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United States District Court, S.D. New York.

SATCOM INTERNATIONAL GROUP PLC,
Plaintiff,
v.
ORBCOMM INTERNATIONAL PARTNERS, L.P.,
Defendant.

No. 98 CIV. 9095 DLC. | Feb. 16, 1999.

Attorneys and Law Firms

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OPINION

COTE, District J.

***1** Plaintiff Satcom International Group PLC ("SATCOM"), a British corporation, filed this action against Orbcomm International Partners, L.P. ("ORBCOMM"), a Virginia limited partnership, on December 23, 1998. The Complaint alleges causes of action based on breach of contract and tortious interference with prospective business advantage relating to ORBCOMM's termination of a number of license agreements. The parties are currently conducting discovery in preparation for a preliminary injunction hearing. In addition to a number of discovery disputes addressed by the Court in conferences with the parties, the parties have a current dispute with respect to ORBCOMM's assertion of the attorney-client privilege during the deposition of Andre Halley, an ORBCOMM officer, on January 21, 1999, over all communications at ORBCOMM's Executive Committee meeting on October 13, 1998. ORBCOMM has submitted an affidavit from Mary Ellen Seravalli, ORBCOMM's general counsel and the attorney present at the Executive Committee meeting. Both parties have also submitted letter briefs.

Neither party addresses choice of law issues in its letter brief. Where state law will supply the rule of decision, issues of privilege will also be decided under state law. *See*Rule 501, Fed.R.Evid. A federal court sitting in diversity must apply the choice of law rules of the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Although it appears that New York law will otherwise apply to the substantive claims in this action because of choice of law clauses in the licensing agreements, a separate inquiry into which state's law will apply is necessary with respect to an assertion of the attorney-client privilege. *See Tartaglia v. Paul Revere Life Insurance Co.*, 948 F.Supp. 325, 326–27 (S.D.N.Y.1996). New York uses a "grouping of contacts" analysis to apply the law of the jurisdiction with the greatest interest in applying its privilege law. *See id.* at 326; *Bamco 18 v. Reeves*, 685 F.Supp. 414, 416 (S.D.N.Y.1988); *First Interstate Credit Alliance v. Arthur Anderson & Co.*, 541 N.Y.S.2d 433, 434 (App.Div.1989); *Brandman v. Cross & Brown Co.*, 479 N.Y.S.2d 435, 437 (Sup.Ct.1984).*See also AroChem Int'l, Inc. v. Buirkle*, 968 F.2d 266, 271 (2d Cir.1992) (in tort context, applying New York's interest analysis to determine that since privilege is a conduct regulating rule, the law of the locus state should apply); *Sackman v. Ligget Group, Inc.*, 920 F.Supp. 357, 362–63 (E.D.N.Y.1996), *vacated on other grounds*,167 F.R.D. 6 (E.D.N.Y.1996); 3 *Weinstein's Federal Evidence* § 501.02[3][c][i]-[ii] ("Most courts apply the privilege law of the state that would be chosen under the choice-of-law rules used by the state where the court sits .... A respectable argument may be made for applying the law of the state where the deposition will be offered into evidence.").

From the information available to the Court, Virginia possesses the superior interest in seeing its privilege law applied to the communications in issue. ORBCOMM is a Virginia corporation with its principal place of business in Virginia. The asserted privilege involves communications between ORBCOMM and its general counsel at an ORBCOMM Executive Committee meeting.

***2** Under Virginia law, the attorney-client privilege is "strictly construed" and the party asserting the privilege has the burden to establish that (1) the attorney-client relationship existed, (2) the communications under consideration are privileged, and (3) the privilege was not waived.*Commonwealth v. Edwards*, 370 S.E.2d 296, 301 (Va.1988). Privileged communications are "[c]onfidential communications between attorney and client made because of that relationship and concerning the subject matter of the attorney's employment ...."*Id. See also X Corp. v. John Doe*, 805 F.Supp. 1298, 1305 (E.D.Va.1992). This privilege extends to communications between a corporation and its in-house attorney. *See Owens–Corning Fiberglass Corp. v. Watson*, 413 S.E.2d

630, 638 (Va.1992) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389–390 (1988)).

In this case, SATCOM does not dispute that ORBCOMM has established the existence of an attorney-client relationship between the Executive Committee and Ms. Seravalli. There is also no issue as to whether the privilege has been waived. The sole question is whether ORBCOMM is able to assert the privilege over all communications at the Executive Committee meeting without providing any additional information as to the subject matter of those communications.[1]

[1] SATCOM argues that ORBCOMM has failed to comply with Local Civil Rule 26.2 on the ground that Ms. Seravalli's affidavit does not state who was present at the Executive Committee meeting. Since this information was included in Mr. Halley's deposition testimony, the Court sees no merit in this argument.

The privilege was asserted at the deposition of an officer of ORBCOMM, Andre Halley. At that deposition, Mr. Halley indicated that the Executive Committee of ORBCOMM made the final decision at a meeting on October 13, 1998, to send a default letter to SATCOM. Mr. Halley then invoked the privilege when asked about particular discussions at that meeting with respect to the system availability date. He indicated that Ms. Seravalli, Vice President and General Counsel of ORBCOMM, was present at the meeting. He indicated that Ms. Seravalli attends the Executive Committee meetings for the purpose of providing advice and that "as a lawyer she participates in decisions pertaining to the exposure of our company and contractual arrangements."In response to a question as to whether the October 13, 1998 meeting was conducted in the normal course of business, Halley stated: "That meeting was conducted to make a decision."In addition, Ms. Seravalli has provided an affidavit indicating that she is in charge of legal matters at ORBCOMM. In her affidavit, she represents that (1) the specific purpose of the October 13, 1998 meeting was to discuss ORBCOMM's legal options for addressing SATCOM's nonperformance under the licensing agreements, (2) she prepared for and was present at the meeting for the purpose of rendering legal advice to the Executive Committee, and (3) "apart from pleasantries, those communications consisted either of confidential communications to me for the purpose of obtaining legal advice, or legal advice rendered by me to ORBCOMM."

ORBCOMM has provided sufficient information to support its invocation of the attorney client privilege as to the communications at the meeting.[2]Both Mr. Halley and Ms. Seravalli make clear that the purpose of the meeting was exclusively to make a decision with respect to the default letter, that Ms. Seravalli was present to render legal advice on that issue, and that all communications were to that end. There is no suggestion that this was a meeting with a general business purpose that only touched tangentially on the question of the licensing agreements. Importantly, the subject matter of the meeting is specifically related to what Mr. Halley indicated were Ms. Seravalli's main legal duties as general counsel, namely advising ORBCOMM on its contractual exposure. This information is sufficient to demonstrate that the purpose of the meeting was to make a *legal* decision to terminate a *legal* relationship with SATCOM and that Ms. Seravalli was present to provide advice in the making of this decision. The mere fact that this legal decision had commercial ramifications does not alter this conclusion.

[2] SATCOM's specific requests for additional information relate to the substance of conversations and hardly count as the type of general subject matter necessary to decide whether the assertion of the privilege is proper.

***3** In sum, Virginia law allows assertion of the privilege over all communications at the Executive Committee meeting. There is no need for additional disclosure prior to assertion of the privilege.[3]The limited Virginia case law dealing with such meetings supports this conclusion. *See Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 350 (4th Cir.1979) (analyzing similar situation but requiring disclosure because of interest of shareholders) (vacated due to settlement). In addition, other courts applying a standard similar to Virginia's have taken an even broader approach, allowing assertion of the privilege over all communications at a strategy and policy committee meeting that included both legal and business decisions so long as those decisions were arrived at "only after examining the legal implications of doing so."*Kelly v. Ford Motor Co.*, 110 F.3d 954, 966 (3d Cir.1997). As a result, ORBCOMM has carried its burden to establish that the communications from the October 13, 1998 Executive Committee meeting are protected by the attorney-client privilege.

[3] Specifically, SATCOM seeks the following information, "Which alleged defaults, if any, did the Executive Committee discuss? Did it discuss the general subjects of SATCOM's efforts to obtain country licenses in the territory, to market the ORBCOMM system or to procure and prepare the land for a Gateway Earth Station? Did it discuss SATCOM's on-going negotiations with INMA and ARAMCO in Saudi Arabia?"

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All Citations

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SO ORDERED:

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