

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re LEHMAN BROTHERS SECURITIES  
AND ERISA LITIGATION

This Document Applies To:

*In re Lehman Brothers Equity/Debt  
Securities Litigation, 08-CV-5523-LAK*

Case No. 09-MD-2017 (LAK)

ECF CASE

**LEAD PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR  
MOTION FOR LIMITED RELIEF FROM THE PSLRA DISCOVERY STAY**

Lead Plaintiffs respectfully submit this reply memorandum in support of their motion for partial modification of the discovery stay imposed by the Private Securities Litigation Reform Act of 1995 (“PSLRA”).

**I. INTRODUCTION**

As Lead Plaintiffs summarized in their opening papers, numerous criminal, civil, and regulatory investigations or litigations are continuing, all focused on the conduct at Lehman prior to its bankruptcy filing. While Lead Plaintiffs seek to recover for a class of investors harmed by misconduct at Lehman, they remain the only parties prevented by the PSLRA from accessing materials produced in these parallel proceedings. The PSLRA expressly provides an avenue for relief, however, and Lead Plaintiffs seek only to obtain copies of materials already gathered and produced in parallel proceedings. This relief is appropriate for several reasons.

First, as an initial matter, neither of the purposes of the PSLRA – preventing coercive “strike suits” and preventing discovery “fishing expeditions” to locate a new and viable claim – would be affected by the requested relief here, and Defendants do not argue to the contrary. Second, Lead Plaintiffs and the class they represent are at a severe disadvantage in forming their litigation and settlement strategy in a complex and constantly evolving landscape. Contrary to Defendants’ mischaracterizations, under the circumstances present here – a massive bankruptcy, numerous parallel proceedings, and settlements and potential settlements – courts recognize that the same relief requested by Lead Plaintiffs is appropriate to prevent undue prejudice. Third, granting the limited relief would also ensure that critical evidence is preserved, a legitimate concern in light of Lehman’s massive bankruptcy, which is in a liquidation mode. Finally, as other courts have concluded, a request limited to documents already gathered and produced to others is sufficiently “particularized” for purposes of the PSLRA.

In short, for the reasons stated below and in their opening papers, Lead Plaintiffs respectfully submit that the Court should grant Lead Plaintiffs' requested relief.

## **II. ARGUMENT**

### **A. Partial Modification Of The PSLRA Discovery Stay Would Not Frustrate The Goals Of The Stay**

The PSLRA discovery stay has two purposes: (1) to prevent plaintiffs from “find[ing] during discovery some sustainable claim not alleged in the complaint”; and (2) to prevent coercive settlement of otherwise frivolous cases merely due to the high cost of discovery. *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 305 (S.D.N.Y. 2002) (internal citations omitted). Courts “have modified the discovery stay in other securities class actions involving concurrent investigations by governmental agencies when doing so would not frustrate Congress’ purposes in enacting the PSLRA.” *In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004) (collecting cases).

Notably, Defendants do not – and cannot – argue that Lead Plaintiffs’ requested modification would frustrate either of the goals of the discovery stay. As described in Lead Plaintiffs’ moving papers, Lead Plaintiffs filed a comprehensive complaint following months of extensive investigation. Further, briefing on Defendants’ motions to dismiss is complete. Thus, this is not a case where Lead Plaintiffs seek discovery merely to locate claims not asserted in their complaint or seek information to supplement their oppositions to motions to dismiss. *Cf. In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, No. 1500, 02 Civ. 5575 (SWK), 2003 WL 21729842, at \*1 (S.D.N.Y. July 25, 2003) (“Nor can it be assured that plaintiffs will not attempt to use the discovery materials in opposition to the recently filed motion [to dismiss].”).

Similarly, a review of Lead Plaintiffs’ detailed complaint reveals that the lawsuit is meritorious, and access to materials already gathered and produced to others would place at most

a negligible burden on the producing parties. Accordingly, absent any meaningful burden caused by Lead Plaintiffs' request, there is no concern that a party may be forced to settle an otherwise frivolous suit simply because of the high cost of discovery. *See, e.g., In re Delphi Corp. Sec., Deriv. & "ERISA" Litig.*, No. 05-MD-1725 (GER), 2007 WL 518626, at \*8 (E.D. Mich. Feb. 15, 2007) ("[M]aintaining the discovery stay as to materials already provided to the federal authorities and to the Unsecured Creditors Committee does not further the policies behind the PLSRA."); *In re FirstEnergy Corp. Sec. Litig.*, 229 F.R.D. 541, 545 (N.D. Ohio 2004) (same).

Because, as Defendants concede, partial modification of the stay would frustrate neither of the statute's purposes, modification is appropriate under the circumstances described below.

**B. Lead Plaintiffs Will Suffer Undue Prejudice Absent Limited Relief From The PSLRA Stay**

The PSLRA provides that courts may grant stay relief when needed to prevent undue prejudice. *See* 15 U.S.C. § 78u-4(b)(3)(B). While Defendants attempt to compare this action to cases in which courts "repeatedly" denied motions for stay relief, Defendants ignore that the facts and circumstances here are unique and bear no resemblance to the facts in those matters. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Modify the PSLRA Discovery Stay ("Defs.' Br.") at 7.

Here, Lehman and its affiliated debtors are in the midst of the largest bankruptcy in the nation's history. Civil, criminal, and regulatory investigations and proceedings are moving ahead, and scrutiny of the conduct at Lehman leading up to its bankruptcy filing continues. Interested parties in other actions are able to pursue remedies against common defendants and seek recovery from limited sources. Further, as Defendants concede, there has already been one settlement of a related action. Defs.' Br. at 7. While Defendants provide no information on settlement discussions in other civil suits brought by private plaintiffs, undoubtedly such

discussions are ongoing. At the same time, Lead Plaintiffs are forced to remain in the dark concerning information available to others as they plan their litigation and settlement strategies. Under these conditions, courts recognize that relief from the stay for access to materials already produced in other proceedings is appropriate to prevent prejudice to Lead Plaintiffs and the class they represent. *See, e.g., WorldCom*, 234 F. Supp. 2d at 306; *Delphi*, 2007 WL 518626, at \*6-8; *In re Enron Corp. Sec., Deriv. & "ERISA" Litig.*, 2002 WL 31845114, at \*1-2 (S.D. Tex. Aug. 16, 2002).

The cases that Defendants cite did not involve the convergence of circumstances present here, and, thus, are readily distinguishable. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 129, 130-31 (S.D.N.Y. 2003) (contrasting with *WorldCom* and noting lack of bankruptcy or settlement discussions); *In re Smith Barney Transfer Agent Litig.*, No. 05 Civ. 7583 (WHP), 2006 WL 1738078, at \*2 (S.D.N.Y. June 26, 2006) (noting that defendant was solvent and distinguishing from cases involving bankruptcy proceedings and settlement discussions, such as *WorldCom*); *In re AOL Time Warner*, 2003 WL 21729842, at \*1 (same); *Rampersad v. Deutsche Bank Sec. Inc.*, 381 F. Supp. 2d 131, 133-34 (S.D.N.Y. 2003) (declining to lift stay so plaintiff could obtain information to respond to motion to dismiss; noting that none of the conditions in *WorldCom* were present; and stating that in *WorldCom* and similar cases, the courts determined that plaintiffs were not engaged in fishing expeditions or strike suits).<sup>1</sup> The courts in those cases highlighted, for example, the lack of bankruptcy proceedings, parallel proceedings and productions, or settlement discussions or agreements. Thus, those cases did not involve the facts present here, as the threat of prejudice to the securities plaintiffs was non-

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<sup>1</sup> For similar reasons, Defendants' October 28, 2009 notice of supplemental authority, attaching *Anwar v. Fairfield Greenwich Ltd.*, 09 Civ. 0118 (VM) (THK) (slip op.) (S.D.N.Y. Oct. 27, 2009), has no applicability. Unlike here, the *Anwar* court noted that plaintiffs were likely seeking an "end run" around the PSLRA discovery stay and stated that the circumstances requiring stay relief in *WorldCom* (and in this case) were not present. *See id.* at ¶¶3, 11.

existent or merely speculative. *See, e.g., Delphi*, 2007 WL 518626, at \*7 (“It was precisely because the defendants in *Enron* and *WorldCom* were bankrupt and subject to other civil lawsuits that a partial lifting of the PSLRA stay was necessary ‘to prevent the securities plaintiffs from being left with nothing if their litigation did not keep pace with the bankruptcy and other proceedings.’”); *cf. In re Refco Inc. Sec. Litig.*, No. 05 Civ. 8626 (GEL), 2006 WL 2337212, at \*2-3 (declining to lift stay where plaintiff negotiated settlement after seeking relief and noting that prejudice, at least at time of decision, was speculative and contingent on future events).

**C. Partially Lifting The Stay Will Ensure That Evidence Is Preserved**

In addition to preventing Lead Plaintiffs from suffering undue prejudice, granting the requested relief will ensure that evidence at the heart of Lead Plaintiffs’ claims is preserved. Given that Lehman and affiliated debtors are in the midst of the largest bankruptcy in history, concerns over lost evidence are certainly warranted. *See, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246, 251 (D. Md. 2004) (corporate reorganization created reasonable concern that documents might be lost despite best efforts). Further, even though some materials are in the hands of government regulators and presumably more secure, Lehman’s wind-down and liquidation raise significant questions over evidence preservation and undoubtedly “add urgency to the discovery timetable.” *Id.* The same concerns expressed by the court in *Royal Ahold* are present here:

[D]iscovery of the previously produced documents, which are likely to comprise the most critical evidence in the case, could help the plaintiffs identify other specific materials that may be at risk of loss. Faced with a shifting corporate landscape and concerns about evidentiary loss that are by no means “wholly speculative,” *CFS-Related Sec. Fraud Litig.*, 179 F. Supp. 2d 1260, 1265 (N.D. Okl. 2001), the plaintiffs are not required to rely on the assurances of counsel that relevant evidence will be preserved.

*Id.* In sum, the need to preserve evidence adds further support for granting Lead Plaintiffs’ request for limited stay relief.

**D. Partially Lifting The Stay Will Impose  
Minimal Burden On Lehman Brothers Holdings Inc.**

Lehman Brothers Holdings Inc. (“LBHI”) and the Trustee in the liquidation proceedings of Lehman Brothers Inc. under the Securities Investment Protection Act (“SIPA Trustee”) submitted letters to the Court on October 27, 2009 indicating that Lead Plaintiffs’ request should be denied because, they say, modifying the PSLRA stay would impose a severe burden on the respective estates.

With regard to LBHI, its objection relies entirely on the false premise that it will need to re-review – for privilege and relevance – materials that it has already produced to parties in parallel proceedings. LBHI fails to explain, however, why it cannot make identical productions on the same terms (*e.g.*, under a claw-back provision) to Lead Plaintiffs or why it needs to conduct an additional review for relevance. There is no need for any additional review because LBHI can simply duplicate productions already made, and LBHI fails to explain why it would face *any* burden if the Court grants relief.<sup>2</sup> Additionally, as indicated in their opening brief, Lead Plaintiffs filed a motion before the bankruptcy court on October 29, 2009 seeking relief from the automatic stay of the Bankruptcy Code in order to obtain materials from LBHI. The Bankruptcy Court will make that determination, and LBHI may formally present any objection in that forum at the appropriate time.

As to the SIPA Trustee, his concerns have no relevance to Lead Plaintiffs’ request. Lead Plaintiffs do not seek documents from the SIPA Trustee and have not moved to lift the automatic stay in the SIPA proceeding. If, at some point in the future, Lead Plaintiffs move to lift the

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<sup>2</sup> As noted in *Royal Ahold*, “the burden of production on the defendants should be relatively slight . . . because the requested materials have been produced already to other parties.” 220 F.R.D. at 253. Because LBHI is not being reorganized, even were there a burden, there is no concern that production will affect an ongoing business. Moreover, relief from the stay will give Lead Plaintiffs the right to serve a subpoena, to which LBHI and other parties may object on grounds set forth in the Federal Rules of Civil Procedure and other applicable law.

bankruptcy stay and seek materials from the SIPA Trustee, then his objection will be ripe for consideration by the Bankruptcy Court.

The fact remains that partially lifting the discovery stay will impose minimal burden on the producing parties. The documents have been gathered, sorted, and electronically copied, and production to Lead Plaintiffs would only require making additional electronic copies.

**E. Lead Plaintiffs' Request Is Sufficiently Particularized**

Contrary to Defendants' assertions, Lead Plaintiffs do not seek "anything ever produced and that will be produced in the largest bankruptcy ever, as well as in multiple governmental investigations and other litigations." *See* Defs.' Br. at 11. Rather, Lead Plaintiffs' request is directed only to Defendants, LBHI, and LBHI-affiliated debtors,<sup>3</sup> and is further limited to discovery already gathered and produced (or to be produced) to governmental authorities and other litigants concerning investigations or litigations related to Lehman's bankruptcy.

Courts have routinely lifted PSLRA discovery stays under similar circumstances based on similar requests for documents already gathered and produced to government regulators or civil litigants. *See, e.g., Royal Ahold*, 220 F.R.D. at 250 (request sufficiently particularized where it requested documents previously produced to government regulators and other entities); *WorldCom*, 234 F. Supp. 2d at 306 ("plaintiffs' request . . . involves a clearly defined universe of documents, specifically certain documents which [the company] has already produced in connection with other identified proceedings"); *FirstEnergy*, 229 F.R.D. at 545 (request limited to closed universe of documents that FirstEnergy has already produced for government investigators and the federal grand jury was sufficiently particularized); *Enron*, 2002 WL

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<sup>3</sup> As to third parties, Lead Plaintiffs seek to serve subpoenas that are limited to copies of documents produced to government authorities and other litigants concerning investigations or litigation related to Lehman's bankruptcy.

31845114, at \*1-2 (request sufficiently particularized where calling for documents “related to any inquiry or investigation by any legislative branch committee, the executive branch, including the Department of Justice and the Securities and Exchange Commission, and all transcripts of witness interviews or depositions related to those inquiries.”).<sup>4</sup>

Lead Plaintiffs’ request for a single category of documents already gathered and produced to other parties is wholly distinguishable from *Mishkin v. Ageloff*, 220 B.R. 784, 793 (S.D.N.Y. 1998), which involved a request for open-ended document discovery from defendants, defendants’ customers and third parties, and multiple depositions of unidentified persons. Here, Lead Plaintiffs do not seek to depose a single witness or propound even one interrogatory. Further, Defendants misinterpret *Vivendi* as holding that “plaintiffs’ general request for documents previously produced to the SEC and its French counterpart did not meet the particularity requirement.” See Defs.’ Br. at 12. The *Vivendi* court denied plaintiffs’ motion to lift the PSLRA discovery stay not because the request lacked particularity, but because plaintiffs had “not met their burden of showing ‘exceptional circumstances’ that render it necessary to lift the stay on discovery.” 381 F. Supp. 2d at 131 (citations omitted).<sup>5</sup>

Defendants’ challenge to the particularity of the request is really grounded in whether some documents produced to governmental agencies or other litigants are irrelevant to Lead Plaintiffs’ claims. See Defs.’ Br. at 13. In reality, Lehman’s collapse is hardly different from *Enron*, *WorldCom* (at the time, among the two largest bankruptcies in U.S. history), or any other

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<sup>4</sup> *In re Spectranetics Corp. Sec. Litig.*, No. 08-cv-02048-REB-KLM, 2009 WL 3346611, at \*3 (D. Colo. Oct. 14, 2009), relied upon by Defendants, further supports the principle that a “discovery request targeting the same list of documents that has already been produced to governmental authorities is more likely to be found ‘particularized.’”

<sup>5</sup> Defendants also misconstrue *Rampersad* as holding that “plaintiffs had failed to show particularized discovery in its general request for documents already produced to government agencies.” See Defs.’ Br. at 12 (internal quotations omitted). Rather, the court found that the “Plaintiff . . . failed to show any particularized discovery **that would affect his ability to respond to the motions to dismiss.**” *Rampersad*, 381 F. Supp. 2d at 133 (emphasis added).

case in which an issuer files bankruptcy and becomes the target of investigations and related litigation.<sup>6</sup> *See, e.g., In re Metropolitan Sec. Litig.*, No. CV-04-25-FVS, 2005 WL 940898, at \*3 (E.D. Wash. Mar. 31, 2005) (plaintiffs allowed to obtain documents provided to bankruptcy examiner). The Examiner's investigation goes to the core of Lead Plaintiffs' allegations, including "colorable claims for breach of fiduciary duties and/or aiding or abetting any such breaches against the officers and directors of LBCC and/or other Debtors," and "events that occurred from September 4, 2008 through September 15, 2008 or prior thereto that may have resulted in commencement of the LBHI chapter 11 case." *See* Declaration of David R. Stickney in Support of Lead Plaintiffs' Motion for Limited Relief from the PSLRA Discovery Stay, at Ex. B, pp. 3-4. The Examiner's investigation into "events that post-date the bankruptcy" and analysis of the "assets of each of the various Lehman affiliates and subsidiaries" is no less relevant to Lead Plaintiffs' claims. *See* Defs.' Br. at 13. As just one example, post-bankruptcy events are highly probative of whether Lehman's pre-bankruptcy asset valuations were inflated. Similarly, analyses of the assets of BNC Mortgage and Aurora Loan Services, Lehman's mortgage subsidiaries, are relevant to Lead Plaintiffs' allegations that such assets were riskier than Lehman and Defendants represented and overvalued.

Additionally, it is not surprising that the SIPA Trustee has responded to "non-party subpoenas issued in connection with various litigations and arbitrations around the United States, and has made over one hundred document productions." *See* Defs.' Br. at 13. But this fact has no bearing on the instant motion – other than to underscore how Lead Plaintiffs are prejudiced by not being on equal footing with others – because Lead Plaintiffs are not seeking discovery *from*

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<sup>6</sup> Defendants' citation to *In re Fannie Mae Sec. Litig.*, 362 F. Supp. 2d 37 (D.D.C. 2005), is inapposite. In *Fannie Mae*, counsel for plaintiffs admitted during oral argument that not all of the documents produced to various agencies would be relevant to its claims. Lead Plaintiffs have made no such concessions in this matter.

the SIPA Trustee at this time. Conversely, that Defendants, LBHI and LBHI-affiliated debtors may have made voluminous productions to the SIPA Trustee or other governmental authorities is not a basis to challenge the particularity of the request, which must be assessed in light of the complexity of the underlying litigation. *See Royal Ahold*, 220 F.R.D. at 250 (finding that courts “must take into account the nature of the underlying litigation” and determining that the volume of documents requested was “not unreasonable in light of” the matter’s complexity).

**F. Lead Plaintiffs Have Complied With All Procedural Requirements**

Finally, Defendants’ assertions that Lead Plaintiffs have not followed appropriate procedures in presenting their motion are misplaced. This motion is not a “discovery motion” for purposes of Rule 37 of the Federal Rules of Civil Procedure, Pretrial Order No. 1, or this Court’s Individual Practices. These provisions, by their express terms and context, clearly apply to motions to compel and other similar motions relating to discovery disputes under Rule 37 and the rules governing various categories of discovery. *See Fed. R. Civ. P. 26-37*. This motion, however, seeks relief under a specific statutory provision – the PSLRA. Accordingly, Lead Plaintiffs believe that they have complied with motion filing requirements under the Federal Rules of Civil Procedure, Pretrial Order No. 1, and this Court’s Individual Practices.

**III. CONCLUSION**

For the reasons stated above and in Lead Plaintiffs’ moving papers, Lead Plaintiffs respectfully request that the Court grant their motion and partially lift the PSLRA’s stay of discovery as to materials produced to government agencies and parties in parallel proceedings.

Dated: November 3, 2009

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