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Courts Are Getting It Right On Litigation Funding Discovery

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Earlier this month, the U.S. District Court for the Northern District of California denied discovery into the identification of third-party funders with a financial interest in the outcome of an underlying patent infringement action.[1] This order follows a long line of well-reasoned precedent across U.S. federal courts rejecting discovery forays into funding arrangements unless the party seeking discovery can make a specific showing that funding is relevant to the claims and defenses of the litigation.[2] As the case law demonstrates, these instances are few and far between.

Background

Plaintiff MLC Intellectual Property LLC sued defendant Micron Technology Inc. for patent infringement related to its flash memory devices. During discovery, Micron sought the identity of anyone with a financial interest in the litigation, including third-party funders.[3] MLC objected to Micron's request on the basis that such information was irrelevant and privileged.[4] Micron argued that the discovery was relevant "to uncover possible bias issues," including "to understand the existence of conflicts of interest and identify and exclude jury members who may have a bias" and "explore credibility and bias issues concerning MLC's witnesses."[5] MLC responded that it had already identified persons and entities having a financial interest in the controversy pursuant to Civil Local Rule 3-15,[6] and that neither the federal nor the local rules required disclosure of litigation funding agreements under the circumstances.[7]

Siding with MLC, U.S. District Judge Susan Illston held that the discovery sought by Micron was irrelevant, and that MLC had complied with the local rules.[8] Judge Illston found that "Micron's assertions of potential bias and conflicts of interest are speculative" because MLC's nonparty witnesses were not funding the litigation, and, if the case were to proceed to trial, the court could "question potential jurors in camera regarding relationships to third party funders and potential conflicts of interest."[9] Judge Illston distinguished the cases upon which Micron relied for its bias argument, noting that the courts there simply held that litigation funding agreements "could be discoverable when there was a specific, articulated reason to suspect bias or conflicts of interest."[10] Judge Illston found no such reason.

The Micron Decision Is Consistent With Foundational Relevance Principles

Judge Illston's ruling in Micron is the latest in a parade of case law uniformly holding that, absent a showing of relevance, the identity of third-party funders, details of the funding arrangements, and communications between funders and claimants are not discoverable. The comprehensive opinion penned by Northern District of Illinois Magistrate Judge Jeffrey Cole in Miller UK Ltd. v. Caterpillar Inc. is generally regarded as the seminal decision concerning the parameters of discovery into litigation funding arrangements.[11] Nearly every subsequent federal court decision on the issue has followed Miller's sound rationale. Relevance (or, typically, the lack thereof) is the main driver of these decisions. That is, courts have routinely rejected discovery into funding arrangements unless the requesting party demonstrates that it somehow relates to the claims and defenses of the litigation.

This jurisprudence makes sense: Neither the existence of a funding arrangement nor its details matter in almost every case in which funding is present. And as the Advisory Committee to Federal Rules of Civil Procedure aptly noted, "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[12] This typically arises when the financial wherewithal of the funded party is actually at issue — e.g., adverse costs awards, discovery cost-shifting and monetary sanctions orders.[13] But in all events, courts have compelled disclosure of litigation funding arrangements only in unusual circumstances.[14] An earlier decision authored by Judge Illston illustrates the point.

In Gbarabe v. Chevron Corp., defendant Chevron sought disclosure of an unredacted version of a litigation funder's agreement with a law firm seeking to serve as lead counsel at the class certification stage of litigation relating to an oil rig explosion off the coast of Nigeria.[15] Lead plaintiffs counsel were two individual lawyers who lacked a formal office or support staff, missed several deadlines, and admitted to needing outside financing to prosecute the case. Thus, Chevron sought to defeat class certification on "adequacy of counsel" grounds (among other reasons), putting the firm's financial and other resources squarely at issue.[16] To demonstrate Federal Rule of Civil Procedure 23(a)(4)'s adequacy requirement, counsel conceded both relevance and privilege, and directed the court to a highly redacted version of the funding agreement.[17]

Chevron argued that the redactions made it impossible to assess whether counsel could commit "adequate resources to the class."[18] Given that the lawyers waived the two strongest arguments for nondisclosure, they were left only with the claim that producing the agreement would breach its rather toothless confidentiality provision.[19] Judge Illston was unpersuaded, and she ordered plaintiff to produce an unredacted copy and declined to conduct in camera review "because it would deprive Chevron of the ability to make its own assessment and arguments regarding the funding agreement and its impact, if any, on plaintiff's ability to adequately represent the class."[20]

It is unremarkable under these unique circumstances that the court permitted disclosure (relevance conceded) while rejecting it in Micron (relevance not established). None of the unique facts of Gbarabe were present in Micron. And while Micron attempted to skirt existing case law by advancing a tenuous "juror bias" argument, Judge Illston soundly rejected this argument, finding that any purported bias was entirely speculative and, in any event, could be addressed through in camera review if necessary.

Broader Implications of the Micron Decision on the Litigation Funding Disclosure Debate

Judge Illston's decision in Micron follows the approach taken by U.S District Judge Dan Polster of the

Northern District of Ohio in the opioid multidistrict litigation.[21] There, Judge Polster required the lawyers to submit any litigation financing agreements for in camera review, balancing the court's need to learn about the existence of any funding arrangements for a specific, narrow purpose with the reality that the funding terms were likely wholly irrelevant to the underlying litigation.[22] As Judge Polster aptly noted, "[a]bsent extraordinary circumstances, the Court will not allow discovery into [third-party] financing."[23]

While Micron is on all fours with the precedent, it is still a significant piece of jurisprudence because earlier rulings in California have only touched lightly on relevance in the context of funding arrangements.[24] It also perhaps provides some insight into the 2017 standing order change in the Northern District of California, requiring parties to disclose "any person or entity that is funding the prosecution of any claim or counter-claim" only in class, collective or representative actions.[25] After an open comment period, the Northern District declined to adopt a much broader local rule change that would have required automatic disclosure of third-party funding arrangements in every civil case.

While we can only speculate, bedrock principles of relevance under Rule 26(b)(1) likely had some influence on the Northern District's decision to institute a far narrower disclosure requirement. Relevance also appears to be at the heart of the Advisory Committee on Rules of Civil Procedure's continued rejection of proposed amendments to Rule 26 seeking automatic disclosure of funders at the outset of all federal civil cases.[26]

In short, every court, rules committee and neutral commentator that has considered the issue has concluded the same thing: Relevance matters in discovery, including with respect to litigation funding. And as recent precedent demonstrates, courts have the power to review these arrangements to address any potential concerns without creating burdensome and costly discovery sideshows. The rationale behind Micron and its predecessors is instructive: Prophylactic rules requiring disclosure of funding arrangements have no foundation in relevance, the cornerstone of discovery under Rule 26.[27]

Conclusion

The myriad of decisions rejecting discovery into litigation funding would ideally deter adversaries of financed litigants from pursuing such discovery in the first place. Unfortunately, litigants are likely to continue to take shots at uncovering funding arrangements and related communications, if only to impose additional burdens on pursuing meritorious claims. Decisions like Micron counsel that such efforts are likely to fail.

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[1] MLC Intellectual Property LLC v. Micron Technology, Inc., No. 14-cv-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

[2] In pertinent part, amended Federal Rule of Civil Procedure 26(b)(1) permits discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of

the case… .” This article does not address the separate but equally forceful basis upon courts routinely deny discovery of funding arrangements and related communications: attorney work product protection.

[3] MLC Intellectual Property, 2019 WL 118595, at *1.

[4] Id.

[5] Id.

[6] Northern District Local Rule 3-15 requires the disclosure of “any persons [with] (i) financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.” N.D. Cal. Civ. R. 3-15(a)(1).

[7] Id. at *2; see also Standing Order for All Judges of Northern District of California, ¶ 19 (“In any proposed class, collective, or representative action, the required disclosure [of Non-party Interested Entities or Persons] includes any person or entity that is funding the prosecution of any claim or counterclaim.”) (emphasis added).

[8] Id. Judge Illston did not address MLC’s argument that the discovery sought by Micron was privileged, having soundly rejected disclosure on relevance grounds.

[9] Id.

[10] Id. (emphasis added).

[11] Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 723-24 (N.D. Ill. 2014) (holding defendant’s claim of relevance to an unpled defense concerning maintenance and to whether the funder was a real party in interest lacked “any cogency”); accord, e.g., In re National Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (noting that discovery into third-party funding arrangements would not be permitted “[a]bsent extraordinary circumstances.”); Kaplan v. S.A.C. Capital Advisors LP, No. 12-cv-9350, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (rejecting discovery of class plaintiff’s funding agreement and related documents where defendants failed to show that the requested information was relevant); VHT, Inc. v. Zillow Group, Inc., No. C15-1096JLR, 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016) (“Without some objective evidence that any of Zillow’s theories of relevance apply in this case, the court will not order VHT to respond” to Interrogatory 19 and produce responsive documents.”).

[12] David G. Campbell, Report of Advisory Committee on Civil Rules at 4 (Dec. 2, 2014), located at http://www.uscourts.gov/file/17932/download.

[13 See Minutes of Civil Rules Advisory Committee at 12-14 (Oct. 30, 2014), located at http://www.uscourts.gov/sites/default/files/fr_import/CV10-2014-min.pdf; Report of Advisory Committee on Civil Rules at 3-4;

[14] See, e.g., Acceleration Bay LLC v. Activision Blizzard, Inc., No. 16-453-RGA, 2018 WL 798731, at *1-2 (D. Del. Feb. 9, 2018) (applying, incorrectly, minority Fifth Circuit “primary motivating purpose” test to order production of plaintiff’s communications with funder because primary purpose was obtaining a

"loan"; noting plaintiff's representation that documents did not exist and failure to assert privilege over communications); Odyssey Wireless, Inc. v. Samsung Elec. Co., Nos. 3:15-cv-01738, 3:15-cv-01743, 3:15-cv-01735, 2016 WL 7665898, at *6-7 (S.D. Ca. Sept. 20, 2016) (finding plaintiff's patent valuations shared with funder constituted attorney work product but requiring production under Fed. R. Civ. P. 26(b)(3)(A)(ii) because defendant could not otherwise obtain the information without undue hardship); In re Int'l Oil Trading Co., 548 B.R. 825, (S.D. Fla. Apr. 28, 2016) (requiring production of redacted funding agreement as "central" to defendant's theory in support of its motion to dismiss, and debtor demonstrated substantial need because "no other document production, depositions, or other discovery methods will adequately substitute for the original document").

[15] Gbarabe v. Chevron Corp., No. 14-cv-00173, 2016 WL 4154849 (N.D. Cal. Aug. 5, 2016).

[16] Gbarabe, 2016 WL 4154849, at *1.

[17] Id. at *2.

[18] Id.

[19] The confidentiality provision in question required the firm to preserve the confidentiality of the funder's identity and the terms of the agreement, "absent a Court order or a determination that it would be prudent to do so." Id.

[20] Id.

[21] In re National Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807 (N.D. Oh. May 7, 2018).

[22] Id. at *1.

[23] Id.

[24] Compare Telesocial Inc. v. Orange S.A., No. 3:14-cv-03985 (N.D. Cal. Sept. 30, 2016) (denying, in minute order, defendant's motion to compel production of documents and communications between plaintiff and litigation funder); Space Data Corp. v. Google LLC, No. 16-cv-02360, 2018 WL 3054797 (N.D. Cal. June 11, 2018) (denying defendant's motion to compel production of documents and communications about potential litigation funding).

[25] N.D. Cal. Civ. R. 3-15(a)(1).

[26] David G. Campbell, Report of Advisory Committee on Civil Rules at 4 (Dec. 2, 2014), available at http://www.uscourts.gov/file/17932/download.

[27 Although courts have often recognized this principle, the legislature has not. Indeed, a draft bill proposed by the Senate Judiciary Committee—The Litigation Funding Transparency Act of 2018—would require disclosure of litigation funding agreements, including the agreements themselves, in any federal class action and any federal multi-district litigation proceeding. See Litigation Funding Transparency Act of 2018, S. 2815, 115th Cong. § 2 (2018), available at https://www.congress.gov/bill/115th-congress/senate-bill/2815/text. This proposed bill entirely ignores the concept of relevance.