

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
11 CVS 9668

WNC HOLDINGS, LLC, MASON  
VENABLE and HAROLD KEE,

Plaintiffs,

v.

ALLIANCE BANK & TRUST  
COMPANY, EDGAR W. TANNER, JR.,  
TANNER REAL ESTATE SERVICES,  
INC. and DANIEL C. AYSCUE, Trustee  
under Deeds of Trust,

Defendants.

**ORDER**

{1} **THIS MATTER** is before the Court on Plaintiffs' Motion to Compel as to Alliance Bank & Trust Company ("Alliance Bank") ("First Motion to Compel"); Plaintiffs' Motion to Compel as to Tanner Defendants ("Second Motion to Compel"); Plaintiffs' Motion to Compel as to Eugene Booth ("Booth") and Booth Realty, Inc. ("Booth Realty") ("Third Motion to Compel"); and Defendant Tanner Real Estate, Inc.'s ("Tanner Real Estate") Motion for Protective Order ("Motion for Protective Order"). After considering the parties' motions, and the arguments and contentions made by counsel during a hearing on the parties' motions, the Court: **GRANTS**, in part, and **DENIES**, in part, Plaintiffs' First Motion to Compel; **GRANTS** Plaintiffs' Second Motion to Compel; **GRANTS**, in part, and **DENIES**, in part, Plaintiffs' Third Motion to Compel; and **DENIES** Defendant Tanner Real Estate's Motion for Protective Order.

{2} The parties' motions were filed with the Court along with certifications required by Rule 18.7 of the General Rules of Practice and Procedure for the North Carolina Business Court. Accordingly, the parties were not required to file briefs with their motions and the Court set an expedited hearing date. *See* BCR 18.7.

## I.

### Procedural History

{3} On August 29, 2011, the Plaintiffs served their First Set of Interrogatories and Request for Production of Documents on Defendant Alliance Bank and the Tanner Defendants, to which responses were due by October 28, 2011.

{4} On October 28, 2011, Defendant Alliance Bank and the Tanner Defendants served objections and responses to the interrogatories, and the Tanner Defendants produced roughly two-hundred pages of documents.

{5} On January 10, 2012, this Court entered a consent confidentiality and protective order to address Defendants' objections to the requested discovery, and to date, Defendant Alliance Bank has produced approximately twenty-three hundred pages of documents in response to Plaintiffs' interrogatories.

{6} On January, 5, 2012, Plaintiffs served a Subpoena Duces Tecum on non-party Booth and Booth Realty for the production of documents relating to Defendant Tanner's employment at Booth Realty. Booth and Booth Realty objected to the Subpoena Duces Tecum, and refused to produce any documents absent an order from the Court.

{7} Plaintiffs and Defendant filed the above-listed motions between April 26, 2012, and June 13, 2012, and the Court held a hearing on the motions on August 8, 2012.

## II.

### Plaintiffs' First Motion to Compel

{8} Plaintiffs filed their First Motion to Compel to resolve a dispute over interrogatory numbers three, seventeen, twenty-five, twenty-six, twenty-nine, and production request seven. Through the production request and interrogatories, Plaintiffs requested loan

compliance documents and loan review committee documents regarding the loan made by Defendant Alliance Bank to Plaintiffs. Defendants argue that Plaintiffs' production request and interrogatories can not be produced because they are either not discoverable pursuant to N.C. Gen. Stat. § 53-99.1, or protected by the attorney-client privilege.

A.

#### Interrogatory Three

{9} Defendant Alliance Bank objects to interrogatory number three and its corresponding production request because the requested documents are not discoverable pursuant to N.C. Gen. Stat. § 53-99.1.

{10} N.C. Gen. Stat. § 53-99.1 provides:

[b]anks chartered under the laws of North Carolina or of the United States shall maintain complete records of compliance review documents, and the documents shall be available for examination by any federal or State bank regulatory agency having supervisory jurisdiction. Notwithstanding Chapter 132 of the General Statutes, compliance review documents in the custody of a bank or regulatory agency are confidential, are not open for public inspection, and are not discoverable or admissible in evidence in a civil action against a bank, its directors, officers, or employees, *unless the court finds that the interests of justice require that the documents be discoverable or admissible in evidence.*

N.C. GEN. STAT. § 53-99.1(b) (2012) (emphasis added).

{11} The Court holds that Section 53-99.1(b) does not prevent the discovery of documents covered by the statute, but instead requires that the Court find that the requested documents' discovery is required in the interests of justice. To the Court's knowledge there is no case law in North Carolina dealing with the interpretation of Section 53-99.1(b), and what the legislature intended by the phrase "in the interests of justice." In its usual and ordinary meaning, justice implies the fair allocation of common advantages and the sharing of common burdens between parties to a legal action. *See* BLACK'S LAW DICTIONARY 881 (8th ed. 2004) (defining

distributive justice). Accordingly, the Court hereby **GRANTS** Plaintiffs' First Motion to Compel as to interrogatory number three and its corresponding production request, and **ORDERS** that Defendant Alliance Bank produce for in camera review the documents requested in interrogatory number three and its corresponding production request, within ten (10) days from the entry of this Order. After in camera inspection, the Court will determine whether the production of the requested documents would be in the interests of justice.

B.

Interrogatories Seventeen, Twenty-Five, Twenty-Six, Twenty-Nine, and Production Request  
Seven

{12} In response to Plaintiffs' request and interrogatories, Defendant Alliance Bank produced a privilege log for the requested communications and made representations concerning the disputed recipient of the requested communications during this Court's hearing on Plaintiffs' motions. Plaintiffs argue in response that even though the communications appear to be protected by the attorney-client privilege, the communications are subject to the crime-fraud exception and therefore discoverable. In light of the privilege log and the representations made at hearing, the Court holds that all of the requested documents appear to be subject to the attorney-client privilege and therefore would only be discoverable if Plaintiffs can demonstrate that the documents are covered by the crime-fraud exception to the attorney-client privilege.

{13} When determining whether the an exception to the attorney-client privilege applies, the North Carolina Supreme Court has adopted the in camera review process enunciated by the United States Supreme Court in *United States v. Zolin*. *In re Investigation of the Death of Miller*, 357 N.C. 316, 337, 584 S.E.2d 772, 788 (2003). Under both *Miller* and *Zolin*, a court confronted with the assertion that privileged documents are subject to an exception should

review the documents in camera prior to ordering production. *Id.*; *United States v. Zolin*, 491 U.S. 554, 572 (1989).

{14} However, in camera review is not *per se* appropriate in all situations. While not evaluated by the North Carolina Supreme Court in *Miller*, the Court in *Zolin* held that prior to engaging in an in camera review, a “‘judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person,’ . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” *Id.* While not binding, the Court finds the analysis and conclusions in *Zolin*, persuasive, and thus, the Court holds that Plaintiffs must present “‘a factual basis adequate to support a good faith belief by a reasonable person,’ . . . that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.” *Id.*

{15} Plaintiffs have argued that the requested documents should be produced because they constitute communications between Defendant Alliance Bank and its counsel during a time Plaintiffs have alleged Defendant Alliance Bank converted hundred-thousands of dollars from Plaintiffs’ bank account held with Defendant Alliance Bank. While those communications might show that Defendant Alliance Bank was seeking legal advice regarding its plan to place a hold on Plaintiffs’ account, the Court can not conclude that Plaintiffs stated reason for seeking the communications provides a sufficient factual basis to support a good faith belief that in camera review will reveal evidence to support the claim that the crime-fraud exceptions applies. Accordingly, the Court holds that Plaintiffs have failed to meet their burden and their First Motion to Compel as to interrogatory numbers seventeen, twenty-five, twenty-six, twenty-nine, and production request seven is **DENIED**.

## II.

### Plaintiffs' Second Motion to Compel

{16} Plaintiffs ask in their Second Motion to Compel that the Tanner Defendants be compelled to produce the documents requested in interrogatories six, twelve, eighteen, and those interrogatories' corresponding production requests. Plaintiffs limited their request at hearing by: (1) waiving part 6(b) of their Second Motion to Compel and (2) limiting part 6(a) to the nine sub-division appraisals that Defendant Tanner mentioned in his 30(b)(6) deposition. Defendants argue that previous sub-division appraisals conducted by Defendant Tanner are irrelevant to this action, and, due to the organizational structure of Defendant Tanner's filing system, would be overly burdensome to produce. Plaintiffs counter that the request is not burdensome because Defendant Tanner is required by law to keep and maintain the requested documents, and the request is reasonably calculated to lead to the discovery of admissible evidence that could be used to attack the credibility of Defendant Tanner at trial.

{17} Rule 26 of the North Carolina Rules of Civil Procedure states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." N.C. R. Civ. P. 26(b)(1). Rule 26 goes on to state that "[i]t is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence . . . ." *Id.* Based on the arguments made by Plaintiffs at the hearing, the Court holds that Plaintiffs' limited request meets the requirements of Rule 26 and that production of the requested documents will not be overly burdensome to Defendant Tanner. Accordingly, the Court **GRANTS** Plaintiffs' Second Motion to Compel as amended at hearing, and **ORDERS**

Defendant Tanner to produce the nine sub-division appraisals referenced in his deposition within thirty (30) days from the entry of this Order.

### III.

#### Plaintiffs' Third Motion to Compel

{18} Plaintiffs request in their Third Motion to Compel that Booth and Booth Realty be compelled to produce:

- a. All appraisals and/or value opinions and each work file for all appraisals and value opinions of subdivisions worked on by Edgar W. Tanner, Jr. and/or which Edgar W. Tanner, Jr. assisted you and/or Booth Realty, Inc. in the preparation of the appraisal and/or value opinion of a subdivision from January 1, 2001 to present.
- b. The complete employment file of Edgar W. Tanner, Jr.
- c. All written complaints against Edgar W. Tanner, Jr. during his employment.
- d. All appraisals and the work files that Edgar W. Tanner, Jr. worked on where the client and/or lender was Alliance Bank.

(Pls.' Third Motion to Compel 1.)

{19} Plaintiffs argue that production of these documents is justified for the same reasons discussed *supra* in Plaintiffs' Second Motion to Compel. Booth and Booth Realty counter that the requested appraisals would have been completed by Defendant Tanner during his employment with Booth Realty from 2001 until 2006, and that the required period of time for keeping the requested documents has passed. Booth and Booth Realty further allege that after issuance of the Subpoena, Plaintiffs provided a more specific list of requested appraisals, and that after diligent search Booth and Booth Realty were unable to find the requested documents.

{20} The Court agrees with Booth and Booth Realty that most of Plaintiffs' request is unduly burdensome and therefore Plaintiffs' Third Motion to Compel is **GRANTED** in part, and **DENIED**, in part. Booth and Booth Realty are hereby **ORDERED** to produce within thirty (30) days from the entry of this Order the complete employment file of Edgar W. Tanner, Jr., and all

written complaints against Edgar W. Tanner, Jr. during his employment. If these documents are not in Booth or Booth Realty's possession, the Court **ORDERS** that Booth and Booth Realty certify in writing that they do not have possession of the documents. All other relief requested by Plaintiffs is **DENIED**.

#### IV.

##### Tanner Real Estate's Motion for Protective Order

{21} Tanner Real Estate seeks a protective order to prevent Plaintiffs from questioning Defendant Tanner in his representative capacity at a 30(b)(6) deposition about documents requested by Plaintiffs, and subject to this Court's determination in Plaintiffs' Second Motion to Compel. Because the Court ordered the production of all documents requested by Plaintiffs in their Second Motion to Compel as amended at hearing, the Court **DENIES** Tanner Real Estate's Motion for Protective Order for the same reasons provided in Section III of this Order.

#### V.

##### Conclusion

{22} For the above-stated reasons, the Court: **GRANTS**, in part, and **DENIES**, in part, Plaintiffs' First Motion to Compel; **GRANTS** Plaintiffs' Second Motion to Compel; **GRANTS**, in part, and **DENIES**, in part, Plaintiffs' Third Motion to Compel; and **DENIES** Defendant Tanner Real Estate's Motion for Protective Order. The Court **ORDERS** as follows: Defendant Alliance is **COMPELLED** to produce for in camera review the documents requested in Plaintiffs' interrogatory number three and its corresponding production request, within ten (10) days from the entry of this Order; Defendant Tanner is **COMPELLED** to produce to Plaintiffs the nine sub-division appraisals referenced in his deposition within thirty (30) days from the entry of this Order; and Booth and Booth Realty are **COMPELLED** to produce to Plaintiffs,



within thirty (30) days from the entry of this Order, the complete employment file of Edgar W. Tanner, Jr., and all written complaints against Edgar W. Tanner, Jr. during his employment. If the documents that Booth and Booth Realty are ordered to produce are not in their possession, the Court **ORDERS** that Booth and Booth Realty certify in writing that they do not have possession of the documents

**SO ORDERED**, this the 9<sup>th</sup> day of August, 2012.

/s/ Calvin E. Murphy  
Calvin E. Murphy  
Special Superior Court Judge