

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PFIZER INC., PFIZER IRELAND :
PHARMACEUTICALS, WARNER- :
LAMBERT COMPANY, WARNER- :
LAMBERT COMPANY, LLC, and :
WARNER-LAMBERT EXPORT, LTD., :
 :
Plaintiffs, :
 :
v. : Civil Action No. 03-209-JJF
 : (Consolidated)
RANBAXY LABORATORIES LIMITED :
and RANBAXY PHARMACEUTICALS, :
INC., :
 :
Defendants. :

Rudolf E. Hutz, Esquire, Jeffrey B. Bove, Esquire and Mary W. Bourke, Esquire of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware.

Attorneys for Plaintiffs.

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Attorneys for Defendants.

MEMORANDUM OPINION

October 7, 2004

Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is a Motion To Compel The Production Of Unredacted And Withheld Pfizer Documents (D.I. 131) filed by Ranbaxy Laboratories Limited and Ranbaxy Pharmaceuticals, Inc. (collectively, "Ranbaxy") challenging the application of the attorney-client privilege and work product doctrine to documents withheld by Pfizer Inc., Pfizer Ireland Pharmaceuticals, Warner Lambert Company, Warner Lambert Company, LLC and Warner-Lambert Export, Ltd. (collectively, "Pfizer"). Specifically, Ranbaxy seeks the production of four categories of documents: (1) documents with no attorney identified as the author or recipient; (2) documents with no author or recipient identified at all; (3) documents where only scientific teams or committees are listed as author or recipient; and (4) documents where an attorney is only one of many recipients. The Court ordered Ranbaxy to select 15 documents from the several hundred documents being withheld by Pfizer for in camera review. Ranbaxy made its selection based on the privilege log entries, and Pfizer has submitted the documents selected by Ranbaxy for the Court's in camera review. For the reasons set forth below, the Court will order Pfizer to produce the withheld documents. In addition, the Court will require Ranbaxy to submit the attorneys' fees and costs it incurred in bringing this Motion so that the Court can assess sanctions against Pfizer.

DISCUSSION

I. Legal Standards for Attorney-Client Privilege and Work Product Doctrine

The party invoking the attorney client privilege must prove: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication related to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. The privilege applies to communications from the attorney to the client and from the client to the attorney. Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 144 (D. Del. 1977). The attorney client privilege attaches to the communication itself and not to the facts communicated. Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 632 (M.D. Pa. 1997). Factual information, technical data, the results of studies, investigations and testing to be used at trial, and other factual information is discoverable. Id. Documents sent or prepared by counsel containing such factual information for the purpose of obtaining or giving legal advice

are protected from disclosure, but to the extent purely factual information can be extracted, such information is discoverable. Id.

The contents of a communication determine whether the attorney-client privilege applies. Only communications made for the purpose of obtaining or giving legal advice are protected. Id. Routine, non-privileged communications between corporate officers and employees do not attain privileged status solely because counsel is copied on the correspondence. Id. (citations omitted). Further, the privilege does not attach simply because the communication was uttered by or to an attorney or an attorney's agent. HPD Laboratories, Inc. v. The Clorox Company, 202 F.R.D. 410, 414 (D.N.J. 2001).

Attorney work product includes documents prepared by counsel or at counsel's direction in preparation for trial or in anticipation of litigation. Andritz Sprout-Bauer, 174 F.R.D. at 633. Such documents are not discoverable absent a showing of substantial need, undue hardship, or inability to obtain their equivalent by other means. The attorney work product doctrine is codified by Federal Rule of Civil Procedure 26(b)(3), which provides:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or

for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3). Facts learned in preparation for trial are discoverable, but materials prepared by counsel or at the request of counsel with an "eye toward litigation" are not discoverable. Andritz Sprout-Bauer, 174 F.R.D. at 633.

II. Whether Ranbaxy Is Entitled To Production Of The Withheld Documents

After reviewing the documents selected by Ranbaxy and produced by Pfizer, the Court concludes that Pfizer has improperly used the attorney-client privilege and work product doctrine to shield discoverable documents. The redacted portions of the documents reviewed by the Court contain factual and/or scientific information of the type not covered by the attorney-client privilege. For example, several of the redactions refer to the purely factual information of when a patent was issued or when it expires. Other documents contain purely scientific data. Indeed, the Court's review of the documents was consistent with

the examples provided by Ranbaxy in its Motion of documents that were initially redacted by Pfizer and later produced in full only to reveal that the redacted portions did not contain privileged information. See D.I. 131 (Comparing Exhs. 5 and 6, 12 and 13, 19 and 20).

In addition, Pfizer has not established the application of the work product doctrine to the withheld documents. As Ranbaxy pointed out in its Motion, Pfizer's work product log entries either have no date at all or dates too early to have been prepared in anticipation of any specific litigation. In its response to Ranbaxy's Motion, Pfizer has not rebutted this assertion or otherwise established that the work product doctrine applies to the withheld documents.

In sum, the Court concludes that Pfizer has not established the application of the attorney-client privilege and/or work product doctrine to the withheld documents. Based on the Court's review of a sampling of the documents withheld, the Court further concludes that Pfizer has improperly used the attorney-client privilege and work product doctrine to evade discovery. Accordingly, the Court will grant Ranbaxy's Motion.

CONCLUSION

For the reasons discussed, the Court will grant Ranbaxy's Motion To Compel The Production Of Unredacted And Withheld Pfizer Documents and order Pfizer to produce the withheld documents that

are the subject of the Motion. In anticipation of the imposition of sanctions against Pfizer, the Court will also require Ranbaxy to submit the attorneys' fees and costs it incurred in bringing this Motion.

An appropriate Order will be entered.

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Defendants. :

O R D E R

At Wilmington, this 7th day of October 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. The Motion To Compel The Production Of Unredacted And Withheld Pfizer Documents (D.I. 131) filed by Defendants Ranbaxy Laboratories Limited and Ranbaxy Pharmaceuticals, Inc.

("Ranbaxy") is GRANTED.

2. Within ten (10) days of the date of this Order, Plaintiffs Pfizer Inc., Pfizer Ireland Pharmaceuticals, Warner-Lambert Company, Warner-Lambert Company, LLC and Warner-Lambert Export, Ltd. ("Pfizer") shall produce to Ranbaxy the withheld documents.

3. Because the Court intends to award attorneys' fees and

costs to Ranbaxy, Ranbaxy shall submit to the Court, within five (5) days of the date of this Order, the attorneys' fees and costs it incurred in bringing this Motion. Pfizer shall respond to Ranbaxy's submission within five (5) days of service.

Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE