

TERRI A. NUNAN,

Plaintiff,

DECISION AND ORDER

Index No. 2004/00280

v.

MIDWEST, INC., et al,

Defendant.

I have the in camera submissions forwarded to the court pursuant to the stipulated order filed December 12, 2005, and the letters of Mr. Essler of December 9, 2005, and December 20, 2005, and the letter of Ms. Korona dated December 14, 2005. I have reviewed in some detail the in camera submissions made, and can make a determination with respect to most of the documents in question.

However, there is a series of documents which plaintiff contends should not be privileged by reason of the fact that the Phillips Lytle firm represented the plaintiff personally in the so called McGrain litigations, First Austin Funding Corp. v. Midwest Financial Acceptance Corp. & Lovenduski (Index No. 2000-3280, and other related actions.) Plaintiff contends that communications by defendants with anyone at the Phillips Lytle Firm during the time that that firm was representing her cannot be privileged as to her, citing Tekni-Plex, Inc. v. Meyner &

Landis, 89 N.Y.2d 123, 137 (1996) ("where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients"). It appears undisputed that the Phillips Lytle firm represented plaintiff personally in connection with the McGrain litigations.

Negotiations leading up to the settlement of those actions occurred well before I was assigned to the Commercial Division, and accordingly, I have little or no knowledge of the circumstances of those litigations other than a brief exposure to them in January of this year when I was first assigned to this part. On the other hand, the in camera submissions make repeated references to the McGrain litigation, and plaintiff's role in it. Defense counsel has asserted in her December 14th letter that the McGrain litigations are "unrelated" to this litigation.

Yet this allegation concerning the unrelatedness of the McGrain litigation comes in the form of a letter to the court, instead of in affidavits or other evidence accompanying the in camera submission. Furthermore, it comes in a paragraph of the letter in which defense counsel objects to the manner in which plaintiff submits this issue to the court, and it is claimed that plaintiff has the burden to submit affidavits and memorandum of

law to support plaintiff's position concerning disclosure. For the reasons stated in my prior decisions and orders, and in e-mails to the parties, defense counsel has this, again, turned around. The proponent of the privilege has the burden of establishing it, and it must do so by appropriate evidence. "Since the defendant asserts the privilege, the burden rests on him 'to show the existence of circumstances justifying its recognition.'" Baird v. Ames, 96 A.D.2d 119, 122 (4th Dept. 1983) (quoting Bloodgood v. Lynch, 293 N.Y.2d 308, 314 (1944)).

Moreover, this in camera review is being conducted solely by the consent of the parties resulting in the stipulated order filed December 12, 2005. As far as the court was concerned, defendant has not met its burden to show the applicability of the privilege inasmuch as it has not followed the procedural prerequisites for establishing the same on the current record. See fn, infra. This failure continues even with the December 14th submission by defendants, particularly in respect to the issue whether the two litigations are related in some respect. If the litigation is indeed unrelated, it is defendants' burden to establish the same by appropriate affidavit or evidence; the in camera submissions themselves cannot be confronted by plaintiff and in any event they do not by themselves establish the unrelatedness of the two litigations. Indeed, some of the in camera submissions suggest otherwise. Therefore, I could,

strictly on the burden of proof issue, hold that defendants have failed to meet their burden with respect to the Paley document and perhaps others.¹ But in view of the parties' stipulation, the court simply orders that, if defendants are of a mind to establish the applicability of the privilege by meeting their burden in accordance with the law, they may do so by filing appropriate affidavits and submissions by December 30, 2005. Plaintiff may respond in kind by January 5, 2006.

The court is already concerned with the piecemeal manner in which this privilege issue has been presented to the court, and

¹For convenience, and to make a fuller record, the text of my email of December 22, 2005, acceding to this stipulated procedure is reproduced below:

For the reasons stated in my decision, I question the sufficiency of the threshold showing made to support the applicability of the privilege. A judge should not have to engage in voluminous and lengthy in camera review on such a slender reed as defendants put up in this case. In other words, I question "the possible due process implications of routine use of in camera proceedings." United States v. Zolin, 491 U.S. 554, 571, 109 S.Ct. 2619, 2630 (1989) (adding: "we cannot ignore the burdens in camera review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties"). See also, id. 491 U.S. at 570, 109 S.Ct. at 2630 ("Our endorsement of the practice of testing *proponents'* privilege claims through in camera review of the allegedly privileged documents has not been without reservation.")(emphasis supplied).

Here, knowing the standard for disclosure/protection articulated in the court's prior oral decision, which was incorporated into the order signed, defendants gave only affidavits asserting in the most general terms the applicability of the privilege to a wide assortment of documents and they did not even attach a privilege log. Cf., Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003, 4 N.Y.3d 665, 679 n.11 (2005); Matter of Subpoena Duces Tecum To Jane Doe Dated April 25, 2001, 99 N.Y.2d 434, 442 (2003). Even if the privilege log submitted post decision by defendants may be considered on a motion for reargument/renewal, my examination of it raises serious questions concerning whether it improves the threshold showing found insufficient in my November decision. United States v. Construction Products Research, Inc., 73 F.3d 464 (2d Cir. 1996), cited with approval in Matter of Subpoena Duces Tecum To Jane Doe Dated April 25, 2001, 99 N.Y.2d at 442 .

However, with Ms. Korona's letter of today just faxed, I will accede to the joint request, and a stipulated order to that effect may be prepared.

that, with the trial fast approaching, that there is too narrow a window available to afford meaningful discovery. Therefore, there will be no adjournments of the deadlines herein provided.

SO ORDERED.

Dated: December 23, 2005.

ON FINAL SUBMISSION

Following submission of two packets of documents for in camera review pursuant to a stipulation endorsed as a court order dated December 12, 2005, the following is the court's decision on plaintiff's motion to compel discovery of said documents, and defendants' motion for a protective order concerning the same on the grounds that the documents are covered by the attorney client privilege. Defendants' general contention concerning these documents is that the e-mails and other communications involved in these two packets concern Midwest's effort to prepare for an expected lawsuit to be filed by plaintiff. The communications are actually by and between Midwest's Chairman Joseph Lovenduski, who is a lawyer, Timothy P. Sheehan, General Counsel and Vice President of Midwest until he became president in December of 2003, and Justin Lovenduski, who is described at times as Midwest's in-house counsel.

First Packet

The first packet of papers presented in camera involves documents Bate Stamped #400455 (first numbered page) and #401447

(last numbered page). With two exceptions, I find that none of the documents are privileged, which is to say that defendants have not met their burden of proving that these documents are privileged. In each instance, with the two exceptions being the top two lines of #401428 and #401430, I find that the materials fit the business dynamic, and not the attorney client relationship dynamic, in the everyday dealings of Midwest, Inc. concerning plaintiff during 2003.

In addition to the principles thoroughly articulated in my oral decision of May 25, 2005, which was incorporated into a subsequent written order, the fact that the business of Midwest, Inc. was largely done by lawyers, does not carry defendants' burden to show the applicability of the privilege; "a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or a personal advice, or to do the work of a non-lawyer." Spectrum Systems International Corp. v. Chemical Bank, 78 N.Y.2d 371, 379 (1991). The point is not that the communications at issue here involve "staff counsel" who have "mixed business-legal responsibility" and whose communications "may blur the line between legal and non-legal communications." Rossi v. Blue Cross and Blue Shield of Greater NY, 73 N.Y.2d 588, 592-93 (1989). Instead, in this case, many of the principal corporate actors in the Nunan saga during the year 2003 were lawyers, but they were acting in their business capacity for all

of the transactions revealed in the documents contained in this first packet.³

The attorney client privilege must be applied "cautiously and narrowly . . . less the mere participation of an attorney be used to seal off disclosure." Id. 73 N.Y.2d at 593. While it is true that "the inquiry is necessarily fact specific," id. 73 N.Y.2d at 593, "for the privilege to apply when communications are from attorney to client--whether or not in response to a particular request--they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." Id. 73 N.Y.2d at 593. It is important here, unlike the situation in Rossi, where the lawyer "had no other responsibility within the organization," id. 73 N.Y.2d at 593, that the communications between Joseph Lovenduski, Timothy Sheehan, Justin Lovenduski, and Martin Reinhold, were communications by principal corporate actors acting in their corporate capacity, not in the rendition of legal advice in the course of a professional relationship. In fact, the primary purpose of the e-mails and documents in the first packet was Lovenduski's effort to find a way to maintain business productivity at Midwest in spite of what he considered to be the

³ The two redacted portions confirm this. When Midwest's principal actors really wanted legal advice, they went to outside counsel, either Gerald Paley, Esq. at Phillips Lytle or Pat Soloman, Esq. to get it.

counter productive actions of plaintiff. Cf., Brooklyn Union Gas Co. v. American Home Assurance Co., ___ A.D.3d ___, 803 N.Y.S.2d 532, 534 (1st Dept. 2005).

Accordingly, defendants do not carry their burden to show with respect to these documents that "the communication[s] . . . [are] primarily or predominantly of a legal character, . . . [even though they] also refe[r] to certain non-legal matters." Id. 73 N.Y.2d at 594. See also, Matter of Estate of Seelig, 302 A.D.2d 721, 725 (3d Dept. 2003). With the exception of the two redactions approved above, the documents in the first packet submitted for in camera review must be disclosed. See also, Matter of Grand Jury Subpoena (Bekins Record Storage Co., Inc.), 62 N.Y.2d 324, 329 (1984) (consultation with an attorney for business or personal advice does not invoke the privilege nor would the privilege apply to communications to an attorney who "was acting in a capacity as a commercial consultant").³

³ The court is mindful of the admonition in Spectrum Fitness International that the trial court should not have "disregar[d] the sworn statements describing the engagement as one for legal not business advice, which is evident in the . . . [communication] itself." Id. 78 N.Y.2d at 379-80 (emphasis supplied). But here, despite the Sheehan affidavit filed only after several orders and directives of the court concerning the proper manner in which to present the issue and carry a proponent's burden to show the applicability of the privilege, it is "evident" from the in camera submissions themselves that a business dynamic was at play, and that these principal corporate actors were not consulting one another primarily for legal advice. Accordingly, the "court is not bound by the conclusory characterizations of client or counsel" as is contained in the latest filed Sheehan affidavit. Id. 78 N.Y.2d at 379-80. As

Second Packet

A different situation pertains to a number of the documents in the second packet submitted for in camera review. Document #15 concerns a draft letter from Joseph A. Lovenduski to Nunan, Sheehan, Reinhold, and Himmelberg dated April 10, 2003, sent to outside counsel for advice, describing various corporate powers shared by the officers. Although nominally addressed to Terri Nunan, the privilege log indicates that it was only actually delivered to Sheehan, Reinhold and the two Lovenduski's. It is by itself entirely business in character and reflects, as the privilege log indicates, a "Chairman Directive" dated April 10, 2003. To avoid disclosure, however, Sheehan states in his affidavit that, although the "document was prepared by me as General Counsel of Midwest, Inc., and at the request of Chairman Lovenduski, . . . the document was not delivered to the identified recipients because Midwest, Inc. wished to seek the advice of outside counsel." Sheehan does not state that the document was actually communicated to outside counsel, however, nor does he provide any context, and in any event the privilege log indicates that it was delivered, presumably in the regular course of Midwest's business, to all the named recipients except plaintiff. Accordingly, defendants do not carry their burden to

noted above, when these principal corporate actors really wanted legal advice, they went to Paley or Soloman for it (see below).

show the predominately legal character of the document or its contents.

Documents #36 and #37 are clearly covered by the privilege inasmuch as they are communications to Patrick Soloman, Esq., who was hired by Midwest in August of 2003 to deal with the corporation' concerns about plaintiff. Document #38, a memorandum from Justin Lovenduski to Gerald Paley, Esq. at Phillips Lytle, LLP, also clearly fits the criteria inasmuch as it involves a communication from Mr. Sheehan to Mr. Paley concerning the Nunan situation. Documents #43, #44, #46, and #47, also fits this legal dynamic. On the other hand, the Himmelberg documents, #39 and #40, summaries of Nunan's fringe benefit and health care payments, are not shown to be documents or communications primarily for the rendering or obtaining of legal advice. They manifestly concern the business interests of Midwest.

With respect to the Paley communications, and in particular Document #38, plaintiff contends that such communications cannot be privileged as to her because the Phillips Lytle firm was representing Midwest, and plaintiff personally, in connection with what has been variously called the McGrain litigation, or First Austin litigation. It appears from the affidavits which have been submitted that Midwest and its affiliated companies discharged McGrain, who was formerly president of Midwest

Financial Acceptance Corporation, in the spring of 2000. McGrain sued MFAC and Joseph Lovenduski in response to the termination, and the latter commenced a third party action against Craig McGrain and his father, who owned First Austin Funding Corporation. McGrain thereupon filed a dissolution petition in connection with Midwest Holdings Corporation, naming all the shareholders of that corporation, including plaintiff Terri A. Nunan, as respondents. Defendants concede that the Phillips Lytle law firm represented them in the First Austin litigation and that that law firm represented the respondents, including the plaintiff, in the dissolution proceedings involving Midwest Holdings. According to the defendants, all of these actions were settled in November 2003, including the proceeding to dissolve Midwest Holdings. Defendants' emphasize, however, that Midwest, Inc., the defendant in this action, was not a party to the First Austin litigation since it was formed after McGrain was terminated by MFAC, and that plaintiff was not a party in the First Austin litigation; rather she was only involved in the litigation as a corporate officer of MFAC.

Plaintiff contends, on the other hand, that her status as a party respondent in the Midwest Holdings Corporation dissolution proceeding was only a minor part of the equation. In essence, she posits Midwest, Inc. as the successor to MFAC, and that Midwest, Inc. was designed to insulate the business of Midwest

from the reach of the McGrains. In particular, she asserts that Midwest Servicing, Inc., another Midwest affiliated corporation of which she was the sole shareholder, was named as a party defendant with McGrain in the third party lawsuit commenced by Joseph Lovenduski and Midwest Financial Acceptance Corporation against McGrain and his father. Nunan asserts further that, in July 2000, she conveyed her entire interest in Midwest Servicing to the newly formed Midwest, Inc., the defendant in this present lawsuit, and received as partial consideration 10 percent of the stock of Midwest, Inc., 10 percent of the stock of Midwest Financial, and her employment contract as President of Midwest, Inc., which she says "is at the heart of the current litigation." After the transfer, Midwest Servicing became a wholly owned subsidiary of Midwest, Inc., "and the latter therefore had a specific and direct interest in the outcome of the McGrain litigation." Finally, Nunan alleges that Midwest, Inc., the defendant in the current lawsuit was formed as a new entity to pursue the business opportunities which had theretofore been pursued by MFAC, and that the newly formed corporation was designed to protect those opportunities from Mr. McGrain's claims in the First Austin litigation. Nunan maintains, with considerable support in the in camera submissions, that "the management of the McGrain litigation . . . [was] an integral part of the business of Midwest, Inc."

Separately, Nunan seeks to link the McGrain/First Austin litigations to this one by reference to her pleadings in this litigation. She asserts as part of her complaint that defendants breached her employment contract by, inter alia, constructively terminating her, restraining her access to McGrain litigation documents, and by settling the McGrain litigation without her knowledge or consent. She adds that Midwest employees were instructed by defendants "to watch me" because she allegedly was disloyal to Midwest "and was improperly photocopying documents to assist Mr. McGrain." This was, indeed, a part of Midwest's written resolution discharging Nunan from her employment as President of Midwest on December 1, 2003, shortly after the McGrain/First Austin litigation was settled.

Mr. Sheehan has testified in deposition that plaintiff made a "veiled threat to align herself with Mr. McGrain against the corporation and disrupt the reasonable defense of the corporation in that litigation." Mr. Sheehan's position in his testimony was that Nunan's "veiled threat," her actions in "jeopardiz[ing]" the negotiated settlement of the McGrain/First Austin litigation, and her reluctance earlier in 2003 to reaffirm Midwest's borrowing relationship with Cargill upon the same terms as other Midwest shareholders, were designed to leverage for herself a more advantageous employment contract with Midwest. Both Lovenduski and Sheehan testified in deposition, and the in camera

submissions confirm, that defendants consulted the Phillips Lytle firm about Nunan's efforts in this regard. Lovenduski also testified that, although he believed that he had grounds to fire Nunan in September 2003, he consulted with counsel and decided not to fire her while the McGrain litigation was still pending.

Joint Representation and Fiduciary Exceptions to the Privilege

Plaintiff draws from these circumstances an argument that defendants' communications with Phillips Lytle during 2003 about her, and their strategizing with the Phillips Lytle firm concerning her employment status, cannot be privileged as to her because Phillips Lytle was jointly defending her and the defendants in the McGrain/First Austin litigation. Relying on Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123 (1996), plaintiff contends that, "[g]enerally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other." Id. 89 N.Y.2d at 137. Plaintiff's position ignores the actual holding of Tekni-Plex, the particulars of the joint representation doctrine, and the reality of the representations at issue here. Moreover, plaintiff's contention that this litigation, and the events leading up to it, involve the "same matter" as the McGrain/First Austin litigation, at least insofar as the quoted term applies in the joint or common defense or representation

context, is without merit.

Given her position in Midwest as president and employee, aligned with the Lovenduski interests against the interests of McGrain/First Austin, she had no right to expect that the Phillips Lytle firm represented anything more than Midwest's corporate interests against McGrain's faction. "Unless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees." Talvy v. American Red Cross in Greater New York, 87 N.Y.2d 826 (1995), aff'g for the reasons stated at, 205 A.D.2d 143, 149 (1st Dept. 1994). See also, Bison Plumbing City, Inc. v. Benderson, 281 A.D.2d 955 (4th Dept. 2001); Omasnky v. 64 N. Moore Associates, 269 A.D.2d 336 (1st Dept. 2000); Walker v. Silver Eagle Aircraft Corporation, 239 A.D.2d 252 253, (1st Dept. 1997); Kushner v. Herman, 215 A.D.2d 633, 633-34 (2d Dept. 1995); Deni v. Air Niagara, 190 A.D.2d 1011 (4th Dept. 1993). Plaintiff has not established that Phillips Lytle "assumed an affirmative duty to represent . . . [her]" individually. Kushner v. Herman, 215 A.D.2d at 633.

Plaintiff had no reason to expect separate representation by Phillips Lytle, even if she had decided to join the McGrain faction. Indeed, if she, without first declaring her intention to seek legal advice in an individual capacity and executing consents pursuant to DR 5-105(C), see below fn.3, disclosed her

intention to do so to Phillips Lytle, she should nevertheless expect that such an intention immediately would be communicated to the Lovenduski faction. This is because both plaintiff as the corporate employee, and Phillips Lytle as corporate counsel, had an obligation to communicate to the corporation any information bearing upon corporate business. Id. 205 A.D.2d at 149-50. See also, Meyers v. Lipman, 284 A.D.2d 207 (1st Dept. 2001); Polovy v. Duncan, 269 A.D.2d 111, 112 (1st Dept. 2000). This is not altered by the mere fact that plaintiff was named as party respondent in the corporate dissolution action. Id. 205 A.D.2d at 150 ("even in circumstances where the employer's attorney represented the employee individually, albeit jointly with former employer, in prior litigation, the court rejected the former employee's attempt to disqualify the employer's attorney because of shared confidences or conflict of interest grounds, holding that the former client could not have reasonably assumed that the attorneys would withhold from the present client the information received") (citing Allegaert v. Perot, 565 F.2d 246, 250-51 (2d Cir. 1977)). Plaintiff evidently understood this, because the in camera submissions reveal that she hired separate counsel, whether to represent her in her unsuccessful effort to leverage a better employment contract (as defendants contend), or merely to fend off Lovenduski's unjustified constructive termination of her (as she contends).

Courts have recognized that employees may "assert a personal

privilege with respect to conversations with corporate counsel, despite the fact that the privilege generally belongs to the corporation, but only by meeting certain requirements that . . . [Nunan] simply cannot satisfy." United States v. Int'l Broth. Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 119 F.3d 210, 215 (2d Cir. 1997). Even if Nunan "reasonably believed" that Phillips Lytle was representing her "on an individual basis," she had no legitimate expectation, without more that she does not allege here, that anything she said to them concerning corporate affairs would be privileged as to her. Id. 119 F.3d at 216-17.⁴ Accordingly, this is not an appropriate case for the application of the joint defense or representation exception; the privilege has been asserted by the corporation which owns it, and plaintiff fails to show that defendants' assertion thereof is not effective as to her. Estate of Weinberg, 133 Misc.2d 950, 952-53 (Surr. Ct., N.Y. Co. 1986), modified on other gr., 129 A.D.2d 126, 139-40 (1st Dept. 1987), rearg. denied, 132 A.D.2d 190 (1st Dept. 1987), app. dis., 71

⁴ Plaintiff would have the burden to show (1) that she approached corporate counsel for the purpose of seeking legal advice, (2) that when she approached corporate counsel she made it clear that she was seeking legal advice in her individual rather than in her representative capacity, (3) that corporate counsel "saw fit to communicate with . . . [her] in . . . [her] individual capacit[y], knowing that a possible conflict could arise, (4) that her conversations were confidential, and (5) that the substance of the conversations "did not concern matters within the company or the general affairs of the company." United States v. Int'l Broth. Teamsters, 119 F.3d at 215 (quoting In re Bevill, Bresler & Schulman Asset Mgmt., 805 F.2d 120, 123, 125 (3d Cir. 1986)).

N.Y.2d 994 (1988). Although there is discredited authority to the contrary, Kirby v. Kirby, #8604, 1987 WL 14862 (Del. Ch. July 29, 1987); Gottlieb v. Wiles, 143 F.R.D. 241 (D. Colo. 1992), most of the more recent cases embrace the view that, when a former officer or director is suing the company for his or her own personal gain, the privilege belongs to the corporation and if asserted is effective to prevent disclosure to the former officer or director. Milroy v. Hanson, 875 F.Supp. 646, 650, 651-52 (D. Neb. 1995). Accord Genova v. Longs Peak Emergency Physicians, P.C., 72 P.3d 454 (Colo. Ct. App. 2003); Lane v. Sharp Packaging Systems, Inc., 251 Wis.2d 68, 640 N.W.2d 788 (2002). See also, American Steamship Owners Mutual Protection and Indemnity Associates, Inc. v. Alcoa Steamship Co., Inc., ___ F.R.D. ___ 2005 WL 2234029 (S.D.N.Y. Sept. 13, 2005); Bushwell v. VIS Corp., unpublished 1996 WL 506914 (N.D. Cal. August 29, 1996). Enforcing the privilege in this context also is consonant with Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348-49 (1985) ("authority to assert and waive the corporation's attorney client privilege passes . . . [to current management]"), and Tekni-Plex, Inc. v. Meynor and Landis, 89 N.Y. 123, 132-34 (1996) (same), the latter of which rejected application of the joint representation doctrine on the record before it. Id. 89 N.Y.2d at 137-38. Plaintiff fails to establish joint representation with respect to the subject of the communications submitted in camera, for the reasons stated above

and in the margin.

Docket #9 is unquestionably privileged inasmuch as it concerns Mr. Paley's advice to Sheehan and the Lovenduski's concerning the annual meeting. The same is true with respect to documents #10 and #11. Plaintiff asserts that, inasmuch as Document #9 contains communications with Phillips Lytle about the holding of a Midwest shareholders meeting, she, "[a]s a shareholder of that corporation, . . . do[es] not see how that could be privileged as to me." While no authority is cited, plaintiff appears to invoke the so-called "fiduciary exception" to the attorney-client privilege first articulated in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970). The Garner exception, however, canvassed in some detail recently in American Steamship Owners Mutual Protection and Indemnity Assoc., Inc. v. Alcoa Steamship Co., Inc., ___ F.R.D. at ___, was formulated before the Supreme Court's decisions in Weintraub, supra and Upjohn Co. v. United States, 449 U.S. 383 (1982) and our Court of Appeals decisions in Tekni-Plex and Talvo. It is controversial. See discussion, Milroy v. Hanson, 875 F.Supp. at 651-52 (collecting authorities). Garner's continuing viability need not be reached, however, because it "has no applicability where the plaintiff stockholder asserts claims principally to benefit h[er]self." Id. 875 F.Supp. at 651. The doctrine's application in New York is unsettled, Hoopes v. Carota, 142 A.D.2d 906, 909-10 (3d Dept. 1988), aff'd, 74 N.Y.2d 716, 718 (1989) (applying

Garner's "good cause" for disclosure criterion on facts but otherwise declining expressly to adopt it as the law of the state), but authorities in this state agree that Garner should not be applied when the plaintiff is "in a[n] adversary relation" with the corporation's current management. Beck v. Manufacturer's Hanover Trust Company, 218 A.D.2d 1, 17-18 (1st Dept. 1995); Hoopes v. Carota, 142 A.D.2d at 910-11; NYSBA Committee on Professional Ethics Opn. #789, at fn.1 (N.Y. State 789) (October 26, 2005). Separately, even if Garner was applicable in this context, plaintiff fails to establish "good cause" for disclosure under the Garner doctrine. Cf., Hoopes v. Carota, 74 N.Y.2d at 718. Accordingly, defendants have met their burden of showing the applicability of the privilege to these documents, and plaintiff fails to establish the applicability of the claimed exceptions.

CONCLUSION

The motion to compel and cross-motion for a protective order in connection with the documents submitted by stipulated order in camera is granted in part and denied in part as specified above.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 10, 2006
Rochester, New York