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Growing Trend Favors Disclosure of Witnesses' Identities

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Plaintiffs in private securities litigation are finding it increasingly difficult to maintain the anonymity of confidential witnesses. Due to the heightened pleading standards imposed by the Private Securities Litigation Reform Act (PSLRA) and the Supreme Court's decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), it has become "common for a plaintiff to rely on confidential witnesses in a complaint," "presumably with the goal of protecting it against dismissal." *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron, Inc.*, 278 F.R.D. 335, 341 (S.D.N.Y. 2011). In addition to requiring that complaints alleging private securities fraud "state with particularity all facts on which that belief is formed," the PSLRA requires that a plaintiff "state with particularity facts giving rise to a strong inference that the defendant acted with" scienter. 15 U.S.C. 78u-4(b)(1)(B), (b)(2). The Supreme Court clarified in *Tellabs* that a complaint gives rise to such an inference of scienter "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." 551 U.S. at 324.

In general, private securities plaintiffs need not specifically identify such sources by name in the complaint to satisfy their pleading burden. *See, e.g.*, *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 712 (7th Cir. 2008); *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). Moreover, historically, some plaintiffs have defeated motions to compel the disclosure of their confidential witnesses' identities on attorney-work-product grounds. A recent trio of cases in the Southern District of New York, however, seems to solidify a mounting trend requiring plaintiffs to produce such information in discovery. This shift is an additional factor that plaintiffs may wish to weigh in deciding whether to rely on confidential witnesses—and that defendants may be well advised to consider as they plan their strategy for discovery.

Moving to Compel the Disclosure of Confidential Witness Identities

Plaintiffs can properly exclude the identities of confidential witnesses referenced in a complaint from their Rule 26(a)(1) disclosures if they do not intend to rely on those individuals "to support [their] claims or defenses." Fed. R. Civ. P. 26(a)(1). Under Rule 26(b)(1), however, "[p]arties may obtain discovery regarding *any nonprivileged matter that is relevant to any party's claim or defense—including . . . the identity and location of persons* who know of any discoverable matter." Fed. R. Civ. P. 26(b)(1) (emphasis added). Indeed, a "literal reading" of Rule 26(b)(1), in contrast with Rule 26(a)(1), "requires the disclosure of the identities of all individuals who have knowledge of any discoverable matter, whether or not the individual will be called as a witness." *In re Marsh & McLennan Co.'s, Inc. Sec. Litig.*, No. 04 Civ. 8144, 2008 WL 2941215, at *2 (S.D.N.Y. July 30, 2008). Accordingly, if plaintiffs rely on confidential witnesses in a complaint, then the "identities of the CWs are relevant to [the plaintiffs'] claims." *In re Harmonic, Inc. Sec. Litig.*, 245 F.R.D. 424, 427 (N.D. Cal. 2007); *see In re Marsh & McLennan*,

2008 WL 2941215, at *2 ("Because Lead Plaintiffs relied upon the CWs in drafting the [complaint], the CWs possess discoverable information."); *Brody v. Zix Corp.*, No. 3-04 Civ. 1931-K, 2007 WL 1544638 (N.D. Tex. May 25, 2007) (finding that confidential witnesses "unquestionably have knowledge of facts relevant to a claim or defense, as evidenced by statements attributed to them in plaintiffs' complaint"). Defendants therefore frequently seek this information in discovery. *See, e.g.*, *Hubbard v. Bankatlantic Bancorp, Inc.*, No. 07 Civ. 61542, 2009 WL 3856458, at *3 (S.D. Fla. Nov. 17, 2009) ("Defendants are requesting the names of the confidential witnesses in a discovery request, not as part of Plaintiffs' initial disclosure."). Because plaintiffs typically resist such discovery, defendants often move to compel the production of the confidential witnesses' identities. *See, e.g.*, *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 676 (N.D. Ga. 2009) ("In their Motion to Compel, the Defendants request an order requiring the Plaintiffs to answer Interrogatories 1–7 seeking specific identification of confidential witness sources that the Plaintiffs relied upon in [the complaint]," which the plaintiffs had refused to provide.).

Split Courts

In opposing a defendant's motion to discover the identities of specific confidential witnesses referenced in a complaint, plaintiffs often argue that the confidential witnesses' identities are protected from disclosure under the attorney-work-product doctrine. Specifically, plaintiffs contend that disclosing the confidential witnesses' identities would allow opposing counsel to "infer which witnesses counsel considers important, revealing mental impressions and trial strategy[, and that s]uch evaluations, impressions, and strategy are at the heart of the work product rule." *In re MTI Tech. Corp. Sec. Litig. II*, No. SACV 00-745 DOC, 2002 WL 32344347, at *3 (C.D. Cal. June 13, 2002) (internal citations omitted). In several cases decided prior to 2012, that argument carried the day. *See id.* (denying motion to compel disclosure of confidential witness identities referenced in complaint on the ground that "there is work product in the identity of witnesses interviewed or otherwise relied upon by plaintiffs"); *see also* Fed. R. Civ. P. 26(b)(3)(B) (providing that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other legal representative concerning the litigation").

In *In re SLM Corp. Securities Litigation*, No. 08 Civ. 1029, 2011 WL 611854 (S.D.N.Y. Feb. 15, 2011), for example, Judge Pauley of the Southern District of New York credited this argument, denying a motion to compel on the ground that the identities of 16 confidential witnesses cited in the complaint were "protected work product." *Id.* at *1. Judge Pauley explained that, "[w]hile the identities of witnesses with relevant information are discoverable, Defendants are not automatically entitled to know which of those witnesses Plaintiffs consider important." *Id.*

The court in *In re Veeco Instruments, Inc. Securities Litigation*, No. 05 MD 0169, 2007 WL 274800 (S.D.N.Y. Jan. 29, 2007), similarly held that the plaintiffs were not required to disclose the identities of three confidential witnesses identified in their complaint:

> Defendants essentially seek the identity of witnesses interviewed by counsel for the Lead Plaintiffs and relied upon in the preparation of the complaint. Such information would demonstrate which witnesses that Lead Plaintiff deems important and is protected from disclosure by the work product privilege.

Id. at *1.

The plaintiffs in *MTI Technology*, *SLM Corp.*, and *Veeco Instruments* prevailed on an additional ground as well. In each case, the plaintiffs' Rule 26(a)(1) disclosures included the names of all of the confidential witnesses referenced in the complaints—along with the names of several other individuals. As the *Veeco Instruments* court stated, requiring the defendants to identify the confidential witnesses from among the other witnesses whose names appeared on that list simply was not "unmanageable." 2007 WL 274800, at *1.

Courts in certain other jurisdictions have reached the opposite conclusion, however, holding that confidential witness identities were not entitled to any work-product protection. For example, in *Miller v. Ventro Corp.*, No. C01-01287, 2004 WL 868202 (N.D. Cal. Apr. 21, 2004), the court held that a list of the identities of confidential witnesses referenced in the complaint "would not reveal counsel's mental impressions or processes and therefore is not protected by the work product doctrine." *Id.* at *2. In *In re Faro Technologies Securities Litigation*, No. 6:05 Civ. 1810, 2008 WL 205318 (M.D. Fla. Jan. 23, 2008), the court likewise declined to protect the identities of confidential witnesses relied on in the complaint on work-product grounds because the plaintiffs had "already revealed which witnesses counsel finds important, by setting forth specific information as to their knowledge, in the [complaint]. . . . Their name and address does not add to counsel's mental impression." *Id.* at *2 n.1

A Growing Trend Favors Disclosure of Confidential Witnesses' Identities

Although "the case law regarding the application of the work-product doctrine to motions to compel the name[ ] of a witness referenced but not named in a complaint" is still "not uniform," *In re Bear Stearns Cos. Sec. Litig.*, No. 08 MDL 1963, 2012 WL 259326, at *3 (S.D.N.Y. Jan. 27, 2012), three recent cases in the Southern District of New York have now echoed sporadic earlier decisions in the Northern District of California, the Eastern District of Pennsylvania, and a handful of other jurisdictions that have required the production of confidential witnesses' names in response to such motions. *See In re Am. Int'l Grp., Inc. 2008 Sec. Litig.* (*AIG*), No. 08 Civ. 4772, 2012 WL 1134142, at *3 (S.D.N.Y. Mar. 6, 2012) (Freeman, Mag.) ("Plaintiffs' claims of work product protection are outweighed by Defendants' interest in discovering the CWs' identities."); *In re Bear Stearns*, 2012 WL 259326, at *3 ("[T]he work product doctrine cannot be employed to protect the identities of [the plaintiffs'] confidential witnesses."); *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron, Inc.*, 278 F.R.D. 335, 340 (S.D.N.Y. 2011) ("[T]he names of the persons identified in the [complaint] as confidential informants are not entitled to any work product protection.").

In both *Arbitron* and *AIG*, the court reasoned that when plaintiffs "rely on the testimony of confidential witnesses to state their claims," they may not also "withhold the identities of the confidential witnesses during discovery." *In re AIG*, 2012 WL 1134142, at *4; *Arbitron*, 278 F.R.D. at 341 (holding that "where a party has attempted to satisfy the pleading requirements of the PSLRA by showcasing statements from a limited number of confidential witnesses, it may not thereafter refuse to disclose who they are on grounds of work product") (internal quotations omitted); *see also Hubbard v. Bankatlantic Bancorp, Inc.*, No. 07 Civ. 61542, 2009 WL 3856458, at *4 (S.D. Fla. Nov. 17, 2009) (deeming it inequitable for plaintiffs "to rely so heavily in their Complaint on the confidential witnesses, yet allow Plaintiffs to keep their identities from Defendants during discovery. . . ."); *cf. Ross v. Abercrombie & Fitch Co.*, No. 2:05 Civ. 819, 2008 WL 821059, at *3 (S.D. Ohio Mar. 24, 2008) ("[W]hen a plaintiff attempts to satisfy the pleading requirements of the [PSLRA] by 'showcasing' statements from a limited number of confidential witnesses, it may not thereafter refuse to disclose who they are. . . . [A] party is not permitted to use such doctrines as both a shield and a sword.").

The *Arbitron* court also concluded that the plaintiffs had failed to demonstrate "that opinion work product would be implicated by" disclosing the identities of the specific confidential witnesses referenced in the complaint, stating that it "is difficult to see how syncing up the 11 [confidential informants] with these already disclosed names [in Plaintiff's Rule 26(a)(1) disclosures] would reveal Plaintiff's counsel's mental impressions, opinions, or trial strategy." *Arbitron*, 278 F.R.D. at 340; *accord In re Bear Stearns*, 2012 WL 259326, at *2. This is because "disclosing the identities of the confidential witnesses will not reveal any more of the mental impressions, conclusions, opinions and legal theories of Plaintiffs' attorneys than Plaintiffs' attorneys have already chosen to reveal in the Complaint." *Hubbard*, 2009 WL 3856458, at *3; *accord In re Faro Techs.*, 2008 WL 205318, at *2 n.1; *In re Connetics Corp. Sec. Litig.*, No. C 07-02940, 2009 WL 1126508, at *1–2 (N.D. Cal. Apr. 27, 2009); *In re Theragenics Corp. Sec. Litig.*, 205 F.R.D. 631, 635 (N.D. Ga. 2002); *In re Harmonic, Inc. Sec. Litig.*, 245 F.R.D. 424, 428 (N.D. Cal. 2007).

Arbitron, *Bear Stearns*, and *AIG* also held for the defendants on the alternative ground that, under Rule 26(b)(3), any minimal work product associated with the confidential witnesses' identities is outweighed by defendants' need for the information and the substantial burden they would bear if they were forced to identify the confidential witnesses through other means. *See Arbitron*, 278 F.R.D. at 342 (highlighting burden on defendants to identify 11 witnesses out of a potential pool of 72); *In re AIG*, 2012 WL 1134142, at *4 ("[T]he difficulty Defendants would face in trying to ascertain the identity of these witnesses from otherwise available information is a burden that overcomes Plaintiffs' need for protection."); *In re Bear Stearns*, 2012 WL 259326, at *2 (holding that "if any work product protection does apply to these names, it is minimal"); *accord In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144, 2008 WL 2941215 (S.D.N.Y. July 30, 2008); *Lefkoe v. Jos. A. Bank Clothiers*, No. 06 Civ. 1892, 2008 WL 7275126, at *11 (D. Md. May 13, 2008); *In re Harmonic*, 245 F.R.D. at 429; *In re Aetna Inc. Sec. Litig.*, No. Civ. A. MDL 1219, 1999 WL 354527, at *4 (E.D. Pa. May 26, 1999).

This is especially true where the plaintiffs' Rule 26(a)(1) disclosures include the identities of all of the confidential witnesses on whom they relied; under such circumstances, it is generally not a question of "*if* the CWs' identities will ever be discovered, but rather *when* they will be discovered." *In re Harmonic*, 245 F.R.D. at 427 (emphasis in original); *accord Lefkoe*, 2008 WL 7275126, at *10 (finding confidential witnesses' identities would "inevitably be revealed in the course of discovery"). Accordingly, the *Bear Stearns* court—following *Arbitron* and a few earlier decisions—opted for the more efficient route of requiring the plaintiffs to disclose their confidential witnesses' identities in the spirit of Rule 1 of the Federal Rules of Civil Procedure (which instructs that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"), rather than forcing the defendants to engage in the more costly and time-consuming process of deposing numerous individuals to identify the confidential witnesses from among a larger group. *In re Bear Stearns*, 2012 WL 259326, at *2 (concluding that undue hardship on defendants outweighed any work-product protection where the identities of 7 confidential witnesses were disclosed among list of 148 individuals provided by plaintiffs); *see also Arbitron*, 278 F.R.D. at 342 (finding that defendant had shown both "a substantial need for these names" and that "undue hardship" would be imposed if the court "forc[ed] a party, in the name of an opponent's evanescent work product interest, to play a high-cost game of 'Where's Waldo?'"); *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 678 (N.D. Ga. 2009) (holding that, although it was possible for defendants to identify 7 confidential witnesses contained in list of 130 individuals, "this court will not require the Defendants to engage in such a wasteful and time consuming process"); *In re Connetics Corp.*, 2009 WL 1126508, at *1 ("[R]equiring such a dilatory exercise runs counter to the 'just, speedy, and inexpensive determination' directed by the Federal Rules of Civil Procedure.").

Public Policy Considerations

Plaintiffs also frequently cite confidential witnesses' fear of retaliation as a factor warranting the protection of their identities. However, "there is no public interest privilege that precludes lawful discovery of confidential witnesses" in private securities litigation. *Hubbard*, 2009 WL 3856458, at *4. Thus, according to recent decisions in the Southern District of New York, this "contention is less an argument against discovery and more an argument pertinent to the imposition of a protective order limiting access to the requested information." *In re Marsh & McLennan*, 2008 WL 2941215, at *5; *see also In re AIG*, 2012 WL 1134142, at *5 (directing parties to "utilize the existing confidentiality order in this action to address any *specific* confidentiality concerns") (emphasis in original); *Arbitron*, 278 F.R.D. at 344 ("In an appropriate case, a court may decline to order disclosure of a [confidential informant's] name, or fashion an appropriate protective order, in order to guard against [retribution].").

Conclusion

Although the case law is still unsettled, the growing trend requiring plaintiffs to disclose in discovery the identities of specific confidential witnesses referenced in their complaint seems unmistakable. Given this pattern, it may behoove defendants to press the issue if they seek this information in discovery and plaintiffs to decline to provide it. Indeed, defendants may be well

served by focusing their efforts on confidential witnesses at an even earlier phase. For example, to the extent that defendants can identify and interview at least some of the confidential witnesses prior to discovery and establish that, in at least a couple of instances, the complaint takes liberties with the confidential witnesses' position on the relevant events, this may assist defendants in arguing that "substantial need" exists for broader discovery rights with respect to the confidential witnesses.

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