

**Antipodean Dom. Partners, L.P. v Clovis Oncology,
Inc.**

2018 NY Slip Op 31812(U)

July 25, 2018

Supreme Court, New York County

Docket Number: 655908/2016

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Andrea Masley JSC PART 48

ANTIPODEAN DOMESTIC PARTNERS, L.P.,

Plaintiff,

-against-

INDEX NO. 655908/2016

MOTION DATE:

MOTION SEQ. NO. 005

CLOVIS ONCOLOGY, INC.; PATRICK J. MAHAFFY; ERLE T. MAST; ANDREW ALLEN; ANNA SUSSMAN; J.P. MORGAN SECURITIES LLC; CREDIT SUISSE SECURITIES (USA) LLC; STIFEL, NICOLAUS & COMPANY, INC.; and MIZUHO SECURITIES USA INC.,

Defendants.

The following papers, numbered 1 were read on this motion to compel.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that motion 005 is granted.

Antipodean moves pursuant to CPLR 3124 to compel production of certain documents from Clovis. Antipodean seeks production of (1) Clovis's Bates-stamped document CLVS SEC 01408471-8483; and (2) documents similar to CLVS SEC 01408471-8483 (collectively, the Documents). The Documents, Antipodean alleges, "summarize key portions of over 40 gigabytes of rociletinib trial data" and likewise chronicle the events regarding Clovis's drug trials leading to this action.

The facts are set forth in this court's four prior decisions and will not be repeated here. In connection with a pending SEC investigation into the Offering, the SEC subpoenaed Clovis for documents relating to rociletinib. In response, Clovis prepared and produced documents to the SEC, including CLVS SEC 01408471-8483. In May 2017, the SEC interviewed Eric Chen, Managing Member of Antipodean, in connection with the Clovis investigation. During the interview, Mr. Chen learned of the Documents when the SEC questioned Mr. Chen about, among other things, CL VS SEC 01408471-8483.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Clovis objects to production for three reasons: (1) that the Documents are protected by the work product doctrine because they were created during, and for, the SEC investigation; (2) the Documents are not relevant; and (3) the request amounts to impermissible "cloned" or "piggyback" discovery.

Antipodean argues that (1) the Documents are not entitled to work product protection, and alternatively, it was waived by the SEC production; and (2) "confidentiality" is not a legitimate basis for withholding the Documents from production.

CPLR 3101 (c) provides that "the work product of an attorney shall not be obtainable." To constitute protected work product, the party asserting the privilege must establish that the documents at issue were "primarily prepared in anticipation of litigation and are, thus, privileged matter." (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 575 [1st Dept 2012]). The party asserting the privilege bears the burden of establishing that the documents are protected from disclosure. (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]).

Clovis has established that the SEC Documents are work product. The SEC subpoena requested "underlying data" for Clovis's developmental drug as referenced in its May 31, 2015 presentation at the ASCO conference. Clovis voluntarily complied with the SEC request by producing the rociletinib data and Clovis's analysis of the data. Given the context of the request, the Documents were unquestionably prepared in anticipation of litigation. (*see Gruss v Zwirn*, 2013 US Dist LEXIS 100012, *20 [SD NY 2013] [applying work product analysis to internal and governmental investigations]). The remaining question is whether Clovis's production to the SEC constitutes waiver of the privilege.

Generally, voluntary disclosure of privileged communication waives privilege for all other communications on the same subject. (*see Am. Re-Ins. Co. v US Fid. & Guar. Co.*, 40 AD3d 486, 495 [1st Dept 2007]). That rationale applies where a party discloses otherwise privileged information to comply with an SEC subpoena that neither coerces nor requires compliance. (*see In re Steinhardt Partners, L.P.*, 9 F3d 230, 234 [2d Cir. 1993]). However, where a party secures a non-waiver agreement prior to disclosure of privileged material, courts have held such disclosures do not waive privilege. (*In re Nat. Gas Commodity Litig.*, 2005 US Dist LEXIS 11950, *37, *39 [SD NY 2005] [explaining that having such agreements in place "goes a long way to a finding of non-waiver."]).

Clovis has not established that the documents remain privileged. First, Clovis relies on *In re Steinhardt Partners, L.P.* for the proposition that disclosure of documents to the SEC does not constitute an automatic waiver of work product privilege. (9 F3d at 236). While true, *Steinhardt* also holds that work product privilege is waived where disclosure is voluntary and in the face an adversarial relationship with the SEC. (*id.* at 234). Where courts have found no waiver of the privilege are situations in which "the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials" (*id. citing In re Sealed Case*, 676 F2d 793,

817 [DC Cir 1982] [work product protection only waived if privileged material is disclosed to a party who does not share a common interests]; *In re LTV Securities Litigation*, 89 FRD. 595, 614-15 [ND Tex. 1981] [SEC and corporation had a shared interest in analyzing facts and legal theories]). It is undisputed that a common interest between Clovis and SEC did not exist here. Further, the absence of a non-waiver agreement bolsters any implication of the SEC's adversarial posture with Clovis. Nevertheless, Clovis voluntarily prepared and produced the Documents.

Second, Clovis insists that it did not waive privilege because the production is confidential, despite the absence of a confidentiality agreement with the SEC. Clovis "assumed" that the SEC had agreed to keep the documents confidential because (1) Clovis "specifically and repeatedly" and "in writing" requested the SEC keep the documents confidential; and (2) the SEC accepted the documents without ever indicating to Clovis that it would not grant confidential status. This is simply not enough.

In lieu of a confidentiality agreement with the SEC, Clovis relies on the SEC's Enforcement Manual. Specifically, Section 5.1 provides that government investigations are confidential.¹ The confidentiality provision serves the SEC by allowing the SEC "to enjoy confidentiality where it is deemed necessary, in order effectively to complete its investigation." (*Baxter v A.R. Baron & Co.*, 1996 US Dist LEXIS 18242, *7 [SD NY 1996] [internal quotations marks and citations omitted]). The confidentiality provision benefits the SEC not Clovis. Therefore, Clovis has failed to establish that the privilege was not waived.

As to relevance, Antipodean argues that the Documents will assist its experts in reviewing the trial data produced by Clovis. Clovis counters that the documents were created in response to specific SEC requests and are thus irrelevant here. Also, since the Documents include data and Clovis has produced the same data to Antipodean, it can perform its own analysis. As to piggybacking or cloning, Clovis argues the Documents do not become relevant because they were disclosed to the SEC.

Antipodean has established that the requested documents are relevant. First, the Documents concern the effectiveness of rociletinib, a critical issue in this litigation. Second, documents produced in related government investigations into similar conduct are relevant in later civil cases. (*US Bank N.A. v Merrill Lynch Mtge. Lending, Inc.*, 2014 NY Slip Op 32943(U), *7 [Sup Ct, NY County 2014]).

Finally, the court rejects Clovis's piggyback argument. Effectively, Clovis seeks to shield the Documents by its production to the SEC. This court will not countenance such selective disclosure. Indeed, *Steinhardt* cautioned against using production to the SEC to shield documents from other litigants. (*See In re Steinhardt Partners, L.P.*, 9 F3d at 235 [explaining that the court has "previously denied a claim of privilege after a claimant decided to selectively disclose confidential materials in order to achieve other beneficial purposes"]).

Accordingly, it is

¹ Securities and Exchange Commission Division of Enforcement, <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

ORDERED that Antipodean's motion to compel is granted and Clovis shall produce the requested documents within 10 days of service of this order with notice of entry.

Dated: 7/25/18 Andrea Masley, J.S.C.
HON. ANDREA MASLEY

- Check one: CASE DISPOSED NON-FINAL DISPOSITION
- MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
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