

Shifting Sands in the Desert of Corporate Disclosure:  
Recent Developments in Litigation Under the PSLRA  
In the Wake of Enron and other Corporate Disasters

David A. Bain and Joseph P. Helm, III  
Chitwood & Harley, LLP  
Atlanta, Georgia

TABLE OF CONTENTS

I.	Recent Decisions Suggest a Changing Interpretive Environment for Pleading Standards Under the PSLRA .....	1
II.	The Element of Loss Causation To Be Further Determined By the Supreme Court .....	8
III.	Asher v. Baxter Int'l, Inc.: The Safe Harbor for Forward-Looking Statements Is Not A License To Lie .....	10
IV.	Exceptions to the PSLRA's Stay of Discovery .....	12

This paper is a brief summary of some recent developments and emerging issues in securities class actions under the Private Securities Litigation Reform Act (“PSLRA”). Among the topics: (1) recent opinions potentially suggesting a new, less stringent approach to analyzing a plaintiff’s allegations under the PSLRA’s heightened pleading requirements; (2) the circuit split regarding proof of loss causation and the Supreme Court’s decision to review the issue; (3) recent case law addressing the “safe harbor” provision of the PSLRA; and (4) an emerging split among district courts regarding the scope of the exception to the PSLRA’s stay of discovery.

## I. Recent Decisions Suggest a Changing Interpretive Environment for Pleading Standards Under the PSLRA

The Private Securities Litigation Reform Act of 1995 (“PSLRA”) was passed by Congress on December 22, 1995, in order to curb perceived abuses in the filing of civil securities class actions. See, e.g., *Novak v. Kasaks*, 216 F.3d 300, 306 (2<sup>nd</sup> Cir. 2000) (“[I]nvestors were apparently motivated in large part by a perceived need to deter strike suits wherein opportunistic private plaintiffs file securities fraud claims of dubious merit in order to extract large settlement recoveries”) (citing H.R. Conf. Rep. No. 104-369, at 31 (1995) (noting “significant evidence of abuse in private securities lawsuits,” including “the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without regard to any underlying culpability of the issuer,” and “the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle,” reprinted in 1995 U.S. Code Cong. & Admin. News 730)).

Among several modifications to the procedures governing the initial stages of class actions alleging fraud under the federal securities laws, the PSLRA imposes

heightened pleading requirements for plaintiffs in conjunction with an automatic stay of discovery pending resolution of a motion to dismiss. In order to state a viable claim for violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, a plaintiff must allege that in connection with the purchase or sale of securities, the defendant(s): (1) made a misstatement or omission, (2) of material fact, (3) with scienter (knowledge of the statement's falsity or severe recklessness with respect to the statement's truth or falsity), (4) upon which the plaintiff relied, and (5) that proximately caused the plaintiff's injury. See, e.g., *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1281 (11<sup>th</sup> Cir. 1999). The PSLRA provides, in pertinent part:

In any private action arising under this chapter in which the plaintiff alleges that the defendant—  
(A) made an untrue statement of a material fact; or  
(B) omitted to state a material fact necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading;  
the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1). Furthermore, in order to sufficiently allege scienter, a plaintiff must, "with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."<sup>1</sup> 15 U.S.C. § 78u-4(b)(2).

Since the enactment of the PSLRA, the proper construction and application of these heightened pleading requirements has been the focal point of much securities

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<sup>1</sup> These requirements have been deemed cumulative of Fed. R. Civ. P. 9(b), which provides that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." See, e.g., *Bryant v. Apple South*, 25 F. Supp. 2d 1372, 1377 (M.D. Ga. 1998).

class action litigation and has received voluminous treatment by commentators. See, e.g., Ray J. Grzebielski & Brian O. O'Mara, Whether Alleging "Motive and Opportunity" Can Satisfy the Heightened Pleading Standards of the Private Securities Litigation Reform Act: Much Ado About Nothing, 1 DePaul Bus. & Comm. L.J. 313 (2003); Lawrence J. Zweifach et al., Recent Developments in the Standard for Pleading Claims Under the Private Securities Litigation Reform Act, 13 Securities Reform Act Litig. Rptr. 213 (May 2002); Elliott J. Weiss, Complex Litigation at the Millennium: Pleading Securities Fraud, 64 Law & Contemp. Prob. 5 (2001); Brian Murray & Donald J. Wallace, You Shouldn't Be Required to Plead More than You Have To Prove, 53 Baylor L. Rev. 783 (2001). Because the PSLRA and its legislative history provide meager guidance as to the practical import of these heightened pleading requirements, there is a marked degree of variation among circuit and district courts as to their application. See Zweifach et al., *supra* (surveying case law).

One of the most challenging aspects of successfully pleading a 10b-5 claim is providing enough particularized allegations to meet the PSLRA's scienter pleading standard (especially without the benefit of formal discovery). While the standard is a subject of ongoing debate among the appellate courts, the U.S. Supreme Court has thus far chosen not to resolve apparent conflicts among the circuits. On opposite ends of the spectrum are the Second and Ninth Circuits, with most circuits taking an approach somewhere in between in terms of what kinds of allegations suffice and how the allegations are to be analyzed.<sup>2</sup>

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<sup>2</sup> For examples of "intermediate" approaches to the heightened pleading requirements of the PSLRA, see, e.g., *In re City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245 (10<sup>th</sup> Cir. 2001); *Helwig v. Vencor*, 251 F.3d 540 (6<sup>th</sup> Cir. 2001); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271 (11<sup>th</sup> Cir. 1999).

In *Novak v. Kasaks*, 216 F.3d 300 (2<sup>nd</sup> Cir. 2000), the Second Circuit held that: (1) the PSLRA did not change the substantive standard of scienter, and therefore, a showing of recklessness as to the truth or falsity of alleged misstatements would suffice; and (2) “motive and opportunity” allegations, such as evidence of insider trading or other economic motives to commit fraud could be alleged to raise a “strong inference” of scienter. As a consequence, a number of district courts in the Second Circuit have denied motions to dismiss where the plaintiffs’ scienter allegations largely center around “motive and opportunity.” See, e.g., *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); *Burstyn v. Worldwide Xceed Group, Inc.*, 2002 WL 31191741 (S.D.N.Y. 2002); *RMED Int’l v. Sloan’s Supermarkets, Inc.*, 185 F. Supp. 2d 389 (S.D.N.Y. 2002); *In re Xerox Corp. Sec. Litig.*, 165 F. Supp. 2d 208 (D. Conn. 2001).<sup>3</sup>

On the other end of the continuum, the Ninth Circuit’s decision in *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970 (9<sup>th</sup> Cir. 1999), represents the most stringent interpretation of the PSLRA’s scienter pleading standard. The Silicon Graphics court held that:

a private securities plaintiff proceeding under the PSLRA must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct . . . . [A]lthough facts showing mere recklessness or a motive to commit fraud and opportunity to do so may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness.

*Id.* at 974 (emphasis in original). The Silicon Graphics holding is predicated on the notion that, by using the phrase “strong inference,” Congress intended to elevate the pre-PSLRA Second Circuit standard that required plaintiffs to allege facts

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<sup>3</sup> The Third Circuit’s construction of the PSLRA’s scienter pleading requirement mirrors that of the Second Circuit. In *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525 (3<sup>rd</sup> Cir. 1999), the court held that it “remains sufficient” for plaintiffs to plead scienter by alleging “motive and opportunity to commit fraud, or by setting forth facts that constitute circumstantial evidence of either reckless or conscious behavior.” *Id.* at 534-35 (cit. omitted).

demonstrating simple recklessness or motive and opportunity to commit fraud. The Ninth Circuit opined that, “[i]n order to show a strong inference of deliberate recklessness, plaintiffs must state facts that come closer to demonstrating intent, as opposed to mere motive and opportunity.” *Id.*

Several post-Silicon Graphics decisions in the Ninth Circuit demonstrated a propensity to interpret the PSLRA very stringently and to dismiss securities class actions at the pleading stage. See, e.g., *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079 (9<sup>th</sup> Cir. 2002); *Lipton v. Pathogenesis Corp. Sec. Litig.*, 284 F.3d 1027 (9<sup>th</sup> Cir. 2002); *DSAM Global Value fund v. Altris Software, Inc.*, 288 F.3d 385 (9<sup>th</sup> Cir. 2002); *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997 (9<sup>th</sup> Cir. 2002); *Ronconi v. Larkin*, 253 F.3d 423 (9<sup>th</sup> Cir. 2001). In *Gompper v. VISX, Inc.*, 298 F.3d 893 (9<sup>th</sup> Cir. 2002), the court seemed to take an even more strict approach to applying the scienter standard, instructing lower courts to disregard the traditional standard of review on a motion to dismiss—requiring that all alleged facts be considered true and that all reasonable inferences be drawn in favor of the non-moving party. Instead, the *VISX* court held that “when determining whether plaintiffs have shown a strong inference of scienter, the court must consider all reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs.” *Id.* at 897.

More recently, however, in the wake of corporate disasters such as Enron, WorldCom, Adelphia, and many others, a couple of recent decisions in the Ninth Circuit appear to signal a new approach to the pleading requirements of the PSLRA. In *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920 (9<sup>th</sup> Cir. 2003), the Ninth Circuit reversed the trial court’s dismissal of the

plaintiffs' complaint, which alleged that America West and its officers and directors had intentionally misrepresented the degree of the company's aircraft maintenance problems in order to artificially inflate the value of the company's stock so their controlling shareholders could reap \$67 million in insider trading profits. *Id.* at 934. The district court dismissed the complaint because, in its view, the plaintiffs "failed to sufficiently support their allegations of false and misleading statements with great detail [the Silicon Graphics articulation] and all relevant circumstances; and . . . failed to state with particularity all facts that gave rise to a strong inference of deliberate recklessness or actual intent." *Id.* at 930.

Acknowledging the tension between the Ninth Circuit's holding in *VISX* (requiring the court to consider all reasonable inferences to be drawn from a plaintiff's scienter allegations, including unfavorable ones) and the standard of review on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the *America West* court reversed the decision below, opining that "[i]n this era of corporate scandal, when insiders manipulate the market with the complicity of lawyers and accountants, we are cautious not to raise the bar of the PSLRA any higher than that which is required under its mandates. The District Court's failure to accept Plaintiffs' allegations as true and construe them in a light most favorable to Plaintiffs does just that." *Id.* at 946.

In an even more recent decision, the Ninth Circuit again reversed the dismissal of a securities fraud complaint for failure to state a claim. In *Nursing Home Pension Fund, Local 144 v. Oracle Corp., et al.*, 2004 WL 1936403 (9<sup>th</sup> Cir. 2004), the plaintiffs had alleged that officers of Oracle were aware of the significant negative effect of the U.S. economy's slowdown on Oracle's business contrary to their representations about

the company's current situation and prospects. The plaintiffs' scienter allegations largely centered around real-time internal sales monitoring at the company and suspiciously-timed stock sales by insiders. *Id.* at \*4-\*6. Finding fault with nearly every aspect of the district court's analysis (which was mostly based on pre-America West authority), the Oracle court echoed the America West court's admonition about overly stringent applications of the PSLRA:

The PSLRA was designed to eliminate frivolous or sham actions, but not actions of substance. This is far from a cookie-cutter complaint. Together, the false representations, both as to current facts and future estimated profits and sales, as well as the improper revenue adjustment and unusual stock sales, provide a basis for the cause of action against Oracle and each of its three top executives.

*Id.* at \*8.

In evaluating a securities claim on a motion to dismiss, courts generally have applied what has been called the "mosaic" theory—that the allegations of a complaint should be viewed in their totality, without regard to whether particular statements were misleading on a statement-by-statement basis. In the age of the PSLRA, many defendants have urged courts to abandon that approach in favor of a statement-by-statement analysis to determine whether a plaintiff has adequately alleged scienter. Although defendants had some initial success with this argument in the Ninth Circuit, a recent opinion flatly rejects this piecemeal type of analysis. In *Broudo v. Dura Pharmaceuticals*, 339 F.3d 933 (9<sup>th</sup> Cir. 2003), the court held that although the trial court had correctly found that scienter was insufficiently pled as to particular statements, the trial court should have nonetheless considered whether the "totality of the plaintiffs' allegations, even though individually lacking, are sufficient to create a strong inference that defendants acted with deliberate recklessness." Accordingly, the



court vacated the decision dismissing the case and remanded for further consideration.

In a similar vein, the Eleventh Circuit recently held that :

Nothing in [the PSLRA] suggests that scienter may only be inferred from individual facts, each of which alone gives rise to a strong inference of scienter, rather than from an aggregation of particularized facts. We readily join the courts that have interpreted the PSLRA to permit the aggregation of facts to infer scienter.

Phillips v. Scientific-Atlanta, Inc., 374 F.3d 1015, 1017 (11<sup>th</sup> Cir. 2004) (citing Dura).

It appears that some courts are backing away from earlier, more harsh readings of the PSLRA in light of recent corporate scandals. Although it is perhaps too early to tell, this is possibly out of the recognition that securities fraud class actions serve an important and necessary role in the enforcement of the federal securities laws, especially in a time when corporate fraud has caused unprecedented harm to investors and massive economic dislocation. In the age of Enron, weakening the federal securities laws does not seem like such a good idea.

## II. The Element of Loss Causation To Be Further Determined by the Supreme Court

Recently the Supreme Court granted certiorari to review the case of Broudo v. Dura Pharmaceuticals, discussed supra. The Court ostensibly agreed to hear the case in order to resolve a burgeoning split among the circuits over the requisite standard with respect to loss causation. As noted above, one of the elements of a cause of action for securities fraud under 10b-5 is that the misrepresentation or omission at issue proximately caused the plaintiff's injury. At the heart of the question is whether a plaintiff is injured by purchasing a security that has an inflated value because of a misrepresentation or omission, or whether a plaintiff only experiences an injury if the fraud is later disclosed in some way, thereby triggering a decline in the investment's

value. Under the latter approach, an important corollary emerges—if a security's decline in value cannot be tied to a “corrective disclosure” of the alleged fraudulent misrepresentation, then the misrepresentation cannot be deemed to have proximately caused the plaintiff's injury.

In *Dura*, the Ninth Circuit held that in a “fraud on the market” case, a plaintiff establishes loss causation if they plead that the stock price on the date of purchase was inflated because of the alleged misrepresentation. The court concluded that it is not necessary that a market price drop actually occur in order to establish loss causation. At issue in the case was whether the company's alleged misstatements regarding regulatory approval of one of its products were actionable in relation to a sharp decline in the price of the company's stock that followed on the announcement of an anticipated revenue shortfall. The announcement preceded by several months any disclosure that the product did not or would not receive regulatory approval. Consistent with the notion that an injury occurs at the time a plaintiff purchases overvalued stock, the court ruled that the misstatements regarding the prospects for its product were indeed actionable. The only circuit to agree with the Ninth on this point is the Eighth Circuit. See *Gebhart v. Conagra Foods, Inc.*, 335 F.3d 824, 831 (8<sup>th</sup> Cir. 2003) (loss causation may be presumed in a fraud-on-the-market case if there is a pleading of price inflation caused by misrepresentation).

Several circuits construe the loss causation element differently, requiring some connection between the corrective disclosure and the subsequent decline in the price of the security at issue. For example, in *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441 (11<sup>th</sup> Cir. 1997), the Eleventh Circuit addressed loss causation in a case where the

misrepresentation was not disclosed to the public until more than a year after the drop in stock price. The court expressly rejected the reasoning that the Ninth Circuit would later apply in *Dura*, opining that the fraud on the market presumption of reliance is more closely related to “transaction causation” than loss causation, and that the law requires “proof of a causal connection between the misrepresentation and the investment’s subsequent decline in value.” *Id.* at 1448. See also, *Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189 (2d Cir. 2003); *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *Bastian v. Petron Resources Corp.*, 892 F.2d 680 (7<sup>th</sup> Cir. 1990), cert. denied, 496 U.S. 906 (1990).

### III. *Asher v. Baxter Int’l, Inc.*: The Safe Harbor For Forward-Looking Statements Is Not A License To Lie

In addition to heightened pleading requirements, the PSLRA also provides a “safe harbor” that protects defendants from liability for “forward-looking statements.” See 15 U.S.C. § 78u-5(c)(1). Under this provision, a corporation or individual defendant may avoid liability for forward-looking statements that prove false if such statements are identified as forward-looking and are “accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement[s] . . . .” 15 U.S.C. § 78u-5(c)(1)(A)(i). The PSLRA defines “forward-looking statements” as, *inter alia*, statements of plans and objectives of management for future operations and statements estimating future economic performance. This statutory safe harbor has frequently been applied to bar claims at the pleading stage, often with little or no analysis by the court of whether the requisite cautionary statements are “meaningful” in the context of what corporate officers are alleged to have known at the time of the alleged

misrepresentations or omissions. See, e.g., *Baron v. Smith*, 380 F.3d 49 (1<sup>st</sup> Cir. 2004); *Harris v. Ivax Corp.*, 182 F.3d 799 (11<sup>th</sup> Cir. 1999).

A recent decision by the Seventh Circuit appears to challenge the propriety of rote application of the statutory safe harbor at the motion to dismiss stage. In *Asher v. Baxter Int'l, Inc.*, 377 F.3d 727 (7<sup>th</sup> Cir. 2004), the court began its inquiry into the proper application of the PSLRA's safe harbor by noting two propositions: (1) "'boilerplate' warnings won't do; cautions must be tailored to the risks that accompany the particular projections"; and (2) "the cautions need not identify what actually goes wrong and causes the projections to be inaccurate; prevision is not required." *Id.* at 732. After a consideration of the origin of the PSLRA safe harbor and what kinds of cautionary information might actually achieve facially meaningful notice of known risks, the court turned to the task of considering the cautionary statements at issue:

Yet Baxter's chosen language may fall short. There is no reason to think—at least, no reason that a court can accept at the pleading stage, before plaintiffs have access to discovery—that the items mentioned in Baxter's cautionary language were those thought at the time to be the (or any of the) "important" sources of variance [from projections]. The problem is not that what actually happened went unmentioned; issuers need not anticipate all sources of variance that (at the time of the projection) were the principal or important risks. For all we can tell, the major risks Baxter objectively faced when it made its forecasts were exactly those that, according to the complaint, came to pass, yet the cautionary statement mentioned none of them.

*Id.* at 734. Accordingly, Judge Easterbrook suggests that whether a cautionary statement is "meaningful" depends to some degree on the defendants' knowledge of actual risks at the time of a projection—in other words, if the (or some of the) reasons that a projection does not come to pass were risks known to the defendants, and yet they

were not articulated in the cautionary statement, the PSLRA's safe harbor should not operate to bar a plaintiff's claim at the pleading stage.

#### IV. Exceptions to the PSLRA's Stay of Discovery

As noted above, the PSLRA provides for a stay of formal discovery pending a motion to dismiss:

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.

15 U.S.C. §§ 77z-1(b)(1) and 78u-4(b)(3)(b). Opining that "the cost of discovery often forces innocent parties to settle frivolous securities class actions," H.R. Conf. Rep. No. 104-369, at 37 (1995), Congress enacted the discovery stay to discourage plaintiffs from filing baseless lawsuits and using the discovery process "in the hopes of finding a sustainable claim not alleged in the complaint." S. Rep. No. 104-98, at 14 (1995).

A number of district courts have recently addressed the scope of the exception to the stay, which allows for particularized discovery to preserve evidence or to prevent undue prejudice. See *Tobias Holdings, Inc. v. Bank United Corp.*, No. 01 Civ. 1343 (SAS), 177 F. Supp. 2d 162, 167 (S.D.N.Y. Aug. 14, 2001) ("...[T]he discovery stay provisions are not absolute but allow for particularized discovery when needed to preserve evidence or prevent undue prejudice to a party."); see also *In re Grand Casinos, Inc. Sec. Litig.*, 988 F. Supp. 1270, 1272 (D. Minn. 1997) ("If . . . Congress had intended an absolute stay on discovery, then Congress would not have authorized a judicial reprieve from such a stay, when a reprieve is needed."); *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 760 (N.D. Cal. 1997) ("the discovery stay provision

provides courts with some discretion to permit discovery in advance of a ruling on dismissal"); *Vacold LLC and Immunotherapy, Inc. v. Cerami*, 2001 WL 167704 at \*7 (S.D.N.Y. Feb. 16, 2001)(Discovery stay modified where request "does not implicate a concern that plaintiffs are seeking discovery to coerce a settlement or to support a claim not alleged in the Complaint.").

Proceeding from the consideration of whether "a production request places an undue burden on the party from which it is requested," *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 306 (S.D.N.Y. 2002), a number of courts have held that limited discovery should be allowed where a defendant has already produced materials in a government investigation or other litigation. See, e.g., *In re LaBranche Sec. Litig.*, 2004 WL 1924541 (S.D.N.Y. 2004) (not allowing plaintiffs access to documents previously produced to government entities would cause "undue prejudice"); *In re AOL Time Warner, Inc. Sec. Litig.*, 2003 WL 715752 (S.D.N.Y. 2003) ("The requested discovery has already been produced by Defendants and providing a copy to Lead Plaintiff will not constitute a burden upon them"); *In re Enron Corp. Sec., Derivative, & ERISA Litig.*, 2002 WL 31845114 (S.D. Tex. 2002) (granting partial lift of discovery of stay for documents made available to government because burden was slight and documents had already been made available outside of securities case); *In re BankAmerica Corp. Sec. Litig.*, MDL No. 1264, Order of July 19, 1999 (E.D. Mo. 1999) (plaintiffs requested modification of discovery stay to allow them to participate in ongoing discovery in a related state action; court granted motion finding that federal plaintiffs would be unduly prejudiced). But see *In re HealthSouth Sec. Litig.*, CV-03-BE-1500-S (N.D. Ala. Dec. 8, 2003) (allowing plaintiffs to use documents produced to

Congress “is not only inconsistent with the statute’s plain language, but creates an absurd result in direct contravention of Congress’ intent to protect defendants from the possibility that documents produced to governmental entities may be used by the plaintiffs in formulating a complaint or in opposing a motion to dismiss”); *In re Vivendi Universal, S.A. Sec. Litig.*, 2003 WL 21035383 (S.D.N.Y. 2003) (statute does not contain exception for documents previously produced to governmental agencies).

The cases in which courts have partially lifted the stay can perhaps be best understood when considered against the policy justifying the discovery stay in the first place. The PSLRA discovery stay was intended to spare defendants the burden and expense of discovery prior to a determination that the complaint has merit on its face. See H.R. Conf. Rep. 104-369, at 32 (1995) (discovery stay is “intended to prevent unnecessary imposition of discovery costs on defendants”). The existence of a parallel government investigation gives the court some assurance (1) that documents produced to the government can be re-produced to the private plaintiffs at minimal cost, and (2) that the private plaintiffs are not just on a fishing expedition. Under these circumstances, a partial lift of the discovery stay is often the least of the company’s concerns.