STATE OF VERMONT
WINDSOR COUNTY

Olympic Precision, Inc. and Robert Colman Plaintiffs v. Daniel Thompson and Susan Thompson Defendants	SUPERIOR COURT Docket No. 43-1-09 Wrcv

OPINION AND ORDER RE: MOTION TO COMPEL

This discovery dispute is before the court on the defendants' motion to compel the deposition testimony of non-party H. Kenneth Merritt, Jr. Defendants Daniel and Susan Thompson, as well as counterclaim plaintiffs Nathaniel Thompson and Lesley Thompson McWilliams, are represented by William Pribis, Esq. and Frank Olmstead, Esq. Mr. Merritt, represented by Robert O'Neill, Esq., has filed a memorandum in opposition to the motion. Plaintiffs Olympic Precision, Inc. and Robert Colman also oppose the motion. They are represented by R. Jeffrey Behm, Esq. and Robert Krasnoo, Esq.

BACKGROUND

Plaintiff Olympic Precision, Inc. (OPI) is a Vermont corporation that does business in Windsor County. Plaintiff Robert Colman is purportedly the majority shareholder, a director, and the president of OPI. OPI performs precision engineering services pursuant to contracts with the United States Government.

In their complaint, Plaintiffs alleges that Daniel Thompson, who is a senior employee, shareholder, and director of OPI, (1) breached his fiduciary duties to OPI, (2) accessed OPI's computer network without authorization in order to defraud OPI, (3) tortiously interfered with OPI's contractual relationships, and (4) defamed Colman. The complaint also alleges that Susan Thompson, Daniel's wife who is not an OPI employee, accessed OPI's computer network without authorization in order to defraud OPI.

Defendants deny these allegations. They filed a counterclaim, in which Nathaniel Thompson and Lesley Thompson McWilliams joined.[1] According to the counterclaim, Daniel founded OPI, and Nathaniel and Lesley, along with others, were shareholders. In 2005, Colman allegedly engaged in a series of forgeries and ultra vires acts to gain control of a majority OPI's shares and appoint himself president. Among other things, the counterclaim plaintiffs allege that

[1] The court granted Nathaniel and Lesley's motion to intervene on March 30, 2009, pursuant to V.R.C.P. 24.

Colman breached his fiduciary duties to OPI and shareholders Nathaniel and Lesley. The counterclaim also states a claim for fraud and misrepresentation. Colman denies these allegations.[2]

In connection with Defendants' claim that Colman wrongfully usurped power in OPI, Defendants are seeking deposition testimony from OPI's corporate counsel, Kenneth Merritt. According to Defendants' motion to compel, Daniel asked Merritt to investigate allegations of forgery, misrepresentation, and breach of duty by Colman, but Merritt refused. Defendants argue that if an agreement exists whereby Colman acquired a majority of OPI's shares from the company, then Merritt, as OPI's counsel, should have access to and knowledge of such agreement.

Merritt and Plaintiffs oppose Defendants' attempt to depose Merritt, claiming attorney-client privilege. Particularly relevant to this dispute is Daniel's current position in the company. The pleadings and the record in this case are less than clear about what position Daniel currently holds in OPI. According to Plaintiffs' complaint, filed February 13, 2009, "Defendant Daniel L. Thompson is a precision engineer. He also is the Chief Technology Officer of Olympic, a member of Olympic's senior management, the owner of approximately ten percent of Olympic's stock, and *a member of Olympic's Board of Directors*." (Compl. ¶ 5 (emphasis added).) Defendants deny this in their answer, but it is unclear which statements in the paragraph they deny.

Merritt asserts in his memorandum in opposition to the motion to compel that Daniel cannot waive OPI's attorney-client privilege because Daniel is a *former* director of the company. In their reply to Merritt's opposition to Defendants' motion to compel, Defendants assert that Daniel is a *current* board member and that Merritt's characterization of Daniel as a former board member is inconsistent with the record and the facts of this case. Plaintiffs filed a response to Defendants' motion and corrected Merritt's mischaracterization. "Daniel Thompson remains a director of OPI." (Pls.' Mem. Opp'n Mot. Compel at 3.) After these memoranda were filed by Defendants and Plaintiffs, Merritt filed a subsequent memo on the issue. Attached to this recent memo is an affidavit from Merritt's attorney, Paul Kearney, Esq. Particularly relevant to the instant dispute is Kearney's statement that, "[s]ubsequent to receipt of Mr. Thompson's Reply to Mr. Merritt's memorandum, I have received information that Olympic Precision does not contest that Mr. Thompson is presently a member of the corporate board." (Kearney Aff. ¶ 6.) In light of this affidavit, Plaintiffs' complaint, Defendants' motion, and Plaintiffs' memo in opposition the court will treat Daniel as a current director of OPI for purposes of the foregoing discussion on the scope of the attorney-client privilege.

DISCUSSION

Defendants issued a subpoena duces tecum to Merritt on January 7, 2010, and it was served on January 13, 2010. The subpoena called for Merritt to give an oral deposition on the

[2] The court granted counterclaim plaintiffs' motion to amend their counterclaim on March 10, 2010, pursuant to V.R.C.P. 15(a). Counterclaim plaintiffs submitted an amended counterclaim alleging that the instant suit is unauthorized corporate action by OPI because Colman has no authority to authorize OPI to file this suit. Plaintiffs/counterclaim defendants have not filed an answer to this additional counterclaim.

topics at issue in the instant action. The subpoena also stated that Merritt was "required to produce for inspection and copying any and all records, tangible, electronic, or in any form that [are] in your possession pertaining to Olympic Precision, Inc." (Defs.' Mot. Compel Ex. A.) Merritt's attorney indicated in an e-mail to Defendants' attorney that Merritt would cooperate with the subpoena. However, Merritt indicated that he would raise the attorney-client privilege on behalf of OPI at the deposition, and it was agreed that the deposition be postponed until the scope of that privilege could be determined by the court. (Defs.' Mot. Compel Ex. B.)

> [A] person commanded to produce and permit inspection, copying, testing, or sampling may . . . serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials . . . . If objection is made, the party serving the subpoena shall not be entitled to the requested production or to inspect, copy, test, or sample the materials . . . except pursuant to an order of the court for which the subpoena was issued. If objection has been made, the party serving the subpoena may . . . move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

V.R.C.P. 45(c)(2)(B) (Cum. Supp. 2009). "On timely motion, the court for which a subpoena was issued shall quash or modify the subpoena if it . . . requires disclosure of privileged or other protected matter and no exception or waiver applies." V.R.C.P. 45(c)(3)(A)(iii) (Cum. Supp. 2009).

In this case, Merritt has served Defendants' attorney with an objection to the production, and Defendants are not entitled to Merritt's testimony and papers until this court orders production. Defendants have moved for an order to compel production under the rule, but the court cannot grant such a motion and must quash or modify the subpoena if it requires Merritt to disclose privileged material. The precise issue under Rule 45(c)(3)(A)(iii) is whether an exception or a waiver applies to Merritt's claim of the attorney-client privilege. The scope of the attorney-client privilege is governed by V.R.E. 502.[3]

It is undisputed that Merritt is Plaintiff OPI's corporate counsel, and Defendant Daniel Thompson is one of OPI's directors. Therefore, Merritt is a "lawyer;" OPI is his "client;" and Daniel is a "representative of the client" under V.R.E. 502(a). See V.R.E. 502(a)(2) ("In the case of a corporation, the officers and directors . . . are also 'representatives of the client.'").

"The privilege may be claimed by the client . . . . The person who was the lawyer . . . at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client." V.R.E. 502(c). Despite Defendants' assertion that Merritt cannot claim the privilege if OPI is silent on the matter, Merritt is presumed to have authority to claim the

[3] "This rule is similar to . . . Uniform Rule 502." Reporter's Notes, V.R.E. 502. Thirty-eight states have adopted the Uniform Rules of Evidence. See Cornell University Law School, Law by Source: Uniform Laws, Uniform Rules of Evidence Locator (March 5, 2003), at http://www.law.cornell.edu/uniform/evidence.html. This court will look to decisions from those states for guidance on how to interpret Rule 502 in the absence of Vermont authority.

privilege on behalf of OPI. Furthermore, the privilege has been properly claimed in this case by OPI itself in its opposition memo.

"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 . . . between himself or his representative and his lawyer . . . ." V.R.E. 502(b)(1). In this case, OPI has a privilege to prevent Merritt from disclosing confidential communications made between Merritt and representatives of OPI.

There are five exceptions to Rule 502(b). Defendants argue that two are applicable to the instant case, but one of these is clearly meritless. "There is no privilege under this rule: . . . If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." V.R.E. 502(d)(1). Defendants clearly believe that Colman is guilty of fraud. However, this belief is not enough to overcome the attorney-client privilege. "[I]t is not enough . . . that the client is guilty of crime or fraud. Forfeiture of the privilege requires the client's *use or aim to use* the lawyer to foster the crime or fraud." *In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005). "The applicability of the exception turns on whether the client intended to use the attorney's services, or advice, to commit or plan to commit an ongoing or future crime or fraud." *In re Motion to Quash Bar Counsel Subpoena*, 2009 ME 104, ¶ 17, 982 A.2d 330. Defendants do not argue that Colman sought or obtained Merritt's services to enable or aid Colman to commit fraud. Although Defendants have proffered some evidence of Colman's alleged forgery (Defs.' Reply to Merritt's Mem. Opp'n Mot. Compel Ex. B), they have proffered no evidence that Colman intended to use Merritt's services to perpetrate the alleged fraud. Therefore, V.R.E. 502(d)(1) is inapplicable.

The parties' main point of contention is whether individual board members of a client corporation are "joint clients." There is no attorney-client privilege "[a]s to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients." V.R.E. 502(d)(5). The Vermont Supreme Court has not addressed the joint-clients exception to the attorney-client privilege. However, other states have addressed whether individual corporate board members are "joint clients" and therefore exempt from the privilege.

"Although the [attorney-client] privilege has a venerable pedigree and helps to ensure competent and complete legal services, it is nonetheless inconsistent with the general duty to disclose and impedes the investigation of the truth. For this reason, . . . the privilege must be strictly construed." *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984) (citations omitted); see also *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28, ¶ 21, 640 N.W.2d 788 (same). "Thus, to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny." *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994). These rules of construction counsel a narrow reading of V.R.E. 502(b) and a broad reading of its exceptions under subsection (d) in order to prevent OPI's assertion of

the privilege from becoming an unreasonable "obstacle to the investigation of the truth." 8 John Wigmore, Evidence § 2291, at 545 (McNaughton rev. ed. 1961).

On the surface, it would appear that the joint-clients exception is inapplicable in the instant case because that exception requires two or more clients, and Merritt has only one client in this case: OPI. "Because in Vermont, as elsewhere, a corporation is a legal entity distinct from its shareholders, it is also the general rule that an attorney representing a corporation owes a duty of care solely to the corporation, not to its separate shareholders, officers or directors." *Bovee v. Gravel*, 174 Vt. 486, 487 (2002) (mem.) (citation omitted); see also *Milroy v. Hanson*, 875 F. Supp. 646, 650 (D. Neb. 1995) ("There is but one client, and that client is the corporation."). However, a closer examination of the caselaw reveals that the joint-clients exception to the attorney-client privilege is not that simple.

Defendants direct the court's attention to the case of *Gottlieb v. Wiles*, 143 F.R.D. 241 (D. Colo. 1992). *Gottlieb* involved litigation between a corporation and the defendant Mr. Wiles, who was both the former chairman of the board and the former chief executive officer (CEO) of the corporation. Similarly to the instant case, Wiles moved to enforce a subpoena directing the corporation's former counsel to produce certain documents consisting of communications between the corporation and its counsel generated during the time that Wiles was chairman and CEO of the corporation. Corporate counsel withheld production under a claim of attorney-client privilege.

The *Gottlieb* court held that, under the circumstances, the documents could be disclosed to Wiles. See *id.* at 246. Citing to federal common law on the issue,[4] the court stated that "the cloak of confidentiality afforded by the attorney-client privilege and the work product doctrine is not absolutely limited to the attorney and his client. Others may come within the mantle of protection, and disclosure to them does not constitute a breach of confidentiality." *Id.*

The court held that disclosure to Wiles did not constitute a breach of confidentiality. The court reasoned that,

> at the time the materials . . . were generated, Wiles was not an outsider. As the Chairman of the Board and Chief Executive Officer, he was squarely within the class of persons who could receive communications and work product from [the corporation's] counsel without adversely impacting the privileged or confidential nature of such material.

Id. at 247.

The court noted that Wiles, as a former director and officer, has no power to waive or assert the privilege because "the attorney-client privilege belongs to the corporation." *Id.* However, "[t]he fact that former officers and directors lack the power to waive the corporate

[4] Unlike Vermont and the vast majority of states that follow the Uniform Rules of Evidence, federal courts look to the common law for evidentiary privileges. See F.R.E. 501; see also *In re Crazy Eddie Sec. Litig.*, 131 F.R.D. 374, 377 (E.D.N.Y.1990) (where action asserted federally based claim, extent of attorney-client privilege was matter of federal common law).

privilege does not resolve the question of whether they themselves are precluded by the attorney-client privilege or work product doctrine from inspecting documents generated during their tenure." *Id.* The court held that "a corporation may not assert the attorney-client privilege against a former director in such a situation" and analogized the situation to the joint-clients exception. *Id.* "An analogous situation presents itself when parties with a common interest retain a single attorney to represent them. When they later become adverse, neither is permitted to assert the attorney-client privilege as to communications occurring during the period of common interest." *Id.*

Clearly under the *Gottlieb* court's interpretation of the joint-clients exception, which is substantially the same as Vermont's under Rule 502(d)(5), Merritt and OPI cannot assert the attorney-client privilege with regard to Daniel's discovery requests.

The *Gottlieb* court remarked on the "surprising dearth of authority on this subject" when this case was decided in 1992. *Gottlieb*, 143 F.R.D. at 247. The *Gottlieb* court cited to an unpublished Delaware trial court opinion for authority on the subject. *Kirby v. Kirby* involved a dispute among four siblings over the control of a charitable corporation. No. 8604, 1987 WL 14862, at *1 (Del. Ch. July 29, 1987). The *Kirby* plaintiffs filed a motion to compel production of certain documents withheld by the defendants on the ground of attorney-client privilege. The *Kirby* court held that the attorney-client privilege may not be invoked against the plaintiffs with regard to documents prepared while they were sitting board members.

> The issue is not whether the documents are privileged or whether plaintiffs have shown sufficient cause to override the privilege. Rather, the issue is whether the directors, collectively, were the client at the time the legal advice was given. Defendants offer no basis on which to find otherwise, and I am aware of none. The directors are all responsible for the proper management of the corporation, and it seems consistent with their joint obligations that they be treated as the "joint client" when legal advice is rendered to the corporation through one of its officers or directors.[5]

Id. at *7. The holding in *Gottlieb* and *Kirby*, at least with regard to current directors, has since been adopted by other courts. See *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 104 (S.D.N.Y. 2009) ("as a general matter, a corporation cannot assert the privilege to deny a director access to legal advice furnished to the board during a director's tenure"); *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 473-74 (W.D. Mich. 1997) (directors have a right to access attorney communications relating to the time that they served as directors); *Harris v. Wells*, 1990 WL 150445, at *4 (D. Conn. Sept. 5, 1990) (applying *Kirby*); *Hutchins v. Fordyce Bank & Trust Co.*, 211 B.R. 330, 333 (Bankr. E.D. Ark. 1997) (citing *Gottlieb*); *Inter-Fluve v. Montana Eighteenth Judicial Dist. Court*, 2005 MT 103, ¶¶ 35-37, 112 P.3d 258, 264 (closely held corporation and directors were joint clients because a corporation can act only through its agents; therefore, the corporation could not assert the attorney-client privilege against its joint client directors); see also *People ex. rel. Spitzer v. Greenberg*, 851 N.Y.S.2d 196, 201-02

[5] Delaware has adopted Unif. R. Evid. 502(d)(5) (1974) which is identical to V.R.E. 502(d)(5) ("joint clients"). See Del. R. Evid. 502(d)(6).

(N.Y. App. Div. 2008) ("a former director is not *absolutely* barred from an inspection of all confidential documents generated during his tenure;" former directors "are within the circle of persons entitled to view privileged materials without causing a waiver of the attorney-client privilege").

Daniel would certainly fall into the *Kirby* court's definition of "joint client," and accordingly Merritt and OPI could not assert the attorney-client privilege with regard to Defendants' discovery requests.

As the courts cited above have noted, a director's exemption from the corporation's attorney-client privilege is concomitant with the director's right to inspect corporate documents generally. "Delaware law recognizes a broad right in corporate directors to access corporate records and documents, both by statute and common law. This right extends to documents otherwise protected by the corporation's attorney-client privilege." *Glidden*, 173 F.R.D. at 473 (citations omitted). Like Delaware, Vermont also recognizes a director's right to access corporate records and documents. See 11A V.S.A. § 8.30(b)(2) (Cum. Supp. 2009) ("In discharging his or her duties a director is entitled to rely on information, opinions, reports, or statements . . . if prepared or presented by: . . . legal counsel."). Therefore, the policy rationale underlying the broad interpretation of the joint-clients exception is consonant with Vermont law on corporate governance.

Gottlieb and *Kirby* are not without its critics.

> With all due respect, cases like *Kirby*, *Harris*, and *Gottlieb* make a fundamental error by assuming that for a corporation there exists a "collective corporate 'client'" which may take a position adverse to "management" for purposes of the attorney-client privilege. There is but one client, and that client is the corporation. *Commodity Futures Trading Comm. v. Weintraub*, 471 U.S. 343, 348 (1985). This is true despite the fact that a corporation can only act through human beings. As the Supreme Court has stated, "for solvent corporations" the "authority to assert and waive the corporation's attorney-client privilege" rests with "*management*." *Weintraub*, 471 U.S. at 348-49 (emphasis added). A dissident director is by definition not "management" and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of "management."

Milroy v. Hanson, 875 F. Supp. 646, 649-50 (D. Neb.1995). In *Milroy*, the plaintiff was a sitting director and a minority stockholder of a corporation, and the defendants were the corporation and its remaining stockholders and directors. The plaintiff alleged that (1) the defendants abused the corporation and violated their fiduciary duty to him; (2) the defendants wasted the assets of the corporation; and (3) the defendants operated the corporation as a criminal enterprise. The plaintiff sought monetary damages against all the defendants, including the corporation, and he also sought a judgment liquidating the corporation's assets. In connection with the litigation, the plaintiff sought documents which the defendants claimed were subject to the attorney-client privilege. The *Milroy* court held that the plaintiff was not entitled to these documents either as a sitting director or as a minority shareholder because the defendants were "management" and

entitled to assert the privilege, while the plaintiff was a dissident director and therefore not "management." See *id.* at 650-51.

Despite its superficial similarities to the case at bar, *Milroy* is distinguishable in several respects. First, the *Weintraub* case—which the *Milroy* court, Merritt, and the instant Plaintiffs rely so heavily on—is inapplicable here because it held that *former* managers (directors and officers) may not *assert* the attorney-client privilege.

> [W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.

Weintraub, 471 U.S. at 349.

Despite initial confusion to the contrary, Daniel is a current director of OPI, even if he may be characterized as a dissident director. Also Daniel is not seeking to assert the privilege; instead he is arguing that the privilege cannot be asserted against him. *Weintraub* speaks only to displaced or former managers of a bankrupt corporation, not dissident managers, and nothing in *Weintraub* suggests that a dissident director in a solvent corporation is the functional equivalent of a displaced director in a bankrupt corporation.

Furthermore, the *Milroy* court's additional authorities do not stand for the proposition that a sitting director cannot assert or waive the privilege.[6] Finally, the *Milroy* court's additional reasons for upholding the privilege in that case are inapplicable here.

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[6] In support of its position, the *Milroy* court cites the following cases in support of its position: *In re Braniff, Inc.*, 153 B.R. 941, 945 (Bankr. M.D. Fla. 1993) (absent a specialized showing, *former* directors and officers were not entitled to documents when privilege asserted by corporation); *Tail of the Pup, Inc. v. Webb*, 528 So. 2d 506 (Fla. Dist. Ct. App. 1988) (individual stockholder who was also officer and director had no authority to waive or assert the privilege against the wishes of the corporation's board of directors); *In re Estate of Weinberg*, 509 N.Y.S.2d 240, 242-43 (N.Y. Sup. Ct. 1986), aff'd sub nom., *In re Beiny*, 522 N.Y.S.2d 511 (N.Y. App. Div. 1987) (officer of a corporation had no claim to see corporation's privileged materials or to waive the privilege); *Hoiles v. Superior Ct.*, 204 Cal. Rptr. 111 (Cal. Ct. App. 1984) (corporation's attorney-client privilege properly asserted against minority shareholder and director). However, a closer reading of these cases distinguishes them from *Milroy* and the instant case. For instance, *Webb* involved a litigant seeking production after he was "wrongfully" removed from his position as director. *Webb*, 528 So. 2d at 506. *Hoiles* undermines the *Milroy* court's argument that a current director cannot assert the right. "Hoiles is arguably entitled to review corporate legal documents and to question [corporate counsel] *in his role as a director* here. But the issue is not presently before us. Hoiles has not sued in that capacity . . . ." *Hoiles*, 204 Cal. Rptr. at 117. And finally, *Weinberg* is of questionable authority in light of subsequent, post-*Kirby* authority from New York. See *People ex. rel. Spitzer v. Greenberg*, 851 N.Y.S.2d 196, 201-02 (N.Y. App. Div. 2008) ("a former director is not *absolutely* barred from an inspection of all confidential documents generated during his tenure;" former directors "are within the circle of persons entitled to view privileged materials without causing a waiver of the attorney-client privilege").

> [Milroy] has filed suit, in major part, to benefit himself. He does not contend that under Nebraska corporate law he has some entitlement to documents in his fiduciary role as a corporate director. Furthermore, he has made no showing that he wants the documents to fulfill his fiduciary duty to [the corporation] and all its shareholders, as opposed to using the documents to further his personal goals in this litigation.

Milroy, 875 F. Supp. at 650.

In the case at bar, Defendants' counterclaim is not intended primarily to benefit Daniel. Instead, Defendants seek "a declaratory judgment ruling establishing the rights of the parties vis-à-vis OPI." (Am. Countercl. ¶ E, at 13.) It would appear that Daniel wants Merritt's documents in order to fulfill his fiduciary duty to OPI and its shareholders, i.e., determine who the true owners and managers are. Thus, Daniel is not seeking OPI's legal documents solely to further his personal goals in this litigation, and he is entitled to the documents in his fiduciary role as a corporate director under Vermont corporate law. See 11A V.S.A. § 8.30(b)(2).

The courts that have since followed *Milroy* and rejected *Gottlieb* and *Kirby* involved cases where *former* board members or officers were seeking privileged material,[7] and this court has been unable to locate any authority decided after *Milroy* that holds that a sitting director of a solvent company may not waive or assert the corporation's attorney-client privilege.[8]

We are persuaded by the *Gottlieb* court's rationale, and accordingly, we hold that individual directors, acting in their roles as fiduciaries, are "joint clients" with the corporation they serve, and an attorney may not withhold privileged documents from his own client.

> In the corporate setting, this principle would clearly require counsel to provide [privileged documents] to the company's board of directors. The policy

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[7] See *Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1187 (D. Nev. 2008) ("Only current management may assert or waive such privilege," and a former manger may not access a company's attorney-client privileged communications); *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 278 (N.D. Ill. 2004) (rejecting *Gottlieb* and holding that a former officer of a corporation has no right to access a privileged document to which he had access when he was a officer); *Genova v. Longs Peak Emergency Physicians*, 72 P.3d 454, 463 (Colo. Ct. App. 2003) (in rejecting *Kirby* and its progeny, court noted that "plaintiff's status as a former director and 'dissident' does not entitle him to access defense counsel's files regarding communications with [the corporation]."); *In re Mktg. Investors Corp.*, 80 S.W.3d 44, 50 (Tex. Ct. App. 1998) ("attorney-client privilege applies against a former corporate officer who had access to documents while a corporate officer"); *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28, ¶ 34, 640 N.W.2d 788 ("even though [plaintiff] is a former officer and director, and the documents at issue were prepared during his tenure, [the corporation's attorney] can effectively assert the lawyer-client privilege against him").

[8] In *American Steamship Owners Mutual Protection and Indemnity Associates, Inc. v. Alcoa Steamship Co., Inc.*, the court noted that the "distinction between a board member's personal role and his role as a director is critical in this case." 232 F.R.D. 191, 198 (S.D.N.Y. 2005). The court held that when a sitting director is acting in his personal role, as opposed to his fiduciary role, "he can neither disseminate confidential information he has received as a Board member nor pierce the privilege to obtain additional information." *Id.* Since Daniel's purpose in seeking Merritt's testimony in the case at bar is consistent with his duties as director, i.e., he is ultimately seeking a determination of OPI's ownership and management as opposed to damages, he is not precluded from discovery under *American Steamship*.

> underlying the [attorney-client privilege] would not be advanced by now denying [a director] access to documents which he could have seen upon request at the time they were generated.

Gottlieb, 143 F.R.D. at 247 (citations omitted).

Therefore, the court finds no privilege under V.R.E. 502 and V.R.C.P. 45(c)(3)(A)(iii), and Merritt is required to produce OPI's relevant legal documents sought in the January 7, 2010 subpoena pursuant to V.R.C.P. 45(c)(2)(B).

ORDER

For the reasons given above, Defendants' motion to compel is GRANTED.

Dated at Woodstock, Vermont this 3 day of May, 2010.

Harold E. Eaton, Jr.
Superior Court Judge