Investor Alert

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DEFENDANTS' RENEWED EFFORTS TO PURSUE DISFAVORED DISCOVERY FROM ABSENT CLASS MEMBERS

In recent years, defendants in securities class action litigation have increased their attempts to obtain discovery from absent class members, purportedly either to defeat class certification or for use at trial. This is also known as "absent class member discovery." However, absent class member discovery is rarely permitted,[1] especially because many courts properly treat absent class members as non-parties.[2] As such, defendants' tactic of seeking discovery from these non-parties runs contrary to the purpose of class actions.[3] Indeed, the U.S. Supreme Court has held that, in a normal civil suit, an absent class member is "not required to do anything" and "may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[4] Despite this principle, courts have found limited exceptions where discovery from absent class members is warranted where those members have injected themselves into the action and defendants met their high burden of showing that such discovery is warranted.

This article explains the origins of absent class member discovery and recent jurisprudence on the factors courts consider when determining whether to allow this exceptionally rare discovery. This article will also provide strategic considerations for avoiding absent class member discovery.

The History of Absent Class Member Discovery

Although not strictly forbidden, absent class member discovery is generally disfavored—and often proscribed—because to allow discovery from absent class members

[1] *See, e.g.*, *In re Petrobras Sec. Litig.*, 2016 WL 10353228, at *1 (S.D.N.Y. Feb. 22, 2016) ("[C]ourts are extremely reluctant to permit discovery of absent class members"); *Holman v. Experian Info. Sols., Inc.*, 2012 WL 2568202, at *3 (N.D. Cal. July 2, 2012) ("[D]iscovery of absent class members, while not forbidden, is rarely permitted") (quoting *McCarthy v. Paine Webber Grp., Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995)).

[2] *Mostajo v. Nationwide Mut. Ins. Co.*, 2020 WL 5658329, at *2 (E.D. Cal. Sept. 23, 2020) ("Unnamed class members are not considered parties, and courts rarely require them to participate in discovery") (citation omitted); *McCarthy*, 164 F.R.D. at 313 ("[A]bsent class members are not 'parties' to the action, and . . . to permit extensive discovery would defeat the purpose of class actions which is to prevent massive joinder of small claims"); *In re Worlds of Wonder Sec. Litig.*, 1992 WL 330411, at *2 (N.D. Cal. July 9, 1992) ("Absent class members are not parties and separate discovery of individual class members not representatives is ordinarily not permitted"); *Fischer v. Wolfinbarger*, 55 F.R.D. 129, 132 (W.D. Ky. 1971) ("It is not intended that members of the class should be treated as if they were parties plaintiff, subject to the normal discovery procedures, because if that were permitted, then the reason for the rule would fail")); *see also* 3 Newberg on Class Actions § 9:12, n.7 (5th ed. 2021) (citing *Kline v. First W. Gov't*, 1996 WL 122717, *2 (E.D. Pa. Mar. 11, 1996) ("Some courts have accepted the argument that absent class members are not 'parties' and are therefore not subject to at least some forms of discovery (i.e. interrogatories). This does not appear to be a majority position, however") (citations omitted)).

[3] *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1004-1005 (7th Cir. 1971) ("We do not believe there is any real inconsistency between Rule 23's general policy of permitting absent class members to remain outside the principal action and our holding that in appropriate cases absent class members may be required to submit to discovery. It is true that an absent class member is given a 'free ride' under Rule 23 and has no duty to actively engage in the prosecution of the action. Yet the absent class member's interests are identical with those of the named plaintiff and his rights and liabilities are adjudicated in the principal suit. If discovery from the absent member is necessary or helpful to the proper presentation and correct adjudication of the principal suit, we see no reason why it should not be allowed so long as adequate precautionary measures are taken to insure [sic] that the absent member is not misled or confused. While absent class members should not be required to submit to discovery as a matter of course, if the trial judge determines that justice to all parties requires that absent parties furnish certain information, we believe that he has the power to authorize the use of the Rules 33 and 34 discovery procedures").

[4] *Phillips Petroleum v. Shutts*, 472 U.S. 797, 810 (1985).

would frustrate the very purpose of Rule 23 to allow unnamed class members to remain passive.[5] In the 1970s, however, limited exceptions began to appear.

Clark v. Universal Builders, Inc. is a seminal case often cited by courts as the starting point to the analysis of whether to permit discovery from absent class members.[6] In *Clark*, the Seventh Circuit Court of Appeals overturned the district court's order "dismissing with prejudice class members who failed to answer interrogatories or appear for depositions."[7] The Seventh Circuit had previously held in *Brennan* that in "appropriate circumstances" discovery may be sought from absent class members "on a showing that the information requested is necessary to trial preparation and that the [discovery] is not designed 'as a tactic to take undue advantage of the class members or as a stratagem to reduce the number of claimants[,]'" but the "party seeking discovery has the burden of demonstrating its merits."[8] Given its prior holding in *Brennan*, the Seventh Circuit found that the district court failed to consider whether the information sought from the absent class members was: (1) necessary; or (2) designed to reduce class size.[9] Moreover, the Seventh Circuit found that the discovery: (3) would have required technical and legal assistance and advice in understanding and formulating responses; (4) sought information that could be proved through other means (*e.g.*, expert testimony); and (5) sought information already known to the defendants.[10]

Although not explicitly mentioned in *Clark*, courts, in applying *Clark* and its progeny, began to focus on whether the absent class members actively involved themselves in the action. In other words, absent class members must "inject" or "insert" themselves into the litigation to be subject to discovery; membership in the class alone does not justify discovery.[11] The reasoning behind this factor is

[5] *See, e.g.*, *McPhail v. First Command Fin. Planning*, Inc., 251 F.R.D. 514, 517 (S.D. Cal. 2008) ("Importantly, a defendant who propounds discovery upon absent class members requires those members to take some affirmative action to remain in the class, 'effectively creating an "opt in" requirement which is inconsistent with the "opt out" provisions of Rule 23.' . . . Thus, allowing defendants to subject absent class members to discovery may defeat the purpose of certifying the class in the first place") (quoting *On the House of Syndication, Inc. v. Fed. Express Corp.*, 203 F.R.D. 452, 456 (S.D. Cal. 2001)); *In re Publ'n Paper Antitr. Litig.*, 2005 WL 1629633, at *1 (D. Conn. July 5, 2005) (permitting absent class member discovery "runs contrary to the general intention of Rule 23 to allow unnamed class members to remain passive, [so] courts that have allowed that discovery have required the defendant to (1) make a strong showing of the need for the particular discovery and (2) narrowly tailor its requests to its particular need, so as not to burden the absent members") (citations omitted); *Adkins v. Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992) ("Whether prior to class certification or after, discovery, except in the rarest of cases, should be conducted on a class wide level. . . . [I]f joinder of all parties is impracticable, propounding discovery like interrogatories, depositions, and requests to produce on an individual basis is even more impracticable"); *see also Petrobras*, 2016 WL 10353228 at *1 ("[T]he practical effect of defendants' [discovery propounded on absent class members] would be the alteration of the Classes from opt-out classes to opt-in classes") (citation and internal quotation marks omitted).

[6] 501 F.2d 324 (7th Cir. 1974).

[7] *Id.* at 340.

[8] *Id.* (quoting *Brennan*, 450 F.2d at 1005).

[9] *Id.*

[10] *Id.* at 340, n.24.

[11] *See, e.g.*, *A.B. v. Pac. Fertility Ctr.*, 2019 WL 6605883, at *1 (N.D. Cal. Dec. 3, 2019) ("[D]iscovery of absent class members is generally not permitted unless the class member has inserted herself into the litigation") (citing *McKinney-Drobnis v. Massage Envy Franchising, LLC*, 2017 WL 4798048, at *3 (N.D. Cal. Oct. 24, 2017)); *Aldapa v. Fowler Packing Co. Inc.*, 2019 WL 1047492, at *9 (E.D. Cal. March 5, 2019) ("[B]ecause the absent members submitted declarations, their expectation of noninvolvement in the litigation is significantly less than those who did not inject themselves in to the litigation"); *In re Navistar MaxxForce Engines Mktg., Sales Practices, & Prods. Liability Litig.*, 2018 WL 316369, at *3 (N.D. Ill. Jan. 4, 2018) ("[U]nlike the passive class member who has been notified that a class has been certified, a named plaintiff moving for voluntary dismissal has already injected itself into the litigation") (citation omitted); *Collier v. BrightPoint, Inc.*, 2013 WL 652448, at *3 (S.D. Ind. Feb. 21, 2013) ("It is difficult for the Court to find that Mr. Lee is a mere absent class member in this case, where he is actively injecting himself into the proceeding"); *Burgess v. Tesoro Refining & Mktg. Co.*, 2011 WL 132117362, at * (C.D. Cal. July 5, 2011) ("[I]t stands to reason that every class member in every class action may have information about the case and could be a fact witness. But this fact alone, without more, does not render every class member a legitimate target for discovery"); *Antoninetti v. Chipotle, Inc.*, 2011 WL 2003292, at *1 (S.D. Cal. May 23, 2011) ("Courts do not usually allow discovery from absent class members," unless for example "the proposed deponents have been identified as potential witnesses or have otherwise 'injected' themselves into the litigation") (quoting *Mas v. Cumulus Media Inc.*, 2010 WL 4916402, at *3 (N.D. Cal. Nov. 22, 2010)); *Cornn v. United Parcel Serv., Inc.*, 2006 WL 2642540, at *4, *4, n.3 (N.D. Cal. Sept. 14, 2006) ("[T]he discovery of anecdotal evidence bearing upon issues common to the class is not itself an adequate justification for ordering

absent class members can potentially waive their Rule 23 protections[12] when they inject or insert themselves into the action.

Recent Jurisprudence on Factors Determining the Permissibility of Absent Class Member Discovery

The "injection" inquiry provides a good starting point for this analysis. But what level of injection is needed? Case law in this area is varied and fact-specific; however, most, if not all, the cases turn on whether the absent class member is participating in a substantive way in the litigation.[13] In other words, the key question courts ask is whether the absent class member supported the plaintiff in prosecuting any of the substantive allegations or theories of liability in the case. Common examples seen in the case law include absent class members previously, although no longer serving as a named plaintiff, filing declarations in support of class certification, or participating or even being identified as witnesses.[14] If the court does find the prerequisite injection, then the court must apply jurisdiction-specific factors that help determine the permissibility of discovery from the absent class member.

In recognition of the general prohibition against absent class member discovery, courts have created various factors to determine when the rare exception of absent class member discovery may be allowed that, in many ways, mimic *Clark*. Interestingly, there are no uniform factors to consider as neither the U.S. Supreme Court nor most Circuit Courts of Appeals have provided guidance on this issue.[15] However, most courts apply similar tests with slight differences in the factors that are considered and applied.

One good example is the Ninth Circuit, where district courts apply different tests to determine the permissibility of absent class member discovery. Courts in the Northern District of California focus on whether the proponent can show that discovery from the absent class member is: (1) relevant; (2) not readily available from other sources or the class representative; and (3) not unduly burdensome and made in good faith.[16] Courts in the Southern District of California look at similar factors, including whether the discovery: (1) is not designed to take undue advantage of class members or reduce class size; (2) is necessary; (3) would require the assistance of counsel in responding to it;

depositions of absent class members[,]" but "[t]his ruling does not preclude UPS from asserting that it is entitled to depose absent class members recently identified by Plaintiffs as potential witnesses").

[12] *See supra*, note 3.

[13] *See, e.g.*, *Waldrup v. Countrywide Fin. Corp.*, 2019 WL 6317767, at *2-3 (C.D. Cal. July 12, 2019) (permitting depositions of percipient witnesses to substantive allegations in the complaint); *Aldapa*, 2019 WL 1047492 at *16-17 (permitting depositions of absent class members who submitted declarations in support of class certification); *Brown v. Wal-Mart Store, Inc.*, 2018 WL 339080, at *2 (N.D. Cal. Jan. 9, 2018) (permitting depositions of absent class members identified in plaintiffs' Rule 26 initial disclosures); *Collier*, 2013 WL 652448 at *3 (absent class member subject to discovery where he "actively inject[ed] himself . . . by way of his pending motion to intervene, and petition for a substantial award in attorney fees"); *Antoninetti*, 2011 WL 2003292 at *1 (permitting discovery from absent members who filed certifications in support of class certification and were identified in lead plaintiff's Rule 26 initial disclosures); *Mas*, 2010 WL 4916402 at *3 (allowing discovery from witnesses identified in plaintiff's Rule 26 initial disclosures); *In re FedEx Ground Package Sys., Inc. Emp. Pracs. Litig.*, 2007 WL 733753, at *8-9 (N.D. Ind. Mar. 5, 2007) (ordering deposition of party who had previously injected himself into the litigation as a named plaintiff).

[14] *See supra*, note 11.

[15] *But see Clark*, 501 F.2d at 340, discussed *supra*; *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1556-57 (11th Cir. 1986) ("We cannot conclude that the interrogatories served upon [absent class member] plaintiffs in this case would satisfy *Brennan* and *Clark*, were we to follow those rulings. We are indeed convinced that these interrogatories were improperly used as a strategy to reduce class size"); *In re Modafinil Antitr. Litig.*, 837 F.3d 238, at 256, n.17 (3d Cir. 2016) ("Defendants claim that a request for discovery of unnamed class members would have been futile because it is highly circumscribed[,]" but "this is merely a heightened standard. . . . Reasonable discovery . . . should be permitted from unnamed class members when the special circumstances of the case justify it") (citation and internal quotation marks omitted); *In re Porsche Automobil Holding SE*, 985 F.3d 115, 121 (1st Cir. 2021) ("[C]ourts that allow discovery from absent class members . . . have allowed such discovery only after considering multiple factors, including whether the defendant has a good faith purpose and whether the request is unduly burdensome") (citations omitted).

[16] *See Brown*, 2018 WL 339080 at *1; *Tierno v. Rite Aid Corp.*, 2008 WL 2705089, at *6 (N.D. Cal. July 8, 2008).

and (4) seeks information not already known to the proponent of the discovery.[17] Eastern District of California courts analyze other similar factors, including whether the discovery is: (1) reasonably necessary; (2) not for an improper purpose; and (3) not unduly burdensome.[18] Finally, Central District of California courts look at whether the discovery is both: (1) necessary; and (2) for a purpose other than taking undue advantage of class members.[19]

Some courts have tried to find a common denominator among the cases, pointing to the fact that various tests turn on whether the proponent can make a showing that the discovery from absent class members is necessary, not burdensome, and for a proper purpose.[20] Until the U.S. Supreme Court addresses the issue directly, creating uniformity in the test, it would be prudent to assume that a court may consider all the factors described above.

Strategic Considerations for Avoiding Absent Class Member Discovery

Counsel for investors should be aware of the potential for absent class member discovery when advising their clients. To avoid a situation where an investor may be subject to such discovery, and consequently the costs associated with non-party discovery, it is important to guide clients in situations where their substantive participation in a case may be construed as injection.

The following are a few examples of pitfalls absent class members can avoid to limit the potential for a court finding the necessary level of injection:

- Avoid accepting solicitations to participate in discovery, such as being a declarant in support of (or opposition to) a class certification motion, unless they are willing to subject themselves to discovery by the parties;[21]
- Serve written objections to any document, or move to quash any deposition subpoena, within the time constraints under Rule 45;[22] and
- Avoid adding anything unique or different than the verbatim requirements for PSLRA certifications in support of a lead plaintiff motion.[23]

Lead Plaintiffs should also be careful in drafting their Rule 26 initial disclosures and otherwise during the action to avoid referencing absent class members unless their testimony is needed.[24]

Implications of Absent Class Member Discovery

Overall, defendants' attempts to obtain absent class member discovery is on the rise. What was once a rare occurrence has now become a strategic defense maneuver, at best intended to support defendants' affirmative defenses and at worst meant to harass lead plaintiffs and absent class members. Understanding what triggers absent class member discovery is key to avoiding the pitfalls of this defense tactic through careful planning for investors. Simply put, outside of the context of being the lead plaintiff, investors should avoid substantive involvement in the case. If an investor is serving as lead plaintiff, they should consider whether absent class members' substantive

[17] *McPhail*, 251 F.R.D. at 517.
[18] *Arredondo v. Delano Farms Co.*, 2014 WL 5106401, at *5 (E.D. Cal. Oct. 10, 2014).
[19] *Negrete v. Allianz Life Ins. Co. of N. Am.*, 2008 WL 8116992, at *2 (C.D. Cal. June 30, 2008).
[20] *Aldapa*, 2019 WL 1047492 at *3-6 (analyzing *Clark*, *McPhail*, *Arredondo*, and *Tierno* and concluding that the test in *Arredondo* encompasses all other factors considered).
[21] *See supra*, note 11.
[22] *See* F.R.C.P. 45(d)(2)(b), and (d)(3).
[23] *See* 15 U.S.C. § 78u-4.
[24] *See supra*, note 11.

involvement in the litigation—whether submitting declarations in support of class certification or being identified as percipient witnesses—opens the door to costly and time-consuming discovery. By maintaining awareness and planning carefully, investors can preclude defendants' attempts to obtain absent class member discovery.

Labaton Sucharow's lawyers are available to address any questions you may have regarding these developments. Please contact the Labaton Sucharow lawyer with whom you usually work or the contacts below.

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