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Re: Oliver, et al. v. Boston University, et al.
C.A. No. 16570-NC
Date Submitted: April 7, 2004

Dear Counsel:

Before the Court is the Plaintiffs' motion to compel production of documents withheld by Seragen, Inc. ("Seragen") and Defendant Boston University ("BU") under claims of attorney-client privilege.[1]

[1] BU's privilege log contains slightly more than twenty entries. In contrast, Seragen's privilege log spans four volumes.

This is a class action brought by former shareholders of Seragen to challenge a series of transactions between Seragen and BU (or persons closely affiliated by BU) leading up to Seragen's merger with Ligand Pharmaceuticals Incorporated. These transactions are said to have occurred as the result of various breaches of fiduciary duties by BU and its affiliates. During the time period of the challenged transactions,[2] the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz Levin") simultaneously represented both Seragen and BU. Significantly, Mintz Levin, with two possible exceptions, did not represent both Seragen and BU (or its related parties) in any of the transactions.[3] The Plaintiffs seek documents exchanged between Mintz Levin and BU and between Mintz Levin and Seragen.

The Plaintiffs argue: (1) as the result of Mintz Levin's joint representation of Seragen and BU, the attorney-client privilege never attached to the documents or was waived; (2) Mintz Levin's transmittal of privileged documents to the Massachusetts Attorney General also waived the attorney-client privilege; (3) business advice (and not legal advice) was given and, thus, it cannot be protected by the attorney-client privilege;

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[2] For a description of the various transactions, *see Oliver v. Boston University*, 2000 WL 1091480 (Del. Ch. July 18, 2000).

[3] Mintz Levin represented Seragen in the Series B transaction and the Series C transaction. It was not Seragen's transactional counsel for any of the subsequent transactions at issue. However, it continued to provide other legal services to Seragen.

and (4) good cause to allow Plaintiffs access to the documents exists under the so-called fiduciary duty exception to the attorney-client privilege.[4]

1. *Formation of the Privilege and Waiver in General*

Under Delaware's 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 (1) between the client or the client's representative and the client's lawyer or 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. . . .[5]

Representatives of both BU and Seragen, during the same time period, sought legal advice from Mintz Levin; both BU and Seragen had established attorney-client relationships with that firm. They consulted with Mintz Levin and, from the rather limited record before me,[6] I conclude that they did so with a reasonable understanding that they were communicating with their lawyers with a client's typical expectation of

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[4] *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1101-04 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Deutsch v. Cogan*, 580 A.2d 100, 108 (Del. Ch. 1990).

[5] DRE Rule 502(b).

[6] A frequent difficulty in assessing challenges to the assertion of the attorney-client privilege is present here in full force. The Plaintiffs' arguments are set forth generally; Seragen and BU, in their papers, have not supplied much detail. Thus, the Court is left with the general impressions and somewhat conclusory allegations. The Plaintiffs are hamstrung by their lack of knowledge regarding the documents for which privilege has been asserted. Nonetheless, the conclusory nature of their presentation, coupled with its broad scope, makes detailed analysis problematic.

confidentiality.[7] At times, Mintz Levin communicated with both BU and Seragen regarding the same matters. I reject Plaintiffs' apparent notion that simultaneous representation alone by the same law firm deprives both clients of the benefit of the attorney-client privilege.[8]

In sum, I find that the documents are subject to the attorney-client privilege and that the privilege has not been waived by the simultaneous representation of BU and Seragen by the Mintz Levin firm.[9]

2. *Communications with the Massachusetts Attorney General*

BU was deeply entangled financially with Seragen in the early 1990s. The Massachusetts Attorney General, which had certain oversight authority in light of BU's charitable status, was concerned about the financial risks associated with BU's investment in, loans to, and loan guarantees for Seragen. In 1992, BU and the Massachusetts Attorney General entered into a consent agreement that, *inter alia*,

[7] Merely because it was not directly representing Seragen (or BU) in a specific transaction does not require the conclusion that its communications with Seragen (or BU) regarding the transaction were not privileged. An understanding of what other lawyers are doing for a shared client may help a lawyer in her broader representation of the same client.

[8] Simultaneous representation may, however, be a factor in evaluating the fiduciary duty exception. *See Deutsch*, 580 A.2d at 107-08.

[9] During argument of this motion, counsel for Seragen conceded that redactions of one or more documents were not properly grounded in the attorney-client privilege. The unnecessary redactions should be corrected.

required certain reporting by BU on a regular basis.[10] Although it appears that the reporting obligations were neither meticulously honored nor vigorously enforced, Mintz Levin did submit reports on behalf of BU; the information was usually provided to Mintz Levin by Seragen. One of those reports involved an assessment by other attorneys representing Seragen of the consequences of a potential Seragen bankruptcy filing. No privilege is now claimed for that memorandum and, indeed, no privilege is claimed for any communications to the Massachusetts Attorney General. Mintz Levin, on behalf of BU, may have transmitted a document to the Massachusetts Attorney General for which the privilege otherwise could have been claimed. That limited disclosure does not support a claim that all privilege as to all documents provided by Seragen to Mintz Levin has been waived. In short, the question of how to handle documents submitted to the Massachusetts Attorney General for which a claim of privilege is now asserted is not presented by this application.

3. *Business Advice*

The Plaintiffs argue that Mintz Levin at that time provided business, and not legal, advice. The attorney-client privilege attaches to communications regarding legal services, but there is no basis for any conclusion that any of the documents contain business advice. Thus, this contention fails.

[10] The Court has separately ordered the production of these reports.

4. *Fiduciary Duty Exception*

Under the so-called fiduciary duty exception to the attorney-client privilege, shareholders who enjoy a "mutuality of interest" with corporate management may obtain access to the corporation's confidential communications with counsel upon a showing of "good cause."

> [The fiduciary duty] exception . . . is generally traced back to *Garner v. Wolfinbarger*, which set forth a framework under which shareholders . . . can gain access to privileged communications of the corporation . . . . The court in *Garner* balanced the harm from disclosure of confidential communications against the benefits to be gained from access to reliable information involving activities of the corporation . . . which are of particular interest to the shareholders . . . . *Garner* recognized that the management function includes communications with counsel and that management has a legitimate concern that its confidential communications should be allowed to remain confidential. *Garner* also acknowledged the "fact that management has duties which run to the benefit ultimately of the stockholders."[11]

Seragen concedes that the Plaintiffs, as former shareholders of Seragen at the time of the subject communications, and Seragen's management shared a "mutuality of interest." Among the factors which the Court may balance in determining whether good cause exists for rejection of the privilege in a specific context are:

[11] *Metro. Bank & Trust Co. v. Dovenmuehle Mortgage, Inc.*, 2001 WL 1671445, at *2 (Del. Ch. Dec. 20, 2001) (citations omitted) (quoting *Garner*, 430 F.2d at 1101).

1. whether a colorable claim has been asserted;

2. whether the information is necessary and whether it is available from another source;

3. whether the request is reasonably focused or whether the shareholder is merely "fishing" for information; and

4. whether litigation strategies relating to the defense of the suit in which the application is presented may be disclosed.[12]

The Plaintiffs have a colorable claim.[13] The documents which Plaintiffs seek were not generated in the defense of this action and would not disclose defense strategies.[14] The Plaintiffs, however, have not demonstrated why any particular document or class of documents identified in Seragen's privilege log is necessary to their prosecution of this action. Their application appears to be for all documents.[15] Thus, the conclusory and general nature of Plaintiffs' argument is more consistent with a fishing expedition than

[12] *Continental Ins. Co. v. Rutledge & Co.*, 1999 WL 66528 Del. Ch. Jan. 26, 1999).
[13] *See Oliver v. Boston University*, 2000 WL 1091480, at *7-*11 (denying motion to dismiss).
[14] Other factors supporting the Plaintiffs' position include the number of shareholders and percentage of ownership of stock (4% by the named plaintiffs and perhaps approaching 50% if the interests of the class are considered); their *bona fides*, which are not questioned; and the absence of trade secrets (or other information entitled otherwise to confidentiality). *See Deutsch*, 580 A.2d at 104-05.
[15] Even a cursory review of Seragen's privilege log reveals that not all of the documents would likely be helpful.

with a serious effort to identify necessary information. Furthermore, Plaintiffs correctly point out the documents which they seek are not otherwise available because either Seragen or their attorneys (or possibly BU) hold the documents and they are not releasing them. That, however, is not the test. Instead, the focus is on whether the Plaintiffs otherwise can gain access to the information that may be contained in the documents. The Plaintiffs, more to the point, recite that "in the depositions of the individual defendants those defendants consistently lack any recollection or information regarding the events leading up to and the reasons for the complained-of transactions as well as the information known by the Board at the time of such transactions."[16] Yet, the Plaintiffs have not identified what documents they believe would be helpful in remedying this knowledge shortfall. Thus, after balancing the various factors, I am persuaded, except as set forth below, that the Plaintiffs have failed to demonstrate good cause for avoiding the attorney-client privilege as asserted by Seragen. It may well be that Plaintiffs have a reasonable need for the documents and cannot obtain the information contained in the documents from other available sources, but, during the course of presentation of this motion, they have not met their burden.

[16] Plfs.' Consol. Reply Mem. in Further Supp. of Mot. to Compel Produc. of Docs. Withheld at 15.

I conclude, however, that with respect to two sets of documents involving communications with Seragen, the Plaintiffs have demonstrated good cause. I refer to those documents involving the Series C transaction and the Series B transaction. In all of the other transactions challenged in this litigation, Seragen and BU had separate transactional counsel. Although the record is less than precise, it appears that Mintz Levin represented Seragen in the Series C and the Series B transactions and that it represented the interests of BU (or its related parties) in those transactions, although BU's in-house counsel may have represented BU. However, given the relationship between BU and Mintz Levin, the better inference from this limited record,[17] which may not be the correct inference, is that the legal services for BU and Seragen for these two transactions were not truly independent. The existence of such a potential conflict on the part of counsel whose advice supports a transaction which is challenged on fiduciary duty grounds is, as set forth in *Deutsch*, a significant factor in assessing a good cause showing. Here, I am satisfied that the potential for conflicting advice and conflicting loyalties is sufficient to tip the balance of the various factors in favor of the Plaintiffs. Thus, the

[17] Most of this is drawn from the representations of counsel.

assertion of the attorney-client privilege as to Seragen's documents related to the Series C and Series B transactions is, pursuant to the fiduciary duty exception, overruled.[18]

In conclusion, those documents relating to the Series C and Series B transactions are not subject to an attorney-client privilege claim by Seragen. Otherwise, Plaintiffs' motion to compel is denied.[19]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC

[18] BU and the Plaintiffs (and those represented by the Plaintiffs) did not share a "mutuality of interest" with respect to these matters. Thus, the fiduciary duty exception is not applicable to BU's separate communications.

[19] To the extent that communications involving the 1995 restructuring transaction are involved, the record on this motion does not disclose whether Mintz Levin may have then represented BU's interests in that transaction.