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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE INCRETIN-BASED THERAPIES Case No. 3:13-md-02452-AJB-MDD
PRODUCTS LIABILITY LITIGATION

This Document Relates to All Cases MDL 2452

Judge: Hon. Mitchell D. Dembin

JOINT MOTION FOR CONSIDERATION OF INSURANCE

COVERAGE ISSUE

1
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3 **PLAINTIFFS' POSITION**

4 Plaintiffs seek to discover the amounts of remaining insurance coverage
5 available under liability policies insuring Amylin, or alternatively, the amount of
6 coverage which has been consumed by defense costs and/or payment of claims. The
7 policies at issue are so-called "burning limits" policies, under which defense cost
8 and claims payments apply against coverage limits. Because available coverage
9 may be considerably less than policy limits, any realistic understanding of available
10 coverage requires disclosure of amounts of coverage remaining and/or amounts
11 spent on cost of defense and payments of claims. Disclosure of the remaining
12 available coverage is both in keeping with the policy behind mandatory disclosure
13 of insurance policies under FRCP Rule 26(a)(1)(D), as well as the general
14 discovery rule of FRCP Rule 26(b)(2).
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18 Amylin has asserted that the amount of coverage consumed is confidential,
19 privileged, and attorney work product. Amylin has cited no authority for the
20 proposition that amounts of available coverage are in any way privileged. None of
21 the recognized privileges, such as attorney/client or work product, are applicable to
22 the question of remaining available coverage.
23
24

25 Disclosure of total amounts expended in attorneys' fees and payment of
26 claims under the burning limits policies likewise will not reveal any privileged or
27 confidential information. Plaintiffs are not seeking any specific details regarding
28

1 The holding in *Wegner*, cited by Amylin in its meet and confer letter, sets
2 forth the policy rationale behind Rule 26(a)(1)(D), which would support disclosure
3 of amounts of coverage remaining in this case.² The *Wegner* court found:

4 This subsection was adopted in order to “enable counsel
5 for both sides to make the same realistic appraisal of the
6 case, so that settlement and litigation strategy are based
7 on knowledge and not speculation.” The subsection is
8 conducive to settlement and will ordinarily help avoid
9 protracted litigation.

10 *Wegner*, 153 F.R.D. at 160 (citations omitted).

11 This policy behind the requirement of disclosure of insurance information
12 would not be furthered if Amylin were allowed to withhold the amount of coverage
13 remaining. The amount of available coverage is likely considerably less than the
14 policy limits. Plaintiffs cannot make a reasonable appraisal of the case when the
15 available coverage may be a fraction of the policy limits. Under a “burning limits”
16 policy, the policy limits and the amount of available coverage are two very different
17 things. The amount of available coverage is much more important information for
18 appraisal of the litigation than is the amount of stated policy limits.
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22 Moreover, the *Wegner* court suggested that when the amount of coverage
23 remaining is less than the potential value of the claim, disclosure of policy limits
24 could fall within the scope of the Rule 26(a)(1)(D) disclosure requirement. In
25 *Wegner*, the court noted that the plaintiff had already made a settlement demand,
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28 ² *Wegner v. Cliff Viessman, Inc.*, 153 F.R.D. 154, 160 (N.D. Iowa 1994)

1 and that defendants had disclosed that the demand was less than the available
2 remaining coverage. Based on this fact, the *Wegner* court concluded, “Nothing
3 *more* need be produced.” *Id.*, at 162 (emphasis added). If there were any question as
4 to whether the remaining available coverage was less than the amount necessary to
5 resolve the case, as is the case here, the *Wegner* court likely would have considered
6 the amount of remaining coverage within the mandatory disclosure requirement of
7 Rule 26(a)(1)(D).
8

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10 No court of this Circuit has held that remaining available coverage is not
11 discoverable under Rule 26(b). In the *Excelsior College* case cited by Amylin, the
12 court was very careful to note that its decision was limited to mandatory disclosure
13 under Rule 26(a)(1)(D), and that it had *not* considered whether the information
14 would have been required in response to formal discovery. The court in *Excelsior*
15 *College* limited its holding to Rule 26(a)(1)(D):
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17

18 The sole issue before the Court is whether Rule
19 26(a)(1)(D) entitled Plaintiff to additional information
20 regarding Defendants’ liability insurance.... Most cases in
21 which there is a dispute as to whether a party must
22 produce certain insurance information involve
23 circumstances in which a formal discovery request was
24 issued, which is not the case here.

24 *Excelsior College*, 233 F.R.D. at 585.

25 In the instant case, assuming disclosure of remaining available coverage were not
26 required under Rule 26(a)(1)(D), it would still be discoverable under FRCP
27 26(b)(1).
28

1 Insurance information not subject to mandatory disclosure under Rule
2 26(a)(1)(D) may still be subject to discovery under Rule 26(b)(1). *Simon v. G.D.*
3 *Searle & Co.*, 816 F.2d 397 (8th Cir. 1986), *cert. denied*, 484 U.S. 917, 108 S.Ct.
4 268, 98 L.Ed.2d 225 (1987).³ The *Excelsior College* court recognized the
5 possibility that information beyond the required disclosure of 26(a)(1)(D) may be
6 obtained through formal discovery under 26(b)(1). *Excelsior College*, 233
7 F.R.D. at 586.

10 Remaining available coverage is relevant to a number of issues in this case,
11 and hence discoverable under FRCP 26(b)(1). Plaintiffs have asserted punitive
12 damages claims that will necessitate discovery of the defendants' ability to pay.
13 Plaintiffs have also asserted alter ego claims. The amount of coverage available to
14 respond to the claims in this lawsuit is important to both of these issues.

17 Under California law, a court awarding punitive damages must take into
18 account the defendant's ability to pay. *Ambassador Hotel Co., Ltd. v. Wei-Chuan*
19 *Inv.*, 191 F.3d 459 (9th Cir. 1999). The amount of coverage remaining to satisfy
20 compensatory awards is a critical factor in establishing Amylin's ability to pay
21 punitive damages.

25 ³ The *Simon* court actually addressed mandatory disclosure under FRCP 26(b)(2),
26 not FRCP 26(a)(1)(D). At the time of the *Simon* holding, the mandatory insurance
27 disclosure provision was found at FRCP 26(b)(2). The requirements of FRCP
28 26(b)(2) were later moved to the required disclosure provisions of FRCP
26(a)(1)(D).

1 Furthermore, providing this information would risk disclosing to Plaintiffs’ counsel
2 confidential information they not entitled to obtain, such as the value of confidential
3 settlements Amylin has entered in related litigation.

4 The Court should deny Plaintiff’s Motion.

5 **I. The Amount of Remaining Insurance Coverage Is Not Discoverable.**

6 The information Plaintiffs seek is not discoverable under any Federal Rule.
7 Indeed, several courts have denied motions to compel information concerning the
8 amount of remaining liability coverage. *See, e.g., In re: Avaulta Pelvic Support*
9 *Sys. Prods. Liab. Litig.*, MDL No. 2187, Pretrial Order No. 16 at 2-3 (Aug. 2,
10 2011) (attached as Ex. 2); *Excelsior College v. Frye*, 233 F.R.D. 583, 586 (S.D.
11 Cal. 2006). Plaintiffs cite no decision compelling this discovery.

12 **A. Amylin Has Satisfied Its Rule 26(a)(1)(A)(iv) Obligation.**

13 Rule 26(a)(1)(A)(iv) requires only that insurance agreements be produced
14 “for inspection and copying as under Rule 34.” By its “plain meaning,” Rule
15 26(a)(1)(A)(iv) “only mandates the production of agreements.” *Excelsior College*,
16 233 F.R.D. at 586. Plaintiffs have Amylin’s insurance policies. Information
17 “regarding the remaining policy limits . . . is . . . clearly not called for by” Rule
18 26(a)(1)(A)(iv). *See id.*

19 Plaintiffs (at 2) bemoan a “dearth of authority.” But Rule 26(a)(1)(A)(iv)’s
20 text is authority—and it is unambiguous. And as Plaintiffs concede, there are
21 judicial decisions on this point, and they uniformly reject Plaintiffs’ position. *See,*
22 *e.g., In re Avaulta*, Pretrial Order No. 16; *Excelsior College*, 233 F.R.D. at 586;
23 *Wegner v. Cliff Viessman, Inc.*, 153 F.R.D. 154, 160 (N.D. Iowa 1994).

24 Plaintiffs (at 4) assert that “[i]f there were any question as to whether the
25 remaining available coverage was less than the amount necessary to resolve the
26 case, as is the case here, the *Wegner* court likely would have considered the amount
27 of remaining coverage within” Rule 26(a)(1)(A)(iv). To support this, Plaintiffs cite
28 language in *Wegner* noting that the plaintiff knew the settlement demand was

1 within remaining coverage and concluding that “[n]othing more need be produced.”
2 153 F.R.D. at 161. Nothing in *Wegner* suggests its result would have been different
3 on the facts here. Quite the contrary: *Wegner* holds that Rule 26(a)(1)(A)(iv)’s
4 “plain language . . . makes it clear that it is a copy of *the insurance agreement*
5 *itself* that defendants must produce.” *Id.* at 160 (emphasis added).

6 Plaintiffs also place substantial weight on what they call the “burning limits”
7 nature of Amylin’s insurance policies, suggesting that this is an anomaly that
8 distinguishes every other decision to address this issue. Factually, this provision is
9 neither unusual nor unknown to decisions rejecting this type of discovery. *See In re*
10 *Avaulta*, Pretrial Order No. 16 at 2 (denying discovery of coverage remaining,
11 including under policies where “defense costs . . . will also erode the coverage
12 limits”). And is it not clear how this facet could be relevant to the analysis. Rule
13 26(a)(1)(A)(iv)’s clear “as under Rule 34” language contains no “burning limits”
14 exception. Nor would any such exception make sense: erosion through defense
15 costs and erosion through settlements or judgments can equally exhaust coverage.⁵

16 If Plaintiffs disagree with the balance struck by Rule 26(a)(1)(A)(iv), they
17 can lobby to amend it. But today, its cold text forecloses their policy arguments.

18 **B. The Amount of Remaining Insurance Coverage Is Not Relevant to**
19 **Any Party’s Claim or Defense.**

20 Nor is Amylin’s remaining insurance coverage within the scope of general
21 discovery under Rule 26(b)(1) because it is not “reasonably calculated to lead to the
22 discovery of admissible evidence.” Rule 26(b)(1). As the Supreme Court has
23 explained, the Rules Committee felt compelled to add what is now Rule
24 26(a)(1)(A)(iv) because the fact of liability insurance “ordinarily cannot be

25 ⁵ Plaintiffs also do not explain *how* this information will affect their settlement
26 position. They specifically do not suggest they might revise their demands
27 downward upon learning of the remaining coverage or dismiss their claims if the
28 policies are exhausted. And that Plaintiffs might want this information—or even
use it in developing a settlement strategy—does not entitle them to it. Only one
Federal Rule allows settlement-related discovery, and it is limited to production of
insurance policies “for inspection and copying.” Rule 26(a)(1)(A)(iv).

1 considered, and would not lead to information that could be considered, by a court
2 or jury in deciding any issues.” *Oppenheimer Fund*, 437 U.S. at 352 & n.16; *see*
3 *also* Rule 26 advisory committee note (1970 Amendment Rule 26 (b)(2)).⁶

4 This is personal injury litigation. The extent of Amylin’s remaining liability
5 coverage has no relevance to any issue raised by any of Plaintiffs’ claims or to any
6 defense Amylin will assert. Nor is it conceivable how the amount of “impacted”
7 coverage could lead to admissible evidence. *See* Fed. R. Evid. 411.⁷

8 In attempting to link this information to admissible evidence, Plaintiffs
9 notably fail to cite any case in which this information has been allowed into
10 evidence for any purpose, let alone the specific rationalizations Plaintiffs offer.⁸
11 Plaintiffs’ stated intent to ask a jury to increase any punitive damage award to
12 account for Amylin’s remaining coverage is directly at odds with Rule of Evidence
13 411.⁹ Plaintiffs also do not address the California law on the non-insurability of
14 punitive damages. *See, e.g., PPG Industries, Inc. v. Transamerica Ins. Co.*, 975
15 P.2d 652 (Cal. 1999). Plaintiffs’ undercapitalization arguments similarly misfire.
16 Plaintiffs lack evidence of undercapitalization. And the information they seek—

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18 ⁶ *See also* *Wegner*, 153 F.R.D. at 160-61 (1970 Amendment requiring disclosure of
19 copies of insurance policies necessary “because [insurance information] was not
20 generally considered relevant or discoverable within the scope of Rule 26(b)(1)”).

21 ⁷ *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1988), merely concluded that
22 “insurance documents” outside of the initial disclosure requirement are not per se
23 shielded from discovery. *See* 816 F.2d at 404. Notably, *Simon* concerned a request
24 for production of historical documents that concerned aggregate insurance reserves
25 and that were calculated by a business unit, not created for litigation purposes. *See*
26 *id.* at 408-09. Here, Plaintiffs do not seek historical documents; they ask to have
27 Amylin calculate its remaining coverage so that Amylin can give them the resulting
28 number. *See also* *Wegner*, 153 F.R.D. at 161 (distinguishing *Simon*).

⁸ The word “insurance” appears nowhere in *Ambassador Hotel Co., Ltd. v. Wei-
Chuan Inv.*, 191 F.3d 459 (9th Cir. 1999) (table opinion), reported at 1999 U.S.
App. LEXIS 31345. And in *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001), the
court rejected a capitalization argument and declined to pierce the corporate veil
without even discussing whether the defendant had liability insurance. *See* 248
F.3d at 927-28.

⁹ Plaintiffs’ use of “compensatory awards” is curious. There would be no basis for a
jury to increase punitive damages in one case due to the defendant’s purported
inability to pay compensatory damages. *See State Farm Mut. Auto. Ins. Co. v.
Campbell*, 538 U.S. 408, 423 (2003).

1 coverage remaining *today*—is not relevant to the capitalization question, which is
2 “measured as of the time of formation.” *See* Fletcher Cyclopedia of the Law of
3 Corporations § 41.33 (2013) (“The adequacy of capital is to be measured as of the
4 time of formation of a corporation. A corporation that was adequately capitalized
5 when formed but subsequently suffers financial reverses is not undercapitalized.”
6 (footnote omitted)).

7 The information Plaintiffs seek is not discoverable.

8 **II. The Court Should Protect this Information From Discovery.**

9 Forcing Amylin to take a position in this litigation on the amount of coverage
10 remaining could also unduly prejudice Amylin in any future dispute with its
11 insurers. The amount of remaining coverage is a legal conclusion that Amylin
12 could not calculate without making a series of assumptions that Amylin’s insurers
13 might dispute. As Amylin has told Plaintiffs, Amylin has received reservations of
14 rights. Given the potential for future disputes, Amylin may be severely prejudiced
15 if forced to take a position here on coverage issues.¹⁰ This discovery would also
16 risk disclosing information about the number and value of settlements in related
17 litigation in which Plaintiffs’ counsel here have active cases.¹¹ The Court should
18 shield this information—which could serve no proper purpose, especially because
19 Amylin cannot speak for its insurers—from discovery. *See* Rule 26(c)(1).

20 **CONCLUSION**

21 The Court should deny Plaintiffs’ Motion.

22
23 ¹⁰ Injecting coverage issues into this proceeding would force Amylin to engage
24 separate coverage counsel. Amylin’s counsel here represents certain of Amylin’s
25 insurers in unrelated matters. *See* Decl. of Amy Laurendeau (attached as Ex. 3).

26 ¹¹ This discovery could further reveal the extent and type of work performed by
27 Amylin’s counsel in this and related litigation, especially because Plaintiffs’
28 counsel might receive rolling updates through the Rule 26(e) supplementation
process. This could risk disclosure of information protected by the attorney-client
privilege and work-product doctrine. *See* Cal. Evid. Code § 950, *et seq.*; Fed. R.
Civ. P. 26(b)(C)(iii). Even if deemed outside the strict limits of those protections,
this discovery could provide Plaintiffs’ counsel an unfair glimpse into Amylin’s
ongoing litigation strategy and activity, which is not justified by any litigation need.

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2 Dated: December 19, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the document(s) listed above with the Clerk of the Court using the CM/ECF system, which will automatically send an email notification to all participants in the case who are registered CM/ECF users.

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