

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CLIFFORD ELOW,)
)
 Plaintiffs,)
)
 v.) C.A. No. 12721-VCMR
)
 EXPRESS SCRIPTS HOLDING)
 COMPANY,)
)
 Defendant.)

**ORDER DENYING PLAINTIFF’S MOTION FOR *IN CAMERA* REVIEW
AND MOTION TO COMPEL**

WHEREAS, on May 31, 2017, this Court entered a Memorandum Opinion in Plaintiff’s favor, requiring the production of certain books and records (the “Memorandum Opinion”);

WHEREAS, on June 29, 2017, Defendant Express Scripts Holding Co. produced certain documents and provided a privilege redaction log (the “Log”);

WHEREAS, on November 27, 2017, Plaintiff Clifford Elow filed a Motion for *In Camera* Review and to Compel Production (the “Motion”) of eleven documents (the “Atkins Documents”) that Defendant withheld on attorney-client privilege and work product grounds;

WHEREAS, on January 16, 2018, Defendant filed a reply in opposition to the Motion;

WHEREAS, on February 8, 2018, Plaintiff filed a reply in further support of the Motion;

WHEREAS, on March 8, 2018, the Court held argument on the Motion.

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. I have reviewed the parties' briefs, supporting submissions, and the applicable law. For the foregoing reasons, the Motion is DENIED.

2. Plaintiff argues that *in camera* review is necessary because each redacted material "contains business discussions or, at best, a combination of legal and business advice." Pl.'s Mot. for *In Camera* Review 8. After reviewing the Log entries and the Atkins Documents, I have no reason to believe that Defendant improperly asserted attorney-client privilege. *See Sicpa Hldgs. S.A. v. Optical Coating Lab, Inc.*, 1996 WL 636161, at *13 (Del. Ch. Oct. 10, 1996) (acknowledging that this Court denies *in camera* review when the party requesting the review fails to show "that the representation[s] of the party asserting the privilege are inaccurate."). Thus, Plaintiff's request for *in camera* review is denied. *See Doppelt v. Windstream Hldgs., Inc.*, C.A. No. 10629-VCS, at 24 (Del. Ch. Sept. 11, 2017) (TRANSCRIPT) ("I have expressed before my reluctance to have a process that would contemplate the [C]ourt engaging in in-camera review every time a privilege issue surfaces.").

3. Plaintiff further argues that production is warranted even if the Atkins Documents are privileged because the *Garner* exception applies. Pl.’s Mot. for *In Camera* Review 10. “[O]ur law embraces the attorney-client privilege and recognizes its importance to the proper administration of justice,” but this privilege is not absolute. *Salberg v. Genworth Fin., Inc.*, 2017 WL 3499807, at *3 (Del. Ch. July 27, 2017). In *Garner v. Wolfinbarger*, the Fifth Circuit established a fiduciary exception to the attorney-client privilege in a stockholder derivative action. 430 F.2d 1093, 1103–04 (5th Cir. 1970). In *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund IBEW*, the Delaware Supreme Court adopted the *Garner* exception and extended its application to books and records actions under 8 *Del. C.* § 220. 95 A.3d 1264, 1280 (Del. 2014). A party seeking to access privileged documents under the *Garner* exception must show “good cause” to set aside privilege. *Id.* at 1275. In *Garner*, the Fifth Circuit set out multiple factors that demonstrate good cause to invoke the fiduciary exception. 430 F.2d at 1104. The purpose of these factors is to “conduct a ‘balancing test ... to determine whether the balance tips in favor of disclosure or non-disclosure.’” *Salberg*, 2017 WL 3499807, at *5. Delaware courts have identified three factors of “particular significance”: “(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 availability of it

from other sources.” *E.g., Buttonwood Tree Value P’rs, L.P. v. R.L. Polk & Co.*, 2018 WL 346036, at *4 (Del. Ch. Jan. 10, 2018); *Salberg*, 2017 WL 3499807, at *5. Plaintiff contends that he has met all three factors.

4. First, Plaintiff argues that his claims are “colorable” because he “prevailed in his Section 220 action.” Pl.’s Mot. for *In Camera* Review 12. This Court has accepted that the “colorability” of a claim must be assessed under the “credible basis” standard in Section 220 actions. *Salberg*, 2017 WL 3499807, at *5. Because I found that Plaintiff met the “lowest possible burden of proof” satisfying credible basis in the Memorandum Opinion, he has sufficiently shown that his claims are colorable. *Elow v. Express Scripts Hldg. Co.*, 2017 WL 2352151, at *6 (Del. Ch. May 31, 2017).

5. Second, Plaintiff asserts that he is not “blindly fishing” because the eleven documents at issue are specifically tailored and identifiable by description and Bates Number. Pl.’s Mot. for *In Camera* Review 12. I agree that Plaintiff is not fishing and that the documents are precisely identified. *See Salberg*, 2017 WL 3499807, at *5 (stating that the parties did not dispute that the documents at issue were precisely identified, and therefore, the plaintiffs were not “blindly fishing.”).

6. Third and finally, Plaintiff argues that he has demonstrated that the information is necessary and that the information is not available from other sources. In support of his claim, Plaintiff states in one sentence, “[i]ndeed, the documents

sought specifically relate to Defendant’s relationship with Anthem, and are not available from any other source, making them appropriate for production.” Pl.’s Mot. for *In Camera* Review 13. Plaintiff’s conclusory statement does not convince me that the information cannot be obtained by other non-privileged sources, such as the sixty-four internal documents he received after trial. *See Oliver v. Bos. Univ.*, 2004 WL 944319, at *3 (Del. Ch. April 26, 2004) (finding that the plaintiffs failed to identify what documents they “believe would be helpful in remedying this knowledge shortfall.”). In balancing the three factors, I find that this action does not warrant the application of the “narrow, exacting, and . . . difficult to satisfy” *Garner* exception. *Wal-Mart*, 95 A.3d at 1278.

7. Lastly, Plaintiff contends that he is entitled to the remaining documents under the “substantial need” exception to the work product doctrine. Pl.’s Mot. for *In Camera* Review 13. Under Court of Chancery Rule 26(b)(3), a party may obtain access to work product “upon a showing that the party seeking discovery has *substantial need* of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Ct. Ch. R. 26(b)(3) (emphasis added). Plaintiff asserts that he has shown “substantial need” for the same reasons he established “good cause” under the *Garner* doctrine. Pl.’s Mot. for *In Camera* Review 13.

Accordingly, just as Plaintiff did not show good cause to apply the *Garner* exception, he has not shown a “substantial need” for the work product documents.

8. Plaintiff’s Motion is DENIED.

/s/ Tamika Montgomery-Reeves

Vice Chancellor

Dated: April 27, 2018