercial nature.

Finally, respondent appears to contend that its response to this interrogatory exceeds the jurisdiction of the Sarbanes-Oxley Act. Respondent does not explain this contention, and it is rejected.

Interrogatory No. 27

This is a standard interrogatory which is clearly reasonable. Respondent's response – that "no one other than counsel prepared LCC's interrogatory responses" - does not provide the information requested. Respondent's counsel must have consulted with respondent's officers and/or employees in formulating their responses to the interrogatories, and complainant is entitled to know their identities.

Respondent shall comply with this order by providing the documents and interrogatory responses indicated herein to complainant's counsel not later than March 25, 2005. If necessary to meet this deadline, the responses shall be hand-delivered.

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JEFFREY TURECK