UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID E. KAPLAN, ROXY D. SULLIVAN, LINDSEY RANKIN, MICHAEL S. ALLEN, GARY W. MUENSTERMAN, and CHI-PIN HSU, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

-against-

S.A.C. CAPITAL ADVISORS, L.P., S.A.C. CAPITAL ADVISORS, INC., CR INTRINSIC INVESTORS, LLC, CR INTRINSIC INVESTMENTS, LLC, S.A.C. CAPITAL ADVISORS, LLC, S.A.C. CAPITAL ASSOCIATES, LLC, S.A.C. INTERNATIONAL EQUITIES, LLC, S.A.C. SELECT FUND, LLC, STEVEN A. COHEN, MATHEW MARTOMA, and SIDNEY GILMAN,

Defendants.

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MEMORANDUM and ORDER

12-CV-9350 (VM)(KNF)

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

By a letter motion, the plaintiffs requested that the Court compel defendant S.A.C. Capital Advisors, L.P. and its affiliates (collectively "S.A.C." or "S.A.C. defendants") to produce, inter alia, documents concerning the indemnification of individual defendant Mathew Martoma ("Martoma") by the S.A.C. defendants in connection with this action. Martoma opposed the plaintiffs' motion.

Also by a letter motion, the defendants requested that the Court compel the Elan shareholder plaintiffs to produce "contracts, litigation funding agreements, other similar documents executed between their counsel and third parties relating to this case, and correspondence with those funders or third parties about this case (the 'Litigation Funding

Documents')." The plaintiffs opposed the motion.[1]

By an order dated June 26, 2015, the undersigned, having considered all the submissions made in connection with the parties' respective motions: (1) granted the plaintiffs' request for documents concerning the indemnification of Martoma by the S.A.C. defendants; and (2) denied the defendants' request for the Elan shareholder plaintiffs' Litigation Funding Documents. Thereafter, Judge Victor Marrero remanded the matter "for the purpose of a statement of the reasoning and findings supporting such Order." Accordingly, the June 26, 2015 order is vacated and the Court sets forth its reasoning and findings in the instant Memorandum and Order.

A. Plaintiffs' Demand for Martoma's Indemnification Documents

The plaintiffs seek, inter alia, "[a]ll documents concerning [S.A.C.] indemnifying, or potentially indemnifying, Martoma for all or any portion of the costs and expenses he had incurred or would incur in connection with any investigation, enforcement action or prosecution by the United States Securities and Exchange Commission, the United States Department of Justice, or any other governmental agency."

The plaintiffs contend that documents concerning S.A.C.'s indemnification of Martoma should be produced because they are relevant to the claims and defenses at issue in this action in that they may show Martoma's "credibility, motive and bias." They also assert that such documents are not privileged.

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[1]By an order dated May 15, 2015, the parties were directed to submit memoranda of law to the Court, with citations to binding caselaw, in support of their respective positions on this issue.

In opposing the plaintiffs' motion, Martoma contends that the plaintiffs "do not and cannot argue that Indemnification Documents (if any) would have any connection to their claims or to Martoma's . . . defenses" and, "[a]t most, [his] credibility or bias would be relevant to impeach his testimony." However, Martoma "does not expect to testify but rather to assert his Fifth Amendment privilege." In addition, according to Martoma, even if the Court were to find that the indemnification documents were relevant to the plaintiffs' claims, it "should still deny Plaintiffs' motion to compel because Plaintiffs already have extensive discovery of the relationship between [S.A.C.] and . . . Martoma." Therefore, the production of any indemnification agreements would add nothing to the plaintiffs' efforts to show credibility, motive, or bias. Martoma also argues that indemnification documents, if any, "would be work product and privileged communications" and would fall under the common interest privilege. Consequently, he contends, such documents are not discoverable.

In response, the plaintiffs argue that, since Martoma's employment with S.A.C. ended in 2010, "production of indemnification documents is necessary to reveal the Defendants' current relationship, if any, as it relates to the claims at issue in this litigation–specifically, whether . . . Martoma is relying on [S.A.C.] for payment of his defense costs, and whether [S.A.C.] would be liable for any judgment obtained against . . . Martoma." The plaintiffs also contend that Martoma's "right to assert a privilege against self-incrimination will likely expire when his appeal is completed."

The scope of discovery in a federal action is broad providing that, unless otherwise limited by court order, a party may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. See Fed. R. Civ. P. 26(b)(1). At the pretrial discovery

stage of a litigation, relevancy, as it relates to information sought to be disclosed, is broadly construed and incorporates information which is not admissible at trial if the discovery sought appears reasonably calculated to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b)(1).

Courts have found that indemnification agreements between co-defendants, including agreements regarding the payment of defense fees and costs, are relevant to credibility issues and a proper subject of discovery. See Concepcion v. The City of New York, No. 05 CV 8501, 2006 WL 2254987, at *4 (S.D.N.Y. Aug. 4, 2006) ["The plaintiff] is entitled to explore the potential bias or prejudice of adverse parties [and] [a]n indemnification agreement between co-defendants may lead to evidence of such bias."); Brocklesby v. United States, 767 F.2d 1288, 1292-1293 (9th Cir. 1985) (finding that indemnification agreement between co-defendants was admissible to show whether their relationship was adverse and to attack the credibility of their witnesses); Powerlift, Inc. v. Mark Indus., Inc., No. 86 CV 2055, 1987 WL 12177, at *1 (N.D. Ill. June 9, 1987) (existence of indemnification agreement may reveal bias or prejudice respecting, inter alia, whether defendant may be seen to induce co-defendant to cooperate in defense); United States v. Cathcart, No. C 07-4762, 2009 WL 1764642, at *2 (N.D. Cal. June 18, 2009)(discovery into source of payment of defendant's legal fees relevant to issue of credibility and bias); cf. In re Lloyd's Am. Trust Fund Litig., No. 96 CIV. 1262, 1998 WL 50211, at *20 (S.D.N.Y. Feb. 6, 1998) (denying motion to compel where disclosure of fee arrangement would be cumulative and details of such agreement would add nothing to argument of potential bias); Trident Steel Corp. v. Reitz, No. 04:11 CV 1040, 2012 WL 6216799, at *1-2, (E.D. Mo. Dec. 13, 2012)(denying motion to compel production of indemnification agreement between defendant and third party).

Further, contrary to Martoma's contention, courts have found that fee payment agreements that may be relevant to credibility and bias are not privileged. See, e.g., Cathcart, 2009 WL 1764642, at *2. Additionally, with respect to Martoma's position that he will assert his Fifth Amendment privilege against self-incrimination if he is called to testify while his criminal case is on appeal, the Court notes that S.A.C. is a party to any indemnification agreement with Martoma and can testify independently of him about such an agreement. For these reasons, the plaintiffs' motion to compel the defendants to produce any indemnification documents between Martoma and S.A.C. is granted.

B. Defendants' Demand for Plaintiffs' Litigation Funding Documents

The defendants have asked the Court to compel the Elan shareholder plaintiffs to produce the set of documents, including litigation funding agreements, which they have designated Litigation Funding Documents. The defendants assert that "[c]ounsel to lead plaintiffs for the Elan shareholder class admit that they are funding this case through a litigation funding agreement with a third party, but have refused to provide any details or documents concerning that arrangement." In asserting their entitlement to discovery of the Litigation Funding Documents, the defendants assert that they should be allowed "to explore whether there may be a risk that the Elan plaintiffs' funding arrangements could affect the strategic decisions they will make on behalf of the class, or could cause counsel's interest to differ from those of the putative class members they purport to represent." Similarly, the defendants argue that, without the discovery they seek, the putative class members may "only later learn, possibly years in the future, that the funding arrangement raises issues with the Elan plaintiffs' resources or adequacy . . . [and] that could have severe consequences." In such a case, there could be "a conflict within

the class, or intra-class conflicts" and, as a result, "class members could attack the result of any settlement or trial of this case." Again, if counsel were to run out of funds, the "class members may attempt to re-litigate this case all over again with a new set of lead plaintiffs."

The defendants argue further that the Court should grant their "narrow and targeted request for Litigation Funding Documents" because these documents are needed "to ensure that the Elan lead plaintiffs and their counsel can satisfy the prerequisites of [Fed. R. Civ. P.] 23." Specifically, the defendants contend, this discovery is needed so that the Court can "assess whether plaintiffs (i) possess sufficient resources to commit to the class; (ii) will adequately represent the class; and (iii) can fund proper notice to the many thousand absent class members."

On the first point, the defendants argue that the "analysis mandated by Rule 23(g) would be impossible without appropriate information about plaintiffs' counsel's arrangements for funding the litigation."[2] The defendants suggest that, although the plaintiffs represent that their firm has sufficient resources to litigate this action, "that is only because–by their own admission–some undisclosed third party is providing funding to them specifically for this litigation." The defendants contend that they are "entitled to understand the details of the arrangements given their relevance to the upcoming Rule 23(g) inquiry."

The defendants contend further that the "Elan plaintiffs' ability to finance the prosecution of this class action is also relevant to whether or not they 'will fairly and adequately protect the interests of the class,' as required by [Rule 23(a)(4)]." The defendants recognize that the Elan plaintiffs' counsel, as opposed to the plaintiffs themselves, are advancing the costs of the

[2]Federal Rule of Civil Procedure 23(g) provides, in pertinent part, that "[i]n appointing class counsel, the court . . . must consider . . . the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(l)(A)(iv).

litigation. Additionally, the defendants acknowledge that "[t]he only case cited by either party . . . that bears directly on the discovery of class counsel's funding for an adequacy inquiry is Guse v. J.C. Penney Co., 409 F. Supp. 28 (E.D. Wis. 1976), *rev'd on other grounds*, 562 F.2d 6 (7th Cir. 1977)." Notwithstanding that the case on which they rely is non-binding, the defendants contend that it considered "an almost identical request" to that made here by the defendants.

In Guse, the defendant sought information concerning the financial status of the Milwaukee Legal Services, Inc. because it had agreed to advance the money necessary for the plaintiff to pursue the case as a class action. 409 F. Supp. at 30. The court found that, with respect to the issue of whether the plaintiff was "an adequate class representative for the purposes of Rule 23(a)(4), the relevant inquiry concerning the ability to fund the costs of a class action focuses upon the assets of the plaintiff's attorneys." Id. Consequently, the court found that a representative of Milwaukee Legal Services, Inc. should be required to answer deposition questions regarding that entity's financial position. Id. at 30-31.

The plaintiffs' counsel's financial arrangements are also relevant, according to the defendants, under Rule 23(c)(2)(B), which requires class representatives to bear the costs of providing notice to class members. Noting that the costs of providing notice to class members in a nationwide securities class action can be high, the defendants assert that the plaintiffs' counsel's ability to pay for notice is relevant to whether they will fairly and adequately represent the class.

In opposing the defendants' motion, the plaintiffs contend that their "demand for discovery from counsel regarding its finances is not supported by any case in this Circuit that

Defendants cite or that Plaintiffs have found." The plaintiffs argue that: (a) speculative discovery regarding counsel's adequacy is not permitted; (b) the defendants are not entitled to discovery because counsel's adequacy and financial capacity are presumed; (c) litigation funding documents are not subject to production unless a specific issue in the case makes them relevant; and (d) communications with potential litigation funders are entitled to attorney-work-product protection.

Regarding the speculative nature of the defendants' discovery demand, the plaintiffs assert that the defendants "have cited no basis for questioning counsel's financial capacity and the demand for financial disclosure is particularly inappropriate because the Kaplan Plaintiffs are represented by two firms with a combined total of over thirty attorneys." Moreover, they argue, the claims in this case are being jointly prosecuted with two other substantial firms representing the Wyeth investors.

On the issue of counsel's adequacy and financial capacity, the plaintiffs argue that "Rule 23(g) has never been held to call for any inquiry into class counsel's finances, absent a reason to doubt their resources." Moreover, they contend, the adequacy of counsel in this case is demonstrated by their work to date: "counsel have devoted many thousands of hours to this action, extensively developed the facts and claims, reviewed millions of pages of documents, and litigated multiple merits and discovery motions." The plaintiffs contend further that litigation funding agreements such as the defendants seek in this case have been ordered produced "only when relevant to a specific issue in controversy" and no such issue exists here. The defendants' motion should also be denied, the plaintiffs argue, because the documents they seek are entitled to attorney-work-product protection.

As a rule, "the party seeking disclosure must make a showing of the requested information's relevance to its claims or defenses." Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co., No. 09 Civ. 3701, 2013 WL 1896934, at *2 (S.D.N.Y. May 7, 2013) (citation omitted). The defendants have failed to make such a showing.

The basis for the defendants' motion to compel production of the Litigation Funding Documents is the acknowledgment by counsel to lead plaintiffs for the Elan shareholder class that funding for this case comes, in part, through a litigation funding agreement with a third party. The defendants argue that discovery of such an agreement is relevant to the issue of the fitness of counsel to represent the class. However, the defendants "have provided no non-speculative basis for raising such concerns." Id. (citing Piazza v. First American Title Ins. Co., No. 3:06 CV 765, 2007 WL 4287469, at *1 (D. Conn. Dec. 5, 2007)) (fee agreement is irrelevant to class certification when there was no basis for defendants' speculation regarding conflicts of interest). Thus, the reasons adduced by the defendants in support of their view that they are entitled to discovery of the Litigation Funding Documents – that: (a) there may be "a risk that the Elan plaintiffs' funding arrangements could affect the strategic decisions they will make on behalf of the class;" or (b) the funding arrangements "could cause counsel's interest to differ from those of the putative class members they purport to represent;" or (c) the putative class members may "only later learn, possibly years in the future, that the funding arrangement raises issues with the Elan plaintiffs' resources or adequacy;" or (d) there could be "intra-class conflicts" or "class members could attack the result of any settlement or trial of this case;" or (e) if counsel were to run out of funds, the "class members may attempt to re-litigate this case all over again with a new set of lead plaintiffs" – are purely speculative. The plaintiffs' admission

that they have entered into a litigation funding agreement does not, of itself, constitute a basis for questioning counsel's ability to fund the litigation adequately.

Additionally, as the defendants acknowledge, the only case that bears directly on the issue of financial disclosure of class counsel's funding, i.e., Guse, is non-binding and factually distinguishable. Moreover, in light of counsel's past work on this litigation, its partnership with other law firms and its explicit representation to the Court that the law firms involved "have sufficient resources to see the case through to trial and appeal, if need be," no basis exists for concluding that counsel's financial resources are inadequate.

For these reasons, the Court finds that the defendants did not show that the requested documents are relevant to any party's claim or defense. Therefore, the defendants' motion to compel production of the plaintiffs' Litigation Funding Documents is denied.[3]

This Order resolves the parties' respective letter motions. The Clerk of Court is directed to record as vacated the June 26, 2015 order appearing at Docket Entry No. 190.

Dated: New York, New York
September 10, 2015

SO ORDERED:

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

[3]On August 17, 2015, after Judge Marrero remanded this matter for the limited purpose explained above, the S.A.C. Defendants submitted a letter to the undersigned seeking to provide new evidence which they contend "warrants reconsideration" of the June 26, 2015 order. Thereafter, on August 21, 2015, the plaintiffs submitted a response to the defendants' letter and, on August 25, 2015, the defendants submitted a reply. The matters raised in the parties' correspondence did not inform the Court's June 26, 2015 order; therefore, those matters exceed the parameters of Judge Marrero's directive, which called for "a statement of the reasoning and findings supporting" the June 26, 2015 order. Consequently, the Court has not considered the parties' recent correspondence in preparing the instant Memorandum and Order.