

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

City of Rockford,	)	
	)	
<i>Plaintiff,</i>	)	
	)	Case No. 17 CV 50107
v.	)	
	)	Magistrate Judge Lisa A. Jensen
Mallinckrodt ARD, Inc., <i>et al.</i> ,	)	
	)	
<i>Defendants.</i>	)	

ORDER

Defendants' motion to compel production [294] is denied without prejudice.

STATEMENT

Plaintiff City of Rockford filed the instant suit alleging, in part, violations of federal and state antitrust and consumer protection laws based on an alleged anticompetitive scheme to maintain a monopoly for adrenocorticotrophic hormone drugs, namely Acthar. As a result, Plaintiff alleges Defendants substantially inflated the price for Acthar. Plaintiff sues on its own behalf and on behalf 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." Plaintiff's Second Amended Complaint at 43, Dkt. 98.

Before the Court is Defendant Mallinckrodt ARD, Inc. and Mallinckrodt PLC's motion to compel. Dkt. 294. Defendants seek to compel Plaintiff to produce documents relating to its retainer and fee arrangements with its counsel as outlined in Request for Production No. 43.¹

¹ Defendants' Request for Production No. 43 requested the following from Plaintiff:

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.

Defendants' Motion, Ex. 1 at 15, Dkt. 294-1.

Plaintiff did not produce documents responsive to Defendants' Request for Production No. 43 and instead objected based on privilege and relevance.

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." A party seeking to compel discovery has the initial burden of establishing that the requested documents are relevant under Rule 26. *See West v. Miller*, No. 05C4977, 2006 WL 2349988, at *2 (N.D. Ill. Aug. 11, 2006), *aff'd*, No. 05 C 4977, 2007 WL 541943 (N.D. Ill. Feb. 13, 2007). If the discovery appears relevant, the burden shifts to the party objecting to the discovery request to show why the request is not relevant. *Id.*

Defendants assert that Plaintiff's retainer and fee agreements with its counsel² are relevant to the issue of class certification. Although class certification is not yet before the court, Plaintiff seeks to represent a putative nationwide class of payors that were allegedly overcharged for Acthar. Under Federal Rule of Civil Procedure 23(a), the named plaintiff must show that it "will fairly and adequately protect the interests of the class." "[A]dequacy of representation is composed of 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." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993) (internal quotations marks and citation omitted).

Defendants are not arguing that the retainer and fee agreements are relevant to Plaintiff's counsels' qualifications. Instead, Defendants argue that the documents are relevant to determining whether a potential conflict exists between Plaintiff and the proposed class members. Defendants speculate that because Plaintiff's counsel represents other payors in other jurisdictions, either in individual actions or potentially overlapping putative class actions relating to the pricing scheme for Acthar, this raises "numerous conflict issues central to the adequacy of Rockford and its counsel to represent the putative class in this case." Defendants' Motion at 1, Dkt. 294. As examples, Defendants assert that any agreement that would cede control over settlement to class counsel would improperly impinge on Plaintiff's independence and ability to protect the interests of the class. Defendants additionally assert that 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. The Court emphasizes that these are merely examples of potential conflicts offered by Defendants. Defendants have offered no evidence indicating such conflicts exist in this case.

² Although Defendants' Request for Production No. 43 seeks all documents relating to Plaintiff's retention of counsel, Defendants' brief and arguments at the motion hearing focused specifically on the retainer and fee agreements themselves. Accordingly, the Court will do the same.

At the motion hearing, the Court pressed defense counsel to support the argument that the requested documents are relevant to class certification. Defense counsel reiterated that Defendants are seeking to understand how any potential conflicts between counsel's representation in the instant case and cases proceeding in other jurisdictions are addressed in the retainer and fee agreements in this case. Defense counsel hypothesized that Plaintiff's retainer agreement with its counsel may include a provision that requires Plaintiff to seek consent from a different named plaintiff in a different action prior to settling the instant case, noting that such an agreement could create a conflict with the other class members in this case.

Based on the speculative nature of Defendants' claimed conflict, the Court finds that Defendants have not carried their burden of proving that the requested documents are relevant to the issue of class certification. *See In Re Riddell Concussion Reduction Litig.*, No. CV 13-7585 (JBS/JS), 2016 WL 7325512, at *3 (D.N.J. Jan. 19, 2016) ("Fee agreements are generally not discoverable unless the party seeking the discovery makes a preliminary showing of a relevant conflict or a prima facie challenge to the class representatives' adequacy to act as a class representative."). Defendants assert that Plaintiff's retainer and fee agreements are relevant by relying on *Epstein v. Am. Reserve Corp.*, No. 79 C 4767, 1985 WL 2598, at *3 (N.D. Ill. Sept. 18, 1985). However, *Epstein* does not support Defendants' argument that these documents are relevant to class certification. In *Epstein*, the court ordered the plaintiffs to disclose fee arrangements with counsel, finding them relevant to the ability of the named plaintiffs to protect the interest of potential class members. *Id.* The court did not address any type of conflict of interest and instead specifically relied on a case that found such fee agreements relevant only to a plaintiff's ability to adequately fund the lawsuit and to the award of attorneys' fees. *Id.* (citing *Klein v. Henry S. Miller Residential Services, Inc.*, 82 F.R.D. 6, 8–9 (N.D. Tex. 1978)). Here, by contrast, Defendants argue only that the retainer and fee agreements are relevant to determine whether a potential conflict exists based on class counsel's representation of litigations in related cases pending in other jurisdictions.

Defendants cite to several other cases from around the country to assert that retainer and fee agreements are relevant and discoverable. *See* Defendants' Motion at 5, Dkt. 294. Defendants do so, however, without explanation as to how those cases support their argument on relevance as it relates to potential conflicts of interest. For example, most of the cases Defendants cite allow discovery of the retainer and fee agreements but do so with the finding that such documents are relevant to a plaintiff's ability to adequately fund the suit. *See, e.g., Porter v. Nationscredit Consumer Disc. Co.*, No. CIV.A. 03-3768, 2004 WL 1753255, at *2 (E.D. Pa. July 8, 2004) (compelling production of fee agreements by finding that "[f]ee agreements may be relevant to a plaintiff's ability to protect the interests of potential class members by adequately funding the suit, and to the question of awarding of attorneys fees upon settlement or judgment"); *Williams v. Sweet Home Healthcare, LLC*, No. CV 16-2353, 2017 WL 2779189, at *3 (E.D. Pa. June 27, 2017) (compelling production of fee agreements by finding documents relevant under *Porter*); *Epstein*,

No. 79 C 4767, 1985 WL 2598, at *3 (focusing on plaintiff's ability to adequately fund the lawsuit). Yet another case Defendants cite relates to the relationship a nonparty had with the lawsuit, but they do not indicate how those facts support production of the agreements in this case or otherwise cite to evidence demonstrating a similar conflict of interest. See *Rochetti v. Am. Fed'n of Musicians & Employers Pension Welfare Fund*, No. 85 C 10479, 1987 WL 10291, at *2 (N.D. Ill. Apr. 24, 1987) (compelling production of copies of any forms of retainer agreements solicited by a nonparty union based on defendants argument that "the text of the retainer agreements may assist in testing the independence of plaintiffs and their counsel, in view of NAOL's advance of \$2,000 for costs in this case and its letter soliciting persons to sign and return agreements authorizing plaintiffs' counsel to represent them in this lawsuit").

Defendants also cite to two cases out of the Ninth Circuit to support producing the retainer and fee agreements in this case, but again, they provide no explanation as to how they support their argument in this case. See *Gusman v. Comcast Corp.*, 298 F.R.D. 592 (S.D. Cal. 2014); *Haghyeghi v. Guess?, Inc.*, No. 14-CV-20 JAH (NLS), 2016 WL 9526465 (S.D. Cal. Mar. 21, 2016) (relying on *Gusman* to support relevance). Nevertheless, the court in *Gusman* found the retainer and fee agreements relevant to class certification by relying on two cases that dealt with the ability of a plaintiff to fund the suit. See *Gusman*, 298 F.R.D. at 600. The Court also finds the *Haghyeghi* court's reliance on *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) distinguishable because that case dealt specifically with an incentive agreement at the settlement stage and did not address a party's need to show relevance at the precertification discovery stage based on a potential conflict of interest.

Defendants also acknowledge "the line of cases" that have found retainer and fee agreements not discoverable. Defendants' Motion at 6, Dkt. 294. Defendants argue that those cases are distinguishable given that the potential conflicts in this case are numerous. However, Defendants do not identify those cases or attempt to distinguish them.

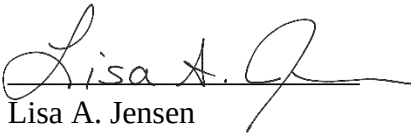
By contrast, Plaintiff has cited to cases to support the proposition that retainer and fee agreements are not always discoverable at the class certification stage. See, e.g., *In Re Riddell*, No. CV 13-7585 (JBS/JS), 2016 WL 7325512, at *2 ("The majority of federal courts considering this issue have ruled that fee agreements are not discoverable before certification."). Additionally, the Court is persuaded by Plaintiff's citation to cases supporting the proposition that when the nature of a potential conflict is speculative, retainer and fee agreements are not discoverable.³ See *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, No. 09 CIV. 3701 JPO JCF, 2013 WL 1896934, at *2 (S.D.N.Y. May 7, 2013) (denying defendants' request for documents

³ Plaintiff also argues that there cannot be a conflict in this case because Plaintiff's counsel is permitted to represent both putative class representatives and absent members in the same or similar litigation. Because Defendants' motion fails on relevance grounds, the Court need not opine on this issue, but it is not closing off the idea that a conflict *could* exist.

concerning lead plaintiffs' retention of counsel because "they have provided no non-speculative basis for raising such concerns" about the arrangement between lead plaintiffs and their counsel); *Piazza v. First Am. Title Ins. Co.*, No. 3:06CV765AWT, 2007 WL 4287469, at *1 (D. Conn. Dec. 5, 2007) (denying a motion to compel retainer and fee agreements, in part, because defendant provided "no factual basis for speculating about conflicts of interest among counsel or between counsel and the plaintiff"). Defendants have provided no valid argument as to why this Court should rule contrary to these cases.

Therefore, Defendants' motion to compel production [294] is denied without prejudice with leave to refile if necessary when addressing class certification or if discovery reveals additional support for the relevance of the retainer and fee agreement in this case. Because the Court is denying Defendant's motion on relevance grounds it need to resolve the parties' dispute about the privileged nature of the responsive documents.

Date: February 26, 2020

By: 
Lisa A. Jensen
United States Magistrate Judge