

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

CITY OF ROCKFORD,

Plaintiff,

v.

MALLINCKRODT ARD INC.,
formally known as QUESTCOR
PHARMACEUTICALS, INC.;
MALLINCKRODT PLC;
and UNITED BIOSOURCE
CORPORATION *et al.*,

Defendants.

Civil Action No.: 3:17-cv-50107

Judge John Z. Lee

Magistrate Judge Lisa Jensen

**DEFENDANTS' MOTION TO COMPEL PRODUCTION OF ROCKFORD'S
RETAINER AND FEE ARRANGEMENTS WITH ITS COUNSEL**

Plaintiff City of Rockford seeks to represent a nationwide class of payors—including, at a minimum, every individual, employer, health and welfare fund, insurance company, and municipal or state government agency that has paid for Acthar[®] prescriptions since 2007—on the theory they paid too much. At the same time, Rockford's counsel, Haviland Hughes, also represents, in separate actions in other jurisdictions, several other payors that appear to fall within the putative class definition. This includes two payors that seek to represent their own payor classes and seek damages on the same Acthar[®] prescriptions (or a subset of those prescriptions), based in part on the same conduct alleged in Rockford's Second Amended Complaint ("Separate Actions"). Such arrangements raise numerous conflict issues central to the adequacy of Rockford and its counsel to represent the putative class in this case.

Accordingly, Defendants' Request for Production No. 43 sought discovery of Rockford's retainer and fee arrangements with its counsel. Courts around the country, including in this district, have held that retainer and fee agreements are relevant, non-privileged, and discoverable. Rockford's boilerplate objections to the contrary are meritless. Defendants have attempted to meet and confer in good faith with counsel for Rockford concerning those objections to no avail. Accordingly, Defendants respectfully request that the Court order Rockford to produce all documents responsive to Request No. 43.

BACKGROUND

Rockford's Second Amended Complaint asserts federal antitrust and other claims on behalf of a sprawling nationwide putative class of "[a]ll third party payors and their beneficiaries in the United States and its Territories that paid for Acthar from August 2007 through the present."¹ Second Amended Complaint ("SAC") at ¶ 165 (Dkt. No. 98). Counsel for Rockford, Haviland Hughes, represents three members of the putative class in individual actions in other jurisdictions. *See Acument Global Technologies, Inc. v. Mallinckrodt ARD Inc., et al.*, Case No. CT-2275-19, Cir. Ct. (Shelby County, Tenn.);² *International Union of Operating Engineers Local 542 v. Mallinckrodt ARD Inc., et al.*, Ct. Common Pleas (Mont. Co., Penn.); *Washington County Board of Education v. Mallinckrodt ARD Inc. et al.*, Case No. 1:19-cv-01854-JKB (D. Md.).³ Haviland also represents two members of the Rockford putative class in separate putative class actions in other jurisdictions. *Steamfitters Local Union No. 420 v. Mallinckrodt ARD LLC et al.*, Case No.

¹ The proposed class excludes Defendants, any co-conspirators, Medicare Advantage Organizations and related entities, and the States of Alaska, Maryland, New York, Texas, and Washington.

² Plaintiff's Second Amended Complaint included Acument Global Technologies, Inc. (Acument) as a named plaintiff. On January 25, 2019, the Court dismissed all claims brought by Acument. Rather than seek to amend its allegations, Acument, represented by the same counsel, filed a complaint in state court. To the extent it is not barred from asserting claims in state court, Acument remains a member of the Rockford putative class.

³ On January 3, 2020, the court dismissed all claims brought by Washington County. *See Washington Cty. Bd. of Educ. v. Mallinckrodt ARD, Inc.*, No. CV JKB-19-1854, 2020 WL 43016, at *3 (D. Md. Jan. 3, 2020).

2:19-cv-03047-BMS (E.D. Pa.); *United Association of Plumbers & Pipefitters Local 322 of Southern New Jersey v. Mallinckrodt ARD LLC, et. al.*, Case No. CAM-L-004696-19, Sup. Ct. (Camden Cty., N.J.).

On October 17, 2019, Defendants requested that the City produce retainer and fee agreements with counsel and related materials:

REQUEST NO. 43. All Documents related to Your engagement or retention of counsel in this litigation, including (i) any retainer or engagement agreement You have with Your counsel or any other counsel for the proposed class in the Complaint; (ii) all Documents relating to who will advance and who is responsible for payment of costs and expenses incurred in connection with this litigation; (iii) all Documents relating to who will share in a recovery, if any realized in this litigation; and (iv) all documents relating to the sharing of fees with any person not a member of Your counsel's firm.

See Ex. 1. On November 18, 2019, Plaintiff served its objections and responses to Defendants' First Request for Production of Documents. *See Ex. 2.* As to Request No. 43, Plaintiff refused to produce any documents, objecting that such documents are privileged and not relevant. *See Response* (objecting "producing any such documents on grounds of privilege and because the Request does not the discovery [sic] of relevance [sic] evidence potentially admissible at any trial in this action.")).

On December 13, 2019, Defendants met and conferred with counsel for Rockford. *See Ex. 3.* Counsel confirmed that Rockford would stand on its objections as to each part of Request No. 43 and would not produce any documents in response to the request.

ARGUMENT

The Federal Rules of Civil Procedure allow parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Here, Rockford seeks to represent a class pursuant to Rule

23(a), (b)(2), and (b)(3). *See* SAC ¶ 165. Accordingly, Rockford’s retainer and fee arrangements with its counsel are relevant for reasons that are only amplified by counsel’s representation of individual and putative class interests in the Separate Actions that overlap with the interests of the proposed class here. Rockford’s assertion of privilege is without merit. Given that Rockford had not objected to Request No. 43 on the ground that production would be unduly burdensome, there is no reason for the Court to postpone discovery of such agreements. Accordingly, the Court should compel Rockford to produce documents responsive to Request No. 43.

I. Plaintiff’s Retainer and Fee Arrangements are Relevant to Class Certification

To represent a class, a plaintiff must establish among other things that the *representative parties will fairly and adequately protect the interests of the class.*” Fed. R. Civ. P. 23(a)(4) (emphasis added). The adequacy requirement under Rule 23(a)(4) comprises two parts: “the adequacy of the named plaintiff’s counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest of the class members.” *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). Among other things, the adequacy inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. *See id.*

Class actions “are rife with potential conflicts of interest between class counsel and class members.” *Mirfashi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004); *see also In re Ocean Bank*, No. 06 C 3515, 2007 WL 1063042, at *6 (N.D. Ill. Apr. 9, 2007) (“There is no question that the financial interests of class counsel often diverge from those of the class.”). And the terms of retainer and fee agreements may reveal disqualifying conflicts. For example, any agreement that would cede control over settlement to class counsel would “improperly impinge on [the plaintiff’s] independence and ability to protect the interests of the class.” *In re Ocean Bank*, 2007 WL 1063042, at *6 (denying class certification motion). Likewise, an agreement to provide incentives to class representatives that is conditioned on their support for settlement may create a conflict of

interest between the class representatives and absent class members. *See Radcliffe v Experian*, 715 F.3d 1157, 1165-67 (9th Cir 2013) (reversing district court's approval of class settlement).

Accordingly, courts around the country, including in this district, have held that retainer and fee agreements are relevant and discoverable. *See, e.g., Williams v. Sweet Home Healthcare, LLC*, No. 16-2353, 2017 WL 2779189, at *3 (E.D. Pa. June 27, 2017) (granting motion to compel); *Haghayeghi v. Guess?, Inc.*, No. 14-CV-20 JAH (NLS), 2016 WL 9526465, at *1-2 (S.D. Cal. 2016) (same); *Gusman v. Comcast Corp.*, 298 F.R.D. 592, 599-600 (S.D. Cal. 2014) (same); *Porter v. NationsCredit Consumer Disc. Co.*, No. 03-cv-2768, 1003 U.S. Dist. Lexis 13641, at *7 (E.D. Pa. July 8, 2004); *Rochetti v. Am. Fed'n of Musicians & Emp'rs Pension Welfare Fund*, No. 85 C 10479, 1987 WL 10291, at *2 (N.D. Ill. Apr. 24, 1987) (same); *Epstein v. Am. Reserve Corp.*, No. 79 C 4767, 1985 WL 2598, at *3 (N.D. Ill. Sept. 18, 1985) (same).

This Court should do the same. The fact that Rockford's counsel represents clients in potentially overlapping class and individual actions justifies this result by making the basic adequacy questions raised by Rockford's selection of counsel central to the class certification determination. And of course, counsel's retention and fee agreements with the plaintiffs in the Separate Actions, which Defendant will seek in those actions, could create even more conflicts in counsel's ability to adequately represent the proposed class here. Plaintiffs in the Separate Actions maintain that their classes and claims do not overlap with those here. They are wrong. For example, on its face the *Steamfitters* putative class is defined to overlap with the Rockford putative class. *Compare* SAC ¶ 165 ("All third-party payors and their beneficiaries in the United States and its Territories that paid for Acthar from August 2007 through the present"), with *Steamfitters* Compl. ¶ 445 ("All third-party payors and their beneficiaries in the United States and its Territories

that paid for Acthar from August 2007 through the present *for any unapproved indication or dose*”) (emphasis added).

In short, Rockford’s retainer and fee agreements are relevant here. *Epstein v. Am. Reserve Corp.*, No. 79 C 4767, 1985 WL 2598, at *3 (N.D. Ill. Sept. 18, 1985) (“Fee arrangements are relevant to the ability of named plaintiffs to protect the interest of potential class members and hence are a proper subject for discovery.”). Defendants are aware of the line of cases suggesting that documents concerning the engagement of class counsel are not always discoverable, but those cases are readily distinguishable given the unusual circumstances that the Court will confront here. Because Rockford’s counsel represents absent members of the Rockford class in other actions, the potential conflicts here are numerous and may raise serious questions about whether Rockford’s counsel should serve as counsel for the Rockford class.⁴

II. Retainer and Fee Arrangements Are Not Privileged

“The general rule is well established that information regarding a client’s fees is not protected by the attorney-client privilege because the payment of fees is not a confidential communication between the attorney and client,” *Matter of Witnesses Before The Special March 1980 Grand Jury*, 729 F.2d 489, 491 (7th Cir. 1984), and that rationale “logically extends to retainer agreements between attorneys and their clients.” *JP Morgan Chase Bank, N.A. v. PT Indah Kiat Pulp and Paper Corp. Tbk*, 2011 WL 6753984, at *3 (N.D. Ill. 2011); accord *Lucas v. Gold Standard Baking, Inc.*, 2017 WL 3394726, at *2 (N.D. Ill. 2017) (“Generally retainer agreements are not protected by attorney-client privilege.”). Rockford has interposed a boilerplate

⁴ Rockford has requested the engagement letters between Defendants and their counsel. But Defendants do not seek to represent a putative class, which means the adequacy of their representation is not relevant to these proceedings and the terms of their engagements with defense counsel are not the proper subject of discovery.

privilege objection but has identified no basis for departing from the general rule. Accordingly, the Court should discard Rockford's privilege objection.

CONCLUSION

For the above reasons, Rockford's retainer and fee arrangements with its counsel in this action are relevant and discoverable, and Defendants respectfully request that the Court compel Rockford to produce all documents responsive to Defendants' Request for Production No. 43.

Dated: February 3, 2020

Respectfully Submitted,

/s/ Scott C. Sullivan

Scott Collins Sullivan
WILLIAMSMCCARTHYLLP
120 West State St.
P.O. Box 219
Rockford, IL 61105-0219
(815) 987-8900
ssullivan@wilmac.com

Matthew M. Wolf
Laura S. Shores
Sonia K. Pfaffenroth
Michael B. Bernstein
Ryan Z. Watts
Adam M. Pergament
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
matthew.wolf@arnoldporter.com
laura.shores@arnoldporter.com
sonia.pfaffenroth@arnoldporter.com
michael.b.bernstein@arnoldporter.com
ryan.watts@arnoldporter.com
adam.pergament@arnoldporter.com

*Counsel for Defendants Mallinckrodt ARD
and Mallinckrodt PLC*

/s/ Michael D. Bonanno

Jan H. Ohlander, Esq.
RENO & ZAHM, LLP
2902 McFarland Road
Suite 400
Rockford, IL 61107
815-987-4050
jho@renozahm.com

Eric C. Lyttle, Esq. (pro hac vice)
Michael D. Bonanno, Esq. (pro hac vice)
Ethan C. Glass, Esq. (pro hac vice)
Meghan A. McCaffrey, Esq. (pro hac vice)
Brian H. Rowe, Esq. (pro hac vice)
Kirk Goza, Esq. (pro hac vice)
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
1300 I Street, NW
Washington D.C. 20005
202-538-8162
ericlyttle@quinnemanuel.com
mikebonanno@quinnemanuel.com
ethanglass@quinnemanuel.com
meghanmccaffrey@quinnemanuel.com

*Counsel for Express Scripts Holding Co.,
Express Scripts, Inc., CuraScript, Inc.,
Accredo, United BioSource*

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2020, a true and correct copy of the foregoing instrument was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Scott Collins Sullivan

Scott Collins Sullivan
WILLIAMSMCCARTHYLLP
120 W. State St.
P.O. Box 219
Rockford, IL 61105-0219
(815) 987-8900
ssullivan@wilmac.com