

Plaintiffs hereby move to file this Sur-Reply to respond to new arguments raised in defendants' reply papers. Among other things, defendants assert for the first time: (i) Rule 11-type arguments necessitate answering the Interrogatories; (ii) plaintiffs' responses to the Interrogatories should be limited to information known to plaintiffs at the time they filed their Complaint in this action; and (iii) and that plaintiffs have neither demonstrated legitimate concerns for the well-being of confidential witnesses should their identities be disclosed or that those concerns cannot be remedied by a hypothetical confidentiality order proposed by defendants for the first time in their reply papers.

Defendants' Reply Brief in Support of their Motion to Compel Answers to Interrogatories demonstrates defendants' motive in propounding the Interrogatories that are the subject of this motion. In fact, defendants do not seek discovery for the purpose of proceeding to trial. Rather, defendants merely wish to engage in a thinly-veiled, Rule 11 witch hunt to determine who confided in Lead Counsel and then besmirch the basis for Lead Plaintiff's allegations. This is not the proper aim of discovery. Moreover, as is detailed below, defendants' assurances to protect the identities of confidential witnesses are falsely premised and defendants' attempt to distinguish cases protecting whistleblowers is unconvincing.

That defendants attack Lead Counsel and the Complaint, rather than the merits of plaintiffs' case, is clear. Why else would "[d]efendants agree to restrict the subject interrogatories to the information Lead Plaintiff had at the time the First Amended Complaint was filed"? Reply at 14. Even more, defendants contend that protecting confidential sources would eviscerate the PSLRA and cause plaintiffs' attorneys to run roughshod over the Federal Rules of Civil Procedure as they would sprinkle complaints with "anonymous sources" wherever necessary to give their pleadings the air of particularity. That defendants merely seek to challenge plaintiffs' pleadings is abundantly clear in their futile attempt to distinguish plaintiffs' work-product doctrine authorities:

If the *MTI* rule is followed, lawyers will easily overcome strict pleadings requirements through liberal use of “anonymous sources,” confident that a “work product” objection will block any effort to probe whether, *inter alia*, an “anonymous source” is even in a position to know the information attributed to him or her, whether the information is based on rumor or hearsay, etc.

Reply at 8. *See also id.* at 3 (if plaintiffs can use confidential witnesses “*the pleading standards in securities cases will be rendered meaningless*”) (emphasis added).¹ The fact of the matter is that counsel who falsify pleadings are subject to severe sanctions under both the PSLRA and the Federal Rules, and both the PSLRA and Federal Rules clearly posit a mechanism by which defendants can address perceived improper conduct. Defendants have not availed themselves of that mechanism.

But defendants in this action have no basis for making any allegations of improper pleading. Plaintiffs’ allegations are well-founded and continually prove to be true upon subsequent revelations of defendants’ conduct. Defendants cannot now seek discovery as to Lead Counsel’s basis for each and every allegation in the Complaint simply as a fishing expedition to bring a Rule 11 motion.

[F]ocusing on the nature of the homework plaintiffs and their counsel did before filing the complaint, would be appropriate not under normal discovery rules, but only under Rule 11. It seems to this court that it would be unwise and unwarranted to permit Rule 11 discovery (*i.e.*, discovery into the quality and scope of the investigation that preceded the filing of a claim) until after the party seeking the Rule 11 discovery has shown, through traditional discovery, that there is more than a speculative basis for believing that its opponent may have violated the norms set forth in Rule 11. The interests potentially invaded by Rule 11 interrogatories are considerable; a party seeking to invade those interests should be required to present a substantial justification.

¹ Defendants’ attempt to distinguish *In re MTI Tech. Corp. Sec. Litig. II*, No. SACV 00-0745 (ANx), 2002 U.S. Dist. LEXIS 13015, at *10 (C.D. Cal. June 13, 2002), did not convince Judge Davis of the Eastern District of Texas, who found the reasoning of *MTI* to be most apt and explicitly said so in rejecting the authorities relied upon by defendants in this action. *See Elec. Data Sys. Corp. v. Steingraber*, No. 4:02 CV225, 2003 U.S. Dist. LEXIS 11816, at *7-*8 (E.D. Tex. June 27, 2003) (declining to follow *In re Aetna Inc. Sec. Litig.*, MDL No. 1219, 1999 U.S. Dist. LEXIS 8038 (E.D. Pa. May 26, 1999) and *In re Theragenics Corp. Sec. Litig.*, 205 F.R.D. 631 (N.D. Ga. 2002)).

In re Convergent Techs. Sec. Litig., 108 F.R.D. 328, 346 (N.D. Cal. 1985). If defendants wish to file a Rule 11 motion then they should do so. Otherwise, it is time to prepare for trial and discovery should be aimed at that purpose and no other.

Defendants also contend, doing so for the first time and without any basis, that responding to the Interrogatories will not jeopardize the livelihood of certain confidential witnesses that have cooperated with Lead Counsel: “Plaintiff offers no proof of any such threatened retaliation, but if Lead Plaintiff has a legitimate concern respecting some of these witnesses, then Defendants can designate the interrogatory answers ‘confidential’ under this Court’s protective order and they will not be disclosed to the witness’s current employer.” Reply at 3. *See also id.* at 14 (same). This argument assumes, wrongfully, that the confidential witnesses are not currently employed by defendants in this action.² As there are defendants in this action who currently employ certain confidential witnesses, the proposed protective order does not solve the problem of retaliation. Furthermore, contrary to defendants’ assertion, plaintiffs do offer “proof of threatened retaliation.” *See Declaration of G. Paul Howes*, ¶¶2-3 (Docket No. 2227). What more could plaintiffs possibly provide? Surely, Lead Plaintiff cannot be expected to provide the sworn affidavits of confidential witness as evidence. Nor should Lead Plaintiff be expected to obtain testimonials from the confidential witnesses’ employers. To require more than Lead Plaintiff’s proffered evidence would be to establish a virtually impossible standard for the protection of confidential sources and would result in a substantial chilling effect to the detriment of the enforcement of the federal securities laws.

² Defendants also misleadingly assert: “In the case at bar, none of the witnesses were employed by the Defendants, who are all individuals.” Reply at 8 n.1. If by “Defendants” the movants mean only to refer themselves, then the definition is obviously too narrow because discovery will necessarily be provided to each of the defendants, including the various corporate defendants in this action.

Finally, defendants cannot distinguish the numerous authorities cited by plaintiffs that recognize the importance of protecting confidential whistleblowers. Defendants contend that this Court and the Fifth Circuit merely sought to protect whistleblowers prior to the ruling on a motion for dismissal, but defendants cannot explain why the courts would suddenly yank away those whistleblowers' protections once the procedural hurdle has been cleared. Reply at 11. Echoing plaintiffs' Rule 11 argument above, the Eighth Circuit, which has established a standard similar to that followed in the Fifth Circuit, recognized that plaintiffs need only disclose the identities of confidential informants in their initial disclosures if they will rely on them at trial:

If the shareholders' attorneys do not have a factual basis for this allegation, they will be subject to Rule 11 sanctions. Therefore, there is already a mechanism in place to deter and punish fabrication. Consequently, there is no need for the name of the money manager to be pleaded in the complaint, although it appears it will soon have to be disclosed *under Fed. R. Civ. P. 26(a)(1)(A) if the shareholders intend to make use of it.*

Fla. State Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645, 668 (8th Cir. 2001) (emphasis added). Here, plaintiffs have revealed the names of confidential witnesses who could possibly be relied on going forward in a Fed. R. Civ. P. 26(a)(1)(A)-type disclosure. This is all that is required.

Similarly, defendants contend that authorities protecting the confidentiality of whistleblowers are distinguishable because they rely upon the "the logical disconnect between the identity of a government informer and a subsequent prosecution by the government of an alleged wrongdoer." Reply at 12. This purported distinction, however, is exactly what we have here. "It is perfectly plain that the names of informers are utterly irrelevant to the issues to be tried by the trial court." *Wirtz v. Continental Fin. & Loan Co.*, 326 F.2d 561, 563 (5th Cir. 1964) (cited by defendants at 12). Plaintiffs can prove the facts supplied by the confidential informants by any number of means: other witnesses, documents produced in discovery, interrogatories, etc. Defendants argue "the identities of the persons quoted or referred to in the Complaint are highly relevant; indeed, Lead Plaintiff chose to highlight their materiality by specifically quoting or referring to them." Reply at 13. That is not

true. Lead Plaintiff quoted or referred to confidential witnesses to demonstrate that plaintiffs could plead with particularity and had a credible basis for their allegations of fact. Now plaintiffs may prove those facts without relying upon the confidential witnesses.³ Forcing plaintiffs to reveal the identities of those witnesses presently would work a legitimate and unnecessary harm to them as

³ Accordingly, defendants' citation of *Roviaro v. United States*, 353 U.S. 53 (1957), is easily distinguished. Reply at 12. In *Roviaro*, "the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was *the only witness* in a position to amplify or contradict the testimony of government witnesses." 353 U.S. at 64. *Roviaro* was a drug prosecution, not a securities fraud. The transactions in this case were witnessed by numerous participants and there are numerous documents that shed light on the facts. Here, there is not only one source of evidence, and disclosure of the plaintiffs' confidential witnesses is not otherwise warranted by defendants.

plaintiffs may not need to rely on these witnesses at trial, making their identification presently “utterly irrelevant to the issues to be tried by the trial court.” *Wirtz*, 326 F.2d at 563.⁴

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⁴ In reaching its conclusion, the Fifth Circuit was careful to note that it did not have to consider the government’s privilege argument. Whereas the privilege argument would have required a “type of weighing of conveniences,” the Fifth Circuit stated “we think we need not indulge in weighing the conveniences” because it “is perfectly plain that the names of informers are utterly irrelevant to the issues to be tried by the trial court.” 326 F.2d at 563. Accordingly, *Wirtz* is authoritative regardless of whether the “informer’s privilege” is applicable, which it is. See, e.g., *Mgmt. Info. Techs. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 478 (D.D.C. 1993) (civil suit not involving the government and extending whistleblowers’ protection from discovery).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO FILE SUR-REPLY AND SUR-REPLY IN RESPONSE TO DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL ANSWERS TO INTERROGATORIES (NOT YET DOCKETED) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this July 6, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S MOTION TO FILE SUR-REPLY AND SUR-REPLY IN RESPONSE TO DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL ANSWERS TO INTERROGATORIES (NOT YET DOCKETED) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this July 6, 2004.

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Mo Maloney