

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>PATRICIA FOX, on behalf of herself and all others similarly situated,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 12 C 9350</b>
	)	
<b>RIVERVIEW REALTY PARTNERS, f/k/a Prime Group Realty Trust, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**Case No. 12 C 9350**

**ORDER ON PLAINTIFFS' MOTION TO COMPEL  
AND MOTION TO EXTEND FACT DISCOVERY**

Patricia Fox represents a certified class consisting of the holders of preferred stock of Prime Group Realty Trust from November 2011 through December 2012. The class's claims, somewhat simplified, arise from their contention that PGRT and its directors engaged in a series of actions—including issuance of common stock to Five Mile Capital Partners LLC—that they say were designed to, and did, marginalize them and eventually wipe them out, arranging for a forced sale of their stock at an inadequate price. The class has sued PGRT (now known as Riverview Realty Partners), its trustees, and Five Mile.

Some months ago, before the Court certified the plaintiff class, the defendants moved to disqualify Fox's attorneys and Fox herself after learning they had obtained from a former PGRT trustee (the equivalent of a director) a number of documents that were subject to PGRT's attorney-client and work product privileges. After extensive briefing and argument, the Court denied the motion. The parties agreed that the privilege question was governed by Illinois law. The Court ruled that the Illinois Supreme Court would adopt the so-called "fiduciary" exception to the attorney-client privilege and would apply it in the shareholder-corporation context, including in a "direct" shareholder action like this one. The Court went on to rule that Fox had shown the

good cause required to apply the exception to the attorney-client-privileged documents in question. The Court also ruled, however, that there was no fiduciary exception to the work product doctrine. The Court determined that some of the documents as to which defendants claimed work product protection were not actually covered by that doctrine and that the others had no substantial relationship with the claims in this lawsuit. The Court noted that disqualification of counsel is considered a drastic remedy and concluded it would be inappropriate under the circumstances. Finally, the Court declined to disqualify Fox because there was no evidence she had seen any of the small number of documents that were actually privileged. The Court therefore denied defendants' motion but directed Fox's counsel to return to defendants the documents the Court had identified as protected by the work product doctrine. See *Fox v. Prime Grp. Realty Trust*, No. 12 C 9350, slip op. (N.D. Ill. Dec. 10, 2013).

A number of months later, Fox moved to compel the defendants to produce a large quantity of materials that defendants had identified as privileged. The Court denied that motion on the ground that the pertinent discovery requests by Fox were overly broad. Fox then narrowed the requests and filed a second motion to compel. Defendants have objected to the motion on various grounds.

Defendants' first objection is that as preferred shareholders, the class members are not owed any fiduciary duties at all. If there is no fiduciary duty, defendants argue, there can be no fiduciary exception to the privilege.<sup>1</sup> The Court previously ruled, in connection with a motion to dismiss, that *the entity* owes no one a fiduciary duty, but that still leaves the directors (the Court will use that term to refer to the trustees).

The Court previously concluded that the law of Maryland, where PGRT was organized, governs Fox's claims, but also noted that Maryland courts tend to follow Delaware corporate law where there is no Maryland law on a particular point. See *Fox v. Prime Grp. Realty Trust*, No. 12 C 9350, 2012 WL 6680349, at \*5 (N.D. Ill. Dec. 21, 2012). Defendants say that under Maryland law, "Preferred shareholders are only owed *limited* fiduciary duties and only when the contract that governs their relationship is

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<sup>1</sup> The Court notes that defendants are making this argument for the first time in connection with the present motion. They did not argue or even hint at it in arguing the motion for disqualification.

silent." *Indiv. Defs.' Opp. to Pl.'s Mot. to Compel* at 5. They cite a Maryland trial judge's decision for the proposition that "[u]nder Maryland law, shareholders of preferred stock are **only** entitled to the preferential rights enumerated in the applicable agreement between the parties." *Id.* (quoting *Jolly Roger Fund, LP v. Prime Grp. Realty Trust*, No. 24-C-06-010433, slip op. at 12 (Cir. Ct. for Baltimore City Aug. 16, 2007) (emphasis added by defendants)).

The Court does not read the Maryland judge's decision as defendants appear to. What the judge appears to have been saying was that a preferred shareholder only gets preferential rights that are provided by contract, not that a preferred shareholder has *only* contractually-based rights and nothing else. This becomes clearer when one examines Delaware law—which is appropriate not just because of the principle referenced in the previous paragraph but also because the judge in *Jolly Roger Fund* relied on two Delaware cases in addressing what duties, fiduciary and otherwise, are owed to Maryland preferred shareholders: *Elliot Assoc., LP v. Avatex Corp.*, 715 A.2d 843 (Del. 1998), and *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594 (Del. Ch. 1986). See *Jolly Roger Fund*, slip op. at 6, 15.

Delaware law holds that "[p]referential rights are contractual in nature and therefore are governed by the express provisions of a company's certificate of incorporation," *Rothschild Int'l Corp. v. Liggett Grp., Inc.*, 474 A.2d 133, 136 (Del. 1984) (emphasis added), not that a preferred shareholder only has contractual rights. Rather, the rule is that although "preferred shareholders' rights are primarily contractual in nature," if "a right asserted is not to a preference but rather to a right shared equally with the common [shareholders], the existence of such right and the scope of the correlative duty may be measured by equitable as well as legal standards." *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 103, 116-17 (Del. Ch. 2007). And in *Jedwab*, the court expressly rejected an argument that a preferred stockholder's rights were exclusively contractual, noting the defendants' "failure to distinguish between 'preferential' rights (and special limitations) on the one hand and rights associated with all stock on the other." *Jedwab*, 509 A.2d at 593. Indeed, "Delaware courts have not hesitated to state that a fiduciary duty of loyalty is one such right shared equally between the common and preferred stockholders." *Jackson Nat'l Life Ins. Co. v.*

*Kennedy*, 741 A.2d 377, 387 (Del. Ch.1999). See also *Eisenberg v. Chicago Milwaukee Corp.*, 537 A.2d 1051, 1062 (Dec. Ch. 1987) ("CMC's directors are fiduciaries for the Preferred stockholders, whose interests they have a duty to safeguard, consistent with the fiduciary duties owed by those directors to CMC's other shareholders and to CMC itself.").

The Court therefore rejects defendants' contention that as preferred shareholders, the plaintiff class was not owed fiduciary duties by PGRT's directors. It is not entirely clear whether defendants are arguing in the alternative that the rights the class asserts in this lawsuit are preferential rights and are, for that reason, limited to what their contract provides. But if they are, they have forfeited the point for present purposes; they have not provided the Court with the contract in connection with the briefing on this motion and thus do not point to any particular contractual term.

The Court also rejects defendants' argument that because the attorney-client privilege in question belongs to PGRT, an entity that (unlike a director) owes no fiduciary duty, there can be no "fiduciary" exception to the privilege. The argument proves too much: the same would be true in virtually any case involving a shareholder/corporation dispute in which the fiduciary exception is invoked and thus would effectively eliminate the exception.

In a footnote, defendants repeat their earlier argument that the fiduciary exception, assuming it exists, does not apply to direct shareholder actions. See *Indiv. Defs.' Opp. to Pl.'s Mot. to Compel* at 5 n.4. The Court rejected this argument in denying the motion for disqualification, and defendants have offered no good reason to revisit the point.

Defendants' next argument is that "courts have refused to apply the fiduciary exception in the absence of a 'mutuality of interest' between the plaintiff shareholder and the defendant corporation." *Id.* at 6. They cite authority for the proposition that if the shareholder and the company were already in an adversarial stance at the time the privileged material was created, the fiduciary exception does not apply. *Id.* Perhaps so, but defendants offer no viable basis supporting a finding that the requisite mutuality was lacking at the relevant time. They cite only the fact that Fox evidently considered bringing a lawsuit in "late 2010, early 2011." *Id.* (citing *Fox Dep.* at 177-78). They offer

no authority for the proposition that this is enough to defeat mutuality of interest between Fox and PGRT, not to mention the rest of the class of shareholders that Fox represents. One of the cases that defendants cite says that "something more than a mere disagreement" must exist, *Delta Fin. Corp. v. Morrison*, 819 N.Y.S.2d 425, 430 (Sup. Ct. 2006), and defendants have not shown anything more than that as of the relevant dates. In addition, defendants cite no evidence for the proposition that the directors of PGRT—whose privilege is, after all, the privilege at issue—considered Fox to be adverse at the relevant times.

Defendants also argue that the Court should not apply the fiduciary exception because concern about exposure of otherwise privileged information would make corporate managers reluctant to obtain legal advice and might make such advice harder to obtain. See *Indiv. Defs.' Opp. to Pl.'s Mot. to Compel* at 7. The Court acknowledges these concerns, but they largely amount to an attack on the fiduciary exception itself. In addition, as the court in *Garner v. Wolfinbarger* stated, "in assessing management assertions of injury to the corporation it must be borne in mind that management does not manage for itself and that the beneficiaries of its actions are the stockholders . . . ." *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970).

That said, it is important to focus any application of the exception to materials that have a direct bearing on a claim of arguable merit and whose production is shown by the requesting party to be necessary to fair consideration of that claim. With this in mind, the Court turns its attention to the particular documents requested. The documents may be grouped in a handful of categories:

- 1) the notes of PGRT in-house attorney Hoffman regarding certain board meetings in July-August 2011 at which it is likely that the issues of full voting rights for the preferred shareholders or the issuance of common shares to Five Mile were discussed;
- 2) a memorandum from outside counsel described in defendants' privilege log as containing advice regarding the common share issuance, one of the transactions under attack in this case;
- 3) e-mails described in defendants' privilege log as concerning the common share issuance;

- 4) e-mails described in defendants' privilege log as concerning Five Mile's tender offer for the preferred shares, another transaction under attack in this cases;
- 5) documents concerning a proposed incentive plan for PGRT management that ultimately was not adopted; and
- 6) documents concerning the return of common shares from PGRT's former sole common shareholder, Prime Office.

Plaintiffs have failed to show anything approaching necessity for production of the documents in categories 5 and 6. The Court declines to order their production.

With regard to category 1, defendants argue there is an absence of need because the minutes of the meetings were produced, but plaintiffs have pointed to some evidence suggesting the minutes may not be accurate. These documents are likely to have a direct bearing on relevant transactions, and plaintiffs have sufficiently shown a need for their production. Documents in categories 2, 3, and 4, by their description on defendants' privilege log, are similarly likely to have a direct bearing on the transactions at issue in this case. Plaintiffs have sufficiently shown a need for their production. Defendants are directed to produce the documents in categories within five days of entry of this order, redacting only material over which work product protection (not attorney-client privilege) is legitimately claimed.

Finally, the Court notes that plaintiffs filed, earlier this week, a motion seeking an extension of the period for discovery, which the Court previously ordered to be completed by June 25. The justification plaintiffs offer is that they may wish to reopen the depositions of certain witnesses if the Court orders production of documents covered by the motion to compel.

The Court denies plaintiffs' motion. As the Court has previously commented, plaintiffs waited until far too late in the discovery process to bring the issues covered in the motion to compel to the Court's attention in an appropriate way. The Court first found the fiduciary exception to apply way back in December 2013, when it denied the motion for disqualification. Yet plaintiffs waited several months to serve, or at least to press, discovery requests seeking additional privileged materials. And when the matter next came before the Court, plaintiffs made a strategic decision to seek extremely broad production—overly broad, in the Court's view. The Court quashed their subpoena to

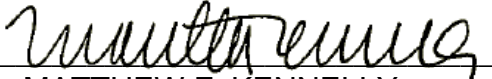
PGRT's outside counsel on that basis, just a few days after the matter was fully briefed. Their strategic decision having been shown to be unwise, plaintiffs then adopted a fallback position, which resulted in the motion to compel that the Court has addressed in this order. That motion was filed at the end of May 2014, just four weeks before a fact discovery cutoff date that the Court had earlier extended to June 25 but had expressly declined to extend by a longer period that plaintiffs sought. The Court has ruled on the present motion as promptly as it reasonably could, after reviewing the parties' briefs and hearing oral argument on June 19.

In sum, the expiration of the fact discovery cutoff date is a result of strategic or tactical decisions that plaintiffs have made, not a result of matters they could not have anticipated, dilatory behavior by defendants, or undue delay by the Court. They have not shown a basis for a further extension of the fact discovery cutoff date.

In addition, because fact discovery has expired, the Court will not entertain further motions by plaintiffs seeking production of additional attorney-client-privileged documents based on the fiduciary exception—or, for that matter, further fact discovery-related motions by any party. The case is going to move to the next phase at this point.

### **Conclusion**

For the reasons stated above, the Court grants plaintiffs' motion to compel in part and denies their motion to extend discovery.

  
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MATTHEW F. KENNELLY  
United States District Judge

Date: June 27, 2014