UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE UNION CENTRAL LIFE INSURANCE COMPANY, AMERITAS LIFE INSURANCE CORP. and ACACIA LIFE INSURANCE COMPANY, Plaintiffs, v. CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., et al., Defendants.	Case No: 11-cv-2890-GBD-JCF

OPPOSITION TO PLAINTIFFS' MOTION TO COMMENCE DISCOVERY FROM DEFENDANTS UBS, MORGAN STANLEY AND WASHINGTON MUTUAL

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Defendants UBS AG, Mortgage Asset Securitization Transactions, Inc. (together, "UBS"), Morgan Stanley, Morgan Stanley & Co. Incorporated, Morgan Stanley Capital I Inc. (together, "Morgan Stanley"), Washington Mutual Mortgage Securities Corp. and WaMu Capital Corp. (together, "Washington Mutual")[1] (collectively, "Responding Defendants") respectfully submit this Memorandum of Law in Opposition to Plaintiffs' Motion to Commence Discovery from the Responding Defendants (the "Motion").

PRELIMINARY STATEMENT

Plaintiffs' Motion should be denied because all discovery in this action is stayed under the Private Securities Litigation Reform Act ("PSLRA") during the pendency of motions to dismiss, which will be filed (in accordance with the schedule agreed to by the parties and so-ordered by this Court) just two weeks from now, on July 13, 2012. Plaintiffs' attempt to circumvent the PSLRA stay by arguing that they are only seeking to commence discovery against a subset of defendants as to whom Plaintiffs have asserted only state law claims is contrary to the plain text of the PSLRA, which stays all discovery in actions asserting federal securities claims, as this action indisputably does. Plaintiffs' Motion relies on a small number of non-binding decisions that are either inconsistent with or distinguishable from the overwhelming weight of authority which holds that the PSLRA stay precludes discovery in the circumstances presented here. Even if the PSLRA stay were held to be inapplicable, this Court should stay discovery pursuant to Rule 26(c) because commencing discovery against a subset of the defendants prior to this Court's consideration of motions to dismiss that may well result in the

[1] Plaintiffs' motion requests discovery from Washington Mutual, Inc. ("WMI") (*see* Pls.' Br. 1 n.1), but WMI is not a defendant in this action (*see* Am. Compl. caption). As far as counsel for Washington Mutual Mortgage Securities Corp. and WaMu Capital Corp. are aware, WMI has not been served with any complaint in this action (although such counsel do not represent WMI). Moreover, WMI is currently in bankruptcy proceedings in the Bankruptcy Court for the District of Delaware and thus all claims against WMI must proceed in the bankruptcy court proceedings.

complete dismissal of this action or a substantial narrowing of the claims asserted against the Responding Defendants would be highly inefficient and potentially a massive waste of the Court's and the parties' resources.

The PLSRA Discovery Stay Applies

This action clearly falls under the purview of the PSLRA because Plaintiffs' Amended Complaint alleges federal securities claims under the Securities Exchange Act of 1934. Consequently, the PSLRA's automatic stay of discovery bars Plaintiffs from seeking discovery on any claims alleged in the Amended Complaint pending this Court's resolution of the Responding Defendants' soon-to-be-filed motions to dismiss. Plaintiffs assert that the PSLRA stay does not preclude discovery on their state law claims against Responding Defendants because this Court has diversity jurisdiction over those claims. However, the availability of diversity jurisdiction does not alter the application of the PSLRA stay. Plaintiffs' assertion to the contrary finds no support in the plain text of the PSLRA and goes against the overwhelming weight of authority.

The PSLRA stay expressly provides that *all* discovery in any action falling under the PSLRA's purview is stayed during the pendency of any motion to dismiss, absent a lifting of the stay (which Plaintiffs here do not seek). Courts have expressly held that the PSLRA stay applies to state law claims in an action in which federal securities claims have also been alleged, irrespective of whether subject matter jurisdiction over the state law claims is based on diversity of citizenship. Indeed, courts have held that application of the PSLRA stay to state law claims is particularly proper where, as here, the plaintiff alleges common law fraud claims that arise out of the same operative facts as the plaintiff's federal securities claims. Plaintiffs provide no apposite authority for their argument that this Court should distinguish between different defendants and different claims in applying the stay, and nor does the PSLRA support such an approach.

Discovery Should Also Be Stayed Pursuant To Rule 26(c)

Even if the Court were to determine that the PSLRA's mandatory stay of discovery does not apply to Plaintiffs' claims against Responding Defendants, the Court should nonetheless exercise its discretion to grant a stay of discovery pursuant to Rule 26(c). Courts frequently stay discovery pending resolution of motions to dismiss to avoid the burden and expense of discovery that the decision may render unnecessary. This is particularly favored here because Responding Defendants have serious grounds for dismissal of Plaintiffs' Amended Complaint, including for failure to state a claim and for failure to satisfy applicable statutes of limitations. A stay of discovery pending the adjudication of motions to dismiss will avoid burdening Responding Defendants with expensive and potentially unnecessary discovery prior to this Court determining the legal sufficiency of Plaintiffs' Complaint, and will avoid burdening the parties and the Court with resolving discovery disputes on common issues before they become ripe as to all defendants.

A discretionary stay is also appropriate because Plaintiffs have not asserted that they will be prejudiced by a temporary stay of discovery as to the Responding Defendants. Responding Defendants have taken customary steps to preserve potentially relevant documents, and thus there is no prejudice to Plaintiffs from waiting until the Court rules on motions to dismiss prior to commencing discovery. Furthermore, Plaintiffs' insistence on immediately commencing discovery following the filing of their Amended Complaint and prior to the Court's determination whether its pleading states a claim is inconsistent with the lack of urgency Plaintiffs have displayed in prosecuting this action to date.

For these reasons and those explained in further detail below, Plaintiffs' Motion should be denied.

BACKGROUND

On April 28, 2011, Plaintiffs commenced this action against numerous defendants alleging state common law and federal securities claims arising out of Plaintiffs' purchases of residential mortgage-backed securities ("RMBS") between 2005 and 2007. *See* Compl. ¶¶ 10-41. In June 2011, Plaintiffs moved to consolidate this action with another action previously commenced by Plaintiffs, *The Union Central Life Insurance Co. et al. v. Credit Suisse Securities (USA), LLC, et al.*, No. 11 CIV 2327 (S.D.N.Y.), also pending before this Court. *See* Dkt. 52. Several defendants opposed Plaintiffs' consolidation motion and certain defendants moved to sever the clams against them. *See, e.g.*, Dkt. 96, 99, 101, 104, 105, 109. At a February 8, 2012 conference, the Court denied without prejudice the motions to consolidate and to sever. *See* Wood Decl. Ex. B, at 3:21-4:1.

On March 14, 2012, Plaintiffs' counsel wrote letters to counsel for certain of the defendants, including the Responding Defendants, enclosing Plaintiffs' proposed requests for the production of documents and asserting that "document discovery with respect to [each defendant] should appropriately commence at this juncture." Wood Decl. Ex. C, at 1. On March 19, 2012, counsel for defendants who received such letters wrote in unified response, objecting to Plaintiffs' attempt to commence discovery because the PSLRA stay precludes Plaintiffs from seeking discovery at this stage of the proceedings, including on their state law claims. Wood Decl. Ex. A, at 1 (citation omitted).

On April 11, 2012, Plaintiffs requested that the April 20, 2012 deadline for filing their amended complaint (which had been agreed to by the parties and so-ordered by the Court on February 27, 2012) be further extended to May 4, 2012, which defendants assented to and this Court so-ordered. *See* Dkt. 141. Over a year after commencing this action, and almost three months after denial of their consolidation motion, Plaintiffs filed their Amended Complaint on

May 4, 2012, alleging substantially the same common law and federal securities claims against the defendants as were asserted in their original Complaint. *See* Dkt. 146. A chart listing the causes of action and the defendants against whom they are asserted is attached hereto as Appendix A.

Despite having failed to demonstrate any urgency in prosecuting this action, which concerns securities Plaintiffs purchased between five and seven years ago, on June 1, 2012, Plaintiffs filed the instant Motion seeking to immediately commence discovery against 7 of the 31 named defendants: (i) Morgan Stanley, (ii) Morgan Stanley & Co. Inc., (iii) Morgan Stanley Capital I Inc., (iv) Washington Mutual Mortgage Corp., (v) WaMu Capital Corp., (vi) Mortgage Asset Securitization Transactions, Inc., and (vii) UBS AG.[2] The Motion seeks to compel the Responding Defendants to produce documents responsive to 41 separate document requests concerning a broad range of topics for an eight-year period between January 1, 2004, and the present. Wood Decl. Ex. D, at 9. Plaintiffs seek, among other things, production of documents related to the securitizations on which the Responding Defendants are being sued; the loans backing the certificates Plaintiffs purchased in those securitizations; Responding Defendants' knowledge concerning the loan originators' origination practices; the representations and warranties in the prospectus supplements and registration statements for the securitizations; the actual and expected performance of Plaintiffs' certificates; the market value of the certificates; the credit ratings for the certificates; and due diligence concerning the certificates. *See* Wood

[2] As the motions to dismiss will show, UBS AG is not alleged to have had (and did not have) any involvement in the offerings or the certificates purchased by Plaintiffs.

Decl. Ex. D; Pls.' Br. 4 n.4 (confirming that Plaintiffs are seeking discovery related to Doc. Req. Nos. 1, 7-18, 22, 24, 27-29, 31-39, 42-47, 49-50, 52-53, 55-58).[3]

ARGUMENT

I. The PSLRA's Automatic Discovery Stay Precludes Plaintiffs From Seeking Discovery Prior To Disposition Of Responding Defendants' Motions To Dismiss

A. The Plain Terms Of The PSLRA Preclude Commencement Of Discovery

The PSLRA provides, in relevant part, that "in any private action arising under [the federal securities laws], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b)(1). The PSLRA's automatic stay provision "creat[es] 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, 378 (S.D.N.Y. 2004); *see also Sedona Corp. v. Ladenburg Thalmann*, No. 03 Civ. 3120 LTSTHK, 2005 WL 2647945, at *3 (S.D.N.Y. Oct. 14, 2005) ("[T]here is no ambiguity in the plain language of the PSLRA's stay provision; the automatic stay applies while 'any motion to dismiss' is pending[.]"). Consistent with the strong presumption that all discovery should be stayed pending the resolution of any motions to dismiss, "courts have broadly construed the scope of the [PSLRA] stay provision" to ensure that this provision serves its legislative purpose, including "'avoid[ing] saddling defendants with the burden of discovery'" in cases, such as this one, that may be dismissed or substantially limited after motions to dismiss are decided. *Gardner v. Major Auto. Cos.*, No. 11-CV-1664 (FB), 2012 WL 1230135, at *3 (E.D.N.Y. Apr. 12, 2012) (citation omitted); *see also In re Salomon Analyst Litig.*, 373 F. Supp. 2d 252, 254 (S.D.N.Y.

[3] If Plaintiffs' Amended Complaint survives dismissal and Responding Defendants are required to respond to Plaintiffs' document requests, they anticipate objecting to many of the requests on various grounds, including, among other things, on the grounds that they are overbroad and unduly burdensome.

2005) ("The purpose of the [PSLRA] stay is to prevent abusive, expensive discovery . . . by postponing discovery until 'after the Court has sustained the legal sufficiency of the complaint.'" (quoting S. Rep. No. 104-98, at 14 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 693)).

In construing the PSLRA's stay provision, courts have held that it bars plaintiffs from seeking discovery on state law securities and non-securities claims in an action that also includes federal securities claims prior to a ruling on motions to dismiss because "the stay applies to 'all discovery' in any 'action' under the PSLRA's purview." *In re Smith Barney Transfer Agent Litig.*, No. 05 Civ. 7583(WHP), 2006 WL 1738078, at *3 (S.D.N.Y. June 26, 2006). Here, there is no question that this action falls under the PSLRA's purview because Plaintiffs' Amended Complaint "alleges claims for [the] violation of the federal securities laws (specifically Sections 10(b), 20(a) and 20(b) of the Exchange Act) against some . . . defendants." Pls.' Br. 3; *see also* Am. Compl. ¶¶ 837-860.

Plaintiffs nonetheless argue that the PSLRA stay does not preclude discovery on their common law claims against Responding Defendants prior to the resolution of motions to dismiss because Plaintiffs have not asserted any federal securities claims against Responding Defendants. This argument ignores that the PSLRA stay bars discovery on all claims asserted in any action falling under the purview of the PSLRA because "the PSLRA stay provision expressly applies to federal securities *actions* (not claims) arising under [the federal securities laws]." *Gardner*, 2012 WL 1230135, at *4. Indeed, courts have held that under the PSLRA's stay provision "discovery should be stayed as to all defendants, even though motions to dismiss were filed by only some of the defendants." *Sedona Corp.*, 2005 WL 2647945, at *3 (listing cases).

Plaintiffs' argument that application of the PSLRA stay should be evaluated separately as to each defendant also finds no support in the text of the PSLRA or the case law. *See* Pls.' Br. 6-7. Indeed, the only cases Plaintiffs cite in support of this proposition are cases in which courts

allowed plaintiffs to commence discovery with respect to their claims against certain defendants only *after denying those defendants' motions to dismiss*. *See In re Lernout & Hauspie Securities Litigation*, 214 F. Supp. 2d 100, 106-07 (D. Mass. 2002); *Latham v. Stein*, No. 6:08-2995-RBH, 6:08-3183-RBH, 2010 WL 3294722, at *3 (D.S.C. Aug. 20, 2010). Such cases are plainly inapposite here because Responding Defendants' motions to dismiss have not been denied.[4]

B. The Availability Of Diversity Jurisdiction Does Not Permit Discovery On Plaintiffs' State Law Claims

Plaintiffs argue that they should be permitted to commence discovery against Responding Defendants because their state law claims "are grounded in diversity jurisdiction and [are] actionable independently from any alleged federal securities claims." Pls.' Br. 2. This argument is meritless. State law claims asserted in an action in which federal securities claims are also asserted are not exempt from the PSLRA stay simply because a court has independent diversity jurisdiction over the state law claims: "There is simply nothing in either the text or the legislative history of the PSLRA that suggests that Congress intended to except federal securities actions in which there happens to be both diversity of citizenship and pendent state law claims." *In re Trump Hotel S'holder Derivative Litig.*, No. 96 Civ. 7820 (DAB)(HBP), 1997 WL 442135, at *2 (S.D.N.Y. 1997); *see also Benbow v. Aspen Tech., Inc.*, No. Civ.A. 02-2881, 2003 WL 1873910, at *3 (E.D. La. Apr. 11, 2003) (holding that the PSLRA's automatic stay provision applies to plaintiffs' state law claims because plaintiffs "chose to . . . claim a violation of federal securities laws"); *Gardner*, 2012 WL 1230135, at *5 ("[T]he discovery stay also applies to

[4] Plaintiffs' request to commence discovery against UBS AG and Mortgage Asset Securitization Transactions, Inc. should be denied for the additional reason that Plaintiffs' Amended Complaint appears to assert federal securities claims against those very same entities. *See* Am. Compl. ¶¶ 58-62 (defining "UBS" to include UBS AG and Mortgage Asset Securitization Transactions, Inc., in addition to UBS Securities LLC); *id.* ¶¶ 850, 858 (alleging that "UBS" violated Sections 20(a) and 20(b) of the Securities Exchange Act).

plaintiffs' state law diversity claims. Where, as here, a private action arises under the federal securities laws, the PSLRA plainly calls for a stay of '*all* discovery and other proceedings,' with no exception carved out for situations also involving non-fraud claims grounded in diversity jurisdiction.").

Applying the PSLRA stay to state law claims for which a court has independent diversity jurisdiction is especially proper where the plaintiff's state law and federal securities claims arise out of the same operative facts and thus will generally involve the same discovery. *See, e.g.*, *Benbow*, 2003 WL 1873910, at *5; *In re Altera Corp. Derivative Litig.*, No. C 06-03447 JW, 2006 WL 2917578, at *1 (N.D. Cal. Oct. 11, 2006). Here, Plaintiffs' state law and federal securities claims clearly arise out of the same operative facts because these claims are premised on Plaintiffs' assertion that "Plaintiffs purchased the subject RMBS while relying on defendants' false and misleading statements and omissions regarding the quality of the underlying loans and the loan underwriting standards that had been used to screen and select the mortgage loans deposited into the RMBS trusts," and that each named defendant "knew or recklessly disregarded the falsity of their material misstatements when selling these RMBS to Plaintiffs." Pls.' Br. 2; *see also* Am. Compl. ¶¶ 815-60 (Counts I-VI) (stating that Plaintiffs "repeat[ ] and reallege[ ] the [same] allegations above as if fully set forth herein" to assert state law and federal securities claims).

Plaintiffs' assertion that the PSLRA stay is inapplicable to state law claims asserted in actions arising under the federal securities laws is premised primarily on one district court decision, *Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162 (S.D.N.Y. 2001), which is not binding on this Court and that other courts have criticized or declined to follow. *See Gardner*, 2012 WL 1230135, at *5 ("[T]his Court respectfully disagrees with the reasoning set forth in *Tobias*, and . . . finds that the text of the PSLRA supports a stay of discovery as to each

of plaintiffs' claims."); *see generally Sarantakis v. Frank Dominic Gruttadauria*, No. 02 C 1609, 2002 WL 1803750, at *4 (N.D. Ill. Aug. 5, 2002) (holding that *Tobias* did not support the conclusion that the PSLRA was inapplicable to the plaintiff's state law claims "even if the Court presumes [the] reasoning [in *Tobias*] is sound"); *Benbow*, 2003 WL 1873910, at *5 (holding that *Tobias* did not render the PSLRA's stay provision inapplicable to state law claims even "[a]ssuming *arguendo* that the rationale underpinning the holding of the *Tobias Holdings* case stands on firm ground").[5]

In addition to being contrary to the weight of authority, *Tobias* is wholly inapposite because "the narrow question presented [in *Tobias* was] whether the PSLRA stays discovery with respect to [the] plaintiff's non-fraud state law claims where jurisdiction over such claims is based on diversity of citizenship." 177 F. Supp. 2d at 164-65. Here, unlike in *Tobias*, Plaintiffs are seeking discovery on state law fraud claims. *See* Am. Compl. ¶¶ 815-27 (alleging "[c]ommon [l]aw [f]raud [a]gainst [a]ll [d]efendants"); *id.* ¶¶ 828-31(alleging unjust enrichment claim based on the defendants' purported fraudulent acts); *id.* ¶¶ 832-36 (alleging that defendants aided and abetted each other's purported fraudulent conduct).[6] Moreover, unlike here, the state

[5] Plaintiffs also rely on *Fazio v. Lehman Brothers, Inc.*, No. 1:02CV157, 1:02CV370, 1:02CV382, 2002 WL 32121836 (N.D. Ohio May 16, 2002), to argue that the PSLRA does not bar discovery on state law claims where independent diversity jurisdiction exists over such claims. Like *Tobias*, courts have criticized the reasoning in *Fazio* and declined to follow its holding. *See, e.g.*, *Sarantakis*, 2002 WL 1803750, at *4 ("*Fazio* is in conflict with the majority of other courts that have examined the PSLRA's mandatory stay provision and appears to disregard the language of the statute."); *Benbow*, 2003 WL 1873910, at *5 ("The *Fazio* case appears to be in conflict with the overwhelming majority view. Moreover, the decision ignores the clear and precise language of the [PSLRA], which requires [a] stay of all discovery and other proceedings pending the determination of the sufficiency of the plaintiff's pleadings[.]").

[6] Notably, the plaintiff in *Tobias*, unlike Plaintiffs here, did not seek discovery on its state law fraud claims even though jurisdiction over these claims was based on diversity of citizenship. 177 F. Supp. 2d at 164, 169; *see also In re Altera Corp.*, 2006 WL 2917578, at *1 (holding that *Tobias* was "inapposite" because "[*Tobias*] stands for the proposition that the PSLRA discovery stay does not apply to non-fraud state law claims"); *Gardner*, 2012 WL 1230135, at *5 (noting that "the plaintiff [in *Tobias*] did not seek

(footnote cont. next page)

law claims for which discovery was allowed in *Tobias* were contract and tortious interference claims which the court characterized as being "separate and distinct" from the plaintiff's federal securities claims. 177 F. Supp. 2d at 166-68. As noted above, Plaintiffs' common law claims against Responding Defendants are hardly "separate and distinct" from Plaintiffs' federal securities claims in this action. To the contrary, Plaintiffs' fraud claims are based on the same operative facts as its federal securities claims and are likely to involve essentially the same discovery.

Indeed, another of the cases cited by Plaintiffs, *Angell Investments, L.L.C. v. Purizer Corp.*, No. 01 C 6359, 2001 WL 1345996 (N.D. Ill. Oct. 31, 2001), makes clear that *Tobias* does not support Plaintiffs' position. In *Angell*, the court expressly rejected Plaintiffs' reading of *Tobias* in holding that *Tobias* "does not stand for the proposition that if the basis of federal jurisdiction over state law claims could be found in diversity of citizenship, even where the state claims are closely tied to the federal claims, the PSLRA's discovery stay does not apply." *Id.* at *2. Rather, *Tobias* "stands for the proposition that state law claims that are distinct from the federal securities claims . . . are not subject to the discovery stay." *Id.* Based on this reading of *Tobias*, the court reversed its prior decision allowing the plaintiffs to commence discovery and held that the PSLRA's stay provision precluded any discovery prior to a ruling on the motion to dismiss even though the court could have invoked diversity jurisdiction over the plaintiffs' state law claims. *Id.*

Plaintiffs' assertion that applying the PSLRA stay to their state law clams against Responding Defendants would penalize Plaintiffs for efficiently asserting all of their claims in a single action also fails. *See* Pls.' Br. 7. "Having chosen to invoke [the federal securities laws in

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and the court did not order discovery on . . . plaintiff's common law fraud claim"); *In re Adelphia Commc'ns Corp.*, 293 B.R. 337, 355-56 (Bankr. S.D.N.Y. 2003) (same).

this action], plaintiffs are necessarily subject to the PSLRA" given that "[t]here is simply nothing in either the text or the legislative history of the PSLRA that suggests that Congress intended to except federal securities actions in which there happens to be both diversity of citizenship and pendent state law claims." *In re Trump*, 1997 WL 442135, at *2.

Finally, Plaintiffs' argument that the PSLRA stay is inapplicable to their state law claims against Responding Defendants because this is an individual action, rather than a class action, has no merit. The PSLRA stay does not distinguish between individual actions and class actions, and courts have repeatedly held that it applies equally to both. *See, e.g.*, *id*. at *1; *Riggs v. Termeer*, No. 03 Civ. 4014 MP, 2003 WL 21345183, at *1 (S.D.N.Y. June 9, 2003); *In re Altera Corp.*, 2006 WL 2917578, at *1; *Linder v. American Express Co.*, No. 10 Civ. 2228(JSR)(JLC), 2010 WL 4537819, at *1 (S.D.N.Y. Nov. 9, 2010).

II. Even If The PSLRA Stay Were Held Not To Apply To Plaintiffs' State Law Claims, A Stay Of Discovery Would Nonetheless Be Proper Under Rule 26(c)

Even if the PSLRA stay were held not to apply to Plaintiffs' state law claims against Responding Defendants, the Court should exercise its discretion to grant a stay of discovery pursuant to Rule 26(c). Under Rule 26(c), a court may grant a protective order "for good cause . . . to protect a party or person from . . . undue burden or expense." Fed. R. Civ. P. 26(c). In determining whether to stay discovery pending the disposition of a motion to dismiss, courts consider: (i) the strength of the dispositive motion; (ii) the breadth of the discovery sought and the burden imposed on the responding party; and (iii) the prejudice a stay would have on the non-responding party. *See, e.g.*, *Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc.*, No. 09 CV 5874(RPP), 2009 WL 2777076, at *1 (S.D.N.Y. Sept. 1, 2009). All three of these factors strongly favor staying discovery on Plaintiffs' state law claims against Responding Defendants pending the adjudication of their motions to dismiss.

First, courts regularly stay discovery pending a decision on dispositive motions to avoid the burden and expense of discovery which the decision may render unnecessary. *See, e.g.*, *id.* (granting stay pending motion to dismiss because it "could avoid the need for costly and time-consuming discovery"); *Johnson v. N.Y. Univ. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (same). Here, Responding Defendants will be filing motions to dismiss all of Plaintiffs' claims against them which, if granted, will result in their dismissal from this action and will thereby obviate the need for the requested discovery. Responding Defendants' motions to dismiss will argue, among other things, that Plaintiffs have failed to plead an actionable misstatement or omission, that their common law fraud claims fail to adequately allege scienter, and that all of their claims are time barred by applicable statutes of limitation. These are far from trivial motions, and clearly satisfy the standard that courts have previously considered sufficient to stay discovery pending resolution of motions to dismiss. *See, e.g.*, *Johnson*, 205 F.R.D. at 434 (granting stay where motion to dismiss "does not appear to be unfounded in the law"); *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (same); *Integrated Sys. & Power, Inc.*, 2009 WL 2777076, at *1 (same). Even if Responding Defendants' motions are granted only in part, the dismissal or narrowing of some of Plaintiffs' claims may significantly affect the appropriate scope of discovery in this action. Embarking on discovery before the sufficiency of Plaintiffs' pleading has been determined would thus be highly inefficient and potentially wasteful of the parties' and this Court's resources.

Second, Plaintiffs are seeking broad discovery that will impose a substantial burden on Responding Defendants. Specifically, Plaintiffs ask the Court to compel Responding Defendants to respond to 41 separate documents requests, all of which are broadly worded and seek documents covering an eight year period. *See* Wood Decl. Ex. D; Pls.' Br. 4 n.4 (confirming that

Plaintiffs are seeking discovery related to Doc. Req. Nos. 1, 7-18, 22, 24, 27-29, 31-39, 42-47, 49-50, 52-53, 55-58). The scope of these document requests demonstrates that the title of Plaintiffs' Motion as being one for "limited" discovery is a misnomer. The requests seek broad-based discovery concerning every conceivable aspect of the securitizations and certificates at issue. To respond to these document requests, if and when the appropriate time comes to do so, Responding Defendants will likely need to review millions of pages of documents, an expensive and time-intensive process that may be rendered unnecessary by the Court's disposition of the motions to dismiss. *See, e.g.*, *Johnson*, 205 F.R.D. at 434; *Spencer Trask Software*, 206 F.R.D. at 368; *Integrated Sys. & Power, Inc.*, 2009 WL 2777076, at *1.

Third, Plaintiffs have not asserted that they will be prejudiced by a stay of discovery on their claims against Responding Defendants, nor can they make any such showing. A stay of discovery will be temporary and will last only for the duration of briefing and ruling on Responding Defendants' motions to dismiss. Plaintiffs commenced this action approximately fourteen months ago and have not demonstrated any particular urgency in moving it forward. Delays have been caused by, among other things, Plaintiffs' motion to consolidate this action with another previously-filed action (which was denied without prejudice), as well as a lengthy period during which Plaintiffs prepared their Amended Complaint. Moreover, Plaintiffs' claims relate to securities that they purchased between five and seven years ago. Having taken so long to commence this action and to file the operative Amended Complaint, Plaintiffs cannot be heard to complain about a stay of discovery while the Court adjudicates dispositive motions that could result in complete dismissal of the action, or dismissal as to the Responding Defendants from which it seeks discovery, or at least a substantial narrowing of the case in a manner that significantly affects the discovery Plaintiffs seek. Responding Defendants have taken all appropriate steps to preserve documents potentially responsive to Plaintiffs' requests, further

demonstrating the lack of prejudice to Plaintiffs from a discovery stay during the pendency of motions to dismiss.

Finally, basic principles of efficiency favor a stay of discovery against the Responding Defendants during the pendency of motions to dismiss. The Responding Defendants are 7 of the 31 named defendants in this action. Commencing discovery in a piecemeal fashion against a subset of the defendants while discovery continues to be stayed against all other defendants will not result in this action being ready for trial (if the Amended Complaint survives motions to dismiss) any quicker than it otherwise would be. Nor will it conserve judicial resources. To the contrary, despite counsel's best efforts, it is inevitable in an action of this complexity and importance that there will be discovery disputes that the parties will bring to this Court for resolution, and that those disputes are likely to be substantially similar as to most or all of the defendants. Embarking on discovery and requiring the parties and the Court to resolve disputes where the issue has become ripe only as to some of the defendants and not others, but as to which the Court's ruling will affect all defendants, will be an inefficient way to resolve such disputes and will potentially prejudice other defendants. The better course would be to deal with common discovery disputes once only, when such disputes are ripe as to all affected parties and with all affected parties being heard.

CONCLUSION

For the foregoing reasons, Responding Defendants respectfully request that the Court dismiss Plaintiffs' Motion and confirm that the automatic stay of discovery under the PSLRA remains in place pending this Court's ruling on Responding Defendants' motions to dismiss, or, if the Court finds that the PSLRA stay does not apply to Plaintiffs' state law claims against Responding Defendants, Responding Defendants respectfully request that the Court grant a stay of discovery pursuant to Rule 26(c) of the Federal Rules of Civil Procedure pending the disposition of Responding Defendants' motions to dismiss.

Dated: June 29, 2012
New York, New York

Respectfully submitted,

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