

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: June 16, 2009

Date Decided: July 10, 2009

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Re: *PharmAthene, Inc. v. SIGA Technologies, Inc.*,
Civil Action No. 2627-VCP

Dear Counsel:

This matter is before me on Plaintiff, PharmAthene, Inc.'s ("Plaintiff" or "PharmAthene"), request that the Court review *in camera* certain documents identified in the privilege log of Defendant SIGA Technologies, Inc. ("SIGA") to determine whether, in connection with those documents, in-house counsel of MacAndrews & Forbes Holdings, Inc. ("MAF") were discussing any discoverable underlying facts or providing business advice about the transaction with PharmAthene. The parties' dispute as to those documents raises two overarching legal issues. The first is whether the communications between attorneys employed by MAF and representatives of SIGA are privileged. The second relates to the proper standard for deciding the types of communications and

related information that should be protected by attorney-client privilege in the context of this case.

With respect to the first issue, I conclude that communications between attorneys employed by MAF and representatives of SIGA may qualify as privileged. Under Rule 502(b)(3) of the Delaware Rules of Evidence:

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 . . . by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest.¹

Steven Fasman, Michael Borofsky, Bill Buccella, and Barry Schwartz are all MAF lawyer-employees.² Because SIGA is a small company that does not have its own in-house counsel, it sometimes uses the services of counsel at MAF, a significant, but not controlling, shareholder of SIGA and home to two or three SIGA Board members. MAF's investment in SIGA includes the provision of "added services," such as legal services through counsel employed by MAF. Several witnesses also confirmed that attorneys employed by MAF have provided legal services to SIGA over the years. SIGA

¹ D.R.E. 502(b)(3).

² Unless otherwise indicated, the facts recited in this letter opinion are drawn from the allegations in Defendants' Joint Memorandum of Law in Opposition to Plaintiff's Motion to Compel Discovery. For the most part, I find Defendants' statement of facts reliable, because it generally is supported by deposition excerpts, an affidavit, and documents produced in discovery.

and MAF share a “common interest” in the success of SIGA, such that MAF’s attorneys could jointly represent MAF and SIGA.

In addition, in determining whether an attorney-client relationship exists, “courts look at the contacts between the potential client and its potential lawyers to determine whether it would have been reasonable for the ‘client’ to believe that the attorney was acting on its behalf as counsel.”³ Based on MAF’s significant investment in SIGA and the presence of MAF representatives on the SIGA Board, the record suggests a reasonable inference that MAF’s attorneys were representing them on a matter of common interest. Therefore, the communications between attorneys employed by MAF and representatives of SIGA on matters of common interest would be privileged, provided they also met the other requirements for a valid claim of privilege.

On the second issue, in connection with the current disputes, I note that the attorney-client privilege protects legal advice, as opposed to business or personal advice.⁴ If a company’s employee, who served as both a business and legal advisor, was a party to a communication regarding a business matter instead of a legal matter, the attorney-client privilege would not protect that communication.⁵ I also note, however, that communications that contain an inseparable combination of business and legal advice

³ *Benchmark Capital Partners IV, L.P. v. Vague*, 2002 WL 31057462, at *3 (Del. Ch. Sept. 3, 2002).

⁴ *Lee v. Engle*, 1995 WL 761222, at *1 (Del. Ch. Dec. 15, 1995).

⁵ *KLM v. Checchi*, 1997 WL 525861, at *1 (Del. Ch. July 23, 1997).

may be protected by the attorney-client privilege.⁶ Where it is a close call whether a communication reflected in a document and pertaining to a mixture of legal-related and business-related matters is more closely related to legal advice as opposed to business advice, the party asserting the privilege will be given the benefit of the doubt.⁷ Moreover, the attorney-client privilege protects only communications, not the underlying facts.⁸

With the foregoing principles in mind, as well as my comments at the argument on Plaintiff's Motion to Compel Discovery, I reviewed the documents SIGA submitted for my *in camera* review with the letter from Andre G. Bouchard, Esquire, on or about March 9, 2009.⁹ Having reviewed those documents, I uphold the claim of attorney-client privilege as to the following record numbers in the log of the allegedly privileged

⁶ *See Sealy Mattress Co. of New Jersey v. Sealy Inc.*, 1987 WL 12500, at *3 (Del. Ch. June 19, 1987) (noting "In my view. . . [the disputed material] contains an admixture of business and legal advice that is not readily divisible into separate categories. Indeed, any effort to parse the business advice which is 'legal' from that which is 'business' would be hazardous at best. Accordingly, the [material] must be treated as one to which the privilege would attach, subject, of course, to any exceptions to the attorney-client privilege that may apply.").

⁷ *SICPA Holdings, S.A. v. Optical Coating Lab., Inc.*, 1996 WL 636161, at *6 (Del. Ch. Oct. 10, 1996).

⁸ *State v. Grossberg*, 1998 WL 117975, at *4 (Del. Super. Jan. 23, 1998).

⁹ The review of these documents effectively was stayed for several months while PharmAthene pursued a potentially dispositive Motion to Strike Defendant SIGA's Answer and Enter Judgment on Liability and for other relief, which it filed on March 16, 2009. The need to review the documents resurfaced after the Court's denial of that motion without prejudice during an argument on June 16, 2009.

documents SIGA submitted for *in camera* review: 100, 166, 194, 197-99, 209, 219, 222, 236, 257-58, 276-78, 299, 315, 321, 327, 360, 377, and 393. I overrule in whole or in part the claim of attorney-client privilege as to the following record numbers in SIGA's privilege log: 56, 59, 62, 203, 210-11, 313-14, 358, and 363-67. In the interests of brevity and efficiency, I comment briefly below only on those documents for which I deny the claim of privilege in whole or in part. As to the documents for which I uphold the claim of privilege, I mention only the general categories into which those documents fall.

A. Documents Ordered Produced in Whole or in Part

Record No. 56¹⁰

There are two redacted portions of SIGA001692-93. The first appears on SIGA001692 and, as indicated in the privilege log, involves an email from Steven Fasman to Tom Konatich regarding a Draft Bridge Note Purchase Agreement. Because Fasman jointly represented both SIGA and MAF, Konatich was SIGA's Chief Financial Officer, and the content of the email is "confidential information for the purpose of facilitating the rendition of professional legal services to the client,"¹¹ this portion of the document is privileged.

¹⁰ Unless otherwise indicated, the records referred to in this letter opinion are drawn from SIGA's first and second privilege logs, attached as Exhibit B to Letter from Christopher A. Selzer, Esquire, to the Court, dated March 6, 2009.

¹¹ D.R.E. 502(b).

The redacted portion of SIGA001693 appears to contain two sentences. One says, “This email has been scanned using Skeptic(tm) technology powered by MessageLabs,” while the other states, “This email has been scanned using Skeptic(tm) technology.” Neither of these sentences reflects the communication of confidential information for the purpose of facilitating the rendition of legal services. Indeed, SIGA produced the same sentences in the same context in other documents.¹² Because SIGA’s counsel may have redacted something else from SIGA001693 and mistakenly omitted it from the *in camera* submission, I also direct SIGA to reexamine that document to make sure no such mistake was made.

Record No. 59

This document contains two redacted portions. The first spans SIGA006266-67, and the second is the last portion of SIGA006268. The first redaction is identical to what is redacted on SIGA001692 in Record No. 56, and is privileged for the same reasons. Based on the unredacted document submitted for *in camera* inspection, the only part of SIGA006268 that was redacted states: “This e-mail has been scanned using Skeptic(tm) technology.” For the reasons discussed in connection with No. 56, this part of No. 59 is not privileged and must be produced. In addition, I direct SIGA to make sure nothing else was redacted, such as a handwritten note, and mistakenly omitted from the copy submitted for the Court’s inspection.

¹² *E.g.*, SIGA006268 (not redacting “This email has been scanned using Skeptic(tm) technology powered by MessageLabs.”).

Record No. 62

This document consists of two pages, neither of which bears a Bates number. The first page includes a properly redacted portion of SIGA006266-67 and is, therefore, privileged. The second page of No. 62 is not privileged because it is an email from PharmAthene's counsel, which SIGA previously produced.

Record No. 203

This two-page document (SIGA026971-72) constitutes the minutes or draft minutes of a meeting of SIGA's Audit Committee on July 27, 2006. Two subsections of the minutes on SIGA026972 have been redacted. The first relates to the merger and is privileged. The second subsection entitled, "Review of June 30, 2006 financial statements and Form 10-Q," contains three sentences. The first two sentences relate to SIGA's financial results and not the rendition of legal services. Thus, those sentences must be produced. The third sentence relates to the Form 10-Q and is privileged because it reflects a confidential communication for the purpose of facilitating the rendition of professional legal services to SIGA.

Record No. 210

This three-page document (SIGA027028-30) constitutes the minutes or draft minutes of a meeting the SIGA Board of Directors had on January 25, 2007. Beginning at the bottom of the first page and continuing to the third page, virtually all of the substantive portions of the minutes have been redacted. Only some of that information, however, qualifies for protection under the attorney-client privilege. The first of the

redacted sections relates to a “Scientific Update.” The first sentence of this section appears to relate to the provision of professional legal services and, therefore, qualifies as privileged. The remainder of the section, however, involves primarily business matters; hence, I deny SIGA’s claim of privilege as to that portion of No. 210. There is also no privileged material in the next two sections, headed “Report of the Nominating Committee and Corporate Governance Committee” and “Financial Review.” Accordingly, those sections must be produced. Under the “Report of the Audit Committee,” which consists of three paragraphs, only the third through fifth sentences of the first paragraph are privileged. The remainder of this section must be produced. Finally, I uphold the claim of attorney-client privilege as to the last redacted paragraph on SIGA027030.

Record No. 211

This three-page document (SIGA027104-06) constitutes the minutes or draft minutes of a meeting of the SIGA Board of Directors on October 30, 2008. Almost all of the substantive portions of these minutes were redacted. SIGA’s privilege log misdescribes this document as including “redacted communications between counsel and client containing legal advice re: PharmAthene.” Because the document does not meet that description and much of the redacted material is plainly not privileged, I order No. 211 produced in its entirety.

Record Nos. 313 and 314

These documents are related: No. 313 is an email that is included in a series of two emails produced in full in No. 314. Fasman sent the emails to representatives of SIGA and MAF regarding an upcoming Board meeting. Both of these documents are not privileged because the email reflects purely business advice.

Record Nos. 358 and 363-67

Record No. 358 is a series of two emails relating to the negotiations with PharmAthene. Two of the several parties to the emails, Fasman and Borofsky, generally served MAF or SIGA or both as attorneys. Fasman, however, also acted as the main negotiator for SIGA in the discussions with PharmAthene. Therefore, he sometimes acted more in a business capacity than a legal capacity. In connection with No. 358, I find that Fasman was acting primarily in a business capacity, and that the document does not reflect any communications relating to legal, as opposed to business, advice. Thus, I conclude that Record No. 358 is not privileged and must be produced.

Similarly, Record No. 363 is a series of three emails regarding a request for technical data having at least some relevance to the negotiations with PharmAthene. In its privilege log, SIGA described its rationale for claiming attorney-client privilege for this document as follows: “Email chain with outside counsel re SIGA 246 data and negotiations with PharmAthene.” Yet, nothing in No. 363 or SIGA’s description of it indicates that the document reflects a communication for the purpose of facilitating the rendition of professional legal services, as opposed to matters regarding the business side

of the negotiations. Because Fasman functioned in a dual capacity with respect to the negotiations with PharmAthene, I find SIGA has not met its burden to demonstrate that No. 363 is privileged.¹³ The redacted material in Record Nos. 364 through 367 is the same as the material at issue in No. 363. I, therefore, overrule the claim of privilege as to Nos. 364-67 and order those documents produced in unredacted form, as well.

B. Documents for Which Privilege Claims Upheld

The documents as to which I have upheld SIGA's claims of privilege logically fall into a few categories, which present slightly different issues in terms of the evaluation of a claim of attorney-client privilege. Those categories are discussed briefly below.

The first category includes minutes or draft minutes of meetings of SIGA's Board of Directors or committees of the Board from which certain excerpts have been redacted. Record No. 222 provides an example. In that document, the redacted portions of SIGA006966-67 are excerpts of Board meeting minutes, reflecting confidential communications between SIGA's outside counsel Grayer and its Board for the purpose of facilitating the rendition of professional legal services to the client. Therefore, the redacted portions of No. 222 are privileged. The same is true for Record Nos. 299 and 315. Thus, in this category, I uphold SIGA's claims of attorney-client privilege as to Record Nos. 222, 299,¹⁴ and 315.

¹³ See *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992) (noting the burden of proving the applicability of a privilege is on the party asserting it).

¹⁴ SIGA's privilege log does not include Bates numbers for this entry. Record No. 299, however, appears to coincide with the redacted documents SIGA006972-73,

The second category includes confidential communications between Fasman or other attorneys for SIGA or MAF¹⁵ and representatives of SIGA, MAF, or both for the purpose of facilitating the rendition of professional legal services to SIGA or MAF on a matter for which SIGA and MAF have a common interest. In this category, I find that the following documents are privileged as claimed: 166, 194, 197-99, 209, 219, 236, 257-58, 276-78, 321, 327, 360, 377, and 393. Some of the documents in this category also may have contained business-related communications. In those cases, however, I found the presence of other matter regarding legal advice or services to be so integral that it rendered the document privileged as claimed.

The last category includes only one document, Record No. 100. The redacted portions of that document coincide with portions of at least one other document that I already held to be privileged, *supra* Part A. Furthermore, I uphold SIGA's claim of attorney-client privilege as to Record No. 100.

CONCLUSION

For the foregoing reasons, I overrule SIGA's claims of attorney-client privilege or work product immunity to the extent indicated in this letter opinion as to Record Nos. 56, 59, 62, 203, 210-11, 313-14, 358, and 363-67. I further direct SIGA to produce those

SIGA026979-80, and SIGA026993-94. My ruling applies to all of those Bates numbers.

¹⁵ Those attorneys include Borofsky and attorneys from Kramer Levin. For purposes of this letter opinion, Borofsky, an MAF employee who has a law degree, is treated as in-house counsel of MAF. *See* Drapkin Dep. at 134-35.

documents consistent with the rulings in this letter opinion within five days of the date of the opinion. In all other respects, PharmAthene's Motion to Compel Discovery is denied.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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