

Antipodean Domestic Partners, L.P. v Clovis Oncology, Inc.
2018 NY Slip Op 33031(U)
November 28, 2018
Supreme Court, New York County
Docket Number: 655908/2016
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 269

RECEIVED NYSCEF: 11/30/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
-----X

ANTIPODEAN DOMESTIC PARTNERS, L.P.,

Index No.: 655908/2016

Plaintiff;

-against-

Motion Seq. No. 010

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.

-----X
Masley, J.:

Defendants 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. (collectively, Clovis Defendants) move to seal their reply memorandum and supporting papers (Reply Brief) on motion sequence number 007 to the extent these documents contain confidential information.

Plaintiff Antipodean Domestic Partners, L.P. (Antipodean) is a private investment fund. (NYSCEF Doc. No. 235 at 1.) On November 10, 2016, Antipodean commenced this action against the Clovis Defendants. In the amended complaint, Antipodean alleges that,

"Defendants raised millions of dollars from Plaintiff and other investors on the basis of false, incomplete and misleading test data purporting to show the efficacy and safety of Clovis's supposedly breakthrough lung cancer drug – rociletinib. In truth, this drug was significantly less effective and safe than Defendants had represented to Antipodean and the investing public. As documented by the FDA, Clovis knew the efficacy and safety data provided to Antipodean was not accurate. Plaintiff brings this action to recover damages suffered as a result of Defendants' misrepresentations to Antipodean."

(NYSCEF Doc. No. 10 at 1.)

Subsequently in motion sequence number 007, the Clovis Defendants moved to compel Antipodean to disclose (1) the identity of all investors, partners and limited partners in Antipodean and all other persons and entities on whose behalf Antipodean had made investments; (2) certain documents and information concerning pharmaceutical company investments made by or on behalf of Antipodean, and (3) documents without redacting the names or other identifying information of Antipodean's investors. (NYSCEF Doc. No. 145.) The reasoning for seeking this discovery was that the Clovis Defendants sought to "probe communications between Antipodean and its investors about Antipodean's reasons for investing in Clovis, trading strategy, awareness of potential risks, and explanations for the decline in the value of Clovis' securities." (NYSCEF Doc. No. 146 at 4.) Additionally, the Clovis Defendants asserted that "communications and other documents concerning Antipodean's actual or potential pharmaceutical company investments are highly relevant; as they speak to Antipodean's sophistication in the pharmaceutical market..." (NYSCEF Doc. No. 146 at 5.)

Antipodean opposed, noting that the document requests from the Clovis Defendants effectively seek all documents concerning 33 companies in which Antipodean actually purchased and or sold securities. (NYSCEF Doc. No. 173 at 4.) Antipodean also argued that this exceedingly burdensome production amounted to harassment. (NYSCEF Doc. No. 173 at 5.) Further, it argued that the requests included documents unrelated to the transactions at issue. (NYSCEF Doc. No. 173 at 7.)

Subsequently, the Clovis Defendants filed their Reply Brief under seal. Although this court issued a decision in motion sequence number 007 (NYSCEF Doc. No. 185), the issue as to whether the Reply Brief should remain sealed is outstanding.

In motion sequence number 010, the Clovis Defendants argue that the Reply Brief describes and appends documents designated as "Confidential" pursuant to the Confidentiality Order¹ of the parties. (NYSCEF Doc. No. 132.) They maintain that the

¹ The confidentiality order provides that designating documents as "Confidential Information" is proper,

"if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients."

(NYSCEF Doc. No. 132 at 2.)

Reply Brief consists of communications between Antipodean and its investors. Accordingly, the Clovis Defendants argue that the Reply Brief should remain sealed to the extent that it refers to Confidential Information. However, they contend that a public version may be prepared with the confidential information unredacted.

In support, Antipodean contends that, the Reply Brief should be available on the public docket but not to the extent that the documents reveal (1) the names and contact information (Contact Information) of Antipodean's investors and (2) the specific dollar amounts each Antipodean investor invested in the fund, and similar references such as the investor's returns in a certain period (Investment Amounts).

Antipodean argues that the Contact Information and Investment Amounts confidential should be redacted because (1) such information is kept confidential by Antipodean, (2) the information is irrelevant to the merits of the action, and (3) the information constitutes trade secrets. (NYSCEF Doc. 234 at 2.)

Antipodean argues that the information constitutes trade secrets especially because Antipodean developed its investor base through contacts made over many years and employs its Chief Financial Officer in part to maintain those relationships. (NYSCEF Doc. No. 235 at 1; NYSCEF Doc. No 234 at 2.) Accordingly, Antipodean contends that it is well-established that the identity of a business' customers qualifies as a trade secret where the information is kept in confidence by that business. Further, in the event that the Contact Information and Investment Amounts are made public, other professional money managers would allegedly solicit Antipodean's investors. (NYSCEF Doc. No. 234 at 2.) As a result, Antipodean's investors allegedly would suffer unwanted nuisance and or refrain from investing with Antipodean in the future, damaging both Antipodean and its investors. (NYSCEF Doc. No. 234 at 2.)

Antipodean also contends that, although the action concerns misstatements by a pharmaceutical company about the safety and efficacy trial data of a developmental drug and therefore raises matters of public concern, the Contact Information and Investment Amounts does not raise any public concern. (NYSCEF Doc. No. 234 at 3.) Accordingly, the Contact Information and Investment Amounts should be redacted only. (NYSCEF Doc. No. 234 at 3.)

Section 216.1(a) of the Uniform Rules for Trial Courts empowers courts to seal documents upon a written finding of good cause. It provides:

"(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

(b) For purposes of this rule, 'court records' shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103 (a)."

Judiciary Law § 4 provides that judicial proceedings shall be public. "The public needs to know that all who seek the court's protection will be treated evenhandedly," and "[t]here is an important societal interest in conducting any court proceeding in an open forum" (*Baidzar Arkun v Farman-Farma*, 2006 NY Slip Op 30724[U], *2 [Sup Ct, NY County 2006] [citation omitted]). The public right of access, however, is not absolute (*see Danco Lab, Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 8 [1st Dept 2000]).

The "party seeking to seal court records bears the burden of demonstrating compelling circumstances to justify restricting public access" to the documents (*Mosallam v Berenson*, 76 AD3d 345, 348-349 [1st Dept 2010] [citations omitted]). The movant must demonstrate good cause to seal records under Rule § 216.1 by submitting "an affidavit from a person with knowledge explaining why the file or certain documents should be sealed" (*Grande Prairie Energy LLC v Alstom Power, Inc.*, 2004 NY Slip Op 51156 [U], *2 [Sup Ct, NY County 2004]). Good cause must "rest on a sound basis or legitimate need to take judicial action" (*Danco Labs.*, 274 AD2d at 9). Agreements to seal are insufficient as such agreements do not establish "good cause" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 2012 NY Slip Op 33147[U], * 9 [Sup Ct, NY County 2012]).

In the business context, courts have sealed records where trade secrets are involved or where the disclosure of documents "could threaten a business's competitive advantage" (*Mosallam*, 76 AD3d at 350-351 [citations omitted]). "A trade secret, like any other secret, is nothing more than a private matter; something known to only one or a few and kept from the general public; and not susceptible to general knowledge." (*Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392 [1972].) "[W]here the customers are not known in the trade or are discoverable only by extraordinary efforts courts have not hesitated to protect customer lists and files as trade secrets." (*Id.*) "This is especially so where the customers' patronage had been secured by years of effort and advertising effected by the expenditure off substantial time and money." (*Id.*)

Additionally, the First Department has affirmed the sealing of records concerning financial information where there has not been a showing of relevant public interest in disclosure of the financing. (*see Dawson v White & Case*, 184 AD2d 246, 247 [1st Dept 1992].) For instance, in *Dawson v White & Case*, the First Department stated that the plaintiff appellant failed to show "any legitimate public concern, as opposed to mere curiosity, to counter-balance the interest of defendant's partners and clients in keeping their financial arrangement private." (*Id.* [internal quotation marks and citation omitted]).

Preliminarily, the parties agree that the confidential information in the Reply Brief should be redacted, however if it is unsealed at this juncture, the documents will be accessible to the public without these redactions.

Here, the Clovis Defendants and Antipodean have demonstrated good cause to the extent that they may redact from the Reply Brief all references to the Contact Information and Investment Amounts. The Contact Information consists of trade secrets insofar as the investors of Antipodean, a private investment fund, are discoverable only by extraordinary efforts. (*Leo Silfen Inc.*, 29 NY2d at 392.) Indeed, Antipodean secured the patronage of its investor base through contacts made over many years and expends money by employing its Chief Financial Officer to maintain those relationships. (*Id.*; NYSCEF Doc. No. 235 at 1; NYSCEF Doc. No. 234 at 2.) Disclosure of this information “could threaten [Antipodean’s] competitive advantage.” (*Mosallem*, 76 AD3d at 350-351 [citations omitted]). Like *Dawson v White & Case*, good cause exists to redact the Investment Amounts because the Clovis Defendants and Antipodean have shown that it is in the interest of Antipodean and its clients to keep their financial arrangements – the specific dollar amounts each Antipodean investor invested in the fund, and similar references such as the investor’s returns in a certain period – private. (*Dawson*, 184 AD2d at 247.) Disclosing the amount each investor has invested and the return on each investment would be detrimental, at the very least, to Antipodean’s competitive advantage in the marketplace. Additionally, there has been no showing of any legitimate public concern as opposed to mere curiosity sufficient to counter Antipodean and its clients interest in keeping their financial arrangements private. (*Dawson*, 184 AD2d at 247.)

Pursuant to, and in accordance with, Rule 216, having determined that good cause exists for the redacting of the Reply Brief as detailed in this decision, and the grounds having been specified, it is now accordingly,

ORDERED that the motion is granted to the extent the Clovis Defendants shall redact all references to Contact Information and Investment Amounts from: NYSCEF Doc. No. 210 up to and including NYSCEF Doc. No. 232; and it is further

ORDERED that the Clovis Defendants are directed to re-file NYSCEF Doc. No. 210 up to and including NYSCEF Doc. No. 232 in redacted form within 10 days of the date of this decision. Future submissions containing or referencing confidential information, as outlined in this decision, shall likewise be redacted prior to being filed publicly in NYSCEF; and it is further

ORDERED that the County Clerk, upon service on him of a copy of this order, is directed to accept NYSCEF Doc. Nos. 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, and 232 in redacted form; and it is further

ORDERED that NYSCEF Doc. Nos. 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, and 232 shall also be

NYSCEF DOC. NO. 269

RECEIVED NYSCEF: 11/30/2018

filed in unredacted form and sealed. Until further order of the court, the County Clerk shall deny access to the unredacted documents to anyone (other than the staff of the County Clerk or the court) except for counsel of record for any party to this case, a party, and any representative of counsel of record for a party upon presentation to the County Clerk of written authorization from the counsel; and it is further

ORDERED that this order does not authorize sealing or redacting for purposes of trial.

Dated: 11/28/18

ENTER

J.S.C.

HON. ANDREA MASLEY