

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: DELPHI CORPORATION
SECURITIES LITIGATION

MDL No. 1725
Master Case No. 05-md-1725
ED Mich. No. 06-10026
Hon. Gerald E. Rosen

**LEAD PLAINTIFFS' MOTION FOR PARTIAL MODIFICATION OF THE PSLRA
DISCOVERY STAY**

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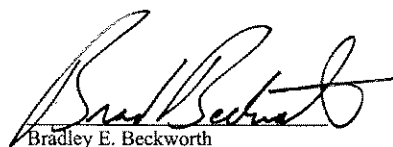
ORAL ARGUMENT REQUESTED

TO THE HONORABLE JUDGE OF SAID COURT:

The Teachers' Retirement System of Oklahoma, Public Employees' Retirement System of Mississippi, Stichting Pensioenfonds ABP, and Raiffeisen Kapitalanlage-Gesellschaft m.b.H. (collectively, "Lead Plaintiffs"), respectfully submit this Motion for Partial Modification of the Discovery Stay under Section 21D(b)(3)(B) of the Private Securities Litigation Reform Act of 1995 (the "PSLRA").

Lead Plaintiffs request entry of an order: (1) permitting Lead Plaintiffs to serve Defendants (other than Delphi Corporation ("Delphi" or the "Company")) and certain third parties with discovery requests to produce the evidence identified in Lead Plaintiffs' Brief in Support of their Motion for Partial Modification of the PSLRA Discovery Stay ("Lead Plaintiffs' Brief"), where applicable; and (2) permitting Lead Plaintiffs to return to the Honorable Judge Robert D. Drain in the Southern District of New York Bankruptcy Court, seeking permission to serve Delphi with discovery requests to produce the evidence identified in Lead Plaintiffs' Brief. Lead Plaintiffs believe that Defendants' counsel's statements at the Status Conference on February 8, 2006 that they intend to oppose this motion satisfy Lead Plaintiffs' obligations under Local Rule 7.1(a).¹ For the reasons discussed more fully in Lead Plaintiffs' Brief, Lead Plaintiffs' Motion for Partial Modification of the PSLRA Discovery Stay should be granted.

Respectfully submitted,



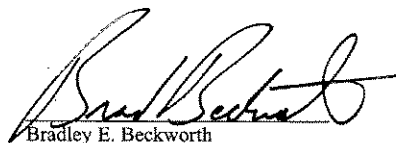
Bradley E. Beckworth

Dated: March 10, 2006

¹ Stuart Baskin of Shearman & Sterling, attorney for Delphi and other defendants, stated "we think, first of all, it's premature to allow discovery. As a practical matter, the Court should entertain the seriousness of the motions to dismiss." Tr. at p. 27, lines 16-20.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically with the Court on this 10th day of March 2006, using the ECF system, which will send notification of such filing to all parties registered to receive such notice in this action. Service by first class mail was made upon all other parties who are not registered to receive electronic service.



Bradley E. Beckworth

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_____ /

**MDL No. 1725
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**LEAD PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL
MODIFICATION OF THE PSLRA DISCOVERY STAY**

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Co-Lead Counsel for Lead Plaintiffs and the Prospective Class

ORAL ARGUMENT REQUESTED

The Teachers' Retirement System of Oklahoma, Public Employees' Retirement System of Mississippi, Stichting Pensioenfonds ABP, and Raiffeisen Kapitalanlage-Gesellschaft m.b.H. (collectively, "Lead Plaintiffs"), respectfully submit this Brief in Support of their Motion for Partial Modification of the Discovery Stay under Section 21D(b)(3)(B) of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"):

I. CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether the Court should partially lift the discovery stay imposed by the PSLRA for a very limited purpose: to allow Lead Plaintiffs to obtain a copy of documents that Delphi Corporation ("Delphi" or the "Company") and other Defendants and certain third parties have already gathered, reviewed, and produced to the federal authorities.¹

Lead Plaintiffs believe the requested relief is necessary and in the best interests of the Prospective Class² due to, among other things: (1) the expansive and intensifying nature of the civil and criminal investigations against Delphi and other Defendants regarding the transactions at issue in Lead Plaintiffs' Consolidated Complaint ("Complaint"); (2) the increasing number of Delphi executives who have been forced out or have resigned from the Company; (3) the progression of the ERISA actions against Delphi; and (4) to prevent undue prejudice to Lead Plaintiffs and the Prospective Class. This relief would not cause any discernable prejudice to anyone. Quite the contrary, to grant dismissal of all, or some parts thereof, of this case based upon motions to dismiss filed without allowing Lead Plaintiffs to fully develop the facts surrounding the allegations in their Complaint, would result in premature adjudication based upon an incomplete record. Such a result would be a clear injustice.

¹ Securities Exchange Commission ("SEC"), Department of Justice ("DOJ"), Federal Bureau of Investigation ("FBI"), and U.S. Postal Inspection Service ("U.S. Postal Inspectors").

² See Compl. ¶ 73 for definition of the proposed class.

**II. MOST APPROPRIATE AUTHORITY FOR THE RELIEF SOUGHT:
PRECEDENT OF *IN RE WORLD COM*, *IN RE ENRON* AND *IN RE TYCO***

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 hereto 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 the authorities.

III. INTRODUCTION

This case involves one of the biggest schemes to defraud investors in the history of corporate America. On March 3, 2005, Delphi announced the findings of an internal investigation conducted by Delphi’s Audit Committee, special counsel Wilmer, Cutler, Pickering, Hale & Dorr, LLP (“Wilmer Cutler”), and outside accountants PriceWaterhouseCoopers (“PWC”), which revealed accounting improprieties dating back to Delphi’s birth as a publicly traded company in 1999, and warned investors that its financial statements for 2001 and beyond were unreliable. On June 30, 2005, Delphi restated five years of financial statements—all of the financial statements it had issued since becoming a public company (“Restatement”). Delphi’s revelations rocked Detroit, the U.S. auto industry, and investors, and set the Company on a collision course towards bankruptcy.

On September 30, 2005, Lead Plaintiffs filed their Complaint on behalf of all persons and entities who purchased Delphi securities between March 7, 2000 and March 3, 2005 (the “Class Period”), against Delphi, certain officers and directors, Delphi’s auditors Deloitte & Touche LLP (“Deloitte”), Delphi’s underwriters³ (“Underwriter Defendants”), and several other culpable parties. Even a cursory review of Lead Plaintiffs’ 257-page Complaint reveals that this is not the type of “strike suit” that concerned Congress when it passed the PSLRA. *WorldCom*, 234 F. Supp. 2d at 305. Far from it, the Complaint’s highly particularized allegations easily state a claim that Delphi’s Restatement was the end-result of a pervasive scheme by which Defendants violated both the Securities Act of 1933 and the Securities Exchange Act of 1934.

However, Lead Plaintiffs are not the only ones seeking to hold Delphi and certain of its officers accountable for their actions. Indeed, in addition to the securities and ERISA actions against Delphi, the SEC, DOJ, FBI, and the U.S. Postal Inspectors have launched federal civil and criminal investigations into the conduct at issue in this litigation.⁴ These ongoing investigations have already resulted in the gathering, review, and production of a mounting mass of documentary evidence regarding Defendants’ unlawful conduct.

For example, news reports state that the SEC and FBI had broadened their respective federal civil and criminal investigations and that Delphi and others already have, since as early as

³ Banc of America Securities LLC, Barclays Capital Inc., Bear, Stearns & Co. Inc., Citigroup Global Markets Inc., Credit Suisse First Boston Corp., Merrill Lynch, Pierce, Fenner, & Smith Inc., Morgan Stanley & Co. Inc., UBS Securities LLC, and Wachovia Capital Markets, LLC.

⁴ The significance of these investigations was apparent at the February 8, 2006 status conference held by the Court, during which the Court inquired into the status and potential impact of the federal criminal investigations on this litigation. The status conference was attended by an Assistant United States Attorney and criminal defense counsel for three of Delphi’s former executives—Defendants Alan Dawes (“Dawes”), Paul R. Free (“Free”) and John G. Blahnik (“Blahnik”).

last fall, gathered and/or produced millions of pages of documents to the SEC and FBI. *See, e.g.*, “Feds Probe Delphi Exec Stock Trades,” The Detroit News, David Shepardson, September 29, 2005; “Feds Expand Delphi Probe,” The Detroit News, David Shepardson, June 30, 2005, true and correct copies of which are attached hereto as Exhibits B & C, respectively. In addition to these pending investigations against the Company itself, the SEC also has served subpoenas on a number of current and former Delphi executives, with some executives having already been interviewed by the SEC. *See* “Delphi Probe Widens,” The Detroit News, David Shepardson, May 17, 2005, attached hereto as Exhibit D. Pursuant to these investigations, Delphi, certain officers, directors and employees, General Motors Corporation (“GM”), Electronic Data Systems Corporation (“EDS”), BBK Ltd. (“BBK”), Deloitte, and Bank One all have produced documents and/or have been interviewed by the SEC and other federal regulators.

Despite the fact that these governmental entities have access to this evidence—and the ERISA Plaintiffs⁵ may be given access to this evidence—Lead Plaintiffs are currently precluded from obtaining this evidence by the PSLRA. Lead Plaintiffs filed their 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 accounting fraud committed by the Defendants. Moreover, due to the inevitable delays caused by the lead plaintiff selection and MDL processes, Delphi’s bankruptcy filing, and the drafting of the motions to dismiss and the responses thereto, it is possible, and indeed quite likely, that by the time the motions to dismiss are ruled upon, it will have been seven years since the date of Delphi’s first accounting

⁵ *In re Delphi Corp. Sec., Deriv. & “ERISA” Litig.*, MDL No. 1725, Master File No. 05-CV-70882-DT, Hon. Gerald E. Rosen, Relates to: 05-70882, 05-70940, 05-71030, 05-71200, 05-71249, 05-71291, 05-71339, 05-71396, 05-71397, 05-71398, 05-71437, 05-71508, 05-71620, 05-71897, 05-72198.

impropriety. Even assuming Delphi preserves all relevant documents going back that far, memories will routinely fade, individuals may pass away, and an increasing number of Delphi executives and employees involved in the alleged fraud likely will depart from the Company. Moreover, it will be extremely difficult for Lead Plaintiffs to even consider an early resolution of their claims against any Defendant unless and until Lead Plaintiffs are allowed access to the documents and other evidence turned over to other entities investigating the Delphi fraud.

IV. THE SECURITIES EXCHANGE COMMISSION DOES NOT OPPOSE THIS MOTION

Lead Plaintiffs have been in contact with attorneys for the SEC regarding the filing of this Motion. The SEC has given Lead Plaintiffs authority to represent to the Court that the SEC does not oppose this Motion.

V. THE IMPACT OF DELPHI'S BANKRUPTCY PROCEEDING UPON THIS MOTION

On October 8, 2005, and subsequently on October 14, 2005, Delphi and substantially all of its active U.S. subsidiaries (42 total debtors) filed voluntary petitions for reorganization relief pursuant to Chapter 11 of the United States Bankruptcy Code in the Southern District of New York Bankruptcy Court ("Bankruptcy Proceeding"). Lead Plaintiffs are creditors, equity holders and parties-in-interest in the Bankruptcy Proceeding. On November 15, 2005, Lead Plaintiffs filed a Motion for a Limited Modification of the Automatic Stay in the Bankruptcy Proceeding.

In their motion, Lead Plaintiffs moved for a narrow modification of the automatic stay to permit Lead Plaintiffs to obtain from Delphi a copy of all documents and materials that Delphi has produced or provided in connection with any inquiries or investigations relating to Delphi's accounting practices or business affairs, to any of the following: (a) the Executive branch of the United States Government (including, but not limited to, the DOJ and the SEC); or (b) Wilmer

Cutler in connection with its representation of the Special Investigative Committee of Delphi's Board of Directors. Following oral argument on January 5, 2006, the Honorable Robert D. Drain, Southern District of New York Bankruptcy Court, granted Lead Plaintiffs' motion in part and entered an order permitting Lead Plaintiffs to seek relief in this Court from the discovery stay under the PSLRA. *See* Order Modifying Automatic Stay, attached hereto as Exhibit E. Judge Drain further ordered that upon entry of an order by this Court granting Lead Plaintiffs relief from the PSLRA stay, the remaining portion of Lead Plaintiffs' Motion shall be heard promptly thereafter by the Bankruptcy Court. *Id.* Accordingly, Lead Plaintiffs now respectfully request that the Court lift the PSLRA stay to allow the limited requested relief.⁶

Moreover, in the ongoing Bankruptcy Proceeding, Lead Plaintiffs objected to Delphi's Motion to Implement a Key Employee Compensation Program ("KECP Objection"). In conjunction with the KECP Objection, Delphi requested documents from Lead Plaintiffs going to Lead Plaintiffs' securities claims, and Lead Plaintiffs complied by producing all non-privileged documents sought by Delphi's requests. When Lead Plaintiffs in turn put the identical requests to Delphi, the Company incongruously invoked the PSLRA discovery stay.

Through these Bankruptcy Proceedings, certain Defendants have obtained discovery and documents from Lead Plaintiffs, circumventing the PSLRA, yet Lead Plaintiffs have been

⁶ The automatic bankruptcy stay does not extend to any of Delphi's officers and directors or any other defendants in this litigation. Although the Underwriter Defendants filed a complaint against Lead Plaintiffs in the Bankruptcy Proceeding seeking to enjoin the Securities Litigation from proceeding in this Court ("Underwriters' Complaint"), that Complaint was withdrawn after Lead Plaintiffs, Debtors and the Official Committee of Unsecured Creditors strongly opposed that attempt. *See* Underwriters' March 3, 2006 Notice of Dismissal Without Prejudice, attached hereto as Exhibit F. Therefore, in the event that this Court grants the present motion, no further action is required in the Bankruptcy Proceeding as to these other Defendants who are not covered by the automatic bankruptcy stay.

blocked every step of the way from obtaining discovery, and the little that Lead Plaintiffs have received is protected from use in the Securities Litigation by confidentiality agreements.⁷

VI. ADDITIONAL RELEVANT FACTUAL BACKGROUND

Defendants in this case engaged in acts, practices, and a course of business that operated as a fraud on the investing public. By participating in a series of multi-million dollar transactions disguised to appear as something other than what the participants knew or suspected to be true, the Defendants presented the investing public with a materially false and misleading picture of Delphi's cash flow, earnings, debt and/or inventory.

Specifically, and as alleged in the Complaint, Defendants engaged in the following fraudulent acts and/or practices:

- (1) In 1999, 2000 and 2001, Delphi improperly accounted for financing transactions as sales of inventory or indirect materials. In each such transaction, Delphi obtained substantial loans secured by certain Delphi assets and treated the proceeds of those loans as though they resulted from sales in the normal course of Delphi's business (*See* Compl. ¶¶ 119-154);
- (2) Delphi improperly accounted for more than \$240 million in transactions with GM by deferring expenses that should have been recognized immediately and by immediately recognizing offsets to expenses that should have been deferred (*Id.* at ¶¶ 155-68);
- (3) Delphi improperly accounted for millions in transactions with various service providers by prematurely recognizing reductions to expenses, improperly deferring the recognition of expenses and improperly failing to recognize obligations (*Id.* at ¶¶ 173-84);
- (4) Delphi overstated its pre-tax income by \$14 million in 2002 and by \$34 million in 2003 by improperly recording obligations and adjustments before they accrued (*Id.* at ¶¶ 185-187); and

⁷ The only documents Lead Plaintiffs received in this regard related to Delphi's development of the KECP.

- (5) Delphi improperly accounted for its direct materials by understating the value of its direct materials inventory on a monthly, quarterly and yearly basis (*Id.* ¶¶ 190-99).

A detailed, substantive background of this action can be found in the Complaint. A brief outline of the events leading up to and including the internal and external investigations into Delphi's accounting misconduct is necessary to demonstrate the propriety of the requested relief.

On September 29, 2004, Delphi announced for the first time that the SEC had served a subpoena on Delphi and certain suppliers of information technology services, including EDS. Compl. ¶ 205. Delphi issued a press release that day, disclosing that it had received the SEC subpoena in July 2004 and received a copy of a formal order of investigation from the SEC in August 2004. *Id.* Delphi stated that the SEC was investigating several transactions between EDS and Delphi from 2001-2003, as well as at least one transaction between Delphi and an unnamed supplier. *Id.*

Three weeks later, on October 18, 2004, Delphi filed its Form 8-K. At the same time, however, Delphi announced that it was not filing its Form 10-Q because the Company's Audit Committee had launched a formal internal investigation in response to the SEC's investigation. *Id.* at ¶ 206. Delphi also announced that its outside auditor, Deloitte, had informed Delphi that it could not complete its review of the quarterly financial information due to the internal review by the Audit Committee and the SEC's investigation. *Id.*

On December 8, 2004, Delphi announced to the public that the Audit Committee had hired PWC to conduct its internal review. *Id.* at ¶ 207. The Company also announced that the Audit Committee had retained outside counsel, Wilmer Cutler, to assist in this review. *Id.* Delphi further disclosed that the initial review process had unearthed substantial accounting

irregularities and internal control issues. *Id.* Shortly thereafter, on February 23, 2005, Delphi announced that its CEO and Chairman, J.T. Battenberg III, was “retiring.” *Id.*

On March 3, 2005, the Company released certain preliminary findings by the Audit Committee and subsequently filed a Form 8-K with the SEC. *Id.* at ¶¶ 209-10. The Company announced that the Audit Committee had determined that the Company’s audited financial statements and related outside auditor’s reports from 2001 and subsequent periods could no longer be relied upon. *Id.* The Company also announced that it would restate its previously reported financial statements. *Id.*

Moreover, the Company announced that the Audit Committee had interviewed numerous members of management and other supervisory level employees who were involved in, or had knowledge regarding the transactions at issue. *Id.* at ¶¶ 213-14. The Audit Committee announced that Delphi’s CFO and Vice-Chairman, Dawes, resigned because the Audit Committee had expressed a “loss of confidence” in him after these meetings. *Id.* The Audit Committee also announced that it had fired Chief Accountant and Controller, Free, and demoted Delphi’s Vice President of Treasury, Mergers and Acquisitions, Blahnik. *Id.*

On March 30, 2005, the FBI and the U.S. Postal Inspectors confirmed that they had initiated a criminal investigation into the transactions at issue. *Id.* at ¶ 217. One week later, GM announced that the SEC had served it with a subpoena for records related to certain of its transactions with Delphi. *Id.* at ¶ 218. These transactions include a \$237 million payment to GM in 2000 for “warranty and retirement expenses.” *Id.* at ¶ 216. Shortly thereafter, BBK announced that the SEC had served it with a subpoena regarding records related to Delphi’s accounting for certain inventory sales. *Id.* at ¶ 218. On May 17, 2005, Delphi announced that

two finance executives had resigned and another was demoted in connection with the ongoing investigations into the Company's accounting violations. *Id.* at ¶ 219. Delphi next announced the resignations of Blahnik and Treasurer Pam Geller ("Geller") on June 8, 2005. *Id.* at ¶ 220.

On June 30, 2005, the *Detroit News* reported that the scope of the SEC's investigation into Delphi's accounting practices had expanded to include Bank One and Deloitte, in addition to GM, EDS and BBK, and that all five companies had produced records to federal investigators. *See* Exh. C. This report also revealed that the DOJ's fraud section had issued a "target letter" to at least one former Delphi executive. *Id.* Of particular note for the present motion, the report also stated that Delphi already had produced thousands of pages of records to the investigators and that they had interviewed at least twelve current and former Delphi employees. *Id.* The Company filed its Restatement later in the day on June 30, 2005. Compl. ¶¶ 115, 220-26.

On September 29, 2005, the *Detroit News* reported that Delphi and several other entities had gathered and produced substantial evidence regarding the financial transactions at issue in this case to the federal investigators. *See* Exh. B. According to this report and others,

- (1) Delphi created a database of over one million company emails in response to SEC and FBI subpoenas. Delphi was asked to search this database for emails containing such terms as "fraud" "accounting" and "jail" as well as searches regarding certain transactions made the basis of the claims set forth in the Complaint. Delphi has produced thousands of documents to the SEC and/or FBI responsive to these searches;
- (2) After Delphi's Audit Committee hired Wilmer Cutler to conduct a review of the Company's accounting violations, Delphi waived the potential protections afforded by the attorney-client privilege between Delphi and Wilmer Cutler. Delphi has allowed Wilmer Cutler to give investigators regular oral briefings, written summaries of its findings, and interview memoranda from interviews with present and former employees;
- (3) The SEC has issued new subpoenas to at least twelve present and former Delphi employees, including Defendants Dawes, Free, Blahnik, and former treasurer

Geller, regarding their stock trading records for transactions dating back to Delphi's spinoff from General Motors in 1999;

- (4) The SEC has questioned numerous present and former employees, some of whom were questioned for two days;
- (5) GM, EDS, Bank One, Deloitte, and BBK have all produced documents to the SEC and/or FBI pursuant to these federal investigations regarding the transactions at issue in the Complaint; and
- (6) Pursuant to these investigations, the SEC has obtained hundreds of thousands of documents regarding the transactions at issue in the Complaint.

Id.; see also Exh. C.

As this outline of events demonstrates, Defendants have gathered and/or produced thousands of pages of documents to federal authorities directly relating to the claims at issue in this case. Lead Plaintiffs are the only interested party who will be denied access to this evidence by the PSLRA's discovery stay. As such, Lead Plaintiffs will continue to suffer undue prejudice unless the PSLRA's discovery stay is modified to the extent requested herein so as to allow Lead Plaintiffs access to the evidence set forth below.

VII. LEAD PLAINTIFFS' PARTICULARIZED REQUESTS FOR DISCOVERY

Lead Plaintiffs' requests for discovery are limited. On information and belief, Delphi 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 the Lead Plaintiffs with minimal, if any, burden. Lead Plaintiffs specifically request entry of an order: (1) permitting Lead Plaintiffs to serve Defendants (other than Delphi) and certain third parties with discovery requests to produce the following evidence, where applicable; and (2) permitting Lead Plaintiffs to return to Judge Drain in the Bankruptcy Proceeding, seeking permission to serve Delphi with

discovery requests to produce the following evidence that has already been produced to authorities:

- a. A copy of all documents produced in conjunction with the internal investigation conducted by the Delphi Audit Committee of its Board of Directors, represented by Wilmer Cutler, outside counsel, and PWC, forensic accountants, including but not limited to: (a) all e-mails and any other documents gathered and/or produced during the course of this investigation; and (b) all documents relating to Delphi's Restatement of June 30, 2005;
- b. A copy of all documents produced in conjunction with the SEC, U.S. Postal Inspectors, DOJ, and/or FBI investigations, including but not limited to: (a) records turned over to federal authorities by GM relating to transactions with Delphi; (b) the results of Delphi's internal investigation turned over to the SEC in June 2005; (c) the database created by Delphi containing more than a million company e-mails, created by "imaging" or copying the hard drives of computers of top executives; (d) the results of the searches of the aforementioned database for specific phrases, including, but not limited to searches for the terms "fraud" and "accounting" or "jail" and "accounting"; (e) any other records produced by Delphi or any present or former Delphi employee to federal authorities; (f) documents produced in connection with and leading up to the DOJ's issuance of a "target letter" to a former mid-level Delphi executive, meaning that the government has "substantial evidence" linking him or her to the commission of a crime; (g) records produced by EDS either voluntarily or pursuant to a subpoena by the SEC for records connected to a rebate transaction between EDS and Delphi; and (h) any and all documents produced by GM, EDS, BBK, Deloitte & Touche, and Bank One to federal authorities; and
- c. Any and all documents previously produced or to be produced in the consolidated ERISA Actions pending in this Court.

VIII. 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*, 220 F.R.D. at 249.

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*, 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 in order to provide fair treatment to securities fraud 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*, Exh. A.

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 LEAD PLAINTIFFS IS APPROPRIATE UNDER THE PSLRA

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

1. Lead Plaintiffs' Discovery Requests Are Highly Particularized

Lead Plaintiffs' requests for limited discovery are highly particularized as set forth in detail in Section VII, *supra*. These requests are narrowly tailored and limited to the "closed universe of materials" that Delphi and third parties have 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 250 pages in length and alleges multimillion dollar accounting errors by Delphi and its auditors—clearly render Lead Plaintiffs' requests reasonable under the circumstances. See *In re Royal Ahold*, 220 F.R.D. at 249. Indeed, many of Lead Plaintiffs' claims are supported by documentary evidence including Delphi's own press statements and

SEC filings admitting major accounting improprieties. In light of the foregoing circumstances, as well as Delphi's Restatement and the SEC and FBI investigations, it is quite obvious that Lead Plaintiffs' claims are far from frivolous and that Lead Plaintiffs "are not in any sense engaged in a fishing expedition or an abusive strike suit and do 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 Lead Plaintiffs' 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, Lead Plaintiffs have satisfied the particularity requirement of PSLRA Section 21D(b)(3)(B).

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

Due in large part to Delphi's bankruptcy filing, it is quite clear that Delphi is undertaking a wide-ranging corporate reorganization. This reorganization, coupled with the departure of several key executives from the Company,⁸ create a reasonable concern that documents may be lost despite Delphi's best efforts to preserve them. *See In re Royal Ahold*, 220 F.R.D. at 251. 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 Lead

⁸ As Delphi has admitted in their KECP motion, filed in the Bankruptcy Proceeding, and in proceedings related to that motion, more than thirty executives have left the Company since January 1, 2005. Of those departing executives, at least six occupied key positions at the top of the Company – J.T. Battenberg III (Chairman and Chief Executive Officer), Dawes (Chief Financial Officer), Free (Chief Accountant and Controller), Blahnik (Vice-President of Treasury, Mergers & Acquisitions), Donald Runkle (Vice-Chairman, Enterprise Technologies), and Geller (Treasurer). Moreover, a number of current and former Delphi executives have been served with subpoenas and interviewed by the SEC, and at least half a dozen current and former employees have retained defense lawyers around the country. *See* Exh. D.

Plaintiffs in identifying other specific materials that may be at risk of loss. *Id.* Faced with Delphi's shifting corporate landscape and concerns about evidentiary loss that are by no means speculative, Lead Plaintiffs should not be required to simply rely "on the assurances of counsel that relevant evidence will be preserved." *Id.*

3. *Lead Plaintiffs and the Class Will Suffer Undue Prejudice if the Discovery Stay is Not Lifted*

Lead Plaintiffs and the Class will suffer undue prejudice if the PSLRA discovery stay is not lifted. Just as in *WorldCom*, if this request is not granted, Lead Plaintiffs 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. 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*, Exh. A at 11.

As previously detailed, federal investigations into the conduct that caused Lead Plaintiffs and the Class to suffer investment losses are ongoing and have been proceeding against certain of the Defendants for over a year. These investigations already have resulted in the production of thousands of pages of documents by Delphi, BBK, Bank One, Deloitte, EDS, GM, and current and former employees, as well as multiple interviews with top executives of the Company. Lead Plaintiffs seek only copies of those documents that Defendants or third parties already have compiled, reviewed, and produced to governmental agencies and private party litigants. Plaintiffs are 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 Lead Plaintiffs will be slight considering this fact. Indeed, Lead Plaintiffs’ limited discovery requests will not cause Defendants or third parties 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.


Moreover, the ERISA actions pending against Delphi have been consolidated and are prepared to proceed with discovery, unimpeded by the PSLRA discovery stay. *See In re Royal Ahold*, 220 F.R.D. at 251 (stating that there is no indication that Congress intended to extend the PSLRA discovery stay to ERISA plaintiffs). This of course, inflicts extreme prejudice upon Lead Plaintiffs. Indeed, the *In re Royal Ahold* court found that the risk of undue prejudice created by this precise situation was the “most compelling reason for allowing the discovery” and found it appropriate to lift the PSLRA stay. *Id.* Furthermore, it would be nonsensical to limit the ERISA plaintiffs to “ERISA-specific” discovery in light of the fact that the ERISA claims involve “allegations of wide-ranging fraud similar to those stated in the securities plaintiffs’ complaint.” *Id.*

Accordingly, it is imperative that Lead Plaintiffs and the Class be given access to documents produced in the course of the aforementioned investigations, as well as to those that will soon be produced in the ERISA actions.

IX. CONCLUSION

For the reasons discussed above, Lead Plaintiffs’ Motion for Partial Modification of the PSLRA Discovery Stay should be granted.

Respectfully submitted,



Bradley E. Beckworth

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