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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PRENA SMAJLAJ, individually and on behalf of others similarly situation v. BROCADE COMMUNICATIONS SYSTEMS, ET AL.	CASE NO.: C05-02042-CRB SECURITIES LITIGATION **LEAD PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PARTIAL MODIFICATION OF THE PSLRA DISCOVERY STAY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Hearing Date: November 3, 2006 Time: 10:00 a.m. Dept.: Courtroom 8, 19th Floor Before: Hon. Charles R. Breyer

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 3, 2006 at 10:00 a.m. or as soon thereafter as the matter may be heard before the Honorable Charles R. Breyer, United States District Judge, Lead Plaintiff Arkansas Public Employees Retirement System will, and hereby does, move this court for an order granting a partial modification of the PSLRA Discovery Stay.

MEMORANDUM OF POINTS AND AUTHORITIES

Lead Plaintiff, Arkansas Public Employees Retirement System ("APERS"), files this, its Motion for Partial Modification of the PSLRA Discovery Stay, for a very limited purpose: to allow APERS to obtain a copy of documents that Brocade Communications Systems, Inc. ("Brocade") has already gathered, reviewed and produced to federal authorities in connection with the investigations into Brocade's fraudulent stock option backdating. APERS would show this Honorable Court as follows:

I. INTRODUCTION

On April 14, 2006, APERS filed its Consolidated Class Action Complaint (the "Complaint") against Brocade, certain of its executives, its Audit Committee and its outside auditor, KPMG. In addition to this case, there are at least four additional actions currently pending against Brocade arising from the same fraudulent conduct alleged in APERS' Complaint: (1) the Securities and Exchange Commission ("SEC") formal action against Brocade, (2) the SEC complaint against Brocade executives, Reyes, Canova and Jensen, (3) the U.S. Attorney's complaint against Reyes and Jensen, and (4) the derivative shareholder amended complaint against Brocade and third party defendants.

In each of these other actions, the plaintiffs (or government) have been allowed to obtain discovery from Defendants. Furthermore, two of the four actions already have reached settlement agreements. Importantly, the plaintiffs in all of these actions, including this one, are competing for the same pot of limited funds. The funds over which these multiple parties are vying include not only the funds available to satisfy likely settlements or judgments, but also, presumptively, the legal costs incurred by Defendants in defending these actions. In all of these other actions, the plaintiffs are on equal footing. However, APERS is not—both in terms of prosecuting its claims and in its

ability to conduct a settlement evaluation. APERS is currently barred by the PSLRA from conducting any discovery in this action. This is not to mention the fact that several Defendants in this litigation have conducted their own investigations into the claims against them, the results of which APERS also is barred from seeing at this time. All of these facts are exacerbated by the dynamic landscape—both legal and political—in which the issue of stock option backdating currently sits. There is no dispute that this case lies in a constantly changing area in which APERS serves as the frontline flag bearer for institutional investors acting as private attorneys general.

Before this Court ever rules upon Defendants' currently pending motions to dismiss APERS' Complaint, Brocade already will have agreed to settle claims against it by the SEC for $7 million, as well as agreed to settle claims against it in the derivative shareholder lawsuit for stronger corporate governance and $525,000 in attorneys' fees (pending approval by this Court). Brocade's quick settlements are more than just an implicit admission of wrongdoing—they also indicate a significant depletion in the funds available to APERS to settle its claims. Indeed, when a company's conduct is so blatantly fraudulent, as is Brocade's here, the attention that it draws is not only that of its investors. Instead, when a company like Brocade deliberately chooses to commit fraud, the result is multiple injured parties seeking to be compensated out of a limited fund.

Without access to documents already made available to the U.S. Attorney, the SEC, and in whole or in part to Brocade's Audit Committee, and the documents that in all likelihood are in the hands of the plaintiffs in the derivative shareholder litigation, APERS is prejudiced by its inability to make informed decisions about its litigation strategy in the rapidly shifting landscape of the stock option backdating scandal, and specifically, the shifting landscape in this particular case. Indeed, APERS essentially would be the only major interested party in the criminal and civil proceedings against Brocade without access to documents that currently form the core of these proceedings.

In order to keep pace with the other entities prosecuting Brocade for its wrongdoing, particularly those who already have entered into settlement agreements with the Company, as well as to prevent significant prejudice that already has and will continue to occur to APERS as the parallel investigations and cases go forward, APERS believes that it is necessary and in the best interests of the Prospective Class for this Court to partially modify the PSLRA discovery stay to

allow APERS to obtain already-produced documents. This relief would not cause any discernable prejudice to any party. Quite the contrary, to grant dismissal of all, or some parts thereof, of APERS' Complaint based upon motions to dismiss filed without allowing APERS to fully develop the facts surrounding the allegations in its Complaint, would result in premature adjudication based upon an incomplete record. Such a result would be a clear injustice.

Furthermore, based upon publicly available information, there is no doubt that Brocade has produced a readily identifiable universe of documents to federal agencies in the course of the ongoing investigations—a universe of documents that can and should be easily reproduced and provided to APERS. For example, in the Affidavit in Support of the Criminal Complaint filed in *United States of America v. Reyes, et al*, No. 3:06 CR 70450, United State District Court for the Northern District of California, Special Agent Joseph L. Schadler declares that a memorandum exists describing the exact fraudulent practices committed by Defendants and specifically alleged in APERS' Complaint. Special Agent Schadler further identified "documentary evidence," "Committee meeting minutes for the Board of Directors," and the "Audit Committee" of Brocade's preliminary and completed internal investigation. Finally, the United States government announced at a hearing on August 9, 2006, that "over 80 boxes of documents and 350 gigabytes of electronic data" exist in this case.

Despite the fact that the governmental entities and the derivative plaintiffs have access to this evidence, APERS is currently precluded from obtaining this evidence by the PSLRA. APERS filed its Complaint without the benefit of even a shred of discovery from Defendants, yet were still able to independently gather enough evidence to specifically detail the egregious backdating fraud committed by Defendants. Even assuming Brocade preserves all relevant documents, memories will routinely fade, and individuals may pass away, or, flee the Court's jurisdiction to evade possible indictment or jail time. Furthermore, an increasing number of Brocade executives and employees involved in the alleged fraud likely will depart from the Company, if they have not already. Moreover, it will be extremely difficult for APERS to even consider an early resolution of its claims against any Defendant unless and until APERS is allowed access to the documents and other evidence turned over to other entities investigating Brocade.

II. APERS' PARTICULARIZED REQUESTS FOR DISCOVERY

APERS' requests for discovery are limited. On information and belief, Brocade has maintained a complete set of all documents that have been produced in the above-described investigations, and can easily provide a copy of these documents to APERS with minimal, if any, burden. APERS specifically requests entry of an order permitting APERS to serve Brocade with discovery requests to produce the following documents:

a. A copy of all documents reviewed by Brocade's Audit Committee and outside auditor, KPMG, in conjunction with their internal investigations of the conduct at issue in this case; and

b. A copy of all documents produced in conjunction with the SEC, DOJ, and/or FBI investigations and/or the derivative shareholders litigation.

APERS respectfully requests that the Court grant this relief immediately. If, however, the Court denies Defendants' motions to dismiss prior to the time a hearing is held on this motion, which would serve to automatically lift the PSLRA's discovery stay, APERS nevertheless would request an order from the Court requiring Defendants to immediately produce the documents itemized above without further delay. APERS makes this request in an effort to avoid the unnecessary waste of time and resources that would be expended should the Court require APERS to serve Defendants with discovery requests for these same documents and allow Defendants thirty days to object and respond.

III. STATEMENT OF FACTS

The factual background of this case is explained in great detail in APERS' Complaint and its Omnibus Response to Certain Defendants' Motions to Dismiss, which are incorporated herein by reference. However, a short summary of specific facts relevant to this motion is provided below.

A. The Restatements

The options backdating scheme carried out by Reyes, Canova and Jensen caused Brocade to materially misrepresent all of its Financial Statements during the Class Period. Indeed, all of Brocade's SEC Form 10-K's and 10-Q's filed for fiscal years 2000-2004, as well as numerous press releases issued by the Company, were materially false and misleading because they omitted

material facts related to the Company's backdating scheme. ¶¶ 44-45, 49, 56[1]. On January 6, 2005, Brocade began a series of restatements (the "Restatements"), announcing that it would restate its Financial Statements for fiscal years ending 2002 and 2003 to record additional stock-based compensation expenses as a result of a still unfinished Audit Committee internal review. *Id.*; ¶¶ 57-59. On May 16, 2005, the Company announced a further restatement to include additional stock-based compensation of $0.8 million related to options grants between August 2003 and November 2004. ¶ 62. On November 14, 2005, Brocade further admitted that its accounting practices had failed in three major regards and, thus, that all Financial Statements issued since its inception as a public company violated GAAP and were materially false and misleading. *Id.*; ¶¶ 45, 63-64; see also Brocade Form 10-KA filed November 14, 2005 for fiscal year-ended 2004, Item 7.

The Restatements resulted from an investigation by Brocade's Audit Committee that found that the Company, under Reyes and Canova, had materially misled investors for five straight years. ¶¶ 46; 58-59. As an obvious result of these findings, Brocade relieved Reyes from his positions as CEO and Chairman in January 2005. *Id*. Brocade also admitted that its internal controls and disclosure procedures regarding its option grant process were not only flawed but were, for much of the Class Period, utterly non-existent. ¶ 47; 70; 152; 199-201. These were startling admissions by the Audit Committee Defendants who, to date, have not even attempted to explain why they failed to do anything at all about the lack of internal controls or the pervasive accounting violations that went on right under their noses.

B. Reyes' Admission that Sonsini Told Him that the Audit Committee had Uncovered "Overwhelming and Conclusive" Evidence Against Him

On February 13, 2006, a Business Week article entitled "Brocade Stung by Stock Options," reported that Reyes admitted that it would have been within his powers to approve the option grants at issue in Brocade's Restatement because Brocade's Board of Directors gave him "sweeping powers" to give out options beginning in 1999. ¶ 54. According to the author, Reyes stated that Sonsini, a member of Brocade's Board of Directors during much of the Class Period and an advisor

[1] All references to "¶_" are to the APERS Complaint.

to the Company since before it went public, urged the Board to make Reyes a "committee of one" for granting options. *Id*. The author also wrote that, while Reyes denied wrongdoing, he stated that Sonsini convinced him to resign as CEO because, according to Sonsini, the evidence against Reyes was "overwhelming and conclusive." *Id*.

C. Governmental Investigations and Brocade's Quick Settlements with the SEC and Derivative Plaintiffs

On or about May 16, 2005, Brocade announced that the SEC was investigating Brocade's accounting and disclosure of stock option grants. ¶ 50. The same day, Brocade also acknowledged that the DOJ was working with the SEC in a joint investigation regarding these issues. *Id*. On or about March 8, 2006, Brocade filed its Form 10-Q for the First Quarter of 2006 announcing that it had reserved $7 million pursuant to an agreement to settle the SEC's claims against the Company, pending final approval by the SEC. ¶ 52.

On August 10, 2006, Brocade announced that it had reached a settlement agreement with plaintiffs in the derivative shareholder lawsuit in which Brocade agreed to strengthen corporate governance and pay $525,000 in attorneys' fees. This Court refused to preliminarily approve the settlement in a hearing on August 18, 2006, expressing concern that the proposed settlement did not square with the plaintiffs' complaint that the backdating scheme caused hundreds of millions of dollars in losses and the proposal did not provide for any payment for those alleged losses.

D. Additional Post-Complaint Events

On July 20, 2006, the SEC filed a civil complaint against Reyes and Canova, as well as Jensen. The SEC complaint charged Reyes with backdating options he doled out as a "committee of one" to hundreds of employees, boosting the potential value of the options and concealing millions of dollars of compensation expenses from shareholders. The complaint further alleged that Canova enabled the backdating scheme to continue undetected by ignoring facts that called into question the integrity of Brocade's Financial Statements based on its options grants. On the same date, the U.S. Attorney for the Northern District of California filed a criminal complaint against Reyes and Jensen alleging a single count of securities fraud, which carries a maximum penalty of 20 years in prison and a $5 million fine. The criminal complaint was supported by the affidavit of FBI

Agent Joseph Schadler. The affidavit was based upon witness interviews and internal documents reviewed by the FBI.

On August 9, 2006, Magistrate Judge Edward Chen denied Reyes' motion to dismiss the criminal complaint against him. At the close of the hearing, the U.S. Attorney stated that the government was ready to produce over 80 boxes of documents to Reyes' attorneys. On August 10, 2006, Reyes was charged with 12 additional counts of securities fraud in a federal indictment. These charges included conspiracy, securities fraud, mail fraud, falsifying books and making false statements to accountants. Jensen also was indicted on eight counts of conspiracy, securities fraud, mail fraud and falsifying books.

IV. THE PRECEDENT OF *IN RE WORLDCOM, IN RE ENRON* AND *IN RE TYCO* SHOULD BE FOLLOWED

The guiding law on this issue can be drawn from three cases in recent history that involved the severity of fraud, magnitude of restated financial statements, and the resulting wide-ranging federal criminal and civil investigations as that here—*In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301 (S.D.N.Y. 2002)("*WorldCom*"); *In re Enron Corp. Sec., Deriv., & ERISA Litig.*, No. MDL-1446, Civ. No. H-01-3624, 2002 U.S. Dist. LEXIS 26261 (S.D. Tex. Aug. 16, 2002)("*Enron*"); and *In re Tyco Int'l, Ltd.*, No. MDL 02-1335-B (D.N.H. Jan. 29, 2003)("*Tyco*")(Practice and Procedure Order No. 5, attached to the Declaration of Brad Beckworth as Exhibit A); *see also* 15 U.S.C. §78u-4(b)(3)(B). In all of those cases, the courts partially lifted the PSLRA discovery stay to allow the plaintiffs to obtain copies of documents previously produced to governmental authorities.

V. ARGUMENTS AND AUTHORITIES

A. Legal Standards

The PSLRA's discovery stay is not absolute. The PSLRA provides that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss....". 15 U.S.C. §78u-4(b)(3)(B). The purpose of this stay is: (1) "to minimize the incentives for plaintiffs to file frivolous securities class actions in the hope either that the corporate defendants will settle those actions rather than bear the high costs of discovery; (2) or that the plaintiff will find during discovery some sustainable claim not alleged in the complaint." *WorldCom*, 234 F. Supp. 2d at 305

(citing H.R. Conf. Rep. No. 104-369 at 37 (1995); S. Rep. No. 104-98 (1995)); *see also In re Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246, 249 (D. Md. 2004).

However, as with most general rules there are exceptions, and discovery may be allowed during the stay "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). These exceptions exist because the PSLRA's stay was not intended to apply to cases where, as here, the fraud is apparent, particularly when the requested discovery already has been collected, was produced in response to governmental investigations, and/or was made public. *See, e.g.*, *In re FirstEnergy Corp. Sec. Litig.*, 229 F.R.D. 541, 545 (N.D. Ohio 2004) ("maintaining the discovery stay as to materials already provided to government entities does not further the policies behind the PSLRA"); *Enron*, 2002 U.S. Dist. LEXIS 26261, at *30 (PSLRA was "not designed to keep secret from counsel in securities cases documents that have already become available for review by means other than discovery in the securities case"); *WorldCom*, 234 F. Supp. 2d at 306 (Where the plaintiffs were not engaged in a fishing expedition or an abusive strike suit, they did not act in contravention of the fundamentals underlying the PSLRA discovery stay, a limited lifting of the stay was granted); *see also Tyco*, Beckworth Dec. Exh. A at 10-11. Indeed, by its terms, the PSLRA discovery stay provides this Court with discretion to order limited discovery in appropriate circumstances. *See Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162, 167 (S.D.N.Y. 2001) (citing *In re Grand Casinos 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.")).

1. *Particularity*

As an initial matter, this Court must determine whether the limited discovery sought is sufficiently particularized. 15 U.S.C. §78u-4(b)(3)(B). It appears clear that the test is met if the "party seeking discovery under the exception . . . adequately specif[ies] the target of the requested discovery. . . ." *In re Lernout & Hauspie Sec. Litig.*, 214 F. Supp. 2d 100, 108 (D. Mass. 2002). The meaning of "particularized" in any specific case must "take into account the nature of the underlying litigation." *In re Royal Ahold*, 220 F.R.D. at 250 (where plaintiff's complaint alone was

430 pages and alleged multibillion dollar accounting errors by a firm with operations on at least four continents, the volume of requested documents—which was estimated at one million pages—was not unreasonable in light of this background).

Furthermore, the particularity requirement is satisfied if the requesting party requests documents already collected, produced in response to governmental investigations, and/or made public. *WorldCom*, 234 F. Supp. 2d at 306 (particularity requirement met where plaintiffs sought "a clearly defined universe of documents, specifically documents that WorldCom has already produced in connection with other identified proceedings."); *Enron*, 2002 U.S. Dist. LEXIS 26261, at *29-30 (particularity requirement met when plaintiff sought production of "all documents and materials produced by [Enron] related to any inquiry or investigation by any legislative branch committee, the executive branch, including the Department of Justice and the Securities and Exchange Commission, and all transcripts of witness interviews and or depositions related to those inquiries.").

The requirement of a particularized request protects the defendant from undue burden and complies with the PSLRA's prohibition on abusive litigation tactics. *Enron*, 2002 U.S. Dist. LEXIS 26261, at *32. Indeed, a request that seeks documents already collected and produced in response to governmental investigations, and/or otherwise made public, is nothing more than a request for discovery already provided, "and it is merely a question of keeping it from a party because of the strictures of a statute designed to prevent discovery abuse." *Id.*

2. *Necessary to Preserve Evidence or to Prevent Undue Prejudice*

Once the particularity requirement is satisfied, the court must then determine whether production "is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. §78u-4(b)(3)(B). Undue prejudice in the instant context is defined as "improper or unfair detriment that need not reach the level of irreparable harm." *In re Lernout & Hauspie Sec. Litig.*, 214 F. Supp. 2d at 107. Employing this accepted standard, several courts have lifted the PSLRA's discovery stay to provide fair treatment to plaintiffs. *See, e.g., id.* at 109; *WorldCom*, 234 F. Supp. 2d at 305; *Anderson v. First Security Corp.*, 157 F. Supp. 2d 1230, 1242 (D. Utah 2001); Global *Intellicom v. Thomson Kernaghan & Co.*, No. 99 Civ. 342 (DLC), 1999 U.S. Dist. LEXIS 5439, at

*5 (S.D.N.Y. Apr. 16, 1999); *In re Royal Ahold*, 220 F.R.D. 246; *Tyco*, Beckworth Dec. Exh. A. Even defendants may avail themselves of this relief to avoid undue prejudice. *See In re AOL Time Warner Sec. Litig.*, No. MDL 1500 (SWK), 2006 WL 1997704 (S.D.N.Y. July 13, 2006) (granting defendant relief from PSLRA discovery stay to avoid "asymmetry" between the parties).

As Judge Cote recognized in *WorldCom*, these circumstances arise when others not subject to the PSLRA's stay are entitled to conduct full discovery:

> Without access to documents already made available to the U.S. Attorney, the SEC, and in whole or part to WorldCom's Creditor Committee and the documents that in all likelihood soon to be in the hands of the ERISA plaintiffs, [Lead Plaintiff] would be prejudiced by its inability to make informed decisions about its litigation strategy in a rapidly shifting landscape. It would essentially be the only major interested party in the criminal and civil proceedings against WorldCom without access to documents that currently form the core of these proceedings.

Id.; see also Enron, 2002 U.S. Dist. LEXIS 26261, at *29-32.

Finally, the PSLRA's discovery stay also may properly be lifted when necessary to preserve evidence. 15 U.S.C. §78u-4(b)(3)(B). Simply stated, no statutory provision or preservation order can preserve documents after they already have been destroyed or have been lost. The early production of core documents is the preferred method to ensure that such materials are available for the prosecution of the action. *In re Lernout & Hauspie Sec. Litig.*, 214 F. Supp. 2d at 109.

B. The Limited Discovery Requested By APERS is Appropriate Under the PSLRA

APERS' requests for limited discovery meets each and every element required by the PSLRA and interpreting case law.

1. *APERS' Discovery Requests Are Highly Particularized*

APERS' requests for limited discovery are highly particularized as set forth in detail in Section II, *supra*. These requests are narrowly tailored and limited to the "closed universe of materials" that Brocade has already assembled and produced to other entities in the course of the ongoing investigations. *See In re FirstEnergy*, 229 F.R.D. at 545. Furthermore, the nature and background of the underlying litigation in this case—the Complaint alone exceeds 100 pages in length and alleges a pervasive scheme of stock option backdating fraud committed by Brocade, Reyes, Canova, its Audit Committee and outside auditor, KPMG—clearly render APERS' requests

reasonable under the circumstances. *See In re Royal Ahold*, 220 F.R.D. at 249. Indeed, many of the allegations in APERS' Complaint are supported by documentary evidence including Brocade's own press statements, SEC filings, the SEC Complaint, the U.S. Attorney's criminal complaint, and the federal indictment.

In light of the foregoing circumstances, it is quite obvious that APERS' claims are far from frivolous and that APERS is "not in any sense engaged in a fishing expedition or an abusive strike suit and does not thereby act in contravention of the fundamental rationales underlying the PSLRA discovery stay." *WorldCom*, 234 F. Supp. 2d at 306. The apparent strength of APERS' case should factor into the Court's determination of the necessity of obtaining already-produced documents under the PSLRA. *See In re Royal Ahold*, 220 F.R.D. at 249.

Accordingly, APERS has satisfied the particularity requirement of the PSLRA.

2. *Partial Modification of the Discovery Stay is Necessary to Preserve Key Evidence*

Although the documents produced to outside agencies presumably will be preserved, those documents—which likely comprise the most critical evidence in the case—could assist APERS in identifying other specific materials that may be at risk of loss. *Id*. Faced with Brocade's shifting corporate landscape and concerns about evidentiary loss that are by no means speculative, APERS should not be required to simply rely "on the assurances of counsel that relevant evidence will be preserved." *See In re Royal Ahold*, 220 F.R.D. at 251.

3. *APERS and the Class Will Suffer Undue Prejudice if the PSLRA Discovery Stay is Not Partially Lifted*

APERS and the Class will suffer undue prejudice if the PSLRA discovery stay is not partially lifted. Just as in *WorldCom*, if this request is not granted, APERS and the Class will be "the only major interested party in the criminal and civil proceedings against [Defendants] without access to documents that currently form the core of those proceedings." *WorldCom*, 234 F. Supp. 2d at 306. Indeed, every entity prosecuting Brocade for its fraudulent option backdating conduct—the SEC, DOJ, FBI and the derivative plaintiffs—has been granted access to critical documents, while APERS has been left with nothing other than publicly available information. While the public information documenting Brocade's rampant backdating conduct is mounting daily, APERS

clearly is and will continue to be prejudiced without access to the key documents relied upon by the federal entities in their complaints against Brocade. Like the plaintiffs in *In re FirstEnergy*, "without discovery of documents already made available to government entities, Plaintiffs would be unfairly disadvantaged in pursuing litigation and settlement strategies." 229 F.R.D. at 545; *see also Tyco*, Beckworth Dec. Exh. A at 11.

As previously detailed, federal investigations into the conduct that caused APERS and the Class to suffer investment losses are ongoing and have been proceeding against certain of the Defendants. These investigations already have resulted in the production of thousands of pages of documents by Brocade, as well as multiple interviews with employees of Brocade. APERS seeks only copies of those documents that Defendants already have compiled, reviewed, and produced to governmental agencies and private party litigants. Obviously, APERS is neither fishing to support frivolous claims nor imposing costly discovery requests upon Defendants.

Therefore, "[n]one of the perceived abuses addressed by Congress are present in this case." *Tobias*, 177 F. Supp. 2d at 166; *see also WorldCom*, 234 F. Supp. 2d at 305 (granting lead plaintiff's request for production of documents already produced to regulatory authorities); *Vacold LLC v. Cerami*, No. 00 Civ. 4024 (AGS), 2001 U.S. Dist. LEXIS 1589, at *24 (S.D.N.Y. Feb. 16, 2001) (lifting stay for particularized discovery after finding that "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"). Furthermore, the burden of producing the same set of documents to APERS will be slight considering this fact. Indeed, APERS' limited discovery requests will not cause Defendants to incur additional expenses, nor will it disrupt Defendants' business.

Judge Harmon addressed a similar issue in *Enron*, where the securities plaintiffs sought to obtain copies of all documents and materials that Enron produced in connection with related inquiries by the DOJ and the SEC. *See Enron*, 2002 U.S. Dist. LEXIS 26261, at *29. In ordering a limited lifting of the discovery stay, Judge Harmon recognized that the requested discovery would not burden the defendants because there, as here, such documents already had been found, reviewed, and organized. Id. at *32; see also, *In re FirstEnergy*, 229 F.R.D. at 545 (defendant cannot "allege any burden from providing documents that it has already reviewed and compiled").

Other courts have similarly decided that the PSLRA discovery stay does not apply to documents, such as those at issue here, which were already produced to other parties in related proceedings. *See, e.g., WorldCom*, 234 F. Supp. 2d at 306 (because documents have already been produced to others it is "easily understood" that defendants have not raised "undue burden" as an obstacle to the requested production). The reasoning of each of these courts applies here.

Accordingly, it is imperative that APERS and the Class be given access to documents produced in the course of the aforementioned investigations.

VI. CONCLUSION

For the reasons discussed above, Lead Plaintiff's Motion for Partial Modification of the PSLRA Discovery Stay should be granted.

DATED: September 29, 2006

Respectfully Submitted,

/s/

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