IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIK VAN DERBERG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 05C-05-218 CLS
EV3 Inc.,	)	
Defendants.	)	

ORDER

AND NOW, TO WIT, this 10th day of July, 2012, **IT IS HEREBY ORDERED** as follows:

Introduction

Before the Court is Plaintiffs', Michael Lesh, M.D. and Erik Van Der Burg ("Plaintiffs") motion to compel the production of Exhibit 19. Exhibit 19 includes three slides (Warburg022195-Warburg022197) that were inadvertently produced by Warburg Pincus[1] in an unredacted form. The slides were presented by Bruce Krattenmaker ("Mr. Krattenmaker"), at a Board meeting on May 5, 2003. The Court finds that ev3 has failed to meet its burden of proving the attorney-client

[1] This document was provided to Warburg Pincus as a member of ev3's Board of Directors.

privilege applies to the production of Exhibit 19. Therefore, Plaintiffs' motion to compel is **GRANTED**.

Background

This case arises from ev3's denial of four Milestone payments to former Appriva shareholders under the parties' Merger agreement. On May 5, 2003, during ev3's Board meeting, Mr. Krattenmaker, ev3's former Vice President of Regulatory Affairs, informed the board that a number of patients implanted with Appriva's PLAATO device required pericardiocentesis. The minutes of the Board meeting indicate that among others, Mr. Krattenmaker was present by telephone for the Business portions of the meeting. During the business portions of the meeting, "Bruce Krattenmaker provided an update on the PLAATO regulatory approval process. He included a comparison of the plan presented by Appriva with the current reality at the FDA. Discussion followed on the risks/benefits of various regulatory alternatives. The Board concluded that all reasonable alternatives should continue to be examined."[2] In the meeting, Mr. Krattenmaker informed the Board that pericardiocentises was not considered surgical intervention. The meeting was adjourned at approximately 6:55 p.m. on May 5, 2003, and reconvened on May 6, 2003, at 8:00 a.m.

[2] Minutes of the Board of Directors of ev3 Inc., at p. 1.

On May 6, 2003, the meeting commenced as a business meeting but later indicated that everyone except the Directors, Cecily Hines ("Ms. Hines"), who was an attorney for ev3, and four other individuals were excused from the meeting. No such note was made in the minutes from May 5, 2003. According to the Board minutes, Mr. Krattenmaker was not a part of the Board meeting on May 6, 2003.

On June 5, 2012, Mr. Krattenmaker was deposed as ev3's Superior Court Civil Rule 30(b)(6) ("Rule 30(b)(6)") witness on several topics, including the achievement of any Milestone under the Merger Agreement. During the deposition, Mr. Krattenmaker testified that pericardiocentesis was considered surgical intervention and that a physician's testimony was not necessary to determine this fact. Plaintiffs' then used the slides from the Board presentation to impeach Mr. Krattenmaker's testimony. Ev3's counsel claimed the attorney-client privilege and then instructed Mr. Krattenmaker to not answer the questions about the presentation. Mr. Krattenmaker testified that he had the assistance Ms. Hines as well as Jeffrey Peters, a non-lawyer, when preparing Exhibit 19.

Specifically, Ms. Hines "assured [Krattenmaker] had all of [his] facts"[3] and presented the facts correctly at the Board meeting. Additionally, during his deposition, Mr. Krattenmaker testified that counsel for ev3 showed him Exhibit 19

[3] Pltfs. Mot. to Compel, Ex. A, at p. 278.

during his deposition preparation and he admitted that the documents refreshed his memory as an individual and a Rule 30(b)(6) corporate representative.

Parties' Contentions

According to the Plaintiffs, ev3's liability for all but the first $50 million Milestone has been established. Plaintiffs contend that ev3's remaining defense is the argument that pericardiocentesis constitutes surgical intervention. The significance of this information is that the medical advice at issue did not meet the safety standards necessary to trigger the $50 million Milestone.

Plaintiffs claim that they are entitled to Exhibit 19 which consists of three powerpoint slides of a presentation to ev3's board of directors. Specifically, it is their contention that the documents do not reflect the communication of legal advice and therefore, the attorney-client privilege is inapplicable. In the alternative, Plaintiffs argue that even if the Court finds that legal advice was communicated, that does not automatically mean that the material is privileged. Plaintiffs next argue that even if the documents are privileged, any privilege is waived when ev3's counsel used Exhibit 19 to refresh Krattenmaker's recollection during his preparation of a Rule 30(b)(6) witness. Additionally, Plaintiffs argue that any privilege is waived because of the doctrine of implied waiver which is where a party makes an assertion and then seeks to block discovery of information directly relevant to that assertion.

The Defendant argues that Plaintiffs were required to immediately notify ev3 or Warburg Pincus that these documents were inadvertently produced under the Rule 4.4(b) of the Delaware Rules of Professional Conduct. It is the Defendant's contention that Plaintiffs were aware of the assertion of the attorney-client privilege because it was objected to in its document production and in letters dated March 10, 2011 and September 19, 2011. Therefore, as a preliminary matter, the Defendant argues that as a sanction for not complying with Rule 4.4(b) the Plaintiffs' motion should be denied. Additionally, the Defendant argues that the Court should deny Plaintiffs' motion because the redacted pages are privileged under the attorney-client privilege. Specifically, the slides which analyze the terms of the parties' merger agreement were created by Mr. Krattenmaker and Ms. Hines. In arguing for the assertion of the attorney-client privilege, the Defendant also claims that: (1) no third-parties outside the scope of the privilege were present during the Board presentation; and (2) just because Mr. Krattenmaker presented legal analysis and Ms. Hines did not, the privilege is still applicable.

The Defendant also submits that no witnesses were prepared using the slides at issue because Mr. Krattenmaker reviewed a copy of his presentation with the privileged slides at issue. Lastly, the Defendant argues that the "at issue" privilege waiver does not apply because the merger agreement and the facts relating to adverse events are the required facts and not ev3's legal analysis.

Discussion

Discovery and The Attorney-Client Privilege.

Pursuant to Superior Court Civil Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[4] A party asserting a privilege has the burden of proof of showing that the privilege is applicable to a communication.[5] Therefore, a party that claims a privilege, "shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."[6]

Delaware Rule of Evidence 502(b) governs privileged attorney-client communications. Pursuant to D.R.E. 502(b):

> 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 (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another in a matter of common interest, (4) between representative of the client or

[4] Super. Ct. Civ. R. 26(b)(1).
[5] *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992).
[6] Super. Ct. Civ. R. 26(b)(5).

> between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.[7]

Moreover, the Rule provides that a communication is "confidential" if it is not "intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[8] "A communication made in furtherance of the rendition of professional legal services to the client is a confidential communication unless the client intends the information to be disclosed to persons outside the circle of confidentiality."[9]

The mere presence of a lawyer is not sufficient to transform a non-privileged communication into a privileged one.[10] In addition, only legal advice and not business or personal advice is protected from the attorney-client privilege.[11] Therefore, the attorney-client privilege will not protect a communication that involves a business matter rather than a legal matter, even if the client's legal advisor is a party to the communication.[12] If a communication refers to legal and business matters and the legal-related aspects can be separated from the business-related aspects, the document must be produced with the legal-related portions

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[7] D.R.E. 502(b).
[8] D.R.E. 502(a)(5).
[9] *Ramada Inns, Inc. v. Dow Jones & Co., Inc.,* 523 A.2d 968, 972 (Del. Super. Dec. 15, 1986).
[10] *Titan Inv. Fund, II LP. v. Freedom Mortg. Corp.*, 2011 WL 532011, at *3 (Del. Super. Feb. 2, 2011).
[11] *Cephalon, Inc. v. Johns Hopkins University, et. al.*, 2009 WL 5103266, at *1 (Del.Ch. Dec. 4, 2009).
[12] *Id*.

redacted.[13] If however, a communication contains an indivisible quantity of legal and business advice, the communication may be protected.[14] Likewise, "an incidental request for business advice made in conjunction with a communication primarily soliciting legal advice will not destroy the privilege."[15] Where the question is a close one, the party asserting the privilege is given the benefit of the doubt.[16]

Here, the question is not a close one. Ev3 has not met its burden of proving that the slides requested are protected by the attorney-client privilege. The slides were produced by Mr. Krattenmaker in preparation for a business portion of a Board meeting and were presented during the business portion of the meeting. The minutes from the meeting indicate that Mr. Krattenmaker was present for the business portion of the meeting. There is no indication that Mr. Krattenmaker's presentation occurred during a legal portion of the meeting. In fact, the only indication the Court has that there was a legal meeting was during the meeting the following day where the minutes indicate that those present during the business portion of the meeting were excused. There was no indication that a legal meeting even occurred on May 5, 2003, which is the day the slides at issue were presented.

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[13] *Id*.
[14] *Id*.
[15] *Titan Inv. Fund, II LP.*, 2011 WL 532011, at *3.
[16] *Id*.

In addition to the inapplicability of the attorney-client privilege that occurred during a business portion of the meeting, Ms. Hines' role in the preparation of the slides is not sufficient to invoke the attorney-client privilege. While Ms. Hines may have helped in preparing the slides, she was merely there to make sure Mr. Krattenmaker's facts were accurate for the meeting. As stated by this Court in *Titan*, the mere presence of a lawyer does not automatically invoke the attorney-client privilege. Therefore, this Court finds that ev3 has not met its burden of showing that discovery of the communications are privileged under the attorney-client privilege.

Conclusion

For the foregoing reasons, Plaintiffs' motion to compel is **GRANTED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.