IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE FUQUA INDUSTRIES, INC.,)	CONSOLIDATED
SHAREHOLDER LITIGATION)	Civil Action No. 11974

MEMORANDUM OPINION

Date Submitted: December 3 1,200 1
Date Decided: May 2,2002

Pamela Tikellis, of CHIMICLES & TIKELLIS, Wilmington, Delaware; Joseph A. Rosenthal, Carrnella P. Keener, of ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: Lowell E. Sachnoff, Duane F. Sigelko, of SACHNOFF & WEAVER, LTD., Chicago, Illinois; David Schachman, of DAVID SCHACHMAN & ASSOCIATES, P.C., Chicago, Illinois, Attorneys for Plaintiffs.

Thomas R. Hunt, Jr., David J. Teklits, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; OF COUNSEL: Oscar N. Persons, of ALSTON & BIRD, Atlanta, Georgia, Attorneys for Defendant J. B. Fuqua.

R. Franklin Balotti, Anne C. Foster, Peter B. Ladig, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware, Attorneys for Nominal Defendant Fuqua Industries, Inc.

CHANDLER, Chancellor

Before me is plaintiffs' third motion to compel defendants Fuqua Industries, Inc. and J. B. Fuqua to produce documents claimed to be privileged.[1] The parties fully briefed this motion and I have conducted *an in camera* inspection of the documents in dispute. This is my decision on the plaintiffs' motion.

I. INTRODUCTION

The numerous claims originally asserted by the plaintiffs were whittled down to one by this Court's 1997 decision on defendants' motion to dismiss plaintiffs' second amended complaint. That decision resulted in the dismissal of all of the plaintiffs' class claims and all but one of their derivative claims.[2] The sole surviving derivative claim concerns the decisions of the defendant directors of Fuqua Industries, Inc. ("FII") to exempt its principal shareholder, Triton Group, Inc. ("Triton"), from 8 Del. C. § 203 and to repurchase 4.9 million Fuqua shares. These decisions were allegedly made for the purpose of increasing Triton's control over FII, entrenching the FII board and, consequently, denying FII shareholders a change of control premium.[3] The asserted purpose of the motion to compel currently before me is to gather evidence in furtherance of that claim.

---

[1] The factual and procedural history of this case are set forth in this Court's 1999 opinion concerning the adequacy of representation, as mandated by Rule 23.1, of the named plaintiffs in this *case. See In re Fuqua Indus., Inc. Shareholder Litig., 752* A.2d 126 (Del. Ch. 1999).

[2] *See In re Fuqua Indus., Inc. Shareholder Litig.,* Del. Ch., C.A. No. 11974, mem. op., Chandler, V.C. (May 13, 1997).

[3] *In re Fuqua, 752* A.2d at 128.

Specifically, the motion requests, pursuant to Rule 37(b) and this Court's September 17, 1999 letter opinion,[4] an order compelling defendants FII and J.B. Fuqua to produce 138 documents identified by the plaintiffs from the defendants' various privilege logs. The bases for the plaintiffs' assertion that these documents should be produced are: (1) that no author or recipient is specified in the relevant privilege logs as required under this Court's Order to sustain a claim of privilege; (2) waiver of the attorney-client privilege; (3) that documents did not contain legal advice; and/or (4) that plaintiffs have shown good cause for the production of all of the specified documents.

Because I find that the plaintiffs have demonstrated good cause why the attorney-client privilege should not apply, I grant the plaintiffs' motion with regard to all requested documents except for those I have determined, through ***in camera*** inspection, to be work product prepared in contemplation of this litigation and eight documents withheld from production by defendant J. B. Fuqua.[5]

---

[4] *In re Fuqua Industries, Inc. Shareholders Litig.,* Del. Ch., let. op., Chandler, C. (Sept. 17, 1999).

[5] In their reply brief, the plaintiffs state that if the eight documents J. B. Fuqua has asserted are privileged "make no reference to Triton's proposed business combination with FII, to change-of-control or to the general context in which J.B. Fuqua's sale of stock to Triton was to take place (matters which Plaintiffs cannot determine from the log entries), Plaintiffs will concede that they do not require production of that document." Pls.' Reply Br. at 11. Those documents were provided to *the Court* for *in camera* inspection under cover of a letter dated November 6, 2001, from Thomas R. Hunt, Jr.; Esquire, counsel for Mr. Fuqua, to the Court. After examination of those documents, I determined that none of the subjects listed by the plaintiffs are referenced in

II. APPLICABLE LEGAL STANDARDS

A. Scope of Discovery and the Attorney-Client Privilege

The scope of discovery permitted in this Court is set forth in Court of Chancery Rule 26(b)(1).[6] The broad discovery permitted by Rule 26(b)(l) is limited to the extent that the party from whom discovery is demanded can properly assert a claim of privilege. The burden of establishing a privilege is on the party asserting that privilege.[7] Defendants assert that the documents subject to the plaintiffs' motion to compel are protected by the attorney-client privilege and produced privilege logs in support of that assertion. Rule 502(b) of the *Delaware Uniform Rules of Evidence* sets forth the scope of the attorney-client privilege in Delaware:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's

---

any of those documents and, therefore, by the plaintiffs' own admission, production of those eight documents is not required.

[6] Rule 26(b)(1) states:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought. appears reasonably calculated to lead to the discovery of admissible evidence.

[7] *Deutsch v. Cogan, 580* A.2d 100,107 (Del. Ch. 1990).

> representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

The purpose of the attorney-client privilege is "to encourage full and frank communication between clients and their attorneys."[8] As others have noted, however, "an inevitable conflict arises" when a corporation asserts the attorney-client privilege in the context of a shareholder derivative action.[9] A claim of attorney-client privilege made on behalf of a corporation may only be asserted "through its agents, *i.e.*, its officers and directors, who must 'exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.'"[10] The "inevitable conflict" develops when a shareholder, who is the intended beneficiary of the acts of his corporation's agents, claims those agents have acted inimically to the interest of the corporation and its shareholders. As the *Deutsch* Court explained:

> Where a fiduciary has conflicting interests, to allow the lawyer-client privilege to block access to the information and basis of its decisions as to the persons to whom the obligations are owed might allow the perpetration of frauds. A fiduciary owes an obligation to his beneficiaries to go about his duties without obscuring reasons from the legitimate inquiries of the beneficiaries. Moreover, "[t]he more general and important right of those who look to fiduciaries to safeguard their interests, to be able to determine the proper

[8] *Zim v. VLI Corp.*, 621 A.2d 773,781 (Del. 1993).
[9] *Id.*
[10] *Id.* (quoting *Commodity Futures Trading Coma'n v. Weintraub*, 471 U.S. 343, 349, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372 (1985)).

> functioning of the fiduciary, outweighs the need for the privilege and its base of attorney-client confidence.“”

Despite this reasoning, however, “discovery of lawyer-client confidential communications is not automatic.”[12] The purpose of fostering full and frank communication between attorney and client is not lessened merely because the client is a corporation. In determining the scope of the attorney-client privilege available to a corporate client, the United States Supreme Court has noted:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. [13]

The need to balance the legitimate assertion of the attorney-client privilege by corporate fiduciaries in furtherance of full and frank communication with counsel, on the one hand, with the right of a derivative plaintiff to discover what advice was given to those fiduciaries when a breach of duty by those same fiduciaries is alleged, on the other, resulted in a doctrine whereby a plaintiff-shareholder can show “good cause” why a corporation’s claimed attorney-client

---

[11] ***Deutsch, 580*** A.2d at 108 (quoting ***Valente v. Pepsico,*** Inc., 68 F.R.D. 361, 369-70, n.16 (D.Del. 1975)) (alteration in original) (citations omitted).

[12] ***Deutsch, 580*** A.2d at 106.

[13] ***Upjohn Co. v. United States,*** 449 U.S. 383, 393, 101 S.Ct. 677, 684, 66 L.Ed.2d 584 (1981); see ***also, id.*** at n.2 (stating that in the absence of the privilege, “the depth and quality of [legal communications between corporations and legal counsel], to ensure compliance with the law would suffer”).

privilege does not attach to the contents of otherwise-protectable communications.

B. "Good Cause" and the Non-application of the Attorney-Client Privilege

The Court in *Garner v. Wolfinbarger* explained that in the face of an assertion of attorney-client privilege by a corporation, a shareholder who is bringing a derivative action may be able to demonstrate good cause why that privilege should not apply.[14] *Garner* identified a non-exclusive list of factors that a court may consider in determining whether good cause has been shown to permit discovery of documents to which the attorney-client privilege would otherwise attach. These factors are:

> [1] the number of shareholders and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [and 9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons."

---

[14] *430* F.2d 1093, 1103-04 *(5th Cir.* 1970), *cert. denied,* 401 U.S. 974 (1971).
[15] *Id.* at 1104.

In ***Deutsch*** v. *Cogan* this Court noted its approval of the ***Garner*** approach to determining the applicability of the attorney-client privilege in shareholder suits. [16] Before the Court considers whether a showing of good cause compels production of purportedly privileged documents, however, the "litigant [must] first establish that a mutuality of interest existed between the parties"" at the time the disputed communication was made.'* This mutuality of interest exists when a fiduciary (such as a corporate director) seeks legal advice in connection with actions taken or contemplated in his role as a fiduciary. Because the director is obligated to act in the best interest of the corporation and its shareholders, there is a mutuality of interest among the director, the corporation, and the shareholders when such legal advice is sought. It is logical, therefore, that upon a showing of good cause, the attorney-client privilege does not attach to prevent a plaintiff-shareholder-for whose ultimate benefit that advice was sought-from discovering the contents of that communication. At the point in time when the interests of the fiduciary and the beneficiary diverge, however, there is no longer a mutuality of interest and a ***Garner*** analysis is not appropriate. Although there is little Delaware case law on

---

[16] 580 A.2d 100, 106 (Del. Ch. 1990) (noting that ***Garner*** provided a "workable and logical framework for analyzing claims of lawyer-client privilege in the context of shareholder suits").
[17] ***The Continental Ins. Co. v. Rutledge & Co., Inc.,*** 1999 WL 66528 at *2 (Del. Ch.).
[18] ***Id.*** at *2 n.17; see ***also, Metropolitan Bank & Trust Co. v. Dovenmuehle Mortgage, Inc., 2001*** WT., 167445 at *3 (Del. Ch.) (stating that "[i]n order for the Plaintiffs to take advantage of the fiduciary duty exception, the documents which they seek must have been created while there was a mutuality of interest with [the fiduciary]").

the subject, and no bright-line rule that identifies the point in time when mutuality of interest diverges in each case, that divergence must necessarily occur at the point in time when the parties can reasonably anticipate litigation over a particular action.[19] During the period when there is a mutuality of interest, however, a plaintiff may attempt to establish that he has shown good cause why the attorney-client privilege should not be invoked.

Although frequently referred to as an exception to the attorney-client privilege, this Court noted in *Sealy Mattress Co. of New Jersey, Inc. v. Sealy Inc.*, that a showing of good cause under the *Garner* doctrine is "technically not an 'exception' to the privilege, [but] results in its nonapplication."[20] Therefore, when considering a motion to compel production of documents-in the context of a shareholder derivative action where discovery requests are met by a properly-supported claim of attorney-client privilege by the corporation concerning

---

[19] *See Metropolitan Bank,* 2001 WL 1671445 at *3 (stating that mutuality of interest "will have lapsed by the time that the [fiduciary and beneficiary] can reasonably anticipate litigation about an identified dispute"); *Continental Ins.,* 1999 WL 66528 at *2 (finding that mutuality of interest diverged "after each party was made aware of the limited partners' intent to withdraw" and that legal advice received after that point in time "is privileged and need not be produced") (applying corporate rules and notions of fairness in the limited partnership context).

The requirement of a mutuality of interest explains why there is no *Garner-exception* to the work product privilege.

[20] 1987 WL 12500 at *3 (Del. Ch.); see *also Deutsch, 580* A.2d at 104 (noting that the "doctrine ... is not technically an 'exception' to the lawyer-client privilege under Delaware Evidence Rule 502, but nonetheless results in its not being applied"); *Garner, 430* F.2d at 1103-04 (stating "where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause *why it should not be invoked in theparticular instance")* (emphasis added).

communications that took place while there was a mutuality of interest between a fiduciary and the shareholders-the Court should first determine whether the shareholder has made a sufficient showing of good cause. If the plaintiff has made that showing, the attorney-client privilege will not attach and otherwise privileged documents may be subject to discovery. If the plaintiff has not made a sufficient showing of good cause, the attorney-client privilege will attach and the Court must next determine whether the plaintiff has alleged facts which would satisfy one of the exceptions to the attorney-client privilege.

In its consideration of whether good cause has been shown, the Court may consider the ***Garner*** factors and conduct a "so-called 'balancing test' . . . to determine whether the balance tips in favor of disclosure or non-disclosure."[21] Of those several factors, the *Sealy* **Court** identified three as having particular significance to the Court's analysis: (1) the colorability of the claim; (2) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; and (3) the apparent necessity or desirability of shareholders having the information and the availability of it from other sources.[22]

---

[21] ***Deutsch,*** *580* A.2d at 105.

[22] ***Sealy,*** 1987 ***WL*** 12500 at *4; ***see also In re Fuqua Indus. Inc. Shareholders Litig.,*** Del. Ch., C.A. No. 11974, let. op. at 6-7, Chandler, C. (Sept. 17, 1999) (noting the identification of the importance of these three factors by ***Seal').***

III. ANALYSIS

The plaintiffs renew their argument-made in support of an earlier, unsuccessful, motion to compel the production of documents-that, even if the defendants make a ***prima facie*** showing that the disputed documents are subject to the attorney-client privilege, the plaintiffs have shown good cause for the production of those documents. In my decision on that earlier, motion, I denied the plaintiffs' motion based on a failure to satisfy two of the three key factors cited by *Sealy* as being particularly important to a finding of good cause. Although the survival of one of the plaintiffs' derivative claims after the 1997 motion to dismiss decision[23] established that at least one colorable claim had been stated, I was not convinced that the plaintiffs had demonstrated that they were not blindly fishing or that the information sought was unavailable from other sources. To illustrate why the plaintiffs had not satisfied those good-cause factors I stated that, "[f]irst, [the plaintiffs] ha[d] not adequately identified the specific communication. Second, and more importantly, that I [was] not satisfied that plaintiffs ha[d] exhausted every available method of obtaining the information they seek."[24] I noted that, "further depositions may provide the answers they seek without infringing upon the attorney-client privilege."[25]

---

[23] ***In re Fuqua Indus., Inc. Shareholder Litig.***. Del. Ch., C.A. No. 11974, mem. op., Chandler, V.C. (May 13, 1997).
[24] ***In re Fuqua,*** let. op. at 7.
[25] ***Id.***

The plaintiffs assert that they have cured these defects and that they are now able to satisfy the criteria necessary to show good cause. With respect to the question whether the plaintiffs are blindly fishing, they have now satisfied that factor by specifically identifying each of the documents that they seek and showing that they are relevant to the two components of their surviving claim-as instructed by the 1999 denial of plaintiffs' earlier motion to compel[26]—by using excerpts from the' privilege logs prepared by FII for its own documents and those of Simpson, Thacher & Bartlett. Arguably, these documents are necessary to support plaintiffs' allegations that decisions of the FII board were made for entrenchment purposes and affected FII shareholders' ability to receive a change of control premium. As evidenced by the survival of this claim, the plaintiffs have stated a plausible scenario that, if ultimately proven true, would support their claim. This more focused and adequately supported 'document request tips the balance in favor of a belief that the plaintiffs are not blindly fishing for information.

With regard to my even greater concern that good cause had not previously been shown because the information sought by plaintiffs might be available via other avenues, such as depositions, rather than a court-ordered production of documents, the plaintiffs have since conducted depositions and report that they

[26] *Id.* at 9.

have still been unable to uncover information that would lead to a determination of whether or not their claim is meritorious. Plaintiffs contend that the deponents either did not recall information concerning the subject upon which they were being questioned or attempted to trivialize certain of the bases of the plaintiffs' claim.

Significantly, the defendants do not dispute that the plaintiffs have sought further discovery through deposition, nor do they contend that other sources of that information are available which would moot the necessity of the plaintiffs' motion to compel. Instead, they attempt to cast the plaintiffs' argument as one in which they purport to have shown good cause because plaintiffs believe the privileged documents will contradict evidence already in the record. I agree with the defendants' contention that record evidence which disproves plaintiffs' allegations does not create good cause for production of otherwise privileged information because of the hope that other information will contradict that which is already in evidence. That would surely be nothing more than a blind fishing expedition and would not support a showing of good cause. As I have already noted, however, the basis of the plaintiffs' request for production is not that evidence they have discovered so far is contrary to their assertions or that they hope to find new information that will support their claim. Rather, they contend that those who are alleged to have acted improperly have been either unable or unwilling to provide

information, which the plaintiffs believe is contained in the disputed documents. Because I conclude that plaintiffs have demonstrated that information necessary to prove or disprove their allegations in this derivative litigation is unavailable (or not forthcoming from any other source), the third critical *Garner* factor also tips in favor of discovery.

The infirmities that prevented the plaintiffs from establishing good cause in support of their earlier motion to compel have been cured. Plaintiffs are now able to demonstrate a colorable claim, lack of blind fishing and the apparent need for production of documents that might otherwise be protected by the attorney-client privilege. Therefore, I conclude that the attorney-client privilege does not attach to those documents as it relates to these plaintiffs and must be produced.[27] Because there is no *Garner* exception to the work product privilege, and because plaintiffs have failed to show a compelling need for those documents as is necessary to overcome that privilege, those portions of documents I have identified through *in camera* inspection to include work product need not be produced.[28]

---

[27] This conclusion makes it unnecessary to consider the parties' arguments concerning waiver or any other possible exceptions to attorney-client privilege that I would have had to consider had I determined that good cause had not been established by the plaintiffs. I express no view on the merits of those arguments.

[28] The portions of documents subject to work product protection on Fuqua Industries, Inc. Privilege Log are:

Tab 10 – F1005094 & F1005099; Tab 16 – FI033873-74; Tab 18 – FI034079-80; Tab 19 – FI034104-05; Tab 25 – FI034558-59, 61-64; Tab 48 – F1037413; Tab 51 – F1037502; Tab 53 – FI037735-36, 40; Tab 58 – FI037901-02, 04-07; Tab 65 – FI042869-71; Tab 67 – F1042876; Tab 70 – FI042886-88; Tab 71 – 042890-93; Tab 74 – FI042951-3104; and Tab 75 – FI043 117-44.

IV. CONCLUSION

For the reasons stated, plaintiffs' motion is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

The portions of documents subject to work product protection on Simpson Thacher & Bartlett's Privilege Log are:

Tab10 – P00061-63; Tab 12 – P00078-79; Tab 13 – P00080-81; Tab 14 – P00082-87; Tab 17 – P00097-117; and Tab 18 – PO01 18-38.