

Askari v McDermott, Will & Emery LLP
2016 NY Slip Op 33053(U)
April 19, 2016
Supreme Court, Nassau County
Docket Number: 606862-15
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

-----X
KEVIN ASKARI and SINA DRUG CORP.,

Plaintiffs,

-against-

**McDERMOTT, WILL & EMERY LLP, and
ONCOMED SPECIALTY, LLC,**

Defendants.
-----X

**TRIAL/IAS PART: 12
NASSAU COUNTY**

**Index No: 606862-15
Motion Seq. Nos. 1, 2 and 3
Submission Date: 3/25/16**

Papers Read on these Motions:

**Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits...X
Memorandum of Law in Support.....X
Notice of Cross Motion.....X
Affirmation in Opposition/Support and Exhibits.....X
Memorandum of Law in Opposition/Support.....X
Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits.....X
Memorandum of Law in Opposition/Support.....X
Reply Affidavit in Support and Exhibit.....X
Reply Affirmation.....X
Reply Memorandum of Law in Support.....X**

This matter is before the court on 1) the motion by Plaintiffs Kevin Askari ("Askari") and Sina Drug Corp. ("Sina") ("Plaintiffs") filed on February 16, 2016, 2) the cross motion by Defendant Oncomed Specialty, LLC ("Oncomed") filed on March 21, 2016, and 3) the cross motion by Defendant McDermott, Will & Emery LLP ("MWE") filed on March 21, 2016, all of which were submitted on March 25, 2016. For the reasons set forth below, the Court 1) denies Plaintiffs' motion; and 2) grants the cross motions and dismisses the Complaint.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3212, granting summary judgment against Defendants MWE and Oncomed (“Defendants”).

Defendant Oncomed cross moves for an Order, pursuant to CPLR §§ 2215 and 3212, granting summary judgment to Oncomed and dismissing the Complaint against Oncomed.

Defendant MWE cross moves for an Order, pursuant to CPLR § 3212, granting summary judgment to MWE and dismissing the Complaint against MWE.

B. The Parties’ History

The Complaint (Ex. 1 to Sawyer Aff. in Supp.) alleges as follows:

Askari is Sina’s former President and controlling shareholder. Throughout 2013 and 2014, MWE¹ represented Plaintiffs in contract negotiations concerning a business restructuring of Sina and its related entities, the transfer by Askari of part of his ownership interest and his control of Sina and a post restructuring employment agreement for Askari’s benefit. The restructuring included transfer by Askari of part of his ownership interest in and all of his control of Sina.

Askari alleges that he has requested a copy of all MWE files (“Files”) concerning the restructuring transaction, the transfer of ownership interests and control of Sina, and Askari’s employment agreement but MWE has refused to deliver those Files to Plaintiffs. Plaintiffs allege that they are entitled to immediate possession of those Files and that MWE has wrongfully refused to deliver the Files to Plaintiffs. Plaintiffs allege that the Files “are of great value” to Plaintiffs but their monetary value is unknown, and that the failure to deliver the Files will cause Plaintiffs “irrevocable harm and unspecified monetary damages” (Comp. at ¶ 13). MWE has asserted that Oncomed, not Plaintiffs, is entitled to the Files, and that Oncomed will not consent to MWE providing the Files to Plaintiffs.

Plaintiffs seek a judgment declaring that Plaintiffs are entitled to immediate possession of MWE’s Files concerning the subject transactions and directing that the Files be delivered to Plaintiffs. Plaintiffs also seek monetary damages.

In its Answer (“MWE Answer”) (Ex. 2 to Sawyer Aff. in Supp.), MWE admits that it represented the former Sina Drug Corp. in connection with certain transactions with Pharmacy

¹ Although the Complaint does not state so explicitly, it is apparent from the motion papers that MWE is a law firm.

Corporation of America but denies Plaintiffs' allegation that MWE "represented plaintiffs in contract negotiations concerning a business restructuring of Sina and its related entities, the transfer by Askari of part of his ownership interest and his control of Sina and a post restructuring employment agreement for Askari's benefit" (Comp. at ¶ 6). MWE admits that it has refused to tender a copy of the Files to Askari without the consent of Sina, MWE's former client and/or pending a determination of whether Askari is entitled to a copy of the Files. MWE asserts that it has communicated that position to Askari's counsel on several occasions. MWE also admits that it has taken the position that Sina, its former client, is now the entity known as Oncomed and that all privileges, including the right to transaction files, are held by Oncomed, as detailed in several communications from MWE to counsel for Askari. In addition, as a courtesy, MWE sought permission from Oncomed to provide Askari with a copy of the former client's files for the transaction, but Oncomed declined to grant that permission. MWE also asserts numerous affirmative defenses.

In support of Plaintiffs' motion, Askari affirms that, before the subject transactions involving Oncomed and other entities, Robert Cohen ("Cohen"), a senior partner at MWE, and MWE became Askari's attorneys. Cohen, when he was with his prior law firm, represented Sina and Askari in a series of matters, including settlement of a lawsuit over ownership of Sina shares, and the possible sale of Sina's business to Medco. Askari affirms that, beginning in 2013 and continuing into 2014, Cohen and MWE represented Sina and Askari in matters and contract negotiations ultimately resulting in the restructuring of Sina and its related entities, and the execution of numerous agreements and documents including a Membership Interest Purchase Agreement ("Purchase Agreement") (Ex. 10 to Askari Aff. in Supp.) and an Employment Agreement between Askari and Oncomed (Ex. 9 to Askari Aff. in Supp.).

Askari affirms that he needs to review the Files as part of his investigation into bringing a legal malpractice action against MWE in connection with the entire restructuring transaction and in connection with his Employment Agreement. Askari affirms his belief that MWE did not protect his interests, or those of Sina, by virtue of its alleged failure to protect Askari and Sina from a waiver of fiduciary obligations, and failure to protect Askari's ability to pursue a claim for breach of his Employment Agreement. Askari provides a copy of the MWE engagement letter ("Engagement Letter") dated January 10, 2013 (Ex. 8 to Askari Aff. in Supp.). Askari suggests that MWE may contend that it only represented the Sina subsidiaries referred to in the Engagement Letter. Askari submits, however, that "is simply not the case notwithstanding the

language in the Engagement Letter” (Askari Aff. in Supp. at ¶ 6).

The Engagement Letter is addressed to Mr. Burt Zweigenhaft (“Zweigenhaft”), Askari and ONCO360. The Engagement Letter provides, in pertinent part, as follows:

Dear Gentlemen:

Thank you for selecting [MWE] to represent ONCO360 and its affiliated entities in connection with the sale of all or substantially all of its assets to PharMerica Corporation.

In order to avoid misunderstandings concerning potential conflicts of interest, it is our policy to clarify the identity of our clients and the circumstances under which we may represent other clients with interests which are or may be adverse to yours. In that regard, it is our policy that our representation does not extend to the employees, officers, directors, shareholders, partners or other affiliates of ONCO360. In addition, we are accepting this engagement with your consent that we may accept any other engagement from an existing or new client, even if the matter requires that we take a position that is or might be directly adverse to ONCO360 or one of its affiliates, provided that the engagement is not substantially related to the subject matter of any services we have provided to ONCO360 and will not require disclosure of any of its confidential information. This advance waiver of conflicts includes litigation matters in which we may represent a client who is adverse to ONCO360 or another member of its corporate family.

Askari affirms that ONCO360, the company referred to in the Engagement Letter, was not in existence at the time that the Engagement Letter was prepared. He affirms that the ONCO360 holding companies were formed by the filing of papers in Delaware on October 8, 2013. Askari affirms that MWE formulated the restructuring of Sina and its affiliated companies and the transfer of shares from Askari, Zweigenhaft (Askari’s co-shareholder in the original Sina Drup Corp.) and related entities. Askari describes the process as “an extremely complicated set of transactions” (Askari Aff. in Supp. at ¶ 6) as evidenced by the book of 75 closing documents that Askari received from MWE (“Closing Binder”). Askari provides a copy of the title page and index to the Closing Binder, as well as the third page of the Closing Binder which contains a diagram reflecting the post-closing corporate restructuring of all involved entities (Ex. 11 to Askari Aff. in Supp.).

Askari suggests that MWE may contend that Askari was represented by Raymond Iryami, Esq. (“Iryami”), the cousin of Askari’s wife. Askari affirms that Iryami is not a merger and acquisition attorney, and has limited experience in that field. Askari affirms that Iryami was

involved as his attorney only to the extent of reviewing the legal services that MWE provided to Askari and was “in no way” substituted as Askari’s counsel (Askari Aff. in Supp. at ¶ 7). Askari affirms that, in light of his position as majority shareholder, president and director of Sina and related entities, it was his expectation that MWE was protecting his interests individually. Askari notes that MWE’s Legal Opinion of Seller’s Counsel Letter (Ex. 12 to Askari Aff. in Supp.) contains a list of MWE’s clients which includes “Kaveh Askari, in his capacity as the Sellers’ Representative.” The Sellers are designated as Oncomed Specialty, LLC, Onco360 Holdings I, Inc., Onco360 Holdings 2 Inc., and Onco360 Holdings 3 Inc. Askari submits that, notwithstanding the characterization of Askari as the Sellers’ Representative, MWE also represented Askari individually. Askari affirms that the documentation prepared by MWE included promissory notes in the amounts of \$916,116 and \$1,500,000 made by Zweigenhaft in favor of Askari (Ex. 13 to Askari Aff. in Supp.).

In further support of the motion, counsel for Plaintiffs (“Plaintiffs’ Counsel”) affirms that prior to filing this action, Askari requested a copy of the Files because he is contemplating a legal malpractice action against MWE and litigation against Oncomed. Plaintiffs’ Counsel affirms that MWE has taken the position that it is the “equivalent of a stakeholder” (Sawyer Aff. in Supp. at ¶ 4) and does not want to decide the issue of which party is entitled to the Files. Plaintiffs’ Counsel provides correspondence between Plaintiffs’ Counsel and James Pardo (“Pardo”) of MWE, including a July 1, 2015 email from Pardo (Ex. 4 to Sawyer Aff. in Supp.) in which Pardo advised Plaintiffs’ Counsel as follows:

Following up on our discussion today.

The OncoMed-Pharmerica transaction, including the creation of OncoMed Specialty LLC, is governed by Delaware law (per the choice of law provisions of each of the various agreements negotiated by the parties).

Under Delaware law, all privileges of the “seller” company become the privileges of the “buyer” company after the deal is closed.

See Delaware General Corporation Law 259(a); Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, Civ. Action No. 7906-CS (Del. Ch. Nov. 15, 2013).

In this case, the “buyer” or successor company is OncoMed Specialty LLC (not Onco 1, 2 or 3; and not Pharmerica). OncoMed Specialty LLC holds the privileges and, therefore, holds the right to the transaction files.

With written approval from someone at OncoMed Specialty with authority - someone from the Board of Managers - we can release a copy of the deal file to Mr. Askari. As I mentioned to you, I would be amenable to approaching OncoMed Specialty for that permission.

Let me know how you want to proceed.

Plaintiff's Counsel affirms that Pardo subsequently advised him that Oncomed would not permit MWE to deliver the Files to Askari.

The Purchase Agreement states that it is "By and Among Pharmacy Corporation of America (as the Buyer); Oncomed Speciality, LLC (as the Company), Kaveh Askari (as Sellers' Representative), Each of the Selling Shareholders (as defined herein), Each of the Sellers (as defined herein), [and] Each of the Operating Companies." Paragraph 13.12 of the Purchase Agreement, titled "Governing Law," provides as follows:

This Agreement and any disputes hereunder shall be governed by and construed in accordance with the internal laws of the State of Delaware without giving effect to any choice of conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of laws of any jurisdiction other than those of the State of Delaware.

In support of MWE's cross motion, counsel for MWE provides a copy of 1) MWE's Answer (Ex. A to Pardo Aff. in Opp./Supp.), 2) the Entity Information for Sina Drug Corp. from the website of the New York State Department of State, Division of Corporations, last accessed on December 6, 2015 (Ex. B to Pardo Aff. in Opp./Supp.), 3) the Plan of Business Reorganization, which was appended to the Purchase Agreement (Ex. C to Pardo Aff. in Opp./Supp.), 4) the Oncomed Specialty LLC Amended and Restated Limited Liability Company Operating Agreement dated December 6, 2013 (Ex. D to Pardo Aff. in Opp./Supp.), 5) an excerpt from the Alegria Specialty Pharmacy website, last accessed on March 16, 2016 (Ex. E to Pardo Aff. in Opp./Supp.), 6) Iryami's biography on his law firm's website, last accessed on February 24, 2016 (Ex. F to Pardo Aff. in Opp./Supp.) ("Iryami Bio"), and 7) the verified amended complaint filed in the action titled *Kevin Askari v. Raymond Iryami and Raymond Iryami Law Firm P.C.*, Nassau Supreme Court Index Number 600169/16 (Ex. G to Pardo Aff. in Opp./Supp.) ("Related Iryami Action").

In the amended complaint in the Related Iryami Action, Askari alleges that "[o]ver a course of time extending over many years and into the year 2015 defendants (along with other attorneys) represented plaintiff, *inter alia*, in contract negotiations concerning a business

restructuring of Sina Drug Corp. and other entities, the transfer by Kevin Askari of part of his ownership interest and his control of Sina, a post restructuring employment agreement for Kevin Askari's benefit, and his relationship with one Burt Zweigenhaft" (Ex. G to Pardo Aff. in Opp./Supp. at ¶ 4). Askari alleges in the Related Iryami Action that he has requested copies of the files of Iryami and his law firm regarding "plaintiff and plaintiff's business entities, including regarding the restructuring transaction, the transfer of ownership interests and control of Sina, the employment agreement, and his relationship with Burt Zweigenhaft" (*id.* at ¶ 5) but Iryami and his law firm have refused to deliver copies of those files to Askari (*id.* at ¶ 6).

In reply, Askari provides certified copies of the Certificates of Incorporation filed October 8, 2013 for Onco360 Holdings 1, Inc., Onco360 Holdings 2, Inc. and Onco360 Holdings 3, Inc. that MWE provided to Askari in the Closing Binder (Ex. 14 to Askari Reply Aff.). Askari submits that this documentation reflects that the three Onco360 companies were not formed until more than 8 months after the date of the Engagement Letter. Askari notes that the Engagement Letter is addressed to Onco360, an "assumed" name for Sina Drug Corp. (Askari Reply Aff. at ¶ 1), Askari and Zweigenhaft. Askari submits that "[t]he letter is not addressed to me as an officer, manager or in any other way, but only as an individual" (*id.*) and argues that his opinion on this issue is entitled to evidentiary weight.

In further reply, Iryami affirms that he is a sole practitioner and the principal of Raymond Iryami Law Firm, P.C. and that his practice is primarily limited to representing health care providers and related entities. Iryami affirms that he offered advice and legal services to Askari concerning the PharMerica transaction but Askari "always told me that he believed he was primarily represented by [MWE]" (Iryami Reply Aff. at ¶ 3). Iryami affirms that he did not prepare any of the agreements involved in the Transaction, including Askari's Employment Agreement which was drafted by PharMerica's counsel and "commented on" (*id.*) by MWE and Iryami.

Iryami affirms that Askari is his cousin by marriage and he has represented Askari in other transactions over the years. Iryami also affirms, however, that "I am not a merger and acquisition specialist, and I know that [Askari] was primarily relying on [MWE's] expertise and legal services" (Iryami Reply Aff. at ¶ 4). Iryami submits that his representation of Askari concerning this matter was as a "second set of eyes and ears for [Askari]" (*id.* at ¶ 5; quotation marks in original), but that he was not Askari's primary counsel concerning the Pharmerica transaction.

Iryami's Bio provides, in pertinent part, as follows:

Whether his clients are in or out of the healthcare sector, Mr. Iryami has served their business/corporate and commercial litigation needs. He has represented clients at all stages of business from the formation of a new entity (including any relevant agreements among partners), to the acquisition of a business or practice, to the sale of a business or practice, and finally to the dissolution of a practice. When negotiations have failed to achieve the desired result, Mr. Iryami has represented clients in state and federal courts on various commercial, corporate, and regulatory matters, including Article 78 proceedings.

C. The Parties' Positions

Plaintiffs submit that 1) Plaintiffs are entitled to MWE's merger and Employment Agreement-related Files because, under applicable New York case law, in matters arising from the merger transaction, Oncomed may not both pursue the rights of the buyer and simultaneously assume the attorney-client rights that the buyer's adversary, in this case Askari and Sina, retained regarding the transaction; 2) New York law governs both the Engagement Letter and the relationship between both Plaintiffs and MWE because New York has the predominant interest in issues involving legal malpractice allegedly committed by a New York attorney with respect to the performance of his duties in New York; and 3) as Askari is currently in an adversarial relationship with Oncomed, Askari is entitled to the documentation sought and, under the same rationale, Askari and Sina are entitled to the MWE Files to prepare and proceed with their legal malpractice action against MWE, and their action against Oncomed.

In opposition to Plaintiffs' motion and in support of its cross motion, Oncomed submits that 1) the Employment Agreement, which states that it is governed by New York law, has no bearing on who has the right to assert or waive the attorney-client privilege regarding the privileged merger transaction communications; 2) this dispute arises under the Purchase Agreement because the issue is whether, pursuant to the complex corporate transaction in which Sina allowed Oncomed to assume control of it, the transaction was a pure asset sale or, rather, effectuated a transfer of all of Sina's business operations, rights and liabilities to Oncomed, including its right to assert or waive the attorney-client privilege; 3) pursuant to Section 13.12 of the Purchase Agreement, Delaware law controls this dispute; 4) under Delaware law, the seller's attorney-client privilege passes to the surviving corporation in a merger; 5) under Delaware law, Plaintiffs do not have a right to receive MWE's attorney-client privileged communications between Sina or Askari; 6) in light of Oncomed's acquisition of Sina's assets and its continued operation of Sina's specialty pharmacy services and clinical services business, Oncomed has

succeeded to the attorney-client privilege that attached to that business; 7) Askari's retention of separate counsel, Iryami, to represent his interests belies his contention that MWE was representing Askari's interests as a shareholder, and the Iryami Bio contradicts Iryami's affirmation that he has limited experience in the area of merger and acquisitions; 8) Askari's contention that MWE represented him personally in the merger transaction is also contradicted by MWE's December 6, 2013 opinion letter (Ex. 12 to Sawyer Aff. in Supp.) which states that MWE represented Askari "in his capacity as the Sellers' Representative;" and 9) Askari should not be permitted to use his former corporation position with Sina to waive a privilege that attached to Sina, and now belongs to Oncomed, to pursue litigation relating to his own rights as a former Sina shareholder that are adverse to Oncomed.

In opposition to Plaintiffs' motion and in support of MWE's motion, MWE submits that the affidavits and exhibits presented demonstrate that prior to the 2013 transaction ("Transaction") at issue in this case, Askari and Zweigenhaft were the sole shareholders of Sina, which is named as a plaintiff but is in fact defunct. At that time, Sina was doing business as Oncomed. Sina held 100% of the membership interest in two companies: OncoMed the Oncology Pharmacy of Buffalo N.Y. LLC and OncoMed the Oncology Pharmacy of Philadelphia PA LLC. Askari and Zeigenhaft also were the sole shareholders of two other related companies: OncoMed Pharmaceutical Jersey City, New Jersey, Inc. and OncoMed Pharmaceutical Services of MA, Inc. The various entities owned by Askari and Zwigenhaft, known as the Operating Companies, provided specialty pharmacy services and clinical services to patients. Askari was the President and majority shareholder of the Operating Companies, and Zweigenhaft was the Chief Executive Officer, Secretary and minority shareholder of the Operating Companies. The Plan of Business Reorganization "essentially required that the businesses of the Operating Companies be consolidated into the newly created Delaware limited liability company, OncoMed Specialty, the other defendant here" (MWE Memo. of Law in Opp./Supp. at p. 3).

MWE submits that the Transaction was "heavily lawyered" (MWE Memo. of Law in Opp./Supp. at p. 4) and Askari had his own attorney. MWE outlines the parties involved in the transactions and their respective attorneys (MWE Memo. of Law in Opp./Supp. at p. 4). MWE submits that Askari acted in two separate capacities in connection with the Transaction, and signed the Purchase Agreement in both separate capacities: 1) in his individual capacity, in which he was represented by Iryami, and 2) in his capacity as the Sellers' Representative on

behalf of Onco360 Holdings, *i.e.* as the agent of that entity, in which he was represented by MWE. This is corroborated by the Engagement Letter which states that MWE's representation does not extend to "the employees, officers, directors, shareholder, partners or other affiliates of Onco360."

MWE characterizes Askari's claim that MWE represented him in his individual capacity in connection with the Transaction as "demonstrably false" (MWE Memo. of Law in Opp./Supp. at p. 9). MWE contends that the Iryami Bio contradicts Iryami's affirmation that he had limited experience in the mergers and acquisition field, and other documentation contradicts Iryami's contention that he had a limited role in representing Askari personally in the Transaction. MWE notes that Section 13.8 of the Purchase Agreement requires that copies of any notices for Askari individually be provided to Iryami. Moreover, in the verified complaint in the Related Iryami Action, Askari alleges that Iryami represented Askari individually in the Transaction.

MWE submits that, in light of the choice of law provision in the Purchase Agreement, Delaware law applies to the question of who is entitled to the privileged documents held by MWE. MWE contends that, under Delaware law, OncoMed Specialty, as the successor company, owns the privileges and is the sole entity that can waive those privilege. As the current management of OncoMed Specialty does not wish to waive the company's attorney-client privilege as to Askari, OncoMed Specialty's privileged communications held by MWE may not be disclosed to Askari.

In reply, Plaintiffs submit *inter alia* that 1) Defendants have failed to contradict Plaintiffs' assertion that, under New York law, Plaintiffs are entitled to the Files; 2) even under Delaware law, Plaintiffs are entitled to the Files to prepare and proceed with actions against Defendants; and 3) Defendants have failed to offer evidentiary proof contradicting Askari's "reasonable expectation and understanding" (Ps' Reply Memo. of Law at p. 8) that MWE represented him personally, in addition to representing Sina.

RULING OF THE COURT

A. Summary Judgment

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the

burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Contract Interpretation

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.*

C. Forum Selection Clause

Parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. *Creative Mobile Technologies, LLC v. Smart Modular Technologies, Inc.*, 97 A.D.3d 626 (2d Dept. 2012), quoting *Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 534 (1996). A contractual forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court. *Creative Mobile Technologies, LLC v. Smart Modular Technologies, Inc.*, 97 A.D.3d at 626, quoting *LSPA Enter., Inc. v. Jani-King of N.Y., Inc.*, 31 A.D.3d 394, 395 (2d Dept. 2006).

D. Attorney-Client Privilege Following Merger or Consolidation

Section 259 of the Delaware General Corporation Law ("DGCL"), titled "Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation," provides, in pertinent part, as follows:

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and ...all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation...

In *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013), plaintiffs (collectively the "Buyer") alleged that defendants, former shareholders and representatives of Plimus, Inc. (collectively the "Seller") fraudulently induced

the Buyer to acquire Plimus, Inc. (“Plimus”). Plimus was the surviving corporation in the merger. *Id.* at 155-56. After the Buyer filed the action, one year after the merger, Buyer notified Seller that, among the files on the Plimus computer systems that the Buyer acquired in the merger, it had discovered certain communications between the Seller and Plimus’ then-legal counsel regarding the transaction. *Id.* at 156. When the Seller was notified that the Buyer had found pre-merger communications on the Plimus computer system, the Seller asserted the attorney-client privilege over those communications on the ground that it, not the surviving corporation, retained control of the attorney-client privilege that belonged to Plimus for communications regarding the negotiation of the merger agreement. *Id.* Before the court was a motion by the Buyer seeking to resolve this privilege dispute and determine, *inter alia*, that the surviving corporation owns and controls any pre-merger privilege of Plimus or, alternatively, that the Seller had waived any privilege otherwise attaching to those pre-merger communications. *Id.*

The Seller argued that the statutory term “all privileges” in DGCL § 259 does not include the attorney-client privilege, and asserted that the Seller still retained control over that particular subset of Primus’ privileges or, at least, the portion of that subset consisting of attorney client communications regarding the merger negotiations. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d at 156. The Court concluded that Seller’s proposed reading of DGCL § 259 was “not a plausible interpretation of the plain statutory language.” *Id.* at 157. The Court agreed with the Buyer’s contention that under the plain terms of DGCL § 259, the attorney-client privilege, like all other privileges, passes to the surviving corporation in the merger as a matter of law. *Id.* at 159.

A claim of attorney-client privilege made on behalf of a corporation may only be asserted through its agents, *i.e.*, its officers and directors, who must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. *In re Fuqua Industries, Inc.*, 2002 Del. Ch. LEXIS 52, * 6 (Del. Ch. 2002), citing *Zirn v. VLI Corp.*, 621 A.2d 773, 781 (Del. 1993), quoting *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 349 (1985).

E. Application of these Principles to the Instant Action

Preliminarily, the Court concludes that, pursuant to the Purchase Agreement's forum selection clause, the Court must apply Delaware law in analyzing the issue of who is entitled to the privileged documents held by MWE. The Court grants the cross motions and dismisses the Complaint based on its conclusion that 1) the documentary evidence establishes that MWE only represented Askari in his capacity as agent for a corporate entity, not personally; 2) Inyami represented Askari personally in the Transaction; 3) under Delaware law, the attorney client privilege passed to Oncomed upon its acquisition of Sina's assets and its continued operation of Sina's business; and 4) as the current management of OncoMed does not wish to waive the company's attorney-client privilege as to Askari, MWE may not disclose OncoMed Specialty's privileged communications held by MWE to Askari.

All matters not decided herein are hereby denied.

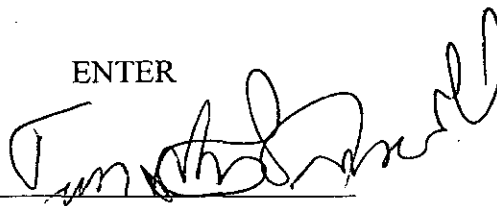
This constitutes the decision and order of the Court.

The Complaint is dismissed.

DATED: Mineola, NY

April 19, 2016

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE