IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DVI, INC. SECURITIES LITIGATION	:	CIVIL ACTION NO. 03-CV-05336-LDD
WM HIGH YIELD FUND, et al., Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 04-CV-3423-LDD
MICHAEL A. O'HANLON, et al., Defendants.	:	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS TO MODIFY OR LIFT THE DISCOVERY STAY MANDATED BY THE PSLRA

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Defendants Michael O'Hanlon, Steven R. Garfinkel, Richard Miller, Anthony J. Turek, John P. Boyle, Terry W. Cady, Matthew Colasanti, Raymond Fear, Gerald Cohn, Harry T.J. Roberts, William S. Goldberg, John E. McHugh, Nathan Shapiro, Deloitte & Touche LLP, Harold Neas, OnCure Technologies Corporation, Jeffrey Goffman, Presgar Imaging, LLC, and Dolphin Medical Inc. in the case captioned *WM High Yield Fund v. O'Hanlon*, Civil Action No. 04-3423, and Defendants Michael O'Hanlon, Steven R. Garfinkel, Richard Miller, Anthony J. Turek, John P. Boyle, Terry W. Cady, Gerald Cohn, Harry T.J. Roberts, William S. Goldberg, John E. McHugh, Nathan Shapiro, Deloitte & Touche LLP, OnCure Technologies Corporation, Presgar Imaging, LLC, Dolphin Medical Inc., RadNet Management, Inc., and Merrill Lynch & Co., Inc. in the case captioned *In re: DVI, Inc.*, Civil Action No. 03-5336 (collectively hereinafter "Defendants"), respectfully submit this Brief in Opposition to (1) Plaintiffs' Motion to Modify the Discovery Stay filed by Plaintiffs in *WM High Yield Fund v. O'Hanlon*, and (2) Lead Plaintiffs' Motion for a Limited Lifting of the PSLRA Discovery Stay filed by Lead Plaintiffs in *In re: DVI, Inc.* (collectively hereinafter "Plaintiffs' Motions").[1]

For the reasons set forth below, Plaintiffs' Motions must be denied. In both cases, Plaintiffs invoke the Private Securities Litigation Reform Act of 1995 ("PSLRA" or "Reform Act"), 15 U.S.C.S. § 78u-4, to purport to state one or more causes of action thereunder against the Defendants. In both cases, all of the Defendants have filed comprehensive motions to

[1] These cases have not been consolidated other than for purposes of the oral argument heard by the Court on Friday, March 4, 2005 in connection with motions to dismiss filed in these cases and the other "related" case, *Fleet National Bank v. O'Hanlon, et al.*, No. 04-CV-1277. However, in an effort to conserve resources and to serve the interests of judicial economy and efficiency, and because Plaintiffs' Motions seek the same relief and warrant similar, if not the same, responses, Defendants submit this single, consolidated brief in opposition to both of Plaintiffs' Motions and have filed this consolidated brief in both cases set forth in the caption above.

dismiss, all of which are not only fully briefed but also were the subject of extensive oral argument on Friday, March 4, 2005.

Having invoked the PSLRA, both groups of plaintiffs must be bound by that statute's mandatory stay of discovery, triggered by the filing of Defendants' motions to dismiss. As set forth more fully below, neither group of plaintiffs has established the requisite showing for lifting the discovery stay. Plaintiffs seek to modify the PSLRA stay based solely on the fact that documents have been produced in investigations involving DVI and may soon be produced in other cases -- unremarkable events that are far from extraordinary. Accordingly, this Court should DENY Plaintiffs' Motions to lift or modify the statutorily imposed stay on discovery.

In light of the many motions to dismiss and related briefs filed by the Defendants in connection with those motions, Defendants will not repeat the factual background set forth in their prior submissions and will instead describe, where applicable, only the pertinent facts necessary to resolve Plaintiffs' Motions.[2] Those facts clearly compel the result that the Court should DENY Plaintiffs' Motions, as the facts here simply do not meet the stringent requirements of the PSLRA to modify or lift the stay of discovery during the pendency of motions to dismiss.

I. THE PENDING MOTIONS TO DISMISS TRIGGER A MANDATORY STAY OF DISCOVERY UNDER THE PSLRA.

Under the PSLRA, a mandatory stay operates as a complete bar to any and all discovery while motions to dismiss are pending in a case purporting to assert a violation of the federal securities laws. That is, the PSLRA provides, in relevant part, that:

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[2] Motions to dismiss were also filed in the *Fleet National Bank* case, see supra n. 1, including extensive briefs which similarly described the factual backdrop related to DVI, Inc. and the various defendants in these actions. Contrary to the suggestions in Plaintiffs' Motions, discovery has not yet begun in the *Fleet National Bank* case. See infra sec. II.B.

> In any private cause of action arising 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.

15 U.S.C. § 78u-4(b)(3)(B). As one court interpreting this provision and its legislative history has remarked recently,

> [D]iscovery is authorized solely for parties to develop the facts in a lawsuit in which a plaintiff **has stated a legally cognizable claim**, not in order to permit a plaintiff to find out whether he has such a claim, and still less to salvage a lawsuit that has already been dismissed for failure to state a claim. **Whatever the norms of discovery in the ordinary lawsuit, such a request is even more plainly without merit in cases covered by the PSLRA**. In such cases, Congress has specifically imposed a stay of "all discovery and other proceedings . . . during the pendency of any motion to dismiss," 15 U.S.C. § 78u-4(b)(3)(B), creating **a strong presumption that no discovery should take place until a court has affirmatively decided that a complaint does state a claim under the securities laws**, by denying a motion to dismiss.

Podany v. Robertson, Stephens, Inc., 350 F. Supp. 2d 375, 2004 U.S. Dist. LEXIS 9363, at *5-6 (S.D.N.Y. 2004) (citing S. Rep. 104-98, at 14 (1995)) (emphasis added).

There has been no such affirmative finding by this Court that any of the complaints in these matters, including *In re: DVI, Inc.* and *WM High Yield*, state a claim under the securities laws. Instead, the legal sufficiency of Plaintiffs' complaints has been challenged by all of the Defendants, who have advanced multiple arguments to demonstrate that the complaints do not state such a claim (or any claim). As the Podany court and countless others have recognized, "the entire purpose of the stay provision 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 civil discovery proceedings will produce facts that could be used to state a valid claim." Id. at *6. Accord In re Vivendi Universal, S.A., Sec. Litig., No. 02 Civ. 5571 (HB), 2003 WL 21035383, at *1 (S.D.N.Y. May 6, 2003) (noting Congressional intent and citing legislative history for the PSLRA to deny

plaintiffs' motion which did not present the exceptional circumstances necessary to disturb statutory stay of discovery).

Defendants' motions to dismiss are pending, and there has been no finding that any of the complaints state a claim against any of the defendants. Thus, under the PSLRA, discovery is stayed.

II. THE REFORM ACT AUTHORIZES A COURT TO LIFT THE MANDATORY STAY OF DISCOVERY ONLY UNDER LIMITED EXTRAORDINARY CIRCUMSTANCES NOT PRESENT HERE.

The PSLRA prohibits a court from lifting the mandatory stay on discovery unless the movant demonstrates that exceptional circumstances exist -- namely, that "particularized discovery is necessary to preserve evidence or prevent undue prejudice to [a] party." Podany, 350 F. Supp. 2d 375, 2004 U.S. Dist. LEXIS 9363, at *6 (emphasis added). See also Riggs v. Termeer, 03 Civ. 4014 (MP), 2003 U.S. Dist. LEXIS 9634, at *2 (S.D.N.Y. June 9, 2003) (denying motion to lift statutory stay where plaintiff did not make sufficient showing to support finding that particularized discovery was necessary to preserve evidence or prevent undue prejudice). This standard is set forth under the express language of the statute, cited above, and by case law construing that statutory language. See, e.g., In re Lantronix, Inc. Sec. Litig., Case No.: CV 02-03899 PA (JTLx), 2003 U.S. Dist. LEXIS 19593, at *3 (C.D. Cal. Sept. 26, 2003) (citing 15 U.S.C. §§ 77z-1(b)(1) & 78u-4(b)(3)(B)). Plaintiffs' Motions present neither of the two bases for modifying or lifting the PSLRA discovery stay and must therefore be denied.

As a preliminary matter, it is Plaintiffs' burden to establish that one of the two exceptions apply. In re: CFS-Related Sec. Fraud Litig., 179 F. Supp. 2d 1260, 1264 (N.D. Okla. 2001). Accord Mishkin v. Ageloff, 220 B.R. 784, 789-90 (S.D.N.Y. 1998) (movant has burden to articulate particularized discovery necessary to establish undue prejudice). To satisfy that

burden, Plaintiffs' Motions must include adequate support for the contention that the discovery stay either causes them undue prejudice or is necessary to preserve evidence. Lantronix, 2003 U.S. Dist. LEXIS 19593, at *6-7 (citing In re AOL Time Warner, Inc. Sec. & "ERISA" Litig., 2003 U.S. Dist. LEXIS 12846 (S.D.N.Y. July 25, 2003) ("Lead Plaintiff's assertions of an impending settlement that could prejudice plaintiffs' possible recovery are premature.")) (emphasis added).

Lantronix is illustrative in this regard, and requires the finding in this case, too, that Plaintiffs have not carried their burden. In Lantronix, plaintiff made no showing of how the discovery materials they sought were necessary at that stage of the proceedings to effectuate a settlement in their case, no showing of how a settlement in another case created anything more than the routine delay contemplated by the PSLRA, and no showing of any risk that documents produced and in the custody of third parties stood anything more than a negligible risk of being lost. Lantronix, 2003 U.S. Dist. LEXIS 19593, at *6-7. Accord Riggs, 2003 U.S. Dist. LEXIS 9634, at *2 (no sufficient showing from which to make findings prerequisite to lifting stay). Accordingly, the plaintiff "failed to establish the need to preserve evidence or undue prejudice required to justify the lifting of the PSLRA's discovery stay" and the court denied their motion. Lantronix, 2003 U.S. Dist. LEXIS 19593, at *7.

The same result must follow in this case, where Plaintiffs' Motions fail to provide the necessary basis to support a finding that particularized discovery is necessary either to preserve evidence or to prevent undue prejudice. Accordingly, Plaintiffs' Motions must be denied.

A. Plaintiffs Have Not Demonstrated Any Risk That Documents May Be Lost Or Destroyed.

Plaintiffs' Motions present no basis for a finding that any of the documents at issue must be preserved for fear of being lost. Accord Vivendi, 2003 WL 21035383, at *1 ("A party

alleging that discovery is 'necessary to preserve evidence' must . . . make a specific showing that the loss of evidence is imminent as opposed to merely speculative."); see also Rampersad v. Deutsche Bank Sec. Inc., No. 02 Civ. 7311 (LTS)(AJP), 2003 U.S. Dist. LEXIS 7867, at *3 (S.D.N.Y. May 9, 2003) (holding that plaintiff was not entitled to exemption from PSLRA discovery stay where plaintiff failed to show any relevant ongoing record keeping violations or that any relevant existing records were at risk of being destroyed).

Moreover, as the court noted in CFS, "[t]he PSLRA . . . provides Plaintiffs with statutory protection, requiring parties to treat evidence in their custody or control as if it were the subject of a continuing discovery request during the pendency of any stay imposed by the PSLRA." 179 F. Supp. 2d at 1264 (citing 15 U.S.C. § 78u-4(b)(3)(C)(i)). Thus, "wholly speculative assertions as to the risk of losing evidence are not sufficient to establish undue prejudice within the meaning of § 78u-4(b)(3)(B)." Id. at 1265. Where, as in the instant case, plaintiffs do not demonstrate any particular threat that evidence would be lost or destroyed without immediate discovery, there is no justification to lift the mandatory discovery stay. Accord CFS, 179 F. Supp. 2d at 1264-65.

Indeed, Plaintiffs are hard-pressed to make such an argument in support of their motion, since they already have the benefit of having reviewed the Bankruptcy Examiner's 188-paged Report and its 97 exhibits, upon which Plaintiffs' complaints are not only based but from which large portions of their complaints derive expressly. Any argument that Plaintiffs suffer from a lack of information or that there is a danger that evidence is on the verge of being lost or destroyed is simply not credible. Further, both actions have been pending for many months -- indeed, *In Re: DVI, Inc.* has been pending for a year and a half -- without any request by Plaintiffs that the Court lift the PSLRA's mandatory discovery stay. That Plaintiffs were content

to sit idle for so long belies any claim on their part that the mandatory stay must be lifted, whether to preserve evidence or for any other reason. Plaintiffs' Motions must be denied.

B. Plaintiffs' Cries Of "Prejudice" Do Not Provide A Basis To Lift The Mandatory Stay Of Discovery Under The PSLRA.

Although Plaintiffs' Motions assert that they will suffer prejudice unless the Court lifts the stay on discovery, their argument and their basis in support of that argument fall short of what the law requires. Indeed, Plaintiffs have done nothing more than proffer a speculative risk of prejudice. See, e.g., WM Plaintiffs' Mem. of Law in Support of Mot. at 12 (describing supposed prejudice in terms of "substantial lead-time" that other litigants will have vis-a-vis Plaintiffs). This is insufficient under the law to warrant lifting of the mandatory stay of discovery under the Reform Act.

As Plaintiffs note, "undue prejudice" has been construed to mean "improper or unfair treatment rising to a level somewhat less than irreparable harm," compare WM Pls.' Mot. at 12 with Faulkner v. Verizon Communications, Inc., 156 F. Supp. 2d 384, 402 (S.D.N.Y. 2001), cited in In re Elan Corp. Sec. Litig., No. 02 Civ. 865 RMB FM, 2004 WL 1303638, at *1 (S.D.N.Y. May 18, 2004). However, with respect to such "undue prejudice," the "**sole example proffered by Congress as to what justifies lifting the stay is the terminal illness of an important witness, which might necessitate the deposition of the witness prior to ruling on the motion to dismiss**." Elan, 2004 WL 1303637, at *1 (quoting S. Rep. No. 104-98, at 14 (1994)); Faulkner, 156 F. Supp. 2d at 402.

Plaintiffs ignore wholly applicable precedent from this court. Judge Padova's recent decision in The Winer Family Trust v. Queen, Civil Action No. 03-4318, 2004 U.S. Dist. LEXIS 1825 (E.D. Pa. Feb. 6, 2004), the leading case from this circuit on this issue, requires that "extraordinary circumstances" must exist in order to lift the mandatory discovery stay imposed

by the Reform Act. Winer, 2004 U.S. Dist. LEXIS 1825, at *5. In Winer, the only discovery permitted by Judge Padova despite the PSLRA discovery stay was discovery of a witness who had been diagnosed with Stage IV brain cancer, for which the witness had recently undergone chemotherapy, radiation, and intensive speech and physical therapy. In light of the extraordinary circumstances relating to that witness's alleged incapacity, and in the interest of preserving evidence and avoiding undue prejudice should the witness pass away during the stay of discovery, the court permitted the parties to conduct limited discovery, subject to receipt of prior submissions concerning the scope, terms, and conditions of such discovery. Id. at *17-18. This type of "extraordinary circumstance" -- the only scenario that supported a lifting of the stay in Winer -- is clearly not present here. Thus, Plaintiffs' Motions should be denied.

Instead of making the requisite showing of "extraordinary circumstances," Plaintiffs argue that they are unduly prejudiced by the stay in two ways. First, because they are not on "equal footing" with other claimants, they will somehow be unable to make litigation decisions. Second, because there "may be" a limited pool of insurance coverage for the DVI officer and director defendants, Plaintiffs are forced to vie against others with superior information for the "same limited pot of money." See WM Plaintiffs' Mem. of Law in Support of Mot. at 2; Lead Plaintiffs' Mem. of Law at 3.

Plaintiffs are wrong on both counts. First, Plaintiffs fail to offer any explanation as to how or why they will be prevented from formulating a litigation strategy. In fact, the stay does not impact Plaintiffs' ability to make any strategic decisions should the motions to dismiss be denied. Moreover, the same "equal footing" theory was advanced and rejected in In re AOL Time Warner, MDL No. 1500, 02 Civ. 8853, 2003 WL 22227945, at *2 (S.D.N.Y. Sept. 26, 2003), where the court held that ". . . it is important to keep parties on an equal footing with

respect to discovery, but not at the expense of the statutory command of the PSLRA." Id. Plaintiffs' unsupported, conclusory statements that their litigation strategy will be affected somehow is not the type of extraordinary circumstances warranting relief from the stay. See Vivendi, 2003 WL 2103583, at *1 (no "extraordinary circumstances" to justify lifting stay where plaintiffs offered "no evidence" that they would be left without a remedy in light of settlement discussions or other intervening events).

In addition, Plaintiffs' supposed "prejudice" caused by mere delay in the ability to proceed with discovery is not "undue" because it is neither improper nor unfair; instead, "it is prejudice which has been mandated by Congress after a balancing of the various policy interests at stake in securities litigation." CFS, 179 F. Supp. 2d at 1265. Thus, Plaintiffs' argument that they may suffer some prejudice due to other litigants' "substantial lead-time" to review documents produced in investigations and other lawsuits not governed by the Reform Act must be rejected outright, especially where, as here, no discovery has been propounded or responded to in any of the three other cases involving DVI that are pending in this Court or in the lawsuit pending in the United States District Court for the District of Delaware. Plaintiffs' claim of "prejudice" is thus doubly speculative and, at best, premature.

Plaintiffs' argument that the stay somehow affects their settlement strategy is equally unpersuasive. In addition to In re WorldCom, Inc., 234 F. Supp. 2d 301 (S.D.N.Y. 2002) -- which is easily distinguishable -- Plaintiffs cite three other cases,[3] each of which relies almost exclusively on the WorldCom opinion. Unlike the cases before this Court, however, the

3 The additional cases relied upon by Plaintiffs are In re Labranche Sec. Litig., 333 F. Supp. 2d 178, 183 (S.D.N.Y. 2004), In re FirstEnergy Corp. Sec. Litig., No. 5:30 Civ. 1684 (N.D. Ohio Jan. 26, 2004), and In re Royal Ahold, 220 F.R.D. 246, 252 (D. Md. 2004). See WM Plaintiffs' Mem. of Law at 13; Lead Plaintiffs' Mem. of Law at 3-4.

WorldCom court had already approved settlements with certain WorldCom officers and ordered coordinated settlement discussions in related cases to occur within weeks of the court's opinion. WorldCom, 234 F. Supp. 2d at 303, 305. The WorldCom court expressly stated that its ruling regarding the lifting of the stay was "based on the unique circumstances of this case" and explained that it was "especially troubling" that plaintiffs did not have access to documents considering that coordinated settlement discussions were imminent. Id. at 305-06. Similarly in Labranche, the parties had reached a $63.5 million settlement, which distinguished that case from others where the parties had not yet entered into settlement agreements. Labranche, 333 F. Supp. 2d at 181, 183 (citing AOL Time Warner, 2003 U.S. Dist. LEXIS 12846, at *1; Vivendi, 2003 WL 21035383, at *1; Rampersad, 2003 U.S. Dist. LEXIS 7867, at *2); see also In re Royal Ahold, 220 F.R.D. 246 (partially modifying stay so parties could proceed to settlement negotiations and make settlement an early priority, but specifically denying any modification of stay with regard to accountants).

In the cases before the Court, no settlements have been consummated and, other than with respect to defendant OnCure Technologies Corporation ("OnCure") in the *In re: DVI* case, no meaningful settlement discussions have occurred or are scheduled to occur.[4] Thus, Plaintiffs' reliance on WorldCom and its progeny is misplaced.

Finally, not all Defendants have received subpoenas to produce documents in connection with any other action or proceeding. Defendants Dolphin Medical, Inc. ("Dolphin") and OnCure Technologies Corporation ("OnCure"), for example, have not received any such requests, nor have they otherwise produced any documents in any forum. Therefore, the foundation for

4 As Lead Plaintiffs' counsel in *In Re: DVI, Inc.* advised the Court during oral argument on March 4, 2005, a settlement agreement in principle has been reached between Lead Plaintiffs in that case and Defendant OnCure.

Plaintiffs' Motions to lift the stay is completely lacking with respect to these Defendants. Indeed, it is the Defendants, not Plaintiffs, who would suffer prejudice by a lifting of the stay by being deprived of statutory protection from discovery without any basis whatsoever.

As in Winer, Elan and Faulkner, supra, the Plaintiffs in the cases before this Court have not demonstrated the kind of "extraordinary circumstances" that warrant a lifting of the mandatory discovery stay in this case. Accordingly, Plaintiffs' Motions must be denied.

C. Plaintiffs Have Not Requested "Particularized Discovery."

Even where, unlike here, it is appropriate to lift the PSLRA discovery stay to preserve evidence or prevent undue prejudice, the statute only envisions "particularized" discovery. See 15 U.S.C. § 78u-4(b)(3)(B). Plaintiffs' Motions, although claiming to seek "limited" documents, are in fact a wholesale request for every document that may have been produced somewhere else, or which may in the future be produced somewhere else. See WM Plaintiffs' Mem. of Law in Support of Mot. at 15 (mischaracterizing their request as "limited in scope" while nonetheless seeking production of "documents that DVI and the defendants have already organized and produced, **or those that they will cull for production and produce in response to additional demands, in the lawsuits brought by Fleet and the Creditors' Committee** . . .") (emphasis added); see also id. at 14 (seeking "documents DVI and the defendants have produced **or will produce** in investigations or other lawsuits . . .") (emphasis added). Accord Lead Plaintiffs' Mot. (requesting "limited lift of the discovery stay . . . to allow . . . access to documents already produced or to be produced in related litigation and investigations") (emphasis added).

This is quite the opposite of what would be required to lift the stay under the Reform Act and case law from this circuit and elsewhere. See, e.g., Winer, 2004 U.S. Dist. LEXIS, at *6, 20 (quoting Faulkner, 156 F. Supp. 2d at 404)) (finding that plaintiffs' request of "all documents,

testimony and transcripts that have been previously produced or will be produced in the future" is not sufficiently particularized). Indeed, Plaintiffs' requests for all discovery produced or to be produced in the "related" cases pending in this Court and elsewhere are very similar to the type of non-particularized discovery requests that Judge Padova rejected in Winer, where plaintiffs asked for discovery from a "related" case, similarly without any limitation. As Plaintiffs' counsel are aware, not only from Judge Padova's decision in Winer but from their representation of the plaintiffs in Winer,[5] Judge Padova rejected plaintiffs' proffered discovery requests as insufficiently particularized. Id. The same result must follow here. In short, even if Plaintiffs could establish that one of the two grounds for lifting the stay were present here -- which Plaintiffs cannot do -- Plaintiffs would have to propound particularized requests, which they have not done.

Furthermore, with regard to documents produced in connection with DVI's bankruptcy proceedings in Delaware, discovery under Bankruptcy Rule 2004 is much broader than what is permitted under the Federal Rules of Civil Procedure. In fact, Rule 2004 has been described as permitting "exploratory groping" and "fishing expeditions." See, e.g., In re Duratech, 241 B.R. 283 (E.D.N.Y 1999); In re Coffee Cupboard, Inc., 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991); In re Silverman, 36 B.R. 254, 289 (Bankr. S.D.N.Y. 1984). The fact that documents have been or may be produced under Bankruptcy Rule 2004, therefore, in no way demonstrates that they are discoverable in a civil litigation like this one, especially one governed by the Reform Act and its mandatory stay of discovery. Moreover, the Bankruptcy Court has expressly ordered that materials requested and produced pursuant to Rule 2004 in DVI's bankruptcy proceeding be used

[5] Lead Plaintiffs' counsel in *In Re: DVI, Inc.*, Steven A. Schwartz and the Chimicles & Tikellis firm, also represented plaintiffs in Winer.

solely for the bankruptcy case and in cases where the liquidating trustee is a party, and for no other purpose. See Order dated Oct. 5, 2004 a true and correct copy of which is attached hereto as Exhibit 1; Order dated Dec. 21, 2004, a true and correct copy of which is attached hereto as Exhibit 2.[6] Thus, even if Plaintiffs were permitted to proceed with discovery upon lifting of the discovery stay, Plaintiffs would have to serve particularized requests, and the Defendants would not be able simply to produce what has been produced previously in other matters. And contrary to Plaintiffs' claim, it would not be simple or costless to undertake the process. See also infra sec. III.B.

III. PLAINTIFFS' ARGUMENTS IN SUPPORT OF THEIR MOTIONS HAVE BEEN REJECTED BY COURTS IN THIS CIRCUIT AND ELSEWHERE, AND MUST BE REJECTED HERE AS WELL.

In Winer, Judge Padova rejected all but one of the reasons (many of which are identical to the reasons set forth in Plaintiffs' Motions before this Court) proffered in support of plaintiffs' request for relief from the statutorily imposed discovery stay. In denying the bulk of plaintiffs' motion, Judge Padova concluded that

- Plaintiffs were not permitted to pursue discovery on state common law claims, since "Congress's attempt to address concerns of discovery abuse would . . . be rendered meaningless if securities plaintiffs could circumvent the PSLRA stay (and relevant case law) simply by asserting pendent state law claims." 2004 U.S. Dist. LEXIS 1825, at *7-10.

- Plaintiffs had not provided a clear indication that the Defendant was destroying or altering documents and had failed "to specifically show that 'the loss of evidence is imminent as opposed to merely speculative,'" 2004 U.S. Dist. LEXIS 1825, at *12-14 (citing CFS, 179 F. Supp. 2d at 1265), and since the PSLRA itself mandates the

6 With regard to certain of the Plaintiffs in the *WM High Yield* matter who are also members of the Creditors' Committee, the instant motion is a blatant attempt to make an end-run around the Bankruptcy Court's October 5, 2004 Order, which held specifically that the documents and information produced in that proceeding shall not be given to "any member or counsel representing any member of the Committee in any litigation or proceeding against Deloitte" so as not to circumvent the PSLRA stay of discovery. Ex. 1 at 3.

preservation of evidence during the pendency of a stay of discovery, there was no basis to grant relief from the PSLRA stay of discovery. Id. at *14-16.

- No discovery had taken place among the defendants in a separately pending action, and Plaintiffs' concerns about discovery commencing in that case was "merely speculative and d[id] not demonstrate undue prejudice" sufficient to justify relief from the PSLRA stay of discovery. Id. at *19-21.

Each of the arguments proffered in Plaintiffs' Motions was rejected by the Winer court and other courts as cited and described herein. Despite the knowledge that their requests are entirely unsupported by precedent in this district, Plaintiffs' counsel advance the same meritless arguments here. They must be rejected and Plaintiffs' Motions should be denied.

A. Production Of Documents To Governmental Agencies Does Not Justify Lifting The Mandatory Stay Of Discovery.

Plaintiffs argue that the discovery stay should be lifted to allow them access to documents that DVI has produced to governmental entities and to plaintiffs in other lawsuits not alleging violations of the federal securities laws. Again, as an initial matter, certain defendants, including Dolphin and OnCure, have not been asked to produce documents to governmental agencies or to plaintiffs in other cases, and have not otherwise done so. At all events, this is the same argument raised and rejected in Lantronix and other cases. That is, despite production of documents by the Lantronix defendant, that court denied the plaintiffs' motion, citing to Third and Ninth Circuit authority that described the purpose of the PSLRA as "to restrict abuses in securities class-action litigation, including . . . the abuse of the discovery process to coerce settlement." 2003 U.S. Dist. LEXIS 19593, at *4 (citing SG Cowen Sec. Corp. v. U.S. Dist. Court, 189 F.3d 909, 911 (9th Cir. 1999) (quoting In re Advanta Corp. Secs. Litig., 180 F.3d 525, 530-31 (3d Cir. 1999))). Accord In re AOL Time Warner, 2003 U.S. Dist. LEXIS 12846 (denying motion to disclose documents provided by defendants to various government departments and agencies, including SEC, Department of Justice, and committees of the legislative and executive branches of the

United States government). See also Winer, 2004 U.S. Dist. LEXIS 1825, at *17-21 (declining to lift stay where supposedly "related" discovery was sought in another litigation).

Similarly in In re Elan Corporation Securities Litigation, the court rejected plaintiffs' argument that the discovery stay should be lifted in light of a production of documents to the SEC: "[**T]he statute does not provide an exception to the mandatory stay when the documents sought have already been produced outside the litigation.**" 2004 WL 1303638, at *1 (citing Rampersad, 2003 WL 21074094, at *2 (emphasis added)). The court's ruling in Rampersad is identical. 2003 U.S. Dist. LEXIS 7867, at *4-5 (rejecting argument that PSLRA discovery stay does not apply when information has been provided to governmental agency). Accord Vivendi, 2003 WL 21035383, at *1-2 (denying plaintiffs' motion to obtain documents produced by defendants to Department of Justice, Securities and Exchange Commission, and French authorities in connection with civil and criminal investigations of misconduct that formed basis for allegations in plaintiffs' complaint); Sarantakis v. Gruttadauria, No. 02 C 1609, 2002 U.S. Dist. LEXIS 14349, at *8-10 (N.D. Ill. Aug. 5, 2002) (no undue prejudice resulting from stay even though defendants produced documents in other cases and investigations); Faulkner, 156 F. Supp. 2d at 405 (denying plaintiffs' motion to lift stay where plaintiffs intended to subpoena all documents already produced or to be produced in related action).

Plaintiffs' argument in this case -- that the production of documents by DVI to the SEC, the Bankruptcy Examiner, and other parties in related proceedings supports the lifting of the mandatory discovery stay -- fails for the same reason that the very same argument failed in Elan, Rampersad, Sarantakis, Faulkner, and Lantronix. The argument must be rejected and Plaintiffs' Motions should be denied.

B. The Bare Assertion That Defendants Purportedly Will Not Suffer An Undue Burden By Proceeding With Discovery Is Not Only False But Also Insufficient Under The Reform Act To Permit Lifting Of The Discovery Stay.

Similar to the argument related to the prior production of documents to governmental agencies, Plaintiffs' argument that lifting the stay would not cause defendants to suffer an undue burden is misplaced and is not sufficient grounds under the PSLRA to lift the stay. Again, the court in Elan rejected the same argument in that case: "Finally, the Plaintiffs' assertion that the stay should be lifted because the Defendants will not suffer an undue burden . . . , even if true, **does not justify overriding the existing statutory stay**." Elan, 2004 WL 1303638, at *1 (emphasis added).

Moreover, as noted above, although there has been no request for discovery in any of the three cases involving DVI before this Court or in the separate action filed by the Official Committee of Unsecured Creditors of DVI, Inc. in the United States District Court for the District of Delaware, (Civil Action No. 04-955, pending before Judge Gregory M. Sleet), Plaintiffs' Motions encompass any and all discovery that may be served in those cases and in other proceedings. See supra sec. II.C. Under these circumstances, lifting the discovery stay would contravene the letter and spirit of the Reform Act and impose an improper, premature burden on Defendants, whose production of the "limited set of documents" sought by Plaintiffs is not only unwarranted but potentially endless in scope here. See generally Winer 2004 U.S. Dist. LEXIS 1825, at *19-21 (citing well-established principle that "general requests to open all discovery do not satisfy . . . burden" under PSLRA for movant to articulate "particularized discovery"); see also supra sec. II.C.

C. The Fact That Not All Defendants Have Moved To Dismiss All Causes Of Action Does Not Affect Either The Discovery Stay Or This Court's Inquiry On Whether Or Not To Lift The Stay.

Plaintiffs in the *WM High Yield* case argue that not all of the Defendants have moved to dismiss all causes of action in the Complaint, and that therefore, the Court should ignore the statutory requirements governing the lifting of the stay on discovery. (WM Plaintiffs' Mot. at 3-4.) Plaintiffs are wrong, as the Reform Act's discovery stay applies equally to related state law claims, and to non-class actions as well. Riggs, 2003 U.S. Dist. LEXIS 9634, at *2. Accord Rampersad, 2003 WL 21074094, at *6-7 (denying request for partial remand to state court to pursue discovery, because doing so would frustrate the purpose of the PSLRA stay).[7]

Further, this argument was also raised and rejected in Lantronix, where the defendant did not challenge the legal sufficiency of the entire complaint: "Even with Lantronix's concession on a portion of Plaintiff's section 10(b) claim, the pendency of the Motions to Dismiss filed by the remaining defendants and Lantronix's Motion to Dismiss Plaintiff's other claims still trigger the PSLRA's discovery stay provisions." Lantronix, 2003 U.S. Dist. LEXIS 19593, at *5-6. Accord CFS, 179 F. Supp. 2d 1260 (rejecting argument that PSLRA's discovery stay does not apply to a defendant who has not filed a motion to dismiss, noting statutory language that stays all discovery "during the pendency of **any** motion to dismiss") (citing 15 U.S.C. § 78u-4(b)(3)(B)) (emphasis supplied in original). The same argument raised in Plaintiffs' Motions in this case fails equally here and must be rejected.

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[7] As one court recently noted, the PSLRA was recently amended in light of Congressional concern that parties were engaging in litigation tactics to sidestep the PSLRA's mandatory stay provision. See In re AOL Time Warner, Inc., 2003 WL 22227945, at *1 n.1. Based on the recent amendment, federal courts now have the authority to "stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph." Id. (citing 15 U.S.C. § 78u-4(b)(3)(D)).

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court DENY Plaintiffs' Motions in their entirety.

Respectfully submitted,

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