Docket: **SUCV2016-3726-BLS2**
Date: **July 20, 2017**
Parties: **JOHN J. MOONEY and MORGAN D. WHEELOCK, Plaintiffs vs. DIVERSIFIED BUSINESS COMMUNICATIONS, DBC PRI-MED, LLC, THEODORE WIRTH, KATHY WILLING, and OAKLEY DYER Defendants**
Judge: **/s/Janet L. Sanders**

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFFS' MOTION TO COMPEL

This case involves a dispute among members of a limited liability company. Plaintiffs, who own a minority interest in the company, are suing (among others) the entity holding a majority interest. Also named as a defendant is the company itself. The case is now before the Court on plaintiffs' Motion to compel certain discovery. Part of the motion raises routine issues regarding the relevance of materials sought; this Court's resolution of those issues is contained in Part One of this opinion. The motion also raises difficult questions concerning attorney client privilege—specifically, whether a former officer of a company can obtain communications between corporate counsel and the corporation exchanged when he still worked for the company but where he is now adverse to the corporation itself. This Court concludes that neither plaintiff can claim to be a holder of the privilege so as to gain access to these communications. The reasons for that conclusion are spelled out in Part Two of this opinion.

BACKGROUND

Defendant Pri-Med LLC is a Delaware limited liability company that provides in-person and digital continuing medical education to medical practitioners, in part through the use of electronic health records software and data analytics tools. The defendant Diversified Business Communications (Diversified) owns approximately 75 percent of Pri-Med. The individual defendants are Diversified officers and serve on Pri-Med's Board of Managers. Plaintiff John Wheelock and John Mooney each hold a five percent interest in Pri-Med. Up until the end of 2016, both plaintiffs were part of Pri-Med's senior management: Wheelock was a senior Vice President in charge of Sales and plaintiff John Mooney was Pri-Med's CEO.

At issue in this lawsuit is the plaintiffs' right to require Diversified to buy out their interest in Pri-Med after January 1, 2017. That right is laid out in an LLC agreement among the parties. The amount that Diversified is required to pay is based on the appraised value of Pri-Med as of December 31, 2016. Plaintiffs contend that, leading up to that date, the defendants took steps to depress Pri-Med's value so as to decrease the amount that Diversified would have to pay to the minority shareholders in a buy-out of their interests. One of those steps was a decision by Diversified to sell off one of Pri-Med's most valuable assets, Amazing Charts (AC), an electronic health records company. As alleged by plaintiffs, Diversified and its Board had concluded in September 2015 that AC was more valuable as part of Pri-Med, but then abruptly changed course and decided to put AC on the market when the defendants realized that keeping AC would require Diversified to pay plaintiffs substantially more. In their Second Amended Complaint, plaintiffs allege a breach of fiduciary duty and a breach of the LLC Agreement.

Plaintiffs' motion seeks to compel production of two categories of documents. The first concerns minutes of Diversified's Board of Directors. Defendants have produced a redacted version of those minutes so as to eliminate discussion of matters that are not directly related to Pri-Med. Plaintiffs seek the minutes in unredacted form. The second category concerns communications among the defendants and Diversified's management team concerning the valuation of Pri-Med preceding its buyout of another

individual's equity interests. That individual, Lynn Long, had threatened to sue the company. The defendants have withheld certain otherwise responsive documents based on a claim of attorney-client privilege. This Court's rulings on these requests are as follows.

1. Diversified Board Minutes

Defendants oppose production of the unredacted copies of the Board minutes on the grounds that the withheld material is not relevant to any claim or defense in this action. It points out that Diversified has other holdings, and that the redacted information relates to Diversified's overall business strategy and financial operations unrelated to Pri-Med. Plaintiffs contend, however, that central to the case is their claim that Diversified was acting in its own self-interest and in disregard of its duties to Pri-Med and its minority members. They argue that Diversified's financial status, information about its overall business strategy, and discussion among Board members about the impact of a buy out on Diversified's other operations could provide some support for plaintiffs' position. This Court agrees. Certainly, production would not be burdensome, and defendants have agreed to keep the information confidential, for use in this litigation only. The Motion is therefore ALLOWED as to this category of documents.

2. Communications Withheld on Grounds of Privilege

The second category of documents that plaintiffs seek are communications among the defendants in 2015 and 2016 about the valuation of Pri-Med in connection with a buy out of Lynn Long's equity interests. The defendants have withheld certain documents based on a claim of attorney-client privilege (Pri-Med being the "client"). They have identified those documents in a privilege log – a designation which plaintiffs question. [1] Plaintiffs assert that, even if the documents are covered by the attorney-client privilege, however, plaintiff Mooney is nevertheless entitled to access them since, as a former CEO of Pri-Med, he holds the privilege jointly with Pri-Med, thus preventing the defendants from using privilege to prevent him access to the information. Resolution of this dispute raises two thorny questions. First, which law -- Delaware or Massachusetts law – should this Court apply? Second, if Massachusetts law applies, what is the result? The SJC has provided only limited guidance on these questions. This Court nevertheless concludes that Massachusetts law applies and that under Massachusetts law, Mooney as former CEO cannot access them given his adverse relationship to Pri-Med.

The choice of law issue an important one because Delaware law and Massachusetts law would (in this Court's view) require different outcomes on the privilege issue. Delaware, along with a few other courts, has adopted the so-called "collective-corporate-client" approach, which was first recognized in the Delaware Chancery Court. See Kirby v. Kirby, 1987 Del. Ch. LEXIS 463, at *18-19 (Del. Ch. July 29, 1987); Moore Bus. Forms, Inc. v. Cordant Holdings Corp., 1996 Del. Ch. LEXIS 56, at *13 n.4 (Del. Ch. June 4, 1996); see also, e.g., Gottlieb v. Wiles, 143 F.R.D. 241, 246-247 (D. Colo. 1992); Glidden Co. v. Jandernoa, 173 F.R.D. 459, 473-474 (W.D. Mich. 1997); Inter-Fluve v. Montana Eighteenth Judicial Dist. Ct., 327 Mont. 14, 24 (2005). Under this approach, former directors or officers are entitled to privileged communications created during their tenure because both the corporation and the then-current officer or director are viewed as joint clients (or separate parts of the collective corporate client) at the time the communications occurred. See Montgomery v. eTreppid Techs., LLC, 548 F. Supp. 2d 1175, 1183-1185 (D. Nev. 2008) (explaining this approach). Courts embracing this theory reason that "because [directors/officers] are collectively responsible for the management of a corporation and a corporation is an inanimate entity that cannot act without humans, it is consistent with a [director/officer's] role and duties that the [director/officer] be treated as a joint client when legal advice is rendered to the corporation." Id. at 1183-1184. The corporation cannot therefore use a claim of privilege against the former officer or director, even where there interests are no longer aligned.

In jurisdictions outside of Delaware, the majority of courts have adopted "the entity is the client" approach. See, e.g., Fitzpatrick v. American Int'l Grp., Inc., 272 F.R.D. 100, 107-109 (S.D.N.Y. 2010); Montgomery, 548 F. Supp. 2d at 1187; Lane v. Sharp Packaging Sys., Inc., 251 Wis.2d 68, 99 (2002); Milroy v. Hanson, 875 F. Supp. 646, 649-650 (D. Neb. 1995). These courts hold that, despite the fact that a corporation can only act through individuals, officers and directors are not properly viewed as joint, independent clients of corporate counsel; the corporation alone is the client. Applying this approach, these courts do not permit former officers and directors to access privileged information for use in litigation where the corporation asserts a privilege. This doctrine represents the modern trend. See Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct., 331 P.3d 905, 913 (Nev. 2014); Todd Presnell & Kristi Wilcox, What's Mine is Not Yours: Former Officers and Directors and a Corporation's Attorney-Client Privilege, Lexology (Jan. 5. 2015).

The courts that have adopted the "entity is client" theory have done so because of certain perceived flaws with the collective-corporate-client approach. First, the approach is inconsistent with the rationale behind the attorney client privilege. The prospect that a director/officer could invade the privilege if he later leaves and sues the corporation could have a chilling effect on the candid communications between corporate managers and counsel that the privilege is designed to promote. Second, the approach conflates the director/officer's role as an individual and his role as a corporate representative, ignoring the fact that, in communicating with counsel, a director/officer acts in a fiduciary capacity and not in an individual capacity. Once the officer/director leaves his position, he no longer bears any fiduciary responsibilities and so there is no reason for him to need or expect access to the privileged communications made while he served the corporation. Third, the approach perversely allows a former director/officer to "weaponize" the fact that he previously had corporate fiduciary obligations, using them to invade the company's privilege for his own personal interests at the expense of the corporation's interests.

The SJC has yet to explicitly address whether a former director or officer can access privileged communications created during his tenure and thus has not indicated which of the two approaches it would follow to resolve this question. However, the recent decision of Chambers v. Gold Metal Bakery, Inc., 464 Mass. 383 (2013) suggests that the SJC would join the majority of courts and adopt the "entity is the client" approach. In Chambers, the SJC held that a current director of a corporation is entitled to privileged communications in equal measure with other directors unless his interests are adverse to the interests of the corporation regarding the matter that is the subject of the communications. Id. at 391. The Court emphasized that as a general matter, a corporate director is entitled to access legal advice so that he may carry out his fiduciary duties and managerial responsibilities, but that "this general proposition is not a per se guarantee," since the proposition is "based on the assumption that the interests of the directors are not adverse to the interests of the corporation on a given issue." Id. at 394-395. It went on to state:

The idea that a director whose interests are adverse to those of a corporation on a given issue is not automatically entitled to access a corporation's confidential communications with counsel furthers the policy rationale underlying the attorney-client privilege: it promotes candid communications between attorneys and organizational clients. See Upjohn Co. v. United States, 449 U.S. 383, 389-390 (1981). It guards against the unfair disadvantage that would result if a director with adverse interests, and who seeks to vindicate those interests against a corporation, could access the corporation's confidential communications with counsel. It also comports with the notion of fiduciary responsibility. A director advancing interests shared with the corporation should be entitled to the associated privilege of access to legal advice furnished to a corporation. A director motivated by adverse interests is not so entitled. Lane v. Packaging Sys., Inc., 251

Wis. 2d 68, 94 (2002).

The Court's rationale is significant because it mirrors the reasons which prompted other courts to adopt the "entity is the client" approach. Like those courts, the SJC was concerned with upholding the purpose of the privilege (candid exchanges with attorneys) and with ensuring that privileged communications are used only for the satisfaction of fiduciary duties owed to the corporation and not for purposes that are adverse to the corporation's interest. Former directors or officers have no fiduciary duties and therefore no reason to access privileged information other than to advance personal interests.

The plaintiffs read Chambers differently. Specifically, they contend that where (as here) there was no adversity of interest between the former officer/director and the company at the time of the communication, privileged documents may not be withheld. But the SJC's analysis does not turn on when the privileged information was created but why the information is sought --that is, whether it is to serve the individual's interest or the corporation's interest. The SJC's reference to Lane, a Wisconsin case, is significant: in adopting the "entity is the client" approach, the Wisconsin Supreme Court noted that "the standard to determine if the lawyer-client privilege applies should be based on why the information is requested, not when the documents are prepared." Lane, 251 Wis. 2d at 94 (emphasis added). In the instant case, Mooney is clearly seeking the communications to further his own personal interest, not that of Pri-Med. That his interests were not adverse to Pri-Med at the time the communications were exchanged is irrelevant.

Because there is indeed a conflict between Massachusetts and Delaware law in connection with the present discovery dispute, the Court must determine which law applies. Massachusetts appellate courts have not directly addressed which standard must be used to resolve a conflict of laws question with respect to privilege in the corporate context. The plaintiffs argue that the analysis should be undertaken using the so-called "internal affairs doctrine," a choice-of-law principle articulated in the Restatement (Second) of Conflict of Laws, § 302 which says that the law of the state in which a corporation is incorporated (here Delaware) should be applied to issues concerning relationships among or between the corporation and its officers, directors and shareholders. Certainly, Massachusetts has long recognized the internal affairs doctrine. See Harrison v. NetCentric Corp., 433 Mass. 465, 471 (2001) (using doctrine to conclude that Delaware law applied to a breach of fiduciary duty claim). However, no Massachusetts court has employed the doctrine in connection with a privilege issue. Moreover, the purposes behind the doctrine do not seem to be directly applicable where the issue concerns attorney-client communications.

The internal affairs doctrine is intended to govern "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders," such as the fiduciary duty owed to shareholders. NetCentric Corp., 433 Mass. at 470. Privilege issues, however, arise in the context of litigation and discovery matters more generally; they are not "peculiar to" the corporate context. Whether a privilege exists turns on the relationship between client and counsel, not on matters specific to corporate governance. But see Barr v. Harrah's Entm't, Inc., 2008 U.S. Dist. LEXIS 26018, at *6 (D.N.J. Mar. 31, 2008) (applying New Jersey choice of law rules and concluding with minimal explanation that, pursuant to the internal affairs doctrine, Delaware law applied to issue of whether former director had right to review otherwise privileged documents). This Court also finds it significant that the Restatement (Second) of Conflict of Laws provides a conflict of laws rule specifically for privileged communications, directing courts to apply the law with "the most significant relationship" to the communications. See Restatement (Second) of Conflict of Laws, § 139. But Section 139 makes no reference at all to Section 302 of the Restatement describing the internal affairs doctrine.

Such a reference would be expected if the internal affairs doctrine were to be an exception to the general rule articulated in Section 139.

Applying the test outlined in Section 139 of the Restatement (a section embraced by the SJC in other contexts), this Court concludes that Massachusetts has the most significant relationship to the issue at hand. Pri-Med is based in Massachusetts and directs substantially all its operations from the state. Pri-Med made and received the privileged communications in Massachusetts. Those communications reflected legal advice sought and rendered in the state by local attorneys. They were made in connection with disputes that arose in the state. Massachusetts law thus applies to the question of whether Mooney as a former director of Pri-Med has access to communications between and among Pri-Med and its corporate counsel. If Massachusetts law is as this Court has construed it, Pri-Med is not prevented from asserting a privilege as to Mooney.

The plaintiffs' motion also questions whether the defendants have properly asserted the privilege as to the documents listed on the privilege log. This Court agreed to conduct an in camera review of those documents. Finally, at the hearing on the motion, plaintiffs' counsel raised a question of waiver as to certain documents. This Court agreed to allow defendants time to respond to the waiver argument. Thus, whether documents will actually have to produce even with this Court's ruling today as to the privilege issue, remains an open question and will be decided by separate order.

/s/Janet L. Sanders
Justice of the Superior Court

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[1] At a hearing on the instant motion, this Court agreed to review in camera those documents withheld by plaintiffs to determine whether they are properly listed as privileged. This Court will issue a separate order following that review.