

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

TULIP COMPUTERS INTERNATIONAL	:	
B.V.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 00-981-### (MPT)
	:	
DELL COMPUTER CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

At Wilmington this **15th** day of **November, 2002**,

This Memorandum Order will address Dell’s motion to compel production, D.I. 274. This court previously made limited findings regarding the issues raised by the parties in relation to this motion in its Memorandum Order of October 2, 2002. *D.I. 317*. Pursuant to that Order, Dell was to identify to Tulip five documents from each of Groups 1, 2, 3 and 6 and three documents from Group 5, which Tulip was then required to produce to the court along with all the documents from Group 4 for an *in camera* review. Tulip produced the documents on October 15, 2002.¹ The court has reviewed those documents that it was able to read. *See, n. 1*. Guided by its prior analysis, the court makes the following findings:

*Group 2*²: This grouping contains the Murtha documents. As noted in the

¹Of the 26 documents produced, approximately half were in Dutch. According to the transmittal letter from Tulip’s counsel, translations for those documents were to follow. The court received those translations on November 7, 2002. As a result, this Order will only address those documents that were in English which are groups 2, 3 and 4.

²The court reviewed documents 149, 152, 172, 181and 184 from this group.

court's prior order, Mr. Murtha was a business consultant³ retained by Tulip to proselytize the '621 patent.⁴ Tulip had argued that the Murtha documents were privileged and/or protected from disclosure under attorney work product since Murtha was acting at the direction of Tulip's counsel. The only counsel clearly identified under whose direction Murtha was acting was Tulip's Dutch attorney, Ruprecht Hermans. See, *D.I. 276 Ex. 8 at 47; D.I. 302, Ex. A at ¶ 4*. During the letter briefing and oral argument, the only Dutch law provided to the court was Article 165 (formerly 191), which initially provides that a summoned witness has the obligation to testify. Under subsection (2)(b), an exception applies to this general rule which allows "persons who are obligated to maintain confidentiality as a result of their profession with respect to information which has been entrusted to them in the capacity of their profession" to invoke the privilege of non-disclosure. The court was also provided with Dutch case law regarding this statute and the application of privilege to patent attorneys. However, the court was never advised whether anything similar to attorney work product exists under Dutch law. Although Murtha testified that at the time of his initial involvement,⁵ Tulip was considering the possibility of a lawsuit, no evidence has been provided that the documents prepared by Murtha were at

³Murtha is the President and CEO of Fairfield Resources International. As noted by his affidavit, he was retained by Tulip to assist it in obtaining royalties from Dell in connection with Tulip's '621 patent. See, *D.I. 302 , Ex. A ¶ 4*.

⁴Since the original letter memoranda and oral argument regarding Tulip's privilege log and privilege documents, the parties have filed additional letter memoranda. On September 9, 2002, Tulip initiated the first volley by filing the affidavit of Mr. Murtha which provides some limited information regarding the relationship and when it began between his company and Tulip. *D.I. 302* Dell objected to both the letter and affidavit for a variety of reasons on September 16, 2002. *D.I. 305*. In the fight for the last word, Tulip responded on September 18, 2002. *D.I. 307*. However, Dell trumped by filing another letter on September 25, 2002. *D.I. 313*. Despite Dell's objections, in reaching its conclusions regarding whether the Murtha documents are privileged, the court considered the affidavit of Mr. Murtha and its attachments, and by so doing in essence, denied Dell's objections.

⁵Although hotly contested, Murtha's involvement with Tulip on this matter appears to have occurred sometime prior to June 1999.

the direction of an attorney practicing in the United States.⁶ Certainly, the court's review of the five documents selected by Dell does not indicate that any United States counsel representing Tulip was involved and for that matter, copied. Most of the documents reviewed relate to business discussions between Murtha and business representatives of Tulip regarding strategies and approaches to licensing of the '621 patent. Even those documents that are directed or copied to Dutch counsel predominantly involve commercial matters relating to the '621 patent, not legal issues or legal advice (the seeking or providing of such advice) and therefore, do not fall within the protection of privilege. See, *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977); *Union Carbide Corp. v. Dow Chemical Co.*, 619 F. Supp. 1036 (D. Del. 1985); *American Standard v. Pfizer, Inc.*, 229 U.S.P.Q. 897 (De. Del. 1989); *RCA v. Data General*, C. A. No. 84-270-JJF (D. Del. 1986); *Synalloy Corp. v. Gray*, 142 F.R.D. 266 (D. Del. 1992). Further, although document 149 contains correspondence from Cees Stulemeijer, who has been identified as a Dutch patent attorney, based on this court's prior decision regarding the law of the Netherlands, it does not appear that Mr. Stulemeijer's letter falls within the exception under Article 165(2)(b), since the information conveyed relates to and falls outside the parameters of a patent attorney as discussed in the Dutch case, *Bruil v. Tital International*, NJ 1989, 563.

Although the matters addressed in the documents reviewed may be confidential, they do not fall within the attorney-client privilege since none appeared to have been made for the purpose of securing primarily either an opinion of law or legal services

⁶Murtha did testify that by July 26, 2000, Robins Kaplan (Unites States counsel for Tulip) was working with him and had been retained by him, but he could not recall when that relationship started. See, *D.I. 297, Ex. D.*

or assistance in some legal proceedings.⁷ Nor do they fall within the protection of the attorney work product doctrine. The possibility of litigation may have been addressed in the reviewed documents, but there is nothing to indicate that they primarily contain the mental impressions, opinions, conclusions, observations or legal theories of an attorney or that the reviewed documents were necessarily prepared in anticipation of litigation or under the direction of an attorney. *Houdstermaatschaap B.V. v. Apollo Computer, Inc.*, 707 F. Supp. 1429 (D. Del. 1989). The clear purpose of the Murtha documents reviewed was to promote the licensing of the '621 patent. Therefore, whether the Murtha documents touch base⁸ with the United States or whether they are subject to some privilege under Dutch law, in the absence of evidence of applicable Dutch law and the clear indication from this court's review of the exemplar documents that no federal privilege law attaches, the Murtha documents are discoverable. The only exception is paragraph 2 (following the sentence that ends in granted) of a letter dated August 17, 1999 from Mr. Deitz, Tulip's patent counsel in Europe to Mr. Murtha, bates numbered TPL1 037320 contained in document 149. Based on the court's prior interpretation of Dutch law, it appears that this paragraph would be subject to privilege and therefore, should be excluded from discovery. Similar information that may be provided in other Murtha documents not examined by this court would likewise not be discoverable. However, based on the documents reviewed, it would seem that such redactions from the Murtha documents would be limited.

⁷Mr. Murtha may have been initially contacted by a Dutch attorney to provide his commercial non-legal services to Tulip. Mr. Murtha was also required to sign a confidentiality agreement. However, the documents reviewed do not suggest that, in general, after the initial contact that any attorney was involved in the exchange of correspondence and other materials regarding licensing efforts.

⁸Since the information requested or exchanged related to the licensing of the '621 and commercial information regarding Dell and other computer manufacturers, it appears that the Murtha documents primarily touch base with the United States as under *Houdstermaatschaap B.V. v. Apollo Computer, Inc.*, 707 F. Supp. 1429, 1444-45 (D. De. 1989). None of the Murtha documents reviewed relate to the prosecution of a patent in the Netherlands.

Group 3: These documents relate to Cees Stulemeijer. In general, they are correspondence either received or sent by him to or from Mr. Murtha. As noted in the court's October 2 opinion, he is an in-house patent attorney in the employ of Tulip. Further, as indicated in the discussion above regarding the Murtha documents, most of those documents are discoverable. As a result, a similar analysis would apply to the Stulemeijer documents.

Document 139 consists of a two page letter dated May 10, 2000 from Stulemeijer to Murtha which is also part of document 149 in Group 2. Since the court has previously addressed this document and has determined that it is not subject to any federal privilege or any known Dutch non-disclosure protection, it shall be produced. Documents 139 and 141 are the same and consist of two different letters or e-mail (with a total of three documents) from Murtha to Meermans (of Tulip) and Stulemeijer sent in the March/April 2000 time frame. Bates No. TLP 1 037296 is a March 3, 2000 one page document to Stulemeijer and Hermans (Tulip's outside attorney at law). All of the documents relate to licensing efforts with Dell. Based upon the court's previous conclusions regarding Group 2, these documents shall be produced.

Document 142 is a one page letter dated January 14, 2000 from Murtha to Stulemeijer. From the court's review no privileged information under federal law and known Dutch law appears in this letter. Moreover, it appears that some of the information contained therein had been conveyed to Dell. Therefore, it shall be produced.

Document 173 is a one page e-mail from Murtha to Stulemeijer. In light of the contents of the e-mail and this court's prior conclusion regarding Group 2, it shall be produced.

Document 246 is a two page e-mail from Murtha to Stulemeijer and

Meermans dated April 4, 2000. Again, based on the findings regarding Group 2, no privilege applies and the document is discoverable.

As a result, based upon the exemplar documents reviewed and this court's reasoning regarding the Murtha document (Group 2), all Stulemeijer documents are subject to production. The limited area not subject to production in these documents shall be the same or similar area as in the Murtha documents.

Group 4: All three documents (20, 58 and 59) contained in this group relate to W.E.M. ten Cate, a Dutch patent attorney with the Vereenigde firm, the outside firm that represents Tulip. These three documents are copies of the same five page letter dated August 23, 2000 from ten Cate to Mr. van den Berg, the CEO of Tulip, relating to the '621 patent and European patent. The documents provides legal advice and a legal review of these patents. Based upon this court's prior analysis of Dutch law, these documents fall within the privilege of non-disclosure since they involve information entrusted and sought in the capacity of his profession. See, *Article 165 (2)(b)* of the Dutch Code of Civil Procedure; *Bruil v. Tital International, NJ 1989, 563*. Therefore, these documents are not discoverable.

As a result,

IT IS ORDERED that Tulip shall produce all Group 2 (Murtha) documents and all Group 3 (Stulemeijer) documents consistent with this Memorandum Order on or before **December 9, 2002.**

Mary Pat Thyng
UNITED STATES MAGISTRATE JUDGE