IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

E.I. DU PONT DE NEMOURS AND COMPANY,	)	
Plaintiff,	)	
v.	)	C.A. No. N10C-09-058 JRS CCLD
MEDTRONIC VASCULAR, INC.,	)	
Defendant.	)	

Date Submitted: February 20, 2012
Date Decided: March 13, 2012

MEMORANDUM OPINION

Upon Consideration of Motions to Compel Discovery.
GRANTED in Part and DENIED in Part.

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SLIGHTS, J.

I.

On February 20, 2012, the Court heard several discovery motions filed by both parties to this breach of contract action - plaintiff, E.I. DuPont de Nemours & Company ("DuPont") and defendant, Medtronic Vascular, Inc. ("Medtronic"). During and at the conclusion of a lengthy hearing, the Court issued oral rulings disposing of all but a few of the disputes presented in the motions. The Court took under advisement the following discreet issues: (1) the extent to which the attorney-client privilege will protect factual content within an attorney-client communication; (2) the extent to which a former employee may assert the attorney-client privilege to protect her communications with counsel for her former employer; and (3) the extent to which a party's document preservation obligation extends to documents created and maintained by an outside auditor.

For the reasons that follow, the Court has determined that: (1) both parties have properly invoked the attorney-client privilege to protect "factual" content within certain documents identified in their respective privilege logs; (2) DuPont has properly invoked the attorney-client privilege on behalf of a former employee in withholding certain documents and in instructing her not to answer certain questions at deposition; and (3) DuPont has complied with its document preservation obligations with regard to documents prepared and maintained by its independent

auditors. The motions to compel this discovery are, therefore, **DENIED.**

II.

This dispute involves a 1989 development and license agreement between DuPont and Medtronic (the "PACRA") pursuant to which a predecessor of Medtronic agreed to pay DuPont royalties for certain designated "Products" that incorporated designated DuPont "Material" or "Technology." DuPont alleges that Medtronic has breached the PACRA by failing to pay royalties on certain Products which DuPont alleges are royalty-bearing. Medtronic denies that it owes royalties to DuPont and, moreover, alleges that DuPont's claims are barred by the statute of limitations. The parties have engaged in substantial discovery and, as noted, have sought the Court's intervention to resolve various discovery disputes that have arisen between them.

III.

A. The Parties' Motions to Compel Factual Content Within Documents Withheld Under The Attorney-Client Privilege

On October 31, 2011, DuPont moved to compel production of a draft letter prepared by a Medtronic in-house attorney, Lawrence Fassler, Esq., dated April 1, 1999, and addressed to Katherine Knox, a DuPont employee (the "Fassler letter"). The Fassler letter had been inadvertently produced but then "clawed back" by Medtronic on the ground that the document was protected by the attorney-client

privilege. After reviewing *in camera* a memorandum prepared by Fassler that explained the context in which he had prepared the Fassler letter (and to which the Fassler letter had been attached), the Court ruled that the entire draft letter (including its "factual" content) reflected a privileged attorney-client communication. The motion to compel production of the letter was denied.

DuPont has now argued that, in denying its motion to compel production of at least the factual content of the Fassler letter, the Court has "adopted [a] fairly broad reading of the attorney-client privilege."[1] This "broad reading" of the privilege, according to DuPont, has allowed Medtronic to resist producing the factual content of privileged documents when it wishes to do so (e.g. the Fassler letter), but to produce factual content within otherwise redacted privileged documents when it senses that such content will enhance its litigation positions. By disclosing what this Court has determined to be privileged information in certain documents, DuPont contends that Medtronic has waived the privilege as to these documents and should be compelled to produce them.[2] Similarly, in its opposition to a Medtronic motion

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[1]Plaintiff E.I. DuPont de Nemours & Co.'s Opposition to Defendant Medtronic Vascular Inc.'s January 13, 2012 Motion to Compel ("DuPont 01/23/12 Response") at 7.

[2]*Id*. at 2. *See also* E.I. DuPont de Nemours & Co.'s Motion to Determine The Sufficiency of Responses to Requests for Admission and Motion to Compel Documents and Reopen Depositions ("DuPont's Motion to Compel Documents Withheld As Privileged") at 1-4 (referring to the Court's ruling denying its motion to compel the Fassler letter).

to compel documents it has withheld as privileged, DuPont argues, *inter alia,* that its practice of designating entire documents containing attorney-client communications as privileged, even when the documents contain some factual content, is entirely consistent with the law of the case, as established in this Court's ruling on the motion to compel the Fassler letter.[3]

DuPont's characterization of the Court's prior ruling gives a faintly bitter nose with a hint of sour grape. It may, however, be the product of legitimate confusion, particularly given the brevity of the Court's written decision denying DuPont's motion to compel the Fassler letter. Although the Court will not revisit that ruling, it will, as promised, explain its view of the settled law regarding the extent to which the attorney-client privilege protects the disclosure of factual content within attorney-client communications. In this regard, the Court does not write on *tabula rasa*.

The attorney-client privilege protects "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client...."[4] This "privilege is the oldest of the privileges for confidential communications known to the common law."[5] As *Upjohn* explained:

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[3]*Id.*

[4]D.U.R.E. 502 (b).

[5]*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advise or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.[6]

Of particular relevance here, *Upjohn* observed that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[7] On the other hand, *Upjohn* recognized that "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."

Any proper application of the rule articulated in *Upjohn* requires a clear understanding of the distinction between a "fact" and a "communication concerning that fact."[8] The distinction was plainly articulated in *Upjohn* itself:

> The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'what did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his

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[6] *Id*.

[7] *Id*. at 390.

[8] *Upjohn*, 449 U.S. at 395.

attorney.[9]

It is clear from *Upjohn*, and the Delaware cases interpreting *Upjohn*, that the attorney-client privilege will protect a confidential factual communication made by a client to counsel or counsel to client "for the purpose of facilitating the rendition of professional legal services to the client."[10] In other words, a party cannot be compelled to disclose the facts he communicated to his attorney to enable the attorney meaningfully to dispense legal advice. But he can be asked to disclose facts he knows personally or knows of from other sources, even if he disclosed those facts to his attorney. The distinction is subtle but significant. In the former scenario, the facts become part of and are integral to the attorney-client communication and are, therefore, protected from disclosure unless the attorney-client privilege as to that communication is waived. In the latter scenario, the facts known to the party through non-privileged means are just that, facts, and they must be disclosed in response to properly propounded discovery unless there is some other legitimate bases upon

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[9]*Id*. at 395-96 (emphasis in original).

[10]*Cincinnati Bell Celluar Systems Co.*, 1995 WL 347799, at * 2. *See also Phillips Elect. North Amer. Corp. v. Universal Elect., Inc.* 892 F.Supp. 108, 110 (D. Del. 1995) (noting that the attorney-client "'privilege recognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client.'") (quoting *Upjohn).*

which to withhold disclosure or resist the discovery.[11] This is the holding in *Upjohn* and the law of attorney-client privilege in Delaware.[12] The Court now turns to the parties' motions to compel "facts" within attorney-client privileged documents.

1. DuPont's Motion To Compel Production Of Documents Withheld By Medtronic Under The Attorney-Client Privilege

DuPont seeks an order compelling Medtronic to produce unredacted versions of two documents, both of which Medtronic has produced in redacted form. The first document is an email, dated April 6, 1999, from Lawrence Fassler, Esq., a former in-house attorney at Medtronic, to members of Medtronic's management team (the "Fassler email"). The unredacted portion of the Fassler email describes DuPont's position with regard to the calculation of royalties Medtronic owes to DuPont upon the sale of certain Medtronic products. It appears that this information was gleaned from conversations between DuPont and Medtronic management. The second document is an email, dated December 3, 2003, from Sarah Koopmans, a Medtronic financial analyst, to Michael Jaro, Esq., Medtronic's chief patent counsel (the

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[11]Thus, for example, with regard to the Fassler letter, DuPont is not entitled to discover what facts were disclosed to Fassler, by Messrs. Madden and Brister or otherwise, that prompted him to recommend to his clients that the Fassler letter be sent to Ms. Knox. DuPont is, however, entitled to inquire of Messrs. Madden and Brister what facts they knew of DuPont's position regarding its entitlement to royalties under the PACRA even if those facts were disclosed to Mr. Fassler.

[12]The protection applies both ways - - factual content embedded within an attorney's confidential communication to a client is also protected by the privilege.

"Koopmans email"). The Koopmans email, in its entirety, reads: "Hi Mike, I received a call today from Don Loveday at DuPont. They believe royalties are still due them. Don would appreciate a call at [phone number] to discuss. Thanks, Sarah." DuPont argues that the production of the unredacted portions of the Fassler email and the entire Koopmans email constitutes a waiver of the attorney-client privilege "with regard to the advice it received regarding how to calculate royalties under the PACRA."

There is no indication in the Koopmans email that legal advice was being requested or delivered. Thus, the email does not implicate the attorney-client privilege and its production by Medtronic does not waive the attorney-client privilege.[13]

As to the Fassler email, Medtronic has listed it in its privilege log and bears "the burden of proving that the privilege applies to [the document]."[14] The privilege log lists the author, recipients and date of the email and describes the document as a "[c]onfidential email from counsel regarding legal advice and made for purposes of facilitating rendition of legal services regarding royalty obligations under PACRA

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[13]*See Dunlap Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1191 (D.S.C. 1974) (holding that if a communication is not privileged its disclosure cannot constitute a waiver as to privileged materials dealing with the same subject matter).

[14]*Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992).

and discussions with DuPont regarding PACRA Amendment." DuPont has not challenged the adequacy of this description, nor has it raised an earnest challenge to Medtronic's invocation of the attorney-client privilege as to this document.[15] Rather, as stated, DuPont's position is that Medtronic has waived the privilege by disclosing a portion of the factual content of the email.

"Where defendants have adequately demonstrated the privilege, plaintiffs have the burden of showing good cause to pierce the privilege...."[16] Nothing in the unredacted portion of the Fassler email indicates that the facts recited there were necessary to "facilitat[e] the rendition of professional legal services to the client...."[17] Nor does the unredacted portion of the email suggest that Fassler was recounting a confidential communication from a client. Rather, Fassler merely restates his

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[15]Even if DuPont had challenged the adequacy of Medtronic's privilege log entry, the Court would reject that challenge. As noted, the log identifies: "(a) the date of the communication; (b) the parties to the communication; (c) the names of the attorneys who were parties to the communication; and (d) the subject matter of the communication sufficient to show why the privilege applies...." *Klig v. Deloitte LLP*, 2010 WL 3489735, at *5 (Del. Ch. Sept. 7, 2010).

[16]*In re Fuqua Indus. Inc. Shareholders Litig.*, 1999 WL 959182, at *2 (Del. Ch. Sept. 19, 1999). *See also F.D.I.C. v. Ogden Corp.,* 202 F.3d 454, 460 (1st Cir. 2000) (holding that "the devoir of persuasion shifts to the proponent of the exception" to the established privilege). The Court is mindful of contrary authority. *See United States v. Deloitte LLP*, 610 F.3d 129, 139-40 (D.C. Cir. 2010) (holding that the party asserting the attorney-client privilege bears the burden of establishing that the privilege has not been waived). In this case, the Court is satisfied that the production of the unredacted portions of the Fassler email does not constitute a waiver of the attorney-client privilege, either as to the balance of the document or as to the subject matter of the document, regardless of which party bears the burden on the waiver issue.

[17]D.U.R.E. 502 (b).

understanding of DuPont's position with respect to the calculation of royalties under the PACRA in a manner that apparently was readily severable from the confidential communication he intended to share with his client. To the extent facts contained within a communication from attorney to client are incidental to the rendering of legal services, and readily severable from the confidential communication, it is proper for a party to disclose that factual content to his adversary in litigation (if otherwise discoverable) without fear that doing so will waive the privilege.[18]

Medtronic has not waived the attorney-client privilege by producing a portion of the Fassler email. DuPont's motion to compel production of the redacted portions of the email, and other Medtronic documents withheld as privileged dealing with the same subject matter (including the Fassler letter) is, therefore, **DENIED.**

Medtronic produced the Fassler email in redacted form on January 31, 2012, the last day of fact discovery as set by the Court's Trial Scheduling Order. By that time, DuPont had already taken the depositions of both the author and at least some of the recipients of the document. DuPont has moved the Court for leave to reopen these depositions so that it might question authors and recipients about the disclosed

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[18]*See Upjohn*, 449 U.S. at 395-96 (distinguishing "facts" from confidential "communications"); *Garvey v. Nat'l Grange Mut. Ins. Co.*, 167 F.R.D. 391, 395 (W.D. Pa. 1996) (holding that attorney-client privilege will not attach when attorney is merely communicating to his client facts he learned from "persons or sources other than the client" separate and apart from legal advice he is rendering to the client).

portion of the Fassler email. The request is well founded and will be **GRANTED.**[19] The re-opened depositions shall last no longer than one hour and shall be limited to the content of the disclosed portion of the Fassler email and topics reasonably derived from that email.

2. Medtronic's Motion To Compel Production Of Documents Withheld ByDuPont Under The Attorney-Client Privilege

DuPont produced its log of privileged documents to Medtronic on November 7, 2011. Medtronic moves to compel production of several documents from the privilege log arguing that the descriptions on the log reveal that at least portions of the documents contain non-privileged facts which should be excised from the privileged communications and produced to Medtronic.[20] DuPont, of course, points to Medtronic's opposition to DuPont's motion to compel the factual content of the Fassler letter and argues that "Medtronic has had a convenient change of heart" with respect to its position on the discoverability of factual content within otherwise

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[19]*See In re Walt Disney Co. Deriv. Litig.*, 2004 WL 1125185, at *1 (Del. Ch. May 4, 2004) (granting leave to reopen depositions to address information produced late in discovery).

[20]Defendant Medtronic Vascular Inc.'s January 13, 2012 Motion to Compel ("Medtronic 1/13/12 Motion"), at 1-2. In this regard, Medtronic urges the Court to construe the privilege "narrowly"because to do otherwise would "obstruct the truth-finding process." *Id.* (citing *Balin v. Amerimar Realty Co.*, 1995 WL 170421, at * 9 (Del. Ch. Apr. 10, 1995) (citation omitted)).

privileged documents.[21]

The documents at issue here are listed as items 1, 2, 62, 63, and 438 on DuPont's privilege log. Items 1 and 2 are described as documents from David J. Wallan to Willaim J. Cotreau, Esq., an attorney in DuPont's legal department, that are "[c]onfidential meeting notes reflecting communications with counsel made for purposes of facilitating legal advice regarding PACRA and Medtronic compliance therewith." Items 62 and 63 are described as "[c]onfidential email[s] to counsel [dated October 28, 1999] for the purpose of facilitating the rendering of legal advice regarding daft letters to Medtronic:" "relating to sale of products [62]" and "regarding PACRA [63]." The log identifies the author of Items 62 and 63 as Blake Bichlmeir and the recipients as William H. Hamby, Esq. (DuPont legal) with copies to two other members of DuPont's management team. Item 438 is described as a "[c]onfidentail email to counsel [dated March 15, 2001] for the purpose of facilitating the rendering of legal advice relating to past agreements with Medtronic and Bard." The log identifies the author of this document as Blake Bichlmeir and the recipient as Craig H. Evans, Esq. (DuPont legal).

Medtronic has not mounted a meaningful challenge to the sufficiency of DuPont's privilege log descriptions, but rather argues that it "is entitled to discover

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[21]DuPont 01/23/12 Response at 1.

relevant facts" that might be contained within the five documents it has identified in its motion.[22] Medtronic invites the Court to conduct an *camera review* of the documents because DuPont, in its privilege log, has demonstrated a pattern of "withholding as privileged other handwritten notes drafted by non-attorneys."[23] The Court declines the invitation. DuPont has appropriately logged each of the five documents and has adequately described them to allow both Medtronic and the Court "to assess the applicability of the privilege."[24] Nothing in the description of the documents suggests that DuPont has improperly withheld "facts" (as opposed to "communications concerning facts") that might be contained within the documents.[25] Medtronic's unfounded suspicion to the contrary is not a legitimate basis for the Court to embark on a fishing expedition through documents DuPont has logged as privileged in search of non privileged facts.[26]

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[22]Medtronic 1/13/12 Motion, at 7-8.

[23]*Id.*

[24]Del. Super. Ct. Civ. R. 26(b)(5).

[25]*See Upjohn,* 449 U.S. at 395.

[26]*See Harris v. Southwest Power Pool, Inc.,* 2012 WL 645908, at *2 (D. Ark. Feb. 28, 2012) (noting that courts should be reluctant to embark on *in camera* "fishing expeditions" through documents withheld by a party on grounds of privilege unless the party challenging the privilege offers a "threshold factual basis" in support of the challenge) (citing *United States v. Zolin,* 491 U.S. 554 (1989)); *E.I. duPont de Nemours & Co. v. MacDermid Printing Solutions LLC*, 2011 WL 4708069, at *3 (D.N.J. Oct. 4, 2011) (noting that party seeking *in camera* review of documents withheld as privileged bore a burden "to establish that *in camera* review is warranted.").

The motion to compel Items 1, 2, 62, 63, and 438 on DuPont's privilege log is **DENIED.**

B. Medtronic's Motion to Compel The Katherine Knox Documents

DuPont has identified several documents on its privilege log either to or from Katherine Knox, a retired DuPont employee who, from the 1980's through 1999, managed DuPont's relationship with Medtronic and its predecessors under the PACRA. The documents at issue were created in 2009 after Ms. Knox left her employment with DuPont. Medtronic argues that the documents are not privileged because Ms. Knox was not a "client" of DuPont's counsel at the time the documents were created. In response, DuPont argues that Ms. Knox, as a former DuPont employee, retains the protection of the attorney-client privilege when she communicates with DuPont attorneys regarding matters "within the scope of her former responsibilities...."[27] Each of the Katherine Knox documents listed in the DuPont privilege log carry either one of two document descriptions: (1) "confidential email to counsel for the purpose of facilitating the rendering of legal advice regarding PACRA and Medtronic compliance therewith;" or (2) "confidential email to counsel for purposes of facilitating rendition of legal advice regarding PACRA and Medtronic obligations thereunder."

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[27] *See In Re Flonase Antitrust Litig.*, 723 F.Supp.2d 761, 765 (E.D. Pa. 2010).

As stated, Ms. Knox was Medtronic's principal contact at DuPont with respect to the PACRA during much of the time-frame at issue in this litigation. While one could quibble regarding the adequacy of DuPont's description of the documents in the privilege log,[28] the adequacy of the log is not the focus of Medtronic's challenge here. Rather, Medtronic argues that the attorney-client privilege does not apply to the documents because Ms. Knox was not a client. By their description, the documents clearly appear to contain confidential communications between Ms. Knox and DuPont attorneys relating to either legal advice or the formulation of legal strategies pertaining to DuPont's relationship with Medtronic under the PACRA. These communications relate directly to "knowledge obtained or conduct that occurred during the course of [Ms. Knox's] employment."[29] Accordingly, the Court is satisfied that Ms. Knox should be deemed a client of DuPont's legal counsel at the time these communications occurred.[30] The documents are privileged.[31]

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[28] *Klig,* 2010 WL 3489735, at *5.

[29] *United States, ex rel Hunt v. Merck-Medco Managed Care, LLC*, 340 F.Supp.2d 554, 558 (E.D. Pa. 2004).

[30] *See In Re Flonase Antitrust Litig.,*, 723 F.Supp.2d at 765.

[31] Medtronic cites *DiOssi v. Edison*, 583 A.2d 1343 (Del. Super. 1990) for the proposition that Ms. Knox, as a former employee, should not be deemed a current client of DuPont's in house legal counsel. In *DiOssi,* the court determined that a party to litigation could contact former employees of an adversary without violating the Delaware Lawyers' Rules of Professional Conduct which prohibit lawyers from directly contacting parties represented by counsel. *Id.* at 1345. The court (continued...)

Medtronic also argues that Ms. Knox waived the privilege by disclosing the content of her discussions with counsel during her deposition. To be sure, Ms. Knox certainly could have waived the attorney-client privilege if she had revealed during her deposition some or all of the confidential communications she had with DuPont's attorneys after she retired from the company.[32] The deposition testimony to which Medtronic refers, however, amounted to nothing more than Ms. Knox describing the topics she discussed with DuPont's counsel without disclosing the content of the communications, much like a party would describe a privileged document in a privilege log. Such descriptions hardly justify a blanket waiver of the attorney-client privilege.

Medtronic's motion to compel production of the Katherine Knox documents is **DENIED.**

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[31](...continued)
based its holding on the conclusion that the former employees could not bind their former employer with their statements or admissions. *Id.* The court did not consider whether an attorney-client relationship existed between the former employee and counsel for the former employer in connection with communications between them that were intended to be confidential, or whether the attorney-client privilege would protect such communications from disclosure. The decision in *DiOssi*, therefore, is of little use here.

[32]*See Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 525 Del. Ch. 1970) (holding that attorney-client privilege was waived as to a document that was discussed extensively by a witness at deposition without objection).

C. Medtronic's Motion To Compel Responses To Its Document Preservation Discovery Relating To The PriceWaterhouse Coopers and Deloitte and Touche Audits

On November 29, 2011, Medtronic served DuPont with a Notice of Taking Rule 30(b)(6) deposition in which Medtronic listed 32 topics on which it sought testimony from DuPont. Topics 7-9 and 15-16 relate to documents prepared during two audits of Medtronic's royalty payments to DuPont under the PACRA - - the first conducted by PriceWaterhouse Coopers ("PwC") in 2000 and the second conducted by Deloitte and Touche ("Deloitte") between 2003 and 2006. Specifically, Medtronic seeks testimony from DuPont regarding any "litigation hold" notices it issued to PwC and Deloitte relating to documents generated during the Medtronic audits. DuPont has objected on the ground that the requests assume that DuPont had a legal obligation to issue a "litigation hold" to independent auditors over whom it had no control. DuPont asserts that topic 15, in particular, is simply a "gotcha" request meant to set up a potential spoliation argument later in the litigation. During oral argument, the auditor's documents were broken down into two categories: (1) work papers; and (2) other documents.

The duty to preserve documents extends to documents within a party's "possession, custody or control."[33] As to the auditor's work papers, it is clear to the Court that these documents were not in DuPont's "possession, custody or control" and, therefore, DuPont had no obligation to preserve the documents and no authority to cause others to do so. In this regard, the Court notes that the PwC Engagement Letter provides that "[t]he working papers created by PwC during this engagement are the property of PwC."[34] Moreover, under Delaware statutory law, an accountant's work papers are and shall "remain the property of" the accountant, absent an express agreement with the client to the contrary.[35] No such agreement has been presented here with respect to the work papers of either PwC or Deloitte.

As to other documents prepared by the auditors, Section 120(a) clearly provides that these materials likewise remain the property of the accountants.[36] Here again, DuPont had no obligation to preserve these documents and no authority to cause others to do so.

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[33]*Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547 (Del. 2006).

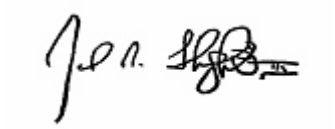
[34]DuPont 01/23/12 Response, Ex. J.

[35]*See* 24 DEL. C. §120(a) ("Section 120(a)"). *See also In re PHP Liquid. LLC*, 2001 WL 194671, at *1-2 (Bankr. D. Del. Feb. 23, 2001) (applying 24 DEL. C. §120(a) to deny motion to compel accountant's work papers).

[36]24 DEL. C. §120(a) (protection applies to "[a]ll statements, records, schedules, working papers or memoranda" prepared by the accountant "incident to or in the course of rendering services to a client;" it does not apply to "records that are part of the client's records.").

The only remaining documents would be those supplied to the auditors by DuPont. It appears from the submissions and from oral argument that DuPont has already produced these documents to Medtronic. If it has not, it should do so now. With regard to Medtronic's request for a DuPont witness to testify regarding any litigation hold DuPont might have directed to the auditors as to these documents, it is difficult to envisage how this would lead to the discovery of admissible evidence since: (a) the Court has been provided with no authority to suggest that such a litigation hold was required under Delaware law; and (b) DuPont has already produced all documents it supplied to its auditors. Medtronic's motion to compel DuPont to produce witnesses to address items 7-9 and 15-16 of its Rule 30(b)(6) deposition notices is, therefore, **DENIED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary