

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

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

**ORDER**

AND NOW, TO WIT, this 23<sup>rd</sup> day of August, 2012, **IT IS HEREBY**

**ORDERED** as follows:

**Introduction**

On July 10, 2012, this Court entered an Order granting Plaintiffs', Michael Lesh, M.D. and Erik Van Der Berg ("Plaintiffs") motion to compel the production of Exhibit 19.<sup>1</sup> On July 26, 2012,<sup>2</sup> Defendant, ev3 Inc., ("Defendant") filed a motion for reargument pursuant to Superior Court Civil Rule 59(e). The Defendant additionally requested that this Court stay the July 10<sup>th</sup> Order pending the resolution of this motion. In its motion, Defendant argues that: (1) the Court

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<sup>1</sup> Exhibit 19 includes three slides that were inadvertently produced by Warburg Pincus in an unredacted form.

<sup>2</sup> The Court accepts this motion as timely filed, as the Order was not uploaded on the LexisNexis® *File & Serve* docket until July 20, 2012.

misapprehended the law and facts in holding that the communications which occurred during a business presentation are not protected by the attorney-client privilege; and (2) the Court did not consider General Counsel's ("Ms. Hines") substantive involvement in creating the slides at issue. The Motion is **DENIED** because the issues raised in the motion were already considered in the Court's July 10<sup>th</sup> Order.

### **Discussion**

This Court will only grant a motion for reargument when it "has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."<sup>3</sup> "A motion for reargument should not be used merely to rehash the arguments already decided by the [C]ourt."<sup>4</sup>

Defendant first argues that the Court misinterpreted the facts and law in determining whether communications during a business presentation of a board meeting by Bruce Krattenmaker, ("Mr. Krattenmaker") are protected by the attorney-client privilege. However, the Court did not misapprehend the law and/or facts in holding that the presentation took place during a business portion of the

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<sup>3</sup> *State Farm Fire and Cas. Co. v. Middleby Corp.*, 2011 WL 2462661, at \*2 (Del. Super. June 15, 2011) (citing *Kennedy v. Invacare Corp.*, 2006 WL 488590, at \*1 (Del. Super. Jan. 31, 2006)).

<sup>4</sup> *Wilm. Trust Co. v. Nix*, 2002 WL 356371, at \*1 (Del. Super. Feb. 21, 2002).

meeting and is thus not privileged. Therefore, this argument is unconvincing and is merely an attempt for Defendant to rehash the arguments made at oral argument.

As articulated in the Court's July 10, 2012 Order, in Delaware, the attorney-client privilege protects legal advice and not business or personal advice rendered.<sup>5</sup> The Defendant relies on *PharmAthene, Inc. v. SIGA Technologies, Inc.*, for the proposition that communications can still be protected during any portion of a board meeting.<sup>6</sup> In *PharmAthene*, the court noted that "the attorney-client privilege protects legal advice, as opposed to business or personal advice"<sup>7</sup> and held that a portion of communications that occurred during a "Scientific Update" portion of a business meeting were protected because the first sentence of the section related to professional legal services.<sup>8</sup> However, the court held that the remaining sections of the "Scientific Update" portion of the business meeting involved business matters that were not protected by the attorney-client privilege.<sup>9</sup>

This case is distinguishable from *PharmAthene*. Here, unlike in *PharmAthene*, in reviewing the board minutes, there is nothing indicating that the presentation of the slides at issue took place during a legal portion of the meeting, or that during the business portion of the meeting, legal issues were discussed.

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<sup>5</sup> *Cephalon, Inc. v. Johns Hopkins University, et. al.*, 2009 WL 5103266, at \*1 (Del. Ch. Dec. 4, 2009).

<sup>6</sup> 2009 WL 2031793 (Del. Ch. July 10, 2009).

<sup>7</sup> *Id.* at \*2.

<sup>8</sup> *Id.* at \*3.

<sup>9</sup> *Id.*

There are certain portions of the board meeting minutes that gives the Court guidance that legal issues were discussed such as on May 6, 2003, when certain individuals were excused from the meeting. However, on May 5, 2003, when the slides at issue were presented by Mr. Krattenmaker, the minutes indicate that Mr. Krattenmaker was present by phone for the business portion of the meeting. Furthermore, in reviewing Section II of the board minutes, there is no indication that any legal issues were discussed during that portion of the meeting. Thus, the Court properly found that because the presentation took place during a business and not legal portion of the meeting, the attorney-client privilege is not applicable.

Defendant also argues that in making its decision, the Court did not consider Ms. Hines' involvement in the preparation of the slides. A party asserting protection under the attorney-client privilege has the burden of establishing that a communication was made: "(1) for the purpose of seeking, obtaining or delivering legal advice, (2) between privileged persons, and (3) that confidentiality was intended."<sup>10</sup> "Only if the attorney is 'acting as a lawyer' giving advice with respect to the legal implications of a proposed course of conduct may the privilege be properly invoked."<sup>11</sup>

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<sup>10</sup> *Rembrandt Technologies, L.P. v. Harris Corp.*, 2009 WL 402332, at \*5 (Del. Super. Feb. 12, 2009).

<sup>11</sup> *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 147 (D. Del. 1977).

The Court considered all of the factors raised by the parties in the briefing and at oral argument in holding that these slides were not protected by the attorney-client privilege. Mr. Krattenmaker stated the following at his Superior Court Rule 30(b)(6) deposition: (1) an attorney was not needed to determine whether a medical procedure was considered surgical intervention; and (2) Ms. Hines and Jeffrey Peters' role was to assure that Mr. Krattenmaker had accurate facts to present at the board meeting. Ms. Hines' involvement in the preparation of the slides is not protected by the attorney-client privilege because the communication was not made, "for the purpose of seeking, obtaining or delivering legal advice."<sup>12</sup> Just because a lawyer was present during the preparation of documents, is not sufficient to transform a non-privileged communication into a privileged one.<sup>13</sup> Therefore, the Court properly held that Ms. Hines' involvement in the preparation of the slides was not sufficient to invoke the attorney-client privilege.

Defendant has failed to establish that: (1) the Court overlooked a precedent or legal principle that would have a controlling effect; or (2) the Court has misapprehended the law or the facts which would affect the outcome of the

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<sup>12</sup> *Rembrandt Technologies, L.P.*, 2009 WL 402332, at \*5.

<sup>13</sup> *Titan Inv. Fund, II L.P. v. Freedom Mortg. Corp.*, 2011 WL 532011, at \*3 (Del. Super. Feb. 2, 2011).

decision. Defendant has essentially rehashed the same argument set forth both its response to Plaintiffs' motion and in the positions argued at oral argument.

**Conclusion**

Based on the foregoing, Defendant's Motion for Reargument is **DENIED** and Defendant is ordered to produce Exhibit 19.

**IT IS SO ORDERED.**

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