

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

JOHN J. SISK, )  
DAVID J. FANNON, )  
QVT FINANCIAL LP, )  
IRON WORKERS OF WESTERN )  
PENNSYLVANIA PENSION PLAN, )  
YAKOV BLYAKHMAN, )  
DAVID PALAN, )

Plaintiffs, )

vs. )

NO. 1:05-cv-01658-SEB-WTL

GUIDANT CORPORATION, )  
RONALD W. DOLLENS, )  
KEITH E. BRAUER, )  
GUIDO J. NEELS, )  
BEVERLY H. LORELL, )  
RONALD N. SPAULDING, )  
J. FREDERICK MCCOY JR., )  
WILLIAM F. MCCONNELL JR., )  
JAMES M. CORNELIUS, )  
JOHN B. KING, )  
KATHLEEN LUNDBERG, )  
ROGER MARCHETTI, )  
BOSTON SCIENTIFIC CORPORATION, )

Defendants. )

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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IN RE: GUIDANT CORPORATION  
SECURITIES LITIGATION  
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Master File No.  
1:05-cv-1658-SEB-WTL

**ORDER DENYING LEAD PLAINTIFFS' MOTION FOR  
PARTIAL LIFTING OF THE PSLRA DISCOVERY STAY**

This Order addresses the Motion for Partial Lifting of the PSLRA Discovery Stay [Docket No. 58] and the Request for Oral Argument [Docket No. 66] filed by Lead Plaintiffs, David J. Fannon and the Iron Workers of Western Pennsylvania Pension Plan (collectively “Plaintiffs”). Plaintiffs, who represent a class of Guidant shareholders, request that we lift the discovery stay imposed by the Private Securities Litigation Reform Act as to particularized documents already produced to the government and other private plaintiffs in related suits. For the reasons detailed in this entry, we find that Plaintiffs will not suffer undue prejudice as a result of the stay, and thus we DENY Plaintiffs’ Motion.<sup>1</sup>

Factual Background

This case arises from a dispute between Guidant Corporation and its shareholders over the price of Guidant stock, which tumbled after information came to light regarding serious

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<sup>1</sup> In addition, Plaintiffs’ Request for Oral Argument, based on Local Rule 7.5, is hereby DENIED. The briefings in this cause are quite thorough. Therefore, we are able to reach our decision based upon these pleadings, and oral argument on the issue before us is unnecessary.

defects in Guidant defibrillators. On December 15, 2004, Guidant entered into a \$24.5 billion merger with Johnson & Johnson, a key component of which (according to Plaintiffs) was Guidant's successful line of defibrillators, including implantable defibrillators (i.e., pacemakers). Six months later, the FDA issued a recall of Guidant defibrillator models based on potentially life-threatening defects. As a result, Guidant's stock fell 4.5% and Guidant investors lost over \$1.9 billion. The following month, in July 2005, the FDA published a press release suggesting that Guidant had had knowledge of these defects, but had not disclosed this knowledge to the public. Guidant's stock price fell again.

In October 2005, Johnson & Johnson representatives stated that they were seeking a way out of the Guidant merger as a result of these developments. Over the next few months, Guidant was subpoenaed by United States Attorneys in Boston and Minneapolis, and was sued by the Attorney General of New York, regarding problems with the defibrillators and the possibility of fraud by Guidant in neglecting to reveal this information in a timely fashion. These developments further damaged Guidant's stock price. Currently, the FDA, the United States Department of Justice, several state agencies, and several private parties are in the process of investigating or litigating with Guidant as a result of these problems. Pls.' Mem. [Docket No. 59] at 3-6.

Plaintiffs, who owned Guidant stock during the relevant time period, allege that Guidant, as well as certain senior officers and directors, withheld pertinent information from investors, made false and/or misleading statements about the integrity of Guidant's defibrillators, and collectively sold off about \$90 million worth of stock from December 2004 through November 2005. They brought this suit alleging that Defendants violated provisions of the Securities

Exchange Act of 1934 by artificially inflating the price of Guidant stock and causing significant harm to their investors.<sup>2</sup>

### Legal Analysis

#### *The PSLRA*

The Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4(b)(3)(B), states that:

In any private 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.

The rationale for this provision is “to minimize the incentives for plaintiffs to file frivolous securities class actions in the hope either that corporate defendants will settle those actions rather than bear the high cost of discovery . . . or that the plaintiff will find during discovery some sustainable claim not alleged in the complaint[.]” In re WorldCom, Inc. Sec. Litig., 234 F.Supp.2d 301, 305 (S.D.N.Y. 2002) (citing House and Senate conference reports). In other words, a PSLRA-mandated stay is designed to prevent meritless “fishing expeditions.” See Newby v. Enron, 338 F.3d 467, 471 (5th Cir. 2003) (describing the purpose of the stay as “[the prevention of] costly extensive discovery and disruption of normal business activities until a court could determine whether a filed suit had merit, by ruling on the defendant’s motion to dismiss”). However, Congress has expressly provided courts with discretion to allow limited discovery in certain circumstances during the pendency of a motion to dismiss. See In re Delphi

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<sup>2</sup> Various plaintiffs initially brought five separate class action suits; we consolidated these actions under the present cause on March 16, 2006 [Docket No. 56; see also Order Consolidating Related Actions, Docket No. 61].

Corp., 2007 WL 518626 at \*4 (E.D. Mich. Feb. 15, 2007).

Defendants filed a Motion to Dismiss [Docket No. 85] in this cause on August 15, 2006. That motion is fully briefed and is currently under consideration by this Court.

*Whether the Plaintiffs will Suffer Undue Prejudice Under the Stay*

Plaintiffs request that we lift the PSLRA stay as to documents, transcripts, and other materials that have been or are being produced to governmental entities (including the FDA, SEC, U.S. Department of Justice, and New York State Attorney General) which are investigating allegations similar to those in this case, as well as materials which have been or are being produced in Motal v. Guidant, a case pending in Nueces County, Texas (Cause No. 0503377000-C). Plaintiffs have stated that they are willing to pay for duplication of all such materials, and maintain that the discovery request does not unduly burden Defendants, as they have already gathered and produced the requested documents for other parties.

Plaintiffs claim that they will suffer undue prejudice if we do not lift the discovery stay as to these particularized documents during the pendency of the motion to dismiss. The thrust of Plaintiffs' argument is that they will be unable to make informed decisions about their litigation strategy in the "shifting and rapidly changing landscape" of this litigation if the stay is not lifted, due in part to the fact that Guidant was acquired by Boston Scientific on April 21, 2006, and to the advancing government investigations and private litigation. Plaintiffs contend that they are the only interested party without access to the core documents, and that they will be unable to engage in meaningful settlement talks while the stay is operative.

Plaintiffs assert that courts routinely grant a partial lifting of PSLRA discovery stays when documents have already been compiled and produced to government agencies. Plaintiffs

cite cases, such as In re WorldCom, Inc. Sec. Litig., 234 F.Supp.2d 301 (S.D.N.Y. 2002) and In re Enron Corp. Sec., Derivative & ERISA Litig., 2002 WL 31845114 (S.D. Tex. 2002), in which courts permitted discovery during the pendency of a motion to dismiss because “[i]n a sense this discovery has already been made” (Enron, 2002 WL 31845114 at \*2) and the plaintiffs were clearly not engaged in the types of “fishing expeditions” that the PSLRA was designed to prevent. Plaintiffs maintain that under these principles, they are entitled to the documentation provided by Defendants to the government.

Defendants rejoin that Plaintiffs will not be prejudiced as to their litigation strategy in a shifting legal landscape, because the only litigation strategy Plaintiffs face at this stage is how to plead an actionable claim for securities fraud without the benefit of discovery. They also maintain that Plaintiffs are not unduly disadvantaged as to settlement negotiations because no such talks are in progress, so Plaintiffs’ concerns are purely speculative. Defendants contend that an NSLRA stay must operate “unless exceptional circumstances exist” (15 U.S.C. §78u-4(b)(3)(B) Conference Report at 37), and that such circumstances do not exist here.

Further, Defendants dispute Plaintiffs’ assertion that courts routinely lift the discovery stay when documents have already been produced to government entities or other private litigants. Defendants cite several cases in which courts have ruled that such a circumstance does not constitute “undue prejudice” sufficient to lift the stay. See, e.g., In re Elan Corp. Sec. Litig., 2004 WL 1303638 at \*1 (S.D.N.Y. 2004) (“the [PSLRA] does not provide an exception to the mandatory stay when the documents sought have already been produced outside the litigation”); In re Odyssey Healthcare, Inc., 2005 WL 1539229 at \*2 (N.D. Tex. 2005) (“[Such a] rationale, if accepted, would effectively result in a structural, or at least categorical, exception to the

discovery stay that is neither apparent nor discernible from § 78u-4(b)(3)(B).”).

We agree with Defendants that Plaintiffs have not demonstrated that they will suffer undue prejudice as a result of the PSLRA discovery stay. To be sure, Plaintiffs have articulated concerns that demonstrate that they are prejudiced by the stay, but they have not demonstrated that such prejudice is *undue* under the PSLRA. See Medical Imaging Centers of America, Inc. v. Lichtenstein, 917 F.Supp. 717, 720 (S.D. Ca. 1996) (defining “undue prejudice” as “prejudice that is *improper or unfair* under the circumstances” (emphasis added)). It appears to us that the prejudice suffered by Plaintiffs is solely that contemplated by Congress when it enacted the PSLRA. As the District Court for the Northern District of Oklahoma stated in In re CFS-Related Sec. Fraud Litig., 179 F.Supp.2d 1260, 1265 (N.D. Okla. 2001), “[p]rejudice caused by the delay inherent in the PSLRA’s discovery stay cannot be ‘undue’ prejudice because it is prejudice which is neither improper nor unfair. Rather, it is prejudice which has been mandated by Congress after a balancing of the various policy interests at stake in securities litigation[.]” There, as here, Plaintiffs “have not demonstrated that they are faced with a type or degree of prejudice distinct from that inherent in all stays of discovery.” Id.

Plaintiffs worry that they will be “left behind” if other parties are privy to discovery while they are not, and that the “shifting legal landscape” to which they repeatedly refer will leave them at a disadvantage if the stay is not lifted. These conditions, as described, do not amount to undue prejudice against Plaintiffs. Surely, it would be preferable to them to have immediate access to the documents Guidant has produced in other investigations and lawsuits; but the statute requires more than this delay or inconvenience before we may lift the stay. Plaintiffs articulate fears that documents “may get lost in the shuffle or misplaced” (Pls.’ Reply

at 11) in the merger of Guidant and Boston Scientific, but such speculative concerns also do not rise to the level of undue prejudice. See CFS, 179 F. Supp. 2d at 1265 (“It is . . . generally the case that during any stay of discovery . . . the risk of inadvertent loss of evidence is marginally increased. These concerns are inherent in the stay which Congress mandated when it enacted § 78u-4(b)(3)(B).”). Moreover, Plaintiffs themselves recognize that “there will be little risk of loss with respect to discovery produced to government entities.” Pls.’s Reply at 11.

Further, the fact that Defendants have already produced the requested documents to governmental entities does not, in our view, create undue prejudice for Plaintiffs. While we note that courts have reached varying holdings on this question,<sup>3</sup> this circumstance is not exceptional, and does not prejudice Plaintiffs in an unfair manner outside the policy considerations inherent in the PSLRA. As Defendants rightly state, several of the cases in which courts have lifted a discovery stay under this circumstance have been cases in which the defendant corporation has filed for bankruptcy or engaged in wholesale document shredding, or where some other extenuating circumstance, not present here, has existed. See Defs.’ Resp. at 11-12 (citing WorldCom, 234 F. Supp. 2d at 304-05; Enron, 2002 WL 31845114 at \*2; In re AOL Time Warner, Inc. Sec. Litig., 2003 WL 21729842 at \*1 (S.D.N.Y. 2003)).

Therefore, because Plaintiffs have not demonstrated that particularized discovery is necessary to prevent undue prejudice to them, we DENY Plaintiffs’ Motion for Partial Lifting of the PSLRA Discovery Stay. IT IS SO ORDERED.

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<sup>3</sup> See Delphi, 2007 WL 518626 at \*7 (noting that “[c]ourts that have addressed whether the PSLRA allows for a partial lift of the discovery stay when the material sought have [sic] already been disclosed to government agencies have reached contrary conclusions” and citing cases which come to differing results).

Date: \_\_\_\_\_

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