IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: CIGNA CORP.	:	CIVIL ACTION
SECURITIES LITIGATION	:	NO. 02-8088
	:	

MEMORANDUM CONCERNING CONFIDENTIAL INFORMANTS

One issue presented by the pretrial motions in this alleged class action securities fraud case is whether the Court should require Lead Plaintiff to disclose "confidential informants" who provided Lead Plaintiff and its counsel with information which was used in the investigation and preparation of the original Complaint in this case.

Confidential informants play a decidedly important role in many areas of public life. They are essential to the craft of espionage, and there are many books revealing the valuable role which confidential information has played in enabling our country to survive numerous wars. In the field of law enforcement, confidential informants are, of course, heavily relied upon by police and other law enforcement agents to detect everything from drug dealing to kidnaping to solving gruesome murders. The role of confidential informants in providing information to the press has recently been under great attention with regard to the so-called "CIA leak case" in which the Court of Appeals for the District of Columbia Circuit upheld a special prosecutor's subpoena requiring Judith Miller, a reporter for the *New York Times*, to testify about her sources. See In re Grand Jury Subpoena (Miller), 397 F.3d 964, 968 (D.C. Cir. 2005) (citing Branzburg v. Hayes, 408 U.S. 665 (1972)). In refusing to obey this order, Ms. Miller spent several weeks in prison but eventually testified.

In addition, the Federal Whistleblower Act, 5 U.S.C. §§ 1201 et seq. (2005), and the qui

tam provisions of the False Claim Act, 31 U.S.C. §§ 3729 et seq. (2005), allow the use of confidential informants who maintain their anonymity for cases to be filed under seal, and for recovery of damages.

With this background, there seems to be little public policy to support the Court requiring Lead Plaintiff to disclose its confidential informants in this case.

Of course, the recent identification of "Deep Throat," whose provision of information to the *Washington Post* led to the infamous Watergate scandal, also reminds us of the value of the free flow of information in a democratic society without fear of disclosure or retribution. However, as the DC Circuit's decision in the case of Judith Miller shows, the ability to avoid disclosing a confidential informant is not absolute; in most instances there is indeed a balancing test. How should the optimal balance be determined in this case?

CIGNA, in its Motion to Compel Discovery (Doc. No. 126), seeks to require Lead Plaintiff to identify its confidential sources. Citing In re Aetna Inc. Sec. Litig., 1999 WL 354527, *2 (E.D. Pa. 1999), CIGNA contends that in requesting the names of Plaintiff's confidential sources, it properly seeks "relevant factual information in support of contentions that were framed by Plaintiffs." CIGNA asserts that such disclosure is consistent with the purposes of the PSLRA and is necessary when a Plaintiff such as SERS builds a Complaint on statements made by confidential sources.

In that case, the plaintiffs referred the defendants to a list of over 750 individuals with knowledge of specific paragraphs of the Complaint, including a list of over 200 names of persons with knowledge of one specific paragraph. Faced with such a burdensome circumstance, Judge Padova found that "without the Court's intervention, Defendants would be forced to engage in a

time-consuming and expensive effort to ferret out the veritable needle in the haystack. In order to identify those persons with information about Plaintiff's allegations, Defendants would have to depose each and every one of the 750 individuals named by Plaintiffs." In re Aetna Secur. Litig., 1999 WL 354527 at *2-*3; see also, e.g., Miller v. Ventro Corp., 2004 U.S. Dist. LEXIS 6913, *7 (N.D. Cal. April 21, 2004) (granting a discovery motion to compel the identity of confidential sources where plaintiffs' initial disclosures listed more than 200 individuals who are believed to have discoverable information, and at least 165 persons appeared to fit the various confidential source descriptions in the complaint). Cf. In re MTI Tech. Corp. Sec. Litig., 2002 U.S. Dist. LEXIS 13015, *13-*14 (E.D. Pa. 2002) (during discovery, holding that Plaintiff's identification of 71 potential witnesses did not create an unmanageable number for Defendant to investigate); In re Ashworth, Inc. Sec. Litig., 213 F.R.D. 385 (S.D. Cal. 2002) (during discovery, denying motion to compel identification of confidential sources, particularly where plaintiff listed only approximately 100 persons with discoverable information).

As a general matter, cases decided under the heightened pleading standards of the PSLRA establish that where plaintiffs rely on confidential personal sources but also on other facts, they need not name their sources as long as the latter facts provide an adequate basis for believing that the defendants' statements were false. In re Cabletron Systems Inc., 311 F.3d 11 (1st Cir. 2002) (quoting Novak v. Kasaks, 216 F.3d 300, 314 (2d Cir. 2000)); ABC Arbitrage v. Tchuruk, 291 F.3d 336, 354 (5th Cir. 2002) (at the pleading stage, interpreting the requirements of section 78u-4(b)(1) to avoid a general requirement of naming confidential sources which may make impossible the adequate pleading of meritorious securities fraud cases in circumstances in which informants do not wish to be exposed too early but in which the PSLRA's stay of discovery

under 15 U.S.C. § 78u-4(b)(3)(B) prevents the acquisition of other sources for allegations which the plaintiffs have no choice but to make on information and belief). Moreover, even if personal sources must be identified in a complaint, there is no requirement that they be explicitly named, provided they are described with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged. Id.

CALPERS v. Chubb Corp., 394 F.3d 126, 147 (3d Cir. 2004), another pleadings-stage case, does not rule on discoverability of confidential sources. In CALPERS, the Court carefully reviewed the plaintiff's reliance on confidential sources in the initial Complaint and held they were insufficient to state a claim, in part because there was also insufficient documentary support. The Court held that, at the pleading stage, the plaintiff failed to meet the PSLRA's requirements by not providing sufficient documentary evidence and specific details about the basis of a source's knowledge and the reliability of the personal sources of the plaintiff's beliefs.

Here, however, CIGNA has not challenged the sufficiency of Plaintiff's pleading on the basis that Plaintiff's averments are insufficient under CALPERS; rather, CIGNA seeks to obtain the specific names of confidential sources during subsequent discovery. In this case, there has already been substantial document discovery, much of it cited in Plaintiff's Revised Amended Complaint.

It is axiomatic that Defendants are entitled to the discovery of the name and address of persons with relevant knowledge, as described in a Complaint; such information is obviously relevant to the claims and defenses involved in the pending action and is "reasonably calculated to lead to the discovery of admissible evidence." In re Aetna Sec. Litig., at *5-*6 (citing Fed. R.

Civ. P. 26(b)(1)).[1] As such, interrogatories requesting the identity and location of persons having knowledge of any discoverable matter raised in the Complaint fall squarely within Rule 26(b)(1). Id. Defendants are therefore entitled to discover the names of all individuals known by Plaintiff to have relevant knowledge.

The Court concludes that requiring specific identification of confidential sources from among the universe of individuals with relevant knowledge in a securities fraud case would chill informants from providing critical information which may end up being in the public eye. In this case, Lead Plaintiff has supported its Complaint with statements made by CIGNA officials and in CIGNA documents, and by making other allegations (the truth of which will be determined at trial). Plaintiff should not be put under any compulsion to disclose the specific identity of its confidential informants. Fairness compels only that if an individual who is a confidential informant does have relevant information, that person's identity should be disclosed as a discoverable matter, but without disclosing that he or she is a confidential informant. The Court believes that this resolution of CIGNA's discovery motion is in accord with the holdings about confidential informants at the pleading stage. See CALPERS, 394 F.3d at 147 ("Far from commanding that confidential sources be named as a general matter, the PSLRA is silent regarding the sources of a plaintiff's facts. Thus . . . there is no reason to inflict the obligation of naming confidential sources."); Novak, 216 F.3d at 314 (in reversing a ruling on a motion to

[1] The disclosure of the names and addresses of persons interviewed by Plaintiffs' counsel is consistent with the policy considerations underlying the PSLRA. The PSLRA was passed in an effort to curtail the filing of securities claims without an adequate basis in fact. To this end, Congress imposed more stringent pleading requirements on plaintiffs in securities fraud cases. One such requirement imposed upon plaintiffs the burden of identifying the sources for allegations pled on information and belief. 15 U.S.C.A. § 78u-4(b)(1). See In re Aetna Secur. Litig., at *12-*13.

dismiss, concluding that the primary purposes of the Federal Rules of Civil Procedure and the PSLRA can be served without requiring plaintiffs to name their confidential sources); In re Tellium, Inc. Sec. Litig., 2005 WL 1677467, *45-*50 (D.N.J. June 30, 2005) (in deciding a motion to dismiss, following CALPERS and commenting upon the role of confidential sources); In re DaimlerChrysler AG Sec. Litig., 197 F. Supp. 2d 42, 77-79 (D. Del. 2002) (in ruling on the sufficiency of pleadings, stating that plaintiffs need not identify anonymous sources, but must only specify the factual information that comes from the sources and connect the information to the sources).

The Court will therefore dismiss CIGNA's motion without prejudice and order Plaintiff to respond to CIGNA's interrogatories designed to elicit from Plaintiff the identity of individuals with relevant knowledge. CIGNA shall tailor these interrogatories, and Plaintiff shall likewise craft its responses, to each paragraph or substantively similar group of paragraphs contained in the Revised Amended Complaint. Should Plaintiff's response bring about an unreasonable, "needle in the haystack" scenario, such as that which occurred in In re Aetna Securities Litigation or Miller v. Ventro Corp., CIGNA may renew its motion with the Court.

An appropriate order follows.

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ORDER

AND NOW, this 31st day of January, 2006, following a hearing with counsel on January 26, 2006, and careful consideration of the parties' extensive briefing, it is hereby ORDERED as follows:

1. Defendant's Motion to Compel Discovery (Doc. No. 126) is GRANTED in part and DENIED in part. Defendant's request requiring Plaintiff to identify their confidential sources is DENIED for the reasons stated in the attached Memorandum; however, Plaintiff shall promptly provide information to identify those individuals with knowledge as to each paragraph of the Complaint or by topic (with reference to specific paragraphs). Defendant's Motion to Compel Discovery as to witnesses Gilbert, McGrath, Bittenbender and Paese is GRANTED under the terms set forth at the hearing.

2. Defendant's Supplemental Motion to Compel (Doc. No. 130), which relates to Mellon Bank information, is GRANTED, subject to the terms as stated at the hearing.

3. Defendant's Motion to Quash or Modify Subpoena and for Protective Order (Doc. No. 94), relating to outside directors, filed September 20, 2005, is DENIED as MOOT, because there are no depositions currently scheduled for outside directors.

4. As to Plaintiff's Motion to Compel (Doc. No. 132), relating to the "Miller Spreadsheet," the parties have agreed to continue further negotiations on the subject matter of this Motion. The Court is therefore holding the Motion under advisement, and counsel shall report further to the Court within fourteen (14) days.

BY THE COURT:

/s/ MICHAEL M. BAYLSON
Michael M. Baylson, U.S.D.J.