

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

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Date Decided: March 3, 2010

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Re: *W.L. Gore & Associates, Inc. v. Darrell Long and BHA Group, Inc.*,  
Civil Action No. 4387-VCP

Dear Counsel:

I have reviewed the unredacted copy of Mr. Pacilio's email dated April 8, 2009 that GE Energy submitted *in camera* and have concluded the document must be produced in unredacted form. The excerpt redacted from the copy previously produced arguably qualifies as an attorney-client privileged communication and for protection under the work product doctrine. Factual issues exist, however, as to whether GE Energy's in-house counsel Scott Blair received the email and, if he did, whether he actually read it. Based on the substance of the redacted excerpt and Blair's testimony that he did not recall seeing the Pacilio email until August 2009, four months after it was sent, I

conclude that Gore has shown a substantial need for the unredacted copy of the email sufficient to overcome the claim of work product under Court of Chancery Rule 26(b)(3).

In addition, I find that a complete copy of the Pacilio email should be produced, notwithstanding the apparently privileged nature of the redacted excerpt, based on the “at issue” exception to the attorney-client privilege,<sup>1</sup> the crime/fraud exception,<sup>2</sup> or both. The nature of the Pacilio email and its relevance to GE Energy’s good faith in responding to Gore’s discovery requests have put the state of mind of GE Energy and, in particular, its in-house counsel Blair at issue. Moreover, the redacted version of the Pacilio email suffices to create a prima facie showing that Pacilio may have sought the services of a lawyer to aid him in committing what he knew or reasonably should have known to be a fraud. Such a showing would vitiate GE Energy’s claim of privilege in the Pacilio email. Accordingly, I hereby order GE Energy to produce the Pacilio email in unredacted form within two business days of the date of this letter.

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<sup>1</sup> See *Alaska Elec. Pension Fund v. Brown*, 2010 WL 376856, at \*5 (Del. Jan. 14, 2010); *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1218674, at \*2 (Del. Ch. Apr. 13, 2007) (citing *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 59 (Del. Ch. 2005)) (Under the at issue exception, a party waives the attorney-client privilege when “it (1) injects the attorney-client communications into the litigation; or (2) injects an issue into the litigation, the truthful resolution of which requires an examination of attorney-client communications.”).

<sup>2</sup> Del. R. Evid. 502(d) (“There is no privilege [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.”); see also *Princeton Ins.*, 883 A.2d at 54; *In re Sutton*, 1996 WL 659002, at \*9 (Del. Super. Aug. 30, 1996).

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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