The PSLRA Discovery Stay Meets Complex Litigation: Five Questions Answered

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The PSLRA Discovery Stay Meets Complex Litigation: Five Questions Answered

By Wendy Gerwick Couture*

1. Introduction

The Private Securities Litigation Reform Act ("PSLRA") was enacted nearly 20 years ago in order to combat perceived abuses in private securities litigation. One key provision of the Act is the discovery stay, which applies in any private action under the Securities Act of 1933 or the Securities Exchange Act of 1934 and which states that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." Congress enacted the discovery stay to prevent the perceived abuses of fishing-expedition and extortive discovery. This stay, which applies in a straightforward fashion in simple cases, raises myriad issues in complex cases with multiple defendants, multiple claims, and staggered briefing schedules. The application of the discovery stay in complex cases is often outcome-determinative because, absent discovery, it is extraordinarily difficult for a plaintiff to meet the PSLRA's heightened pleading standards. Yet, these complexities are rarely addressed by the appellate courts, leaving the district courts in disarray. In this essay, I seek to answer the following five questions that arise when the PSLRA discovery stay meets complex litigation:

When does the discovery stay begin? I argue that, consistent with the legislative intent to prevent fishing-expedition and extortive discovery, the stay begins upon service of the complaint—when the defendant has the opportunity to file a motion to dismiss—and continues until the defendant answers (rather than moving to dismiss) or the motion to dismiss is denied.

Does the discovery stay apply to successive motions to dismiss, even if the first motion to dismiss was denied in part? I argue that the stay applies to successive motions to dismiss because, under the plain language of the statute, the stay applies to "any" motion to dismiss, and this reading is consistent with the legislative goals of preventing fishing-expedition and extortive discovery.

Does the discovery stay apply to 12(c) motions for judgment on the

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pleadings? I argue that the stay does not apply to motions for judgment on the pleadings because, under the plain language of the statute, the stay applies only to motions to dismiss, and this reading neither contravenes legislative intent nor leads to absurd results.

Does the discovery stay apply to the entire case, even if only a subset of defendants have pending motions to dismiss? I argue that the stay applies to the entire case because, under the plain language of the statute, “all” discovery is stayed, and this reading at least partially furthers the legislative goals of preventing fishing-expedition and extortive discovery.

After the discovery stay has been lifted, does the PSLRA prevent the plaintiff from relying on discovered materials to assert additional claims against existing, new, or previously dismissed defendants? I argue that the PSLRA does not impose constraints on amendment in addition to those already embodied in the Federal Rules of the Civil Procedure. The PSLRA’s text does not include any such constraints, and this reading neither contravenes legislative intent nor leads to absurd results.

This essay proceeds in three additional parts. Part II provides an overview of the PSLRA discovery stay. Part III analyzes these five questions. Part IV briefly concludes.

II. Overview of the PSLRA Discovery Stay

In 1995, Congress enacted the PSLRA to combat perceived abuses in private securities litigation. Congress recognized the importance of private securities litigation in compensating defrauded investors, promoting confidence in our capital markets, deterring wrongdoing, and ensuring that corporate officers, directors, auditors, attorneys, and others properly perform their jobs.1 With the PSLRA, Congress sought to “return the securities litigation system to that high standard.”2

One key provision of the PSLRA is the discovery stay, which applies in any private action arising under the Securities Act or the Securities Exchange Act.3 The statute states:

In any private action under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.4

In order to ensure that the discovery stay does not result in the loss of relevant evidence, the PSLRA also requires any party with actual notice of the complaint’s allegations to preserve all relevant documents and authorizes sanctions for “willful violation” of this requirement.5

With the discovery stay, Congress sought to address the following
two perceived abusive practices: (1) "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without any regard to any underlying culpability of the issuer, and with only the faint hope that the discovery process might lead eventually to some plausible cause of action"; and (2) "the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle." For purposes of shorthand, I will refer to these policies as the prevention of fishing-expedition and extortive discovery.

In securities fraud cases, the PSLRA couples the discovery stay with heightened pleading standards, thus imposing an often insurmountable burden on plaintiffs. Although Federal Rule of Civil Procedure 9(b) already requires securities fraud plaintiffs to plead fraud with particularity, Rule 9(b) allows plaintiffs to plead allegations of state of mind generally. The rationale for this carve-out in Rule 9(b) is that the evidence of a defendant's state of mind generally resides solely with the defendant, rendering it very difficult for a plaintiff to describe that state of mind with exactitude. The PSLRA overrides this carve-out, requiring plaintiffs to plead a "strong inference" of the defendant's scienter. As interpreted by the Supreme Court, a complaint subject to the strong inference of scienter pleading requirement will survive dismissal "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." As a consequence, plaintiffs must often rely on confidential informants to prevent dismissal.

The exception to the discovery stay, which allows for particularized discovery when "necessary to preserve evidence or to prevent undue prejudice," is narrow. Prejudice that is merely a natural consequence of the PSLRA, such as a plaintiff's inability to gather evidence to plead a strong inference of a defendant's scienter without the benefit of discovery, is not "undue" because it is prejudice that the PSLRA is meant to cause. Courts often grant a limited exception to the discovery stay to allow a plaintiff to serve non-parties with preservation subpoenas because non-parties are not subject to the PSLRA's preservation requirement and may destroy relevant documents as part of their document retention plans, but this limited exception does not help the plaintiff meet the pleading burden. A few courts have granted exceptions to allow a plaintiff to discover documents already provided to public agencies where the securities plaintiff class was entering into settlement negotiations alongside other plaintiff classes, where the plaintiff class would be the only major interested party without access to the documents, and where the plaintiff class would be "prejudiced by its inability to make informed decisions about its lit-
igation strategy in a rapidly shifting landscape." In sum, however, the exception to the discovery stay has been of little comfort to plaintiffs.

When drafting the discovery stay, Congress did not fully anticipate the myriad issues that can arise when the stay is imposed in complex litigation—with multiple claims, multiple defendants, and multiple briefing schedules." One plaintiffs' attorney has described the application of the discovery stay in complex cases as "Kafkaesque." Moreover, because district court discovery orders are subject to deferential review, and only in the limited circumstance of mandamus or in the event that the case proceeds to appeal after a final judgment, there is little binding precedent about how to apply the discovery stay in complex cases. In this essay, I seek to answer five questions that arise about the discovery stay in complex litigation.

III. Five Questions that Arise in Complex Litigation

In this section, I analyze five unsettled issues about how the discovery stay applies in complex litigation. I am not starting with a clean slate, as if I were charged with drafting a discovery stay. Rather, I seek to remain true to the statute as written, as well as the policy rationales that inform the statute. Thus, if the plain language of the statute unambiguously addresses an issue, the text governs unless it would lead to absurd results or defeat clearly expressed legislative intent. If the text of the statute is ambiguous, however, I look to the policies underlying the statute, as expressed in the legislative history, for interpretive guidance.

(a) When does the discovery stay begin?

The statute states that discovery is stayed "during the pendency of any motion to dismiss." The question is whether the stay begins only when a motion to dismiss is filed or whether it begins at an earlier moment, such as when the complaint is filed or served or when a defendant indicates that it intends to file a motion to dismiss. In a non-complex case, this would ordinarily be a moot point because (1) the 26(f) conference beginning discovery is unlikely to have occurred before a defendant has filed its motion to dismiss; and (2) even if discovery has commenced before the motion to dismiss is filed, it is unlikely that responses to discovery requests served after the defendant is served with the complaint would be due before the motion to dismiss is filed. In a complex case, however, the issue potentially arises. First, it is possible for one defendant's motion to dismiss to have been denied and for the discovery stay to have been lifted before a second defendant has even been served. Second, in light of the customarily extended briefing schedules in these complex cases, if discovery has commenced before a defendant has been served,
it is more likely that responses to discovery requests served after the
defendant has been served with the complaint would be due before
the motion to dismiss is filed. 29

Courts addressing this question are divided, with some courts
imposing the stay when the case is filed, 30 some courts imposing the
stay upon the defendant’s indication that it intends to file a motion to
dismiss, 31 and some courts holding that the mandatory stay begins
only upon the filing of the motion to dismiss. 32

I agree with the court in In re Carnegie International Corporation
Securities Litigation that the term “pendency” in this context is
ambiguous:

When viewed in a vacuum, the requirement of the “pendency of any mo-
tion to dismiss” to trigger the stay of discovery is subject to many
interpretations, including the interpretation that plaintiffs propose,
namely, that a motion must have been filed in fact for the stay to be
triggered. However, the term “pendency” does not necessarily connotate
the formal framing of an issue through a filing. It can just as easily be
interpreted as connotating the period while an issue is unresolved. 33

Therefore, like the court in In re Carnegie, I interpret this term in
light of the legislative intent to prevent fishing-expedition and extor-
tive discovery before the defendant has had “the opportunity to test
the sufficiency of the complaint under the orderly procedures provided
by the rules and court orders.” 34 Pursuant to this policy, the stay
should begin, at the latest, when a defendant expresses the intention
to file a motion to dismiss. 35

If a defendant were required to express the intention to file a mo-
tion to dismiss in order to invoke the discovery stay, however, this
would potentially lead to disputes about when a defendant had
expressed the intention and how a defendant should have done so
and, at the extreme, could provide incentives for the plaintiff’s counsel
to avoid phone calls and emails in order to prevent receipt of notice of
such intention. Thus, consistent with the legislative policy and in or-
der to promote clarity about the starting point of the stay, the
discovery stay should begin when a defendant is served with the com-
plaint and should continue until the defendant has had the op-
portunity to test the sufficiency of the complaint—namely, until the
defendant has answered (rather than filing a motion to dismiss) or the
court has denied the defendant’s motion to dismiss.

(b) Does the discovery stay apply to successive motions to
dismiss, even if the first motion to dismiss was denied in
part?

If the PSLRA discovery stay is applied in a simple case, a motion to
dismiss is either granted with prejudice (thus ending the case),
granted without prejudice (thus extending the discovery stay through the testing of an amended complaint), or denied (thus lifting the discovery stay). In a more complex case, however, a motion to dismiss may be granted in part, with leave to amend, and denied in part. Here, the application of the discovery stay is more complicated. On the one hand, at least one claim has passed muster, suggesting that the stay should be lifted immediately, at least with respect to discovery related to that claim. On the other hand, the plaintiff has leave to amend the complaint to assert additional claims, suggesting that the stay should be continued until the defendant has the opportunity to subject those additional claims to court review via a motion to dismiss. Therefore, the question arises in complex cases: does the discovery stay apply to successive motions to dismiss, even if the first motion to dismiss was denied in part?

The majority of courts to have addressed this question impose the discovery stay during a successive motion to dismiss, even where the prior motion to dismiss was denied in part. The court in In re Salomon Analyst Litigation, however, expressed concerns about the ramifications of automatically imposing the stay for successive motions to dismiss and stated that subsequent stays were subject to court discretion:

Rather, defendants insist that the mere filing of any motion to dismiss, "successive or otherwise" . . ., automatically renew the statutory stay. This argument has troubling implications. The purpose of the statutory stay is to prevent abusive, expensive discovery in frivolous lawsuits by postponing discovery until "after the Court has sustained the legal sufficiency of the complaint." In a case where the court already has sustained the legal sufficiency of the complaint, the purpose has been served. To permit defendants indefinitely to renew the stay simply by filing successive motions to dismiss would be to invite abuse. Some judicial discretion to evaluate the desirability of a renewed stay appears to be necessary.

Despite expressing this concern, the court nonetheless exercised its discretion to impose a stay pending resolution of the defendants' successive motion to dismiss because the motion was "neither frivolous nor advanced solely to delay the proceedings."

The statute states that the discovery stay is in effect "during the pendency of any motion to dismiss." I agree with those courts that have held that this language unambiguously applies to successive motions to dismiss. The court in In re Smith Barney Transfer Agent Litig. aptly explained why the word "any" is unambiguous: "As the Supreme Court has instructed, 'the word "any" has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' In the absence of restrictive language,' there is nothing ambiguous about the meaning of 'any.' Thus, unless this interpretation would lead to
absurd results or defeat clearly expressed legislative intent, it should govern.

The legislative goals of preventing fishing-expedition and extortive discovery are not furthered to the extent the stay applies to discovery related to previously upheld claims, but they are furthered to the extent the stay applies to discovery related to additional claims. The concern expressed by the court in In re Salomon Analyst Litigation about defendants' ability "indefinitely to renew the stay simply by filing successive motions to dismiss" does not rise to the level of overriding the statutory text, especially because defendants must file motions to dismiss "before pleading if a responsive pleading is allowed," lessening the risk that defendants could file successive motions to dismiss merely to extend the stay of discovery into perpetuity. Therefore, the plain language of the statute is at least partially consistent with legislative policy and should govern, extending the stay through successive motions to dismiss, even if earlier motions were only partially successful.

(c) Does the discovery stay apply to 12(c) motions for judgment on the pleadings?

Ordinarily, a defendant challenges the sufficiency of a plaintiff's complaint via a pre-answer motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Occasionally, however, a defendant seeks to challenge the sufficiency of the complaint via a post-answer motion for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c). Courts apply the same standard when assessing the sufficiency of a complaint, regardless of whether the issue is raised via a pre-answer 12(b)(6) motion to dismiss or a post-answer 12(c) motion for judgment on the pleadings. Therefore, the question arises: does the discovery stay apply during the pendency of motions for judgment on the pleadings?

Although this issue has not arisen frequently, the vast majority of courts to have addressed it have applied the discovery stay during the pendency of a motion for judgment on the pleadings. The court in Gardner v. Major Automotive Cos. explained the application of the stay as follows:

Staying discovery pending judicial evaluation of the sufficiency of the complaint is consistent with "the entire purpose of the stay provision[,] which is to avoid saddling defendants with the burden of discovery in meritless cases, and to discourage the filing of cases that lack adequate support for their allegations in the mere hope that the traditionally broad discovery proceedings that will produce facts that could be used to state a valid claim...". Significantly, whether filed under Rule 12(b)(6) or Rule 12(c), a motion to dismiss asks the court to decide whether the complaint should be "authoritatively sustained" based solely on the available pleadings, drawing inferences in the light most favorable to the
non-moving part. Accordingly, this Court agrees with defendants that a Rule 12(c) motion is a "motion to dismiss" within the meaning of the PSLRA automatic stay provision, and that therefore the stay is triggered by defendants' Rule 12(c) motion.47

The court in Brown v. Kinross Gold U.S.A., Inc. similarly described the distinction between 12(b)(6) and 12(c) motions as merely "semantical" because the "principal difference between a Rule 12(b)(6) motion and a 12(c) motion based on failure to state a claim is the time of filing."48

I disagree with these courts. The text of the statutory stay refers only to "any motion to dismiss."49 The names of motions—whether they be motions to dismiss, motions for judgment on the pleadings, motions for summary judgment, or motions for judgment as a matter of law—are terms of art, with the timing and standards of review for each governed by specific rules of civil procedure.50 For example, although the granting of a motion for summary judgment would result in dismissal of the case, no one suggests that the discovery stay applies during the pendency of a motion for summary judgment. Therefore, I contend that, under the text of the statute, the discovery stay unambiguously does not apply during the pendency of motions for judgment on the pleadings.51 Unless this interpretation would lead to absurd results or defeat clearly expressed legislative intent, it should govern.

Turning to the policies underlying the discovery stay, if a defendant elects to forego a motion to dismiss, instead answering the complaint and filing a motion for judgment on the pleadings, the plaintiff could potentially engage in fishing-expedition and extortive discovery before the court has reviewed the sufficiency of the complaint. This would not contravene the policies underlying the discovery stay, however, because this potentiality would be at the election of the defendant. In this circumstance, the defendant had the opportunity to invoke the stay by filing a motion to dismiss, and that opportunity is all that the PSLRA affords. A defendant may, for strategic reasons, choose to forego the discovery stay, answer the complaint, and then file a motion for judgment on the pleadings. For example, because a motion for judgment on the pleadings need only be filed "[a]fter the pleadings are closed—but early enough not to delay trial,"52 a defendant has more time to draft the motion, potentially resulting in a greater likelihood of success. Additionally, although courts have the discretion to rule on a motion for judgment on the pleadings by dismissing a complaint without prejudice,53 the common wisdom is that such rulings are more likely to be with prejudice than rulings on motions to dismiss.54 In sum, the policies underlying the discovery stay are not contravened by interpreting the text of the statute literally so that the stay does

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not apply during the pendency of motions for judgment on the pleadings.

Moreover, the timing difference between a pre-answer 12(b)(6) motion and a post-answer 12(c) motion is meaningful; thus, differential treatment is not an absurd result. The misgivings expressed by the court in In re Salomon Analyst Litigation about permitting "defendants indefinitely to renew the stay simply by filing successive motions to dismiss,"65 while not overly implicated by motions to dismiss that must be filed pre-answer, are implicated by motions for judgment on the pleadings that must merely be filed "early enough not to delay trial."66 Therefore, if the discovery stay applied to motions for judgment on the pleadings, a defendant could conceivably file such a motion merely to halt discovery at a critical juncture. In sum, contrary to the weight of authority, I argue that the discovery stay does not apply during the pendency of motions for judgment on the pleadings.

(d) Does the discovery stay apply to the entire case, even if only a subset of defendants have pending motions to dismiss?

In a simple case, all defendants are served simultaneously, the defendants file motions to dismiss in lockstep, and the court rules on all of the motions in the same way at the same time. The issue of whether the discovery stay applies to only the defendants with pending motions does not arise. In a more complex case, however, some defendants may have pending motions to dismiss while others do not. For example, one defendant may have been served and had a motion to dismiss denied before a second defendant is served and files a motion to dismiss.67 As another example, the court may deny one defendant's motion to dismiss and grant a second defendant's motion to dismiss with leave to amend, leading to an amended complaint and a successive motion to dismiss.68 As a further example, one defendant may elect to answer rather than filing a motion to dismiss, while other defendants file motions to dismiss.69 As a final example, the court may rule on pending motions to dismiss at different times, denying one while another remains pending.69 In these more complex scenarios, the issue arises: does the discovery stay apply to the entire case, even if only a subset of defendants have pending motions to dismiss?

The majority rule61 is that the discovery stay applies to the entire case while a single defendant's motion to dismiss is pending.62 These courts interpret the text of the statute, which halts "all discovery,"63 as unambiguously applying the stay to the entire case.64 In addition, these courts recognize that allowing discovery to proceed, even in a limited fashion against non-moving defendants and third parties,
would prejudice a defendant whose motion to dismiss is pending because “[a]t a minimum, a moving defendant will want to monitor the discovery occurring between plaintiffs and the non-moving defendants to insure that its rights are not prejudiced.”

The minority rule is that discovery is stayed only with respect to the defendant whose motion to dismiss is pending and can proceed against other defendants, whose motions to dismiss were denied or who answered rather than moving to dismiss, and against third parties. These courts interpret the text of the statute as ambiguous about whether a motion to dismiss stays discovery with respect to the entire case or only discovery with respect to the moving defendant. The court in In re Lernout & Hauspie Securities Litigation explained the ambiguity as follows:

The language “all discovery . . . shall be stayed during the pendency of any motion to dismiss” suggests two competing reasonable interpretations. One, which defendants support, would read “any” as “all,” suggesting that no discovery may proceed against any party to an action until all motions by all parties are resolved. The provision could also be read to mean that all discovery against a party must be stayed during the pendency of any motion to dismiss filed by that party. I conclude that the provision is ambiguous on its face.

Then, drawing on the policy rationales underlying the discovery stay of preventing fishing-expedition discovery and costly discovery before a court has held that the complaint passes muster, these courts find that, once a defendant’s motion to dismiss has been denied, the goals of the discovery stay are no longer implicated with respect to that defendant. However, recognizing that allowing depositions to proceed would prejudice those defendants subject to the discovery stay, these courts usually allow only document discovery to proceed.

I agree with the majority rule that the statute unambiguously stays “all discovery,” even if only one defendant has a pending motion. Indeed, even those courts following the minority rule have generally distinguished between depositions and document discovery, refusing to allow the former to proceed during the pendency of a motion to dismiss because of prejudice to the defendant protected by the stay of discovery.” This distinction between depositions and document discovery has no basis in the statutory text, reinforcing that the statute means “all” when it says “all.”

Therefore, unless this interpretation would lead to absurd results or contravene legislative intent, the plain language of the statute should govern, staying all discovery in the case. With respect to those defendants whose motions to dismiss have already been denied, I agree with those courts following the minority rule that the goals of the discovery stay are no longer implicated because the claims against
them have already passed muster. With respect to those defendants with pending motions to dismiss, however, the goals of the discovery stay are at least slightly furthered by a stay of all discovery. First, plaintiffs, if able to obtain discovery from other defendants and third parties, would be able to engage in limited fishing-expedition discovery in order to build a case against those defendants whose motions to dismiss are still pending. Second, even if discovery were limited to document requests, those defendants subject to the stay would probably feel compelled to review the produced documents during the stay, lest they be at an informational disadvantage with other parties, thus imposing at least some discovery costs on the moving defendants before the complaint has passed muster. Therefore, because the plain language of the statute furthers, at least to a small degree, the policies underlying the statutory stay, I agree with the majority rule that a pending motion to dismiss stays all discovery in the case.

(e) After the discovery stay has been lifted, does the PSLRA prevent the plaintiff from relying on discovered materials to assert additional claims against existing, new, or previously dismissed defendants?

If a complaint survives dismissal, discovery may begin. A plaintiff may, in the course of discovery, uncover evidence of additional securities violations and seek to amend the complaint to assert these additional claims. Indeed, one plaintiffs’ attorney has represented that, anecdotally, this is a common occurrence. This scenario raises the following issue: if the plaintiff in the course of discovery uncovers evidence sufficient to plead additional claims—against existing, new, or previously dismissed defendants—does the PSLRA prevent the plaintiff from amending the complaint to assert these additional claims?

The Federal Rules of Civil Procedure already provide significant restrictions on a plaintiff’s ability to amend the complaint to assert new claims based on evidence uncovered during discovery. First, by the time a plaintiff has uncovered additional evidence via discovery, the time to amend the complaint as a matter of course will have elapsed. Therefore, the plaintiff may only amend the complaint “with the opposing party’s written consent or the court’s leave.” As the defendant is unlikely to grant consent under this scenario, the plaintiff must seek the court’s leave to amend. Rule 15(a)(2) states that the “court should freely give leave when justice so requires.” As explained by the Supreme Court, courts should apply the following standard to determine whether to grant leave to amend:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared rea-
son—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.” Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.76

This assessment depends on the facts before the court. For example, granting leave to amend to add a claim against a new defendant shortly before trial might be inappropriate, while granting leave to amend to add a closely related claim against an existing defendant might be appropriate.77

Second, by the time a plaintiff has uncovered evidence in support of additional claims, the scheduling order’s deadline to amend pleadings may well have elapsed.78 A scheduling order “may be modified only for good cause and with the judge’s consent.”79 The determination of whether good cause exists “necessarily varies with the circumstances of each case,” but includes considerations about whether the plaintiff has unduly delayed and whether the defendant would be prejudiced.80

Third, if a plaintiff seeks to amend the complaint to re-assert a claim that was previously dismissed with prejudice but without entry of a final judgment,81 the court has discretion to allow the plaintiff to re-assert the claim,82 but the court’s discretion is limited by the “law of the case” doctrine. Under that doctrine as applied to a trial court’s revisiting its own prior ruling, a court must weigh the interest in stability against the interest in reaching the right result.83

At least three major factors influence a trial court’s decision whether to reconsider an earlier ruling. A ruling made early in the proceedings may rest on poorly developed facts that have been better developed by continuing proceedings. In these circumstances, the forward progress of the case encourages reconsideration. A ruling made early in the proceedings, however, may have shaped later proceedings in ways that can be undone only at the cost of delay and duplicating expense. In these circumstances, the forward progress of the case discourages reconsideration. In all circumstances, an earlier ruling may come to seem wrong. Self-correction is manifestly important if the alternative is the greater delay and expense that would result from persisting in the error and eventual appellate reversal. Even if reversal is not likely, the trial court will prefer to reach a just result.84

Again, the court’s discretionary assessment about whether to allow a plaintiff to re-assert a claim that was previously dismissed with prejudice will depend on the facts of the case, including whether the new claim is closely related to claims already pending.

Courts are divided on the question of whether the PSLRA imposes
restrictions, in addition to those already imposed by the Federal Rules of Civil Procedure, on a plaintiff’s ability to amend the complaint to assert additional claims after discovery has begun. At one extreme, a number of courts, when dismissing claims for failure to meet the PSLRA’s pleading standards, explicitly invite plaintiffs to seek leave to amend re-assert the dismissed claims if they uncover additional evidence during discovery. For example, in In re Bridgepoint Education, Inc. Securities Litig., the court dismissed the plaintiff’s securities fraud claim based on the defendants’ alleged misrepresentations about their ability to obtain accreditation but left open the possibility that the claim could be re-asserted after discovery:

Plaintiff’s current allegations do not support its claim that Defendants could not have remedied the deficiencies in time and misrepresented their ability to do so. But the court notes that Plaintiff may eventually be able to demonstrate that Defendants were aware that WASC would not accredit Ashford well before the WASC denied accreditation in July 2012. If discovery reveals that Defendants knew the denial of accreditation would be denied [sic], then Plaintiff may be permitted to amend its complaint to reassert this claim based on prior misleading statements made during conference calls or other disclosures to investors.

Similarly, in McIntire v. China MediaExpress Holdings, Inc., the court dismissed the securities fraud claims against certain individual defendants without prejudice and left open the possibility that the plaintiffs could re-assert those claims based on evidence obtained during discovery: “In the event that during the course of discovery Plaintiffs come upon sufficient evidence that could reasonably support a finding of knowledge or conscious recklessness on the part of Green and Bird in connection with the fraudulent conduct Plaintiffs allege, Plaintiffs may seek leave to replead the claims dismissed.”

Other courts, without going to far as to invite such amendment at the outset, have permitted plaintiffs to use legitimately obtained discovery to amend their complaints. Likewise, the Third and Ninth Circuits have both acknowledged the possibility that a plaintiff could amend a complaint to re-assert previously dismissed claims based on evidence obtained during discovery that would enable the plaintiff to meet the PSLRA’s pleading standards. The Ninth Circuit went so far as to suggest that “the ability of a district court to revive dismissed claims should evidence come to light tempers the heightened pleading standards of the PSLRA in securities actions where claims survive against co-defendants.”

At the other extreme, a number of courts view a plaintiff’s attempt to amend the complaint after discovery has begun as an impermissible run-around the PSLRA discovery stay. For example, the court in Greebel v. FTP Software Inc. refused to allow the plaintiff’s opportunity to amend their complaint based on evidence obtained during discovery:
The court will not allow Plaintiffs’ leave to amend their complaint for the third time. Plaintiffs would not have discovered the additional evidence but for the inclusion of the white-out claim, which saved Plaintiffs from earlier dismissal, and has since turned out to be groundless. To allow Plaintiffs to amend at this point would fly in the face of PSLRA and the First Circuit’s pre-PSLRA pleading standard. The new law requires Plaintiffs to plead particular facts sufficient to show their case has merit before gaining unfettered access to Defendants’ files. Plaintiffs have failed to do so. Their suit shall be dismissed with prejudice.91

Likewise, the court in In re AOL Time Warner, Inc. Securities & ERISA Litig. denied a motion to dismiss in part and granted it in part with prejudice, reasoning that “[i]f the Court were to permit MBSI to discover its way into a viable securities claim, the PSLRA stay provision would become meaningless and the Congressional intent of the statute vitiated.”92 Similarly, the court in In re Bisys Securities Litig. refused to allow the plaintiffs to amend their complaint, based on evidence obtained during discovery, to re-assert claims against a defendant who had previously been dismissed with prejudice from the case:

[The PSLRA effectively shifted the burden to plaintiffs to acquire particularized knowledge of a party’s scienter prior to obtaining discovery. It would wholly defeat this policy to allow plaintiffs who failed as to a given defendant to sustain their pleading burden at the outset of the case to wait until all discovery in the rest of the case was completed and then add that defendant back into the case. If plaintiffs could not allege fraud with specificity against PwC, they should not have included PwC as a defendant in the original complaint. They chose to do so anyway, thereby running the risk that their claims would be dismissed, which is exactly what happened. Having precipitously tried to pluck the fruit from the tree of knowledge when it was not yet ripe, they are in no position to now demand a second bite at the apple.83]

The Second Circuit affirmed the court’s ruling in In re Bisys Securities Litig. based purely on court’s discretion under Rules 15(a) and 54(b), explicitly not reaching the issue of “whether the PSLRA bars a plaintiff from using evidence obtained in discovery in litigation with one defendant to re-instate a claim against a defendant which had previously been dismissed for failure to state a claim.”94

Further, although not directly on point but instructive, the circuits are split about whether the PSLRA limits the free amendment policy of Rule 15(a)(2) when a plaintiff’s complaint has been dismissed for failure to meet the PSLRA’s pleading standards and the plaintiff seeks leave to amend. Those circuits holding that the PSLRA limits a plaintiff from freely amending a complaint after failing to meet the PSLRA’s pleading requirements95 would probably be more likely to likewise hold that the PSLRA prevents a plaintiff from freely amending a complaint after the plaintiff has uncovered evidence of additional
claims during discovery. Those circuits holding that the PSLRA does not modify the liberal amendment policy of Rule 15(a)(2) in the context of a complaint that is dismissed would probably also be more likely to allow the plaintiff to amend the complaint to take into account discovery. Finally, likewise not directly on point but instructive, the Third Circuit has held that the PSLRA does not impose constraints, in addition to those already contained in Federal Rules of Civil Procedure 15(a)(2) and 60(b), on a plaintiff’s ability to amend a complaint post-judgment based on newly uncovered evidence.

The text of the discovery stay does not impose any procedural restrictions on a plaintiff’s right to amend the complaint after surviving a motion to dismiss. This observation is consistent with those courts that have noted that the text of the PSLRA does not impose additional procedural constraints on a plaintiff’s right to amend the complaint upon dismissal. Therefore, unless it would lead to absurd results or contravene the legislative intent of the PSLRA, the PSLRA should not be interpreted to impose constraints, in addition to those already imposed by the Federal Rules of Civil Procedure, on a plaintiff's ability to amend the complaint once discovery has begun.

The first goal of the discovery stay—the prevention of fishing-expedition discovery—is slightly implicated by allowing a plaintiff to amend post-discovery, but not to such a degree as to rewrite the PSLRA to include additional restrictions on a plaintiff’s ability to amend the complaint after discovery has begun. In 2000, Federal Rule of Civil Procedure 26(b)(1) was amended to limit the scope of discovery: parties may now only engage in discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Parties may engage in broader discovery of “any matter relevant to the subject matter involved in the action” only if they demonstrate “good cause” and obtain a court order. As explained by Committee Notes accompanying the rule amendment, “[t]he rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.” Therefore, a plaintiff is not able to engage in broad discovery for the purpose of uncovering evidence of new claims. Rather, this issue will only arise if the plaintiff stumbles upon evidence of additional securities violations in the course of engaging in discovery about the claims that survived dismissal.

The second goal of the discovery stay—the prevention of using costly discovery to extort settlements—is not implicated by allowing a plaintiff to amend post-discovery. As a number of courts have noted when addressing this issue, the discovery would have occurred anyway
based on the claims that survived dismissal, and by the time the plaintiff seeks to amend the complaint, the discovery costs have already been incurred. 103

In sum, it would neither lead to absurd results nor contravene legislative intent to refuse to read the PSLRA as imposing procedural constraints in addition to those already contained in the Federal Rules of Civil Procedure. In reaching this conclusion, I disagree with the courts in Greebel v. FTP Software Inc., In re Bisys Securities Litig., and In re AOL Time Warner, Inc. Securities & ERISA Litig., which held that permitting amendment after discovery would defeat the PSLRA’s “policy” of requiring a complaint to pass muster before permitting discovery. 104 I believe that these courts mistake the means of accomplishing the PSLRA’s policies with the PSLRA’s policies themselves. The discovery stay is merely the means of accomplishing the policy goals of preventing fishing-expedition and extortionate discovery. Therefore, the question is whether allowing post-discovery amendment contravenes those policy goals, not whether it allows a plaintiff to engage in discovery before pleading a claim. As discussed above, post-discovery amendment does not interfere with the PSLRA’s policy goals to such a degree as to merit rewriting the statute. The PSLRA was enacted to combat certain perceived abuses, not to insulate defendants from any liability for fraud, 105 interpreting the PSLRA to prohibit amendment if a plaintiff uncovers evidence of additional securities violations during the course of permissible discovery would do just that.

IV. Conclusion

In closing, I hope that this essay will help guide litigants and courts as they seek to apply the PSLRA discovery stay in complex litigation. To be sure, this essay does not answer all of the potential issues that may arise in this context. Other open questions include the extent to which the PSLRA discovery stay applies to concurrent derivative litigation, 106 whether the stay applies during the pendency of motions to reconsider rulings on motions to dismiss, 107 and the contours of the “undue prejudice” exception to the discovery stay. 108 I hope that this essay will encourage other scholars and commentators to delve into this messy and unsettled, yet frequently outcome-determinative, area of securities litigation.

NOTES:

2 id.

258 © 2014 Thomson Reuters • Securities Regulation Law Journal • Fall 2014
42:3 2014] THE PSLRA DISCOVERY STAY MEETS COMPLEX LITIGATION


42 U.S.C.A. §§ 77z-l(b)(2) to (3), § 78u-4(b)(3)(C).


43 U.S.C.A. § 78u-4(b)(1) to (2); see Rosenthal, Staying Discovery in Federal Securities Lawsuits, 13 Prac. Litigator 7, 8 (2002) (citing authority for the proposition that the discovery stay and the heightened pleading standards work together as a "Catch-22").


A Fed. Prac. & Proc. Civ. § 1301 (3d ed. 2014) ("The rule recognizes that any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable. It would be unworkable because of the difficulty inherent in describing a state of mind with any degree of exactitude and because of the complexity and prolixity that any attempt to support these averments by setting forth all the evidence on which they are based would introduce into the pleadings."); Conn. Nat'l Bank v. Fluor Corp., 808 F.2d 957, 962 (2d Cir. 1987) ("The absence of a requirement that scienter be alleged with 'great specificity' is based on the premise that a plaintiff realistically cannot be expected to plead a defendant's actual state of mind.").


Mark, Confidential Witnesses in Securities Litigation, 36 J. Corp. L. 551, 554 (2011) ("The combination of the PSLRA's strict pleading requirements and discovery stay explains why the use of confidential witnesses has become so common. Plaintiffs must plead their cases with particularity, but they are generally barred from obtaining discovery to bolster their allegations until after all motions to dismiss have been decided. The result has been almost universal reliance by plaintiffs in class action securities complaints on information provided by confidential witnesses."); Kaufman and Wunderlich, Resolving the Continuing Controversy Regarding Confidential Informants in Private Securities Fraud Litigation, 19 Cornell J.L. & Pub. Poly 687, 689-40 (2010) ("Quite often, to meet the PSLRA's heightened pleading requirements, plaintiffs rely on statements from confidential sources. Confidential sources can serve to 'bridge the gap' between vague allegations of a defendant's access to information and an inference of knowledge.").

H.R. Conf. Rep. No. 104-369, at *37 ("For example, the terminal illness of an important witness might require the deposition of the witness prior to the ruling on the motion to dismiss.").

SG Cowen Sec. Corp. v. U.S. Dist. Ct. for the N.D. of Cal., 189 F.3d 909, 912-13 (8th Cir. 1999) ("Thus, as a matter of law, failure to muster facts sufficient to meet the Act's pleading requirements cannot constitute the requisite 'undue prejudice' to the plaintiff justifying a lift of the discovery stay under § 78u-4(b)(3)(B). To so hold, the plaintiff would contravene the purpose of the Act's heightened pleading standards."); In re Finnsar Corp. Deriv. Litig., No. C-06-07660, 2012 WL 609835, at *3 (N.D. Cal. Feb. 9, 2012) ("The delay of several months and the expense to Finnsar associated with these motions is not undue prejudice within the meaning of § 78u-4(b)(3)(B). The delay faced by plaintiffs is inherent in every PSLRA-mandated stay."); In re Kuriakose v. Fed'l Home Loan Mortg. Co., 674 F. Supp. 2d 483 (S.D.N.Y. Aug. 8, 2006) ("The discrepancy between PSLRA actions and other actions is not evident (quoting Kuriakose v. Fed'l Home Loan Mortg. Co., 674 F. Supp. 2d 483 (S.D.N.Y. Aug. 8, 2006)). In re CFS-Related Sec. actions should be treated differently than other actions."); In re: CFS-Related Sec.
Fraud Litig., 179 F. Supp. 2d 1260, 1265 (N.D. Okl. Dec. 27, 2001) ("Plaintiffs have failed to articulate any prejudice which is not inherent in the fact that the PSLRA imposes a stay in this case.").

15 In re Tyco Int'l, Ltd. Sec. Litig., No. 00-MD-1335, 2000 WL 3365414, at *3 (D.N.H. July 27, 2000) ("I conclude that the service of a limited number of particularized preservation subpoenas on third parties is consistent with the language and purpose of the PSLRA."); In re Carnegie Int'l Corp. Sec. Litig., 107 F. Supp. 2d 676, 678 (D. Md. 2000) ("Since the PSLRA provision on preservation of evidence during a stay only expressly applies to a named party, the court orders, as Grant Thornton offered to do, that Grant Thornton preserve all documents subject to Carnegie's subpoena . . ."); Neibert v. Monarch Dental Corp., No. 3:99-CV-762, 1999 WL 33290643, at *1 (N.D. Tex. Oct. 20, 1999) ("A subpoena which does not demand compliance by a date certain is not inimical to the policy reasons for the discovery bar imposed by the Reform Act, in my opinion."); In re Grand Casinos, Inc. Sec. Litig., 988 F. Supp. 1270, 1272 (D. Minn. 1997) ("[T]he Plaintiffs' service of Subpoenas duces tecum would further Congress' intent by subjecting relevant evidence to a stay pursuant to the Motion to Dismiss by a way that would warrant an enforcement of the Subpoenas."); Novak v. Kasaks, No. 96-CIV-3073, 1996 WL 467584, at *2 (S.D.N.Y. Aug. 16, 1996) ("Plaintiffs' concern that non-parties may not consider themselves under an obligation to retain possession of relevant documents if discovery is stayed is easily remedied. The Court hereby orders that all non-parties upon whom subpoenas have been served in this action are to preserve all documents and other materials responsive to such subpoenas subject to further order of the Court."); but see Asset Value Fund Ltd. P'ship v. Find/ SVP, Inc., No. 97-CIV-3977, 1997 WL 588885, at *1 (S.D.N.Y. Sept. 19, 1997) (denying the plaintiffs' request for a preservation order but noting that "knowing destruction or disposal of evidence in the face of prospective litigation may constitute a criminal offense" under 18 U.S.C. § 1503).

16 In re WorldCom, Inc. Sec. Litig., 234 F. Supp. 2d 301, 305–06 (S.D.N.Y. 2002) (lifting stay to allow plaintiffs to review documents provided in connection with Department of Justice, Securities and Exchange Commission, and internal investigations); see also In re Metropolitan Sec. Litig., No. CV-04-25, 2005 WL 940898, at *3 (E.D. Wash. March 31, 2005) (lifting stay to allow plaintiffs to review documents provided to the Examiner in Bankruptcy Court); In re Royal Ahold N.V. Sec. & ERISA Litig., 220 F.R.D. 246, 251–55 (D. Md. 2004) (lifting stay to allow plaintiffs to review documents provided in connection with governmental, regulatory, or self-regulatory agency investigations).


18 Opposition to Defendants' Motion to Stay Discovery at 4, In re LDK Solar Sec. Litig., No. C-07-05182-WHA (C.D. Cal. filed Aug. 21, 2008).

19 E.g., SG Cowen Sec. Corp., 189 F.3d 909 (holding that the district court's order permitting limited discovery under the "undue prejudice" exception to the PSLRA discovery stay was "clear error" and granting a writ of mandamus vacating a district court's order); Medhekar v. U.S. Dist. Ct. for the N.D. Cal., 99 F.3d 325 (9th Cir. 1996) (granting a writ of mandamus directing the district court to stay the initial disclosures requirement pursuant to the PSLRA discovery stay).
A discovery order can always be unusual circumstances. When a statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. (W)hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. 


Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (“[W]hen [a] statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”); Consumer Product Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”).

Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005) (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”).


A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) . . . (“The parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).”); Fed. R. Civ. P. 16(b)(2) (“The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.”).

A party must make the initial disclosures at or within 14 days after the parties’ Rule 26(f) conference . . . (“A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined . . . ”); Fed. R. Civ. P. 33(b)(2) (“The responding party must serve its answers and any objections within 30 days after being served with the interrogatories.”); Fed. R. Civ. P. 34(b)(2)(D) (“The party to whom the request for documents is directed must respond within 30 days after being served.”); Fed. R. Civ. P. 36(a)(3) (“A matter is admitted unless, within 30 days after being served with a request for admission, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.”) or objection addressed to the matter and signed by the party or its attorney.

A defendant must serve an answer . . . within 21 days after being served with the summons and complaint.”); Fed. R. Civ. P. 12(b) (“A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.”).

E.g., Docket Sheet, In re Longtop Fin’l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y.) (showing that defendant Palaschuk’s motion to dismiss was denied on June 29, 2012; the discovery plan was issued on July 16, 2012; and defendant Deloitte Touche Tohmatsu CPA was served on August 3, 2012); Transcript of January 8, 2013 Hearing at 10, In re Longtop Fin’l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y.)
filed Apr. 5, 2013) (explaining that defendant Palaschuk was served with a document request after defendant Deloitte Touche Tohmatsu CPA had been served but before it had filed a motion to dismiss).

29In Re: Trump Hotel Shareholder Deriv. Litig., No. 96-CIV-7820, 1997 WL 442135, at *2 (S.D.N.Y. Aug. 5, 1997) ("Although plaintiffs are correct that no dismissal motion has yet been filed, this appears to be solely the result of the schedule to which the parties have agreed. In this case, the parties, to their credit, have agreed to a schedule for the filing of a third amended complaint and a moderately extended period within which a dismissal motion would be served. In the ordinary action, responses to discovery requests served with a complaint would not be due until the same time an answer or a Rule 12 motion were due. Thus, in the ordinary action, neither discovery itself nor the Section 21D(b) stay would even be an issue until an answer or dismissal motion were due. No logical reason has been proffered why this chronology should change simply because the parties have amicably worked out a schedule for the service of an amended pleading and dismissal motion.").


E.g., Civil Minutes-General at 3, Petrie v. Elec. Game Card, Inc., No. 8:10-CV-252 (C.D. Cal. filed March 6, 2012) ("The PSLRA discovery stay takes effect upon a defendant’s announcement of his intent to file a motion to dismiss."); In re Cardinal Health, Inc. Sec. Litig., 365 F. Supp. 2d 866, 870 n.3 (S.D. Ohio 2005) (quoting In re DPL Inc., Sec. Litig., 247 F. Supp. 2d 946, 947 n.4 (N.D. Ohio 2003)) ("This stay applies not only where the motion to dismiss has actually been filed, but where it is anticipated that such a motion will be filed in the future."); In re FirstEnergy Corp. Sec. Litig., 229 F.R.D. 541, 543-44 (N.D. Ohio 2004) ("Although FirstEnergy has not yet filed its motion to dismiss, it has advised the Court of its intent to do so after Lead Plaintiff files its consolidated complaint. In such an instance, the Court finds that the PSLRA’s discovery stay provision applies."); In re: JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1133 (N.D. Cal. 2002) (imposing the stay before the motion to dismiss had been filed but after the defendant’s counsel indicated that the defendant would likely file a motion to dismiss).

32Dartley v. Ergobilt, Inc., No. 3:98-CV-1442, 1998 WL 792500, at *2 (N.D. Tex. Nov. 4, 1998) (reviewing a magistrate court’s ruling to allow discovery to determine if it was “clearly erroneous or contrary to law”) ("As Magistrate Judge Sanderson concluded, however, under the PSLRA, discovery must be stayed only when a motion to dismiss has actually been filed. There is no motion to dismiss currently pending before this court."); Novak, 1996 WL 467534, at *1 (S.D.N.Y. Aug. 16, 1996) ("On May 15, 1996, certain defendants requested a stay of discovery in the anticipation that motions to dismiss would be filed. The Court denied the request in a memo endorsed order dated May 23, 1996, stating that ‘[t]he request to stay discovery at this stage of the proceedings, prior to the filing of the motion to dismiss is denied, with leave to renew upon the filing of such motion.’").

33In re Carnegie Int'l Corp. Sec. Litig., 107 F. Supp. 2d at 682.

34Id. at 683.

35Accord Civil Minutes-General at 3, Petrie v. Elec. Game Card, Inc., No. 8:10-CV-252 (C.D. Cal. filed March 6, 2012) ("This rule is logical, as the discovery stay is mandated by the PSLRA to remain in effect until the court upholds the sufficiency of the complaint. If plaintiffs are on notice that defendants plan to challenge the sufficiency of the complaint, it is axiomatic that the complaint’s sufficiency has not yet been upheld by the court.").
Eg., Sedona Corp. v. Ladenburg Thalmann, No. 03-CIV-3120, 2005 WL 2647945, at *1 (S.D.N.Y. Oct. 14, 2005) (explaining that the court granted in part with leave to amend and denied in part defendants’ motion to dismiss, that the plaintiffs have expressed the intention to file an amended complaint, and that the defendants expect to move to dismiss the amended complaint).

Eg., Monk v. Johnson & Johnson, No. 10-4841, Memorandum Opinion and Order, slip op. at 4 (D.N.J. February 5, 2013) (citing the “clear requirements of the PSLRA stay provisions” to extend the discovery stay through the second motion to dismiss; Posbre v. Las Vegas Sands Corp., No. 2:10-CV-765, 2012 WL 5879783, at *3 (D. Nev. Nov. 20, 2012) (“[T]his Court agrees with those decisions which hold that 15 U.S.C. § 78u-4(b)(3)(B) is unambiguous and requires that discovery be stayed when any motion to dismiss is pending . . .”); In re Smith Barney Transfer Agent Litig., No. 05-CIV-7583, 2012 WL 1438241, at *2 (S.D.N.Y. Apr. 25, 2012) (“To be sure, there are compelling policy arguments for permitting discovery to resume after some claims have survived an earlier motion to dismiss. But this Court ‘is not at liberty to rewrite the statute to reflect a meaning [it] deem[s] more desirable.’ Accordingly, the PSLRA discovery stay applies pending the resolution of Defendants’ motions to dismiss the Fourth Consolidated and Amended Class Action Complaint.”) (citation omitted); McGuire v. Dendreon Corp., No. C07-800, 2009 WL 666863, at *1 (March 11, 2009) (“Because a motion to dismiss the Second Amended Complaint is pending, the Court hereby GRANTS Defendant’s motion for relief from the January 12 Order and extends the PSLRA discovery stay.”); Selbst v. McDonald’s Corp., No. 04-C-2422, 2006 WL 566460, at *1 (N.D. Ill. March 1, 2006) (“Plaintiffs argue otherwise, suggesting that this provision should not apply to seriatim motions to dismiss. However, that position has been rejected, at least where-as here-the second motion to dismiss is directed to an amended complaint.”); Sedona Corp., 2005 WL 2647945, at *3 (“[T]he stay would apply where there is a pending motion to dismiss brought by either one or all of the defendants, and regardless of whether the motion is brought initially to dismiss a complaint, or subsequently, in response to an amended complaint.”); but see Rosenbaum & Co. v. H.J. Myers & Co., No. CIV.A. 97-824, 1997 WL 689288, at *5 (E.D. Pa. Oct. 9, 1997) (granting the motion to dismiss in part without prejudice, denying it in part, lifting the discovery stay, and ordering that “discovery will proceed despite the tendency of an amended complaint being filed”).


40 Id. at 256.


42 Posbre, 2012 WL 5879783, at *3 (“[T]his Court agrees with those decisions which hold that 15 U.S.C. § 78u-4(b)(3)(B) is unambiguous and requires that discovery be stayed when any motion to dismiss is pending . . .”); In re Smith Barney Transfer Agent Litig., 2012 WL 1438241, at *2 (“In view of the PSLRA’s expansive language to ‘the ‘weight of authority’ holds that discovery must be staying pending all motions to ‘the willingness of authority’ holds that discovery must be staying pending all motions to be stayed when any motion to dismiss is pending . . .”); McGuire, 2009 WL 666863, at *1 (“The would be unfaithful to the statutory text.”); Selbst, 2006 WL 566450, at *1 (“On its face, the phrase ‘any motion to pending.’”); Selbst, 2006 WL 566450, at *1 (quoting Ali v. Fed’l Bureau of Prisons, 552 U.S. 214, 219 (2008)).
455C Fed. Prac. & Proc. Civ. § 1368 (3d ed. 2014) (“A significant number of federal courts have held that the standard to be applied on a Rule 12(c) motion based on all the pleadings is identical to that used on a Rule 12(b)(6) motion based solely on the complaint. Because of the similarity between the Rule 12(c) and Rule 12(b) standards, courts typically will construe a premature Rule 12(c) motions as if it were brought under Rule 12(b), and a late Rule 12(b) motion, or a Rule 12(b) motion that implicates affirmative defenses, as if it were brought under Rule 12(c).”).
46E.g., Gardner v. Major Auto. Cos., No. 11-CV-1664, 2012 WL 1230135, at *6 (E.D.N.Y. Apr. 12, 2012) (“The Court grants defendants’ motion to stay discovery pending the outcome of their motion for judgment on the pleadings.; Civil Minster-General at 4, Petrie v. Electr. Game Card, Inc., No. 8:10-CV-252 (C.D. Cal. filed March 6, 2012) (“By that date, however, Plaintiffs were already on notice that both Cole and Boyne intended to file a motion for judgment on the pleadings and motion to dismiss, respectively. Plaintiffs were thus on notice that the sufficiency of the complaint had been called into question, such that Plaintiffs should have immediately ceased all discovery.”); Lewis v. Straka, No. 05-C-1008, 2007 WL 2332421, at *4 (E.D. Wis. Aug. 13, 2007) (“In closing, I note that there is yet another motion for judgment on the pleadings pending, which is not yet fully briefed. The stay on discovery will remain in place until such motion is resolved.”); Brown v. Kinross Gold U.S.A., Inc., No. 2:02-CV-605, Order, slip op. at 3 (D. Nev. Sept. 23, 2003) (“The Court has already stayed discovery based on Defendants’ Rule 12(c) motion.”).
47Gardner, 2012 WL 1230135, at *4 (internal citations omitted).
50Fed. R. Civ. P. 12(b) (motions to dismiss); Fed. R. Civ. P. 12(c) (motions for judgment on the pleadings); Fed. R. Civ. P. 50 (motions for judgment as a matter of law); Fed. R. Civ. P. 56 (a) to (c) (motions for summary judgment).
51Contra Gardner, 2012 WL 1230135, at *3 (“Contrary to the premise of plaintiffs’ argument, the plain language of the PSLRA does not limit the scope of the automatic stay requirement to any particular species of motion to dismiss . . . .”).
52Fed. R. Civ. P. 12(c).
53See Monster Cable Prods. v. Dolby Labs. Lic’g Corp., No. 12-CV-2488, 2012 WL 3647705, at *4 (N.D. Cal. Aug. 22, 2012) (“Although Rule 12(c) does not so specify, courts generally have discretion to grant leave to amend, particularly where it appears a claim may be pleaded.”); Tech. Lic’g Corp. v. Technicolor USA, Inc., No. 2:03-1329, 2010 WL 4070208, at *3 (E.D. Cal. Oct. 18, 2010) (“A court may grant leave to amend in response to a Rule 12(c) motion if the pleadings can be cured by further factual enhancement.”).
54See Shannon, Action Is An Action Is An Action Is An Action Is An Action, 77 Wash. L. Rev. 65, 134 (2002) (“On the other hand, the granting of other dispositive motions (like trials) do result in final adjudications of the underlying claims. Accordingly, such orders, being ‘on the merits,’ are always entered with prejudice, and have preclusive effect with respect to later claims of a similar nature. Examples include judgments on the pleadings, default judgments, summary judgments, judgments as a matter of law, and judgments on partial findings.”); 5C Fed. Prac. & Proc. Civ. § 1372 (3d ed. 2014) (“A grant of a motion under Federal Rule 12(c) for judgment on the
pleadings constitutes a final judgment on the merits of the controversy within the
meaning of Rule 54.

58 In re Salomon Analyst Litig., 373 F. Supp. 2d at 255.


60 E.g., Docket Sheet, In re Longtop Fin'l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y.) (showing that defendant Palaschuk's motion to dismiss was denied on
June 29, 2012; the discovery plan was issued on July 16, 2012; defendant Deloitte
Touche Tohmatsu CPA was served on August 3, 2012; and defendant Deloitte Touche
Tohmatsu CPA filed a motion to dismiss on September 10, 2012).

61 Transcript of January 8, 2013 Hearing at 21, Longtop Fin'l Techs. Ltd. Sec.
Litig., No. 11-CV-3658 (S.D.N.Y. filed Apr. 5, 2013) (argument by defendant's counsel)
("If, for example, there were a situation whereby there were multiple defendants or
groups of defendants all sued at the same time and the Court decides to address mo-
tions to dismiss seriatim and deal with the company first and its management, I'm
going to deal with outside directors, it's almost that situation where why should one
party, because its motion to dismiss comes later, why should the other parties be al-
lowed to engage in discovery? And it's a theoretical issue under the statute, and it's,
we think, the letter and the spirit of the statute.").

62 E.g., In re CFS-Related Sec. Fraud Litig., 179 F. Supp. 2d at 1262-63 (2001)
(explaining that defendant CSI answered the complaint and that the individual
defendants filed motions to dismiss).

63 E.g., In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d at 102 (explaining
that the court had recently denied several defendants' motions to dismiss and that
several other defendants' motions to dismiss remained pending).

64 In re Refco, Inc. Sec. Litig., 2006 WL 2337212, at *4 ("In addition to arguing for
a complete lifting of the stay, plaintiffs advance a secondary position—that the stay
should at a minimum be lifted 'as to those Defendants who have answered the
Amended Complaint or have not moved to dismiss some of the claims asserted against
them.' While there is some case law in support of plaintiffs' position, the weight of
authority appears to be to the contrary.") (citations omitted).

65 Sedona Corp., 2005 WL 2647945, at *3 ("[T]he stay would apply where there is
a pending motion to dismiss brought by either one or all of the defendants, and
regardless of whether the motion is brought initially to dismiss a complaint, or
subsequently, in response to an amended complaint."); In re: CFS-Related Sec. Fraud
Litig., 179 F. Supp. 2d at 1263 ("As long as any defendant has filed a motion to
dismiss claims arising under Chapter 2B of the 1934 Securities Act, the PSLRA stays
all discovery,' even discovery against answering, non-moving defendants.").


67 Swartz, 2008 WL 534535, at *1 ("[U]nder the plain language of the Act, the
automatic stay is triggered as to all defendants if any one of them moves to dismiss
the federal securities claims."); In re: CFS-Related Sec. Fraud Litig., 179 F. Supp. 2d
at 1263 ("Plaintiffs suggest that because CSI has not filed a motion to dismiss, the
PSLRA's discovery stay does not apply to CSI, and discovery should proceed as to
§ 78u-4(b)(3)(B)'s language."); see also In re Finisar Corp. Deriv. Litig., 2012 WL 699835, at *2 ("The court has not yet passed on the sufficiency
of plaintiffs' claims against the individual defendants . . . The clear language of the

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PSLRA demonstrates that the discovery stay is to remain in effect during the pendency of those motions . . .”.

65 In re: CFS-Related Sec. Fraud Litig., 179 F. Supp. 2d at 1263; see also Union Central Life Ins. Co. v. Ally Fin’l, Inc., No. 11-CIV-2890, 2012 WL 3553052, at *3 (S.D.N.Y. Aug. 17, 2012) (“For example, if document discovery went forward in this case with respect to only some defendants, the remaining defendants would likely be forced to revisit the same disputes later but would be ‘prejudiced by the inertia that sets in’ once determinations have been made in the initial round of discovery without their input. Because of this, permitting discovery to proceed with respect to UBS, Washington Mutual, and Morgan Stanley would prejudice the other defendants against whom the plaintiffs have raised Exchange Act claims by effectively depriving them of the PSLRA stay.”).

66 Transcript of January 8, 2013 Hearing at 36, Longtop Fin’l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y. filed Apr. 5, 2013) (“Anyway, I’m going to grant only a partial stay. The subpoena on the SEC will not be quashed and the request for information from the plaintiffs goes forward, but no depositions.”); Latham, 2010 WL 3294722, at *3 (allowing discovery to proceed as to defendants whose motions to dismiss were denied in part, even though another defendant’s motion to dismiss was pending); In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d at 102 (“After extensive briefing and a lengthy hearing, this Court recently denied motions to dismiss brought by four senior officer defendants in this proposed class action. Several other defendants’ motions to dismiss remain pending. Defendants now seek to stay discovery until all motions to dismiss are resolved. After reviewing the submissions, this Court DENIES defendants’ motions to stay discovery and orders that discovery may proceed against the senior officers.”).

67 Latham, 2010 WL 3294722, at *2 (“The moving defendants argue the statute is unambiguous, and the stay applies during the pendency of any motion to dismiss. This court disagrees.”); see also In re Global Crossing, Ltd. Sec. Litig., 322 F. Supp. 2d 319, 352 (S.D.N.Y. 2004) (“[This could mean that the stay would either automatically remain in place pending resolution of the balance of the multiple motions to dismiss brought by other defendants, or, at the other extreme, that the resolution of the motions above would moot plaintiffs’ motion by eliminating the necessity for the stay altogether. The Court need not resolve this ambiguity.”).

68 In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d at 105.

69 Transcript of January 8, 2013 Hearing at 21, Longtop Fin’l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y. filed Apr. 5, 2013) (“They didn’t get this discovery from you, and that’s all the PSLRA protects you against. It says discovery may not proceed against a defendant until that complaint has been vetted and they didn’t get it from you.”); Latham, 2010 WL 3294722, at *2 (D.S.C. Aug. 20, 2010) (“[The purpose of the statutory stay has been served in this case, and discovery should proceed as to defendants Signalfire, Inc., Harmison, Matthews, Scherne, Pickard, and Bunes. The complaint was filed nearly two years ago. The court’s September 4, 2009, order found the plaintiffs’ complaint is legally sufficient as to [these] defendants . . .”); In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d at 106 (“I conclude that allowing limited discovery to proceed against the four senior officers is consistent with the intent of the stay provision. Neither of the perceived abuses addressed by Congress is present in this situation.”).

70 Transcript of January 8, 2013 Hearing at 32, Longtop Fin’l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y. filed Apr. 5, 2013) (“If discovery is proceeding with another defendant that you’re not present at — so I’m putting depositions aside because that would be unfair, but if they’re exchanging documents back and forth,
how are you put to any expense, which is what the PSLRA was trying to protect you against..."

In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d at 109 (“Plaintiffs may proceed with the following discovery: 1) document requests and interrogatories upon any party with respect to which a motion to dismiss has been denied; and 2) document subpoenas upon non-parties, limited to issues relevant to the allegations in the class complaint against the senior officers. No depositions may be taken without permission of the Court.”); see also Brian Philip Murray, Lifting the PSLRA “Automatic Stay” of Discovery, 80 N.D. L. Rev. 405, 419–420 (2004) (“The situation where one party answers the complaint, making discovery inevitable, moots most of the concerns which motivated Congress to include the discovery stay in the PSLRA. In these circumstances, it is appropriate to lift the stay with regard to document discovery. This helps insure the speedy disposition of the case and imposes no unnecessary burden on the moving defendants. By limiting the discovery to documents, the moving defendant is protected from the potentially unnecessary cost of depositions of the answering parties.”).


Transcript of January 8, 2013 Hearing at 27, Longtop Fin’l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y. filed Apr. 5, 2013) (argument by plaintiffs’ counsel (“I canvassed my partners, in general, to say, Have you even amended using discovery to revive claims that have been dismissed, and they said, Yes, we do it all the time.”).

Fed. R. Civ. P. 15(a)(1) (“A party may amend its pleading once as a matter of course within...21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.”).


See 6 Fed. Prac. & Proc. Civ. § 1487 (3d ed. 2014) (“Perhaps the most important factor listed by the Court for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter a pleading. Conversely, if the court is persuaded that no prejudice will accrue, the amendment should be allowed. Thus, the facts of each case must be examined to determine whether the threat of prejudice is sufficient to justify denying leave to amend.”); e.g., In re Allstate Life Ins. Co. Litig., No. CV-09-8162, 2012 WL 176497, at *6 (D. Ariz. Jan. 23, 2012) (“In this case, however, Plaintiffs filed their proposed amendment shortly after the discovery period began and before the court-imposed deadline for amending pleadings of June 17, 2011. Moreover, Stern is already defending similar claims under state securities law and common law, and has already been participating in Plaintiffs’ depositions. Stern is not, therefore, unduly prejudiced by the proposed revision of Plaintiffs’ scienter allegations and the resulting revival of Plaintiffs’ § 10(b) claims.”).

Fed. R. Civ. P. 16(b)(3)(A) (“The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.”).


Fed. R. Civ. P. 54(b) (“When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there...
is no just reason for delay.”).

82 Id. (“Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.”); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 (1983) (stating that “every order short of a final decree is subject to reopening at the discretion of the district judge”).


84 Id.

85 E.g., In re Cornerstone Propane Partners, L.P. Sec. Litig., 416 F.Supp.2d 779, 790 (N.D.Cal.2005) (“Therefore, the court finds that the complaint does not satisfy the fraud or scienter components of the PSLRA against defendant Woods. The claim against Woods is dismissed without prejudice. If as a result of discovery, plaintiffs learn of facts that would support claims against Woods sufficient to meet the pleading requirements for fraud and scienter, they may attempt to amend the complaint at that time.”).


88 E.g., Transcript of January 8, 2013 Hearing at 19, Longtop Fin’l Techs. Ltd. Sec. Litig., No. 11-CV-3658 (S.D.N.Y. filed Apr. 5, 2013) (“What use can be made of that legitimately obtained discovery as to a completely different entity? And to think that you’re going to tie their hands and say because the PSLRA exists but the policy of it is not to put people to expense of defending a frivolous lawsuit, that would be the purpose of having a discovery stay, but that wasn’t the purpose here because the discovery was permitted as to Palaschuk. So there’s no policy reason not to use it.”); In re Constellation Energy Group, Inc. Sec. Litig., No. CCB-08-2854, 2012 WL 1067651, at *4 (March 28, 2012) (holding that the PSLRA did not prevent the plaintiffs from amending the complaint to re-assert claims that were previously dismissed without prejudice based on evidence obtained during discovery) (“Lead plaintiff has adequately explained the process by which the new evidence was produced during informal discovery, and the court is satisfied that the PSLRA does not prohibit an amended complaint based on the information defendant has produced.”); In re Allstate Life Ins. Co. Litig., 2012 WL 176497, at *6 (permitting the plaintiffs to amend the complaint based on evidence obtained during discovery to re-assert a claim against an existing defendant, where the claim had previously been dismissed without prejudice) (“Amendments to complaints are not, therefore, necessarily barred by the commencement of discovery.”); In re Retek Inc. Sec. Litig., No. 02-4209, 2007 WL 14352, at *3 (D. Minn. Jan. 3, 2007) (holding that the PSLRA does not prevent a plaintiff from amending their complaint to re-assert claims that were previously dismissed without prejudice) (“[T]he Court sees no reason to ignore the additional allegations on the negative trend allegations.”); In re S. Pacific Funding Corp. Sec. Litig., 83 F. Supp. 2d 1172, 1174–75 (D. Or. Dec. 7, 1999) (rejecting the defendants’ argument that allowing the plaintiffs to amend the complaint based on evidence obtained during discovery would interfere with the underlying purposes of the PSLRA).

Although no common, this procedure would be appropriate should discovery reveal evidence indicating that previously dismissed defendants were in fact involved in the alleged fraudulent conduct.”; Winer Family Trust v. Queen, 503 F.3d 319, 337 (3rd Cir. 2007) (“If a private securities case proceeds past the pleadings stage against a corporation and discovery reveals individual culpability, a plaintiff may seek permission to amend the complaint to assert claims against individual defendants.”) (citing Fed. R. Civ. P. 15).


Public Employees Retirement Ass’n, 305 Fed. Appx. 27704.

Miller v. Champion Enters., Inc., 346 F.3d 666, 691 (6th Cir. 2003) (“We think it is correct to interpret the PSLRA as restricting the ability of plaintiffs to amend their complaint, and thus as limiting the scope of Rule 15(a) of the Federal Rules of Civil Procedure. . . . We agree with the district court that the purpose of the PSLRA would be frustrated if district courts were required to allow repeated amendments to complaints filed under the PSLRA.”); In re NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1332–33 (3d Cir. 2002) (holding that the district court did not abuse its discretion when refusing to grant the plaintiffs leave to amend the complaint because the PSLRA limits the application of Rule 15(a) in securities fraud cases).

E.g., ACA Fin’l Guaranty Corp. v. Advest, Inc., 512 F.3d 46, 56–57 (1st Cir. 2008) (“To read the PSLRA to constrict Rule 15(a) would disturb the legislative balance struck by the Act. The number and nature of prior amendments to a complaint is relevant as to any motion for leave to amend. To the extent that Miller may embody a rule that the PSLRA modifies the operation of Rule 15(a), however, we disagree.”); Belizan v. Hershon, 493 F.3d 579, 584 (D.C. Cir. 2006) (“On the other hand, had the Congress wished to make dismissal with prejudice the norm, and to that extent supersede the ordinary application of Rule 15(a), we would expect the text of the PSLRA to so provide. Unable to derive any guidance from the PSLRA itself, we are governed simply by Rule 15(a), which, as we have observed, allows maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities,’”) (internal citations omitted); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (“Absent prejudice, or a strong showing of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend. . . . Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment. . . . Adherence to these principles is especially important in the context of the PSLRA.”).

Werner v. Werner, 267 F.3d 288, 297 (3d Cir. 2001) (“Although we are reluctant to allow amendment of a pleading at this stage of the proceedings, the plaintiffs were precluded from engaging in discovery in the District Court. Without discovery, the plaintiffs had no way to obtain the meeting minutes other than by happenstance. We will not add to the strict discovery restrictions in the Private Securities Litigation.
Reform Act ("PSLRA") by narrowly construing Rule 15 in this case, even at this late stage in the litigation. Given the high burdens the PSLRA placed on plaintiffs, justice and fairness require that the plaintiffs before us be allowed an opportunity to amend their complaint to include allegations relating to the newly discovered Board meeting minutes;"; see also Goldstein v. MCI WorldCom, 340 F.3d 238, 257–58 (5th Cir. 2003) ("The basis of the district court’s order is that, Rule 60(b) standards aside, our prior case law reads into the PSLRA a requirement that plaintiffs pursuing a securities action must always plead facts with the requisite particularity and specificity in the ‘beginning.’ We have never endorsed this proposition so broadly cast... Ultimately, we need not decide whether or to what extent new evidence, discovered after the dismissal of a complaint based on the plaintiff’s failure to satisfy the requirements of the PSLRA, can form a basis for the granting of a Rule 60(b)(2) motion.").

98 E.g., ACA Fin’l Guaranty Corp., 512 F.3d at 56 ("The text of the Act neither purports to affect Rule 15(a), nor does it require that all dismissals be with prejudice."); Belizan, 434 F.3d at 584 ("On the other hand, had the Congress wished to make dismissal with prejudice the norm, and to that extent supercede the ordinary application of Rule 15(a), we would expect the text of the PSLRA so to provide.") (internal citations omitted).


100 Id.

101 Id.

102 Accord In re Allstate Life Ins. Co. Litig., 2012 WL 176497, at *6 ("This [discovery stay] provision implies that securities actions are not to be used as fishing expeditions. It does not speak, however, to plaintiffs’ use of evidence obtained during subsequent good-faith discovery on other claims.").

103 In re Retek Inc. Sec. Litig., 2007 WL 14352, at *3 ("After the cost of discovery has been incurred, allowing plaintiffs to use the information produced to amend their complaint does not frustrate the policy underlying the Reform Act."); In re S. Pacific Funding Corp. Sec. Litig., 83 F. Supp. 2d at 1175 ("Further, I fail to see how the underlying purposes of the PSLRA would be served since discovery of the expense of discovery has already taken place. Thus, plaintiffs’ motion to file a fourth amended complaint and to supplement that amendment are GRANTED.").

104 Greebel, 182 F.R.D. at 376 ("The new law requires Plaintiffs to plead particular facts sufficient to show their case has merit before gaining unfettered access to Defendants’ files."); In re Bisys Sec. Litig., 496 F. Supp. 2d at 387 ("[T]he PSLRA erodes the party’s scienter prior to obtaining discovery."); aff’d sub nom Public Employees Retirement Ass’n of N.M., 305 Fed. Appx. 742, 2009 WL 27704; In re AOL Time Warner, MBSI to discover its way into a viable securities claim, the PSLRA stay provision would become meaningless and the Congressional intent of the statute vitiated.").


106 See Mustokoff, Shareholder Discovery, The PSLRA and SLUSA in Parallel Securities and Derivative Actions, 35 Sec. Reg. L.J. 143, 163 (2007) ("Clearly, the courts are in disagreement as to whether the PSLRA and SLUSA and the federal policies against frivolous securities litigation underlying those two statutes trump the discovery rights of plaintiffs in related, state law actions.").

107 E.g., Powers v. Eichen, 961 F. Supp. 2d 233, 236 (S.D. Cal. 1997) (applying the discovery stay during the pendency of a motion to reconsider the court’s partial denial
of a motion to dismiss) ("If the Reform Act was read more narrowly, defendants would be afforded very little of the protection that Congress intended in passing the Reform Act.").

106 C. Sec. & Fed. Corp. Law § 16:123 (2d ed. 2014) ("The fact remains that what is regarded as ‘undue prejudice’ is likely to be judge specific."); Rosenthal, supra note 7, at 10 ("Few appellate courts have addressed the ‘undue prejudice’ standard. Plaintiffs' lawyers therefore can and should be expected to make creative arguments that the courts will address on a case-by-case basis.").