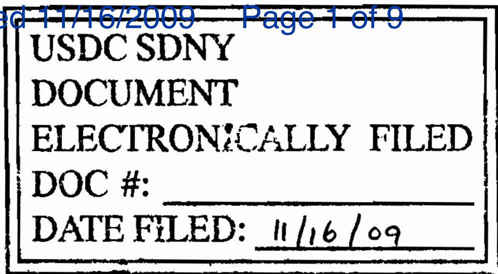

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF AMERICA CORP. SECURITIES, DERIVATIVE, AND EMPLOYMENT RETIREMENT INCOME SECURITY ACT (ERISA) LITIGATION

MEMORANDUM DECISION

No. 09 MDL 2058 (DC)

APPEARANCES: (See last page)

CHIN, District Judge

On June 30, 2009, I ordered the consolidation of thirty cases relating to the merger of Bank of America Corporation ("BofA") with Merrill Lynch & Co., Inc. ("Merrill Lynch") into three consolidated actions: a securities action; a derivative action; and an ERISA action. In re Bank of Am. Corp.

General) conducting investigations into the merger between BofA and Merrill Lynch and the payment of bonuses by Merrill Lynch for 2008; and (2) copies of any transcripts of testimony given in connection with these investigations. (Oct. 6, 2009 Letter)

The Lead Plaintiffs allege that the PSLRA discovery stay was not intended to apply to cases where the claims are adequately alleged and where the requested discovery already had been collected. The Lead Plaintiffs argue that they are "seeking discovery neither to bolster an otherwise frivolous complaint, nor to coerce defendants to settle this matter." If the stay is not partially lifted, they contend, discovery in their case "will lag substantially behind" the discovery in the

expedition' lawsuits." H.R. Conf. Rep. No. 104-369, at 37 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 736. Although undue prejudice to the plaintiffs must be shown, "courts have modified the discovery stay in securities class actions when doing so would not frustrate Congress's purposes in enacting the PSLRA." Seippel v. Sidley, Austin, Brown & Wood LLP, No. 03 Civ. 6942, 2005 WL 388561, at *1 (S.D.N.Y. Feb. 17, 2005); see also In re Labranche Sec. Litig., 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004) (citing In re Firstenergy Corp. Secs. Litig., 316 F. Supp. 2d 581 (N.D. Ohio 2004)).

In determining whether to lift the stay, courts may take all facts into account to determine whether undue burden

The Second Circuit has not addressed what a plaintiff must show to establish "undue prejudice" for these purposes. District courts have construed "undue prejudice" to mean "improper or unfair treatment amounting to something less than irreparable harm." Brigham v. Royal Bank of Canada, No. 03 Civ. 8201, 2009 WL 935684, at *1 (S.D.N.Y. Apr. 7, 2009); see In re Vivendi Universal, S.A., Secs. Litig., 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003); In re Refco, Inc., No. 05 Civ. 8626, 2006 WL 2337212 (S.D.N.Y. Aug. 8, 2006). Courts have found undue prejudice where plaintiffs would be unable to make informed decisions about their litigation strategy in a rapidly shifting landscape because they are the only major interested party

at *1 (S.D.N.Y. Apr. 7, 2009); In re Delphi Corp., MDL No. 1725, 2007 WL 518626, at *7 (E.D. Mich. Feb. 15, 2007). Although some courts have required plaintiffs to demonstrate "exceptional circumstances," 380544 Canada, Inc. v. Aspen Tech., No. 07 Civ. 1204, 2007 WL 2049738 (S.D.N.Y. July 18, 2007) (not lifting the stay because "exceptional circumstances" were not proven), I reject that standard to the extent it implies that something more than "undue prejudice" is required.

Even when a court finds undue prejudice, the stay will only be lifted on a "clearly defined universe of documents." In re Worldcom, 234 F. Supp. 2d at 301. "A string of requests, even a string of individually particularized requests -- is not

Lifting the discovery stay will not frustrate Congress's purposes in enacting the provision, and will not burden the defendants with the cost of defending themselves against a frivolous suit. Although defendants state that "it is far from clear that production of the documents sought by Plaintiff would pose no additional burden on defendants" (Def. Letter, Oct. 8, 2009), they have already collected, reviewed, and organized the documents for production in other proceedings, and the burden of making another copy for plaintiffs here will be slight. Moreover, these consolidated cases include ERISA and derivative actions, as to which the PSLRA stay does not apply.

Accordingly, the Lead Plaintiffs' motion to lift the

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