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Federal Discovery Stays

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FEDERAL DISCOVERY STAYS

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In federal civil litigation, unless a discretionary stay is granted, discovery often proceeds while motions to dismiss are pending. Plaintiffs with non-meritorious cases can compel defendants to spend massively on electronic discovery before courts ever rule on such motions. Defendants who are unable or unwilling to incur the huge up-front expense of electronic discovery may be forced to settle non-meritorious claims. To address multiple electronic discovery issues, Congress amended the Federal Rules of Civil Procedure in 2006 and the Federal Rules of Evidence in 2008. However, the amendments failed to significantly reduce costs and failed to address the critical issue of discovery timing. This Article contends that a mandatory stay is the most effective solution to the problem of electronic discovery during the pendency of motions to dismiss. In 1995, the Private Securities Litigation Reform Act imposed a mandatory stay of all discovery while motions to dismiss are pending in actions alleging violations of securities laws, absent application of two limited statutory exceptions. This Article examines the operation of the mandatory stay in securities actions and concludes that it should be extended to electronic discovery in all federal civil litigation, unless an exception applies. Imposition of a mandatory stay of electronic discovery before the disposition of motions to dismiss is the most equitable and effective solution to the unresolved problem of coercive settlements.

INTRODUCTION

Electronic discovery (e-discovery) is ubiquitous. It has been suggested that in modern litigation all discovery is electronic[1] because 99 percent of the world's information is generated electronically[2] and only a fraction is converted to paper. E-discovery has become increasingly complex and expensive[3] and, in many cases, it

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1. *See* Megan Jones, *Giving Electronic Discovery a Chance to Grow Up*, NAT'L L.J., Dec. 14, 2009, at 18 (citing federal district judge Shira Scheindlin).

2. *See* PETER LYMAN & HAL R. VARIAN, SCH. OF INFO. MGMT. AND SYS. AT THE UNIV. OF CAL. AT BERKELEY, HOW MUCH INFORMATION? 1 (2003) [hereinafter HOW MUCH INFORMATION?], *available at* http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf (reporting that in 2002, 92 percent of new information was stored on magnetic media (primarily hard drives), 7 percent on film, and a mere 0.01 percent on paper).

3. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010). The costs of e-discovery often reach three to four times the low estimate of liability and twice the high estimate of liability in civil cases.

commences during the pendency of a motion to dismiss. Nothing in Rule 12 of the Federal Rules of Civil Procedure (FRCP), which governs motions to dismiss, triggers an automatic stay of discovery before the disposition of such motions.[4] Likewise, no other federal rule triggers an automatic stay. Parties frequently move for discovery stays pending disposition of Rule 12 motions,[5] but the results are decidedly mixed. Accordingly, the default situation is that discovery may proceed during the pleading stage of the approximately 280,000 civil cases that are filed annually in the federal courts.[6]

A major adverse effect of the burden and expense associated with e-discovery during the pendency of motions to dismiss, which typically lasts for months, is that plaintiffs with non-meritorious cases are able to coerce settlements from defendants who cannot or choose not to bear such costs.[7] While "there is also no litmus test to identify extortionate settlements or measure how frequently they occur,"[8] it is clear that they do happen. One indicium is the well-documented phenomenon of vanishing civil trials. A mere 1.1

See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE EMERGING CHALLENGE OF ELECTRONIC DISCOVERY: STRATEGIES FOR AMERICAN BUSINESS 12 (2008), *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-Strategies.pdf; *see also H.R. 4115: Triggering Soaring E-Discovery Costs*, METROPOLITAN CORP. COUNSEL, July 2010, at 6 ("E-discovery is in many cases the most significant cost in litigation. It can easily eat as much as 50 percent of a company's litigation budget.") (quoting David Lender, Partner, Weil, Gotshal & Manges LLP); Nathan Koppel, *Using Software to Sift Digital Records*, WALL ST. J., Nov. 23, 2010, at B6 (noting that at Fortune 1000 companies, spending on e-discovery as a share of litigation costs increased to 7.1 percent in 2010, up from 5.2 percent in 2006).

4. *See* FED. R. CIV. P. 12.

5. Slate Rock Constr. Co. v. Admiral Ins. Co., No. 2:10-cv-01031, 2011 WL 1641470, at *4 (S.D. Ohio May 2, 2011).

6. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 144 (2011) [hereinafter 2010 ANNUAL REPORT OF THE DIRECTOR], *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf (reporting that 282,895 civil cases were filed in U.S. district courts during the 12-month period ending September 30, 2010).

7. A study of almost 8,000 federal district court cases that closed during the period October 1, 2005 to September 30, 2006 found a mean disposition time of 129.78 days for Rule 12(b) motions to dismiss, 12(c) motions for judgment on the pleadings, and 12(f) motions to strike. INST. FOR ADVANCEMENT OF AM LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 48 (2009), *available at* http://www.edu/legalinstitute/pubs/PACER%20FINAL%201-21-09.pdf; *see also* Agile Sky Alliance Fund LP v. Citizens Fin. Group, No. 09-cv-02786-MSK-BNB, 2010 WL 1816351, at *2 (D. Colo. May 5, 2010) ("Motions to dismiss usually take months to decide."); Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 508 n.151 (2010) ("It is not all that unusual for six months to a year to elapse between the filing of a motion to dismiss and the court's decision on that motion.").

8. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 65 (2010).

percent of federal civil cases proceed to trial.[9] This phenomenon has multiple causes, but the high cost of e-discovery plays a primary role.[10] Another indicium is the reported experience of practicing attorneys. According to a 2009 survey by the American Bar Association Section of Litigation, 69.4 percent of approximately 3,300 responding attorneys agreed or strongly agreed that discovery is commonly used as a tool to force settlement,[11] and 54.3 percent of respondents agreed or strongly agreed that discovery concerning the adequacy of e-discovery responses is used as a tool to force settlement.[12] Efforts have been made to confront the numerous problems associated with e-discovery. Congress amended the FRCP in 2006 and the Federal Rules of Evidence (FRE) in 2008. However, those efforts have not reduced costs significantly and failed to address the critical issue of discovery timing. Specifically, the amendments have proven unable to curb the problem of extortionate settlements driven by front-loaded e-discovery costs.

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9. *See* 2010 ANNUAL REPORT OF THE DIRECTOR, *supra* note 6, at 168 (reporting that of the 309,361 civil cases that were terminated in U.S. district courts during the 12-month period ending September 30, 2010, only 1.1 percent reached trial); *see also* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010) ("Pretrial practice in federal civil litigation has dramatically changed over the last thirty years . . . . [T]rials have vanished.").

10. *See* David R. Fine, et al., *The "Vanishing" Civil Jury Trial—(Report of the Middle District Civil Jury Trial Bench/Bar Task Force)*, 80 PA. B. ASS'N Q. 24, 31 (2009) (linking cost of e-discovery, among other factors, to vanishing civil trials); Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 191 (Nov. 20, 2006) *available at* http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/procedure/a-few-thoughts-on-electronic-discovery-after-december-1,-2006/ ("Lawyers and judges are collectively wringing their hands over the continuing decline in the number of trials, especially jury trials. The factors that contribute to this are many and varied, but there is a consensus that the costs and delays of civil litigation—largely due to discovery—play a significant role."); *H.R. 4115: Triggering Soaring E-Discovery Costs*, METROPOLITAN CORP. COUNSEL, July 2010, at 6; JOHN H. BEISNER, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, THE CENTRE CANNOT HOLD: THE NEED FOR EFFECTIVE REFORM OF THE U.S. CIVIL DISCOVERY PROCESS 2 (2010) [hereinafter EFFECTIVE REFORM], *available at* http://www.uschamber.com/reports/centre-cannot-hold-need-effective-reform-us-civil-discovery-process.

11. *See* AM. BAR ASS'N SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 68 (2009) [hereinafter ABA REPORT], *available at* http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf.

12. *Id.* at 80. A separate survey, published in 2009 by the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System, reached the same result: 71 percent of approximately 1,400 responding Fellows of the ACTL agreed that discovery is used as a tool to force settlement. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 9 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008.

An effective solution to the problem is a mandatory stay of e-discovery during the pendency of motions to dismiss. Since 1995, the Private Securities Litigation Reform Act (PSLRA) has mandated a stay of all discovery during the pendency of motions to dismiss in securities litigation, subject to two limited exceptions.[13] The available evidence suggests that the PSLRA discovery stay has accomplished its two primary objectives: it has reduced the number of plaintiffs filing securities class actions to force coercive settlements, and it has reduced the number of plaintiffs commencing securities litigation hoping to uncover a sustainable claim through discovery. The PSLRA's mandatory stay of discovery should be extended to e-discovery in all federal civil litigation while motions to dismiss are pending. Imposition of a mandatory stay is the most equitable and effective solution to the problems posed by costly e-discovery.

I. DISCOVERY PROCEEDS WHILE MOTIONS TO DISMISS ARE PENDING IN FEDERAL COURT

Contrary to recent suggestions by some commentators[14] and the United States Supreme Court,[15] discovery may proceed while motions to dismiss are pending in federal litigation,[16] unless the action

13. *See* 15 U.S.C. § 77z-1(b)(1); 15 U.S.C. § 78u-4(b)(3)(B) (discovery 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.").

14. *See, e.g.*, Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 933 n.249 (2009) (asserting that judges rarely allow targeted discovery prior to resolving Rule 12(b)(6) motions); Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1268 (2008) ("[A] pleading sufficiency challenge is designed to be made before the case advances to the discovery stage."); Schneider, *supra* note 9, at 545 ("At pleading, there has been no opportunity for discovery . . . . With *Iqbal*, a summary judgment decision is effectively disguised as a Rule 12(b)(6) motion before any discovery occurs.").

15. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery . . . ."); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564 n.8 (2007) (referring to an "understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct"); *see also* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 55 (2010) ("The import of *Twombly* and *Iqbal* is that only a complaint that can survive a motion to dismiss entitles a plaintiff to discovery from the defendant or third parties."); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 69 (2010) (noting that the Court's statements in *Iqbal* and *Twombly* reflect its belief that the filing of a motion to dismiss automatically stays discovery); David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 141 (2010).

16. Some states automatically stay discovery. For example, in New York service of a motion to dismiss or motion for summary judgment stays discovery until determination of the motion unless the court orders otherwise. N.Y. C.P.L.R. 3214 (CONSOL. 2011). In 2009,

is governed by the PSLRA's automatic stay of discovery or a discretionary stay has been imposed for good cause under FRCP Rule 26(c). The FRCP have no specific provision about the availability of discovery during the pendency of a motion to dismiss.[17] Rule 26(d)(1) is the only federal rule that specifically addresses discovery timing. It provides that discovery may be taken any time after the completion of the initial discovery conference mandated by Rule 26(f).[18] The Rule 26 conference must take place as soon as practicable and not later than twenty-one days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).[19] In turn, Rule 16(b) requires the issuance of a scheduling order as soon as practicable, but within the earlier of 120 days after service of the initial complaint in the action or 90 days after any defendant has appeared.[20] No aspect of this sequence establishes that a motion to dismiss must be decided, or even filed, before the completion of the Rule 26(f) discovery conference. Indeed, Rule 12(i) provides that a court may defer resolving a motion to dismiss until trial.[21]

The general rule that discovery may proceed while motions to dismiss are pending[22] has been underscored by numerous federal

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Georgia amended its civil practice rules to provide for an automatic stay of discovery lasting ninety days from the filing of a motion to dismiss. *See* Kimberly Hermann & Melissa G. Hodson, *Civil Practice Reform*, 26 GA. ST. U. L. REV. 185, 192–93 (2009).

17. *See* Thompson v. Children's Hosp., No. 11-cv-00049-WYD-KMT, 2011 WL 2066517, at *1 (D. Colo. May 25, 2011) ("The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings."); Williams v. New Day Farms, LLC, No. 2:10-cv-0394, 2010 WL 3522397, at *2 (S.D. Ohio Sept. 7, 2010) ("'Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect.'") (quoting Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990)).

18. FED. R. CIV. P. 26(d)(1).

19. *Id.* 26(f).

20. *Id.* 16(b)(2).

21. *Id.* 12(i). Some local rules provide for automatic stays. *See, e.g.*, 10 W. Chase, LLC v. Shepard, Bankr. (*In re* Shepard), No. 09-17489, 2011 WL 1045081, at *10 (Bankr. D. Md. Mar. 16, 2011) ("Local Rule 7026-1(d) stays discovery pending the resolution of a Rule 12(b) motion.").

22. The general rule has some narrow exceptions. First, the United States Supreme Court has endorsed the practice of staying discovery pending resolution of the threshold issue of qualified immunity. *See* Crawford-El v. Britton, 523 U.S. 574, 598 (1998); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Williams v. Metcalfe, No. C 08-3907 SI (pr), 2010 WL 2640293, at *2 (N.D. Cal. July 1, 2010) ("The U.S. Supreme Court has made it abundantly clear that a district court should stay discovery until the threshold question of qualified immunity is settled."). *Cf.* O'Meara v. Heineman, Nos. 8:09CV00157, 4:10CV3020, 4:10CV3021, 2010 WL 2640299, at *1 (D. Neb. June 28, 2010) ("Thus, where qualified immunity is asserted as a defense, it is within the discretion of the court to stay discovery until the issue of qualified immunity is resolved."). Second, discovery might be stayed pending resolution of a challenge to plaintiff's standing. *See* United States Catholic Conf. v. Abortion Rights Mobilization, Inc., 487 U.S. 72,

courts. For example, the Seventh Circuit stated: "Discovery need not cease during the pendency of a motion to dismiss."[23] A number of courts[24] and scholars[25] are in accord. In addition, the fact that Congress specifically included a mandatory stay provision in the PSLRA strongly undercuts the notion that the FRCP provide for a mandatory stay in all civil litigation.[26]

While there is no automatic stay of discovery in federal actions not governed by the PSLRA, FRCP Rule 26(c) authorizes the imposition of discretionary stays, subject to a showing of good cause.[27]

79–80 (1988); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *1 (N.D. Ill. Nov. 17, 2010).

23. SK Tool Hand Tool Corp. v. Dresser Indus., Inc., 852 F.2d 936, 945 n.11 (7th Cir. 1988).

24. *See, e.g.*, Allstate Ins. Co. v. Levy, No. CV-10-1652 (FB)(VVP), 2011 WL 288511, at *1 (E.D.N.Y. Jan. 27, 2011) ("The pendency of the motion to dismiss does not provide an automatic basis to stay discovery."); *Tamburo*, 2010 WL 4867346, at *2 ("*Twombly* and *Iqbal* do not dictate that a motion to stay should be granted every time a motion to dismiss is placed before the Court."); Integ. Systems & Power, Inc. v. Honeywell Int'l, Inc., No. 09 CV 5874(RPP), 2009 WL 2777076, at *1 (S.D.N.Y. Sept. 1, 2009); DSM Desotech Inc. v. 3D Systems Corp., No. 08 CV 1531, 2008 WL 4812440, at *2 (N.D. Ill. Oct. 28, 2008); Bocciolone v. Solowsky, No. 08-20200-CIV, 2008 WL 2906719, at *1 (S.D. Fla. July 24, 2008). In *Chudasama v. Mazda Motor Corp.*, the Eleventh Circuit made certain statements that have sometimes been misinterpreted to recognize a virtually automatic stay of discovery. 123 F.3d 1353, 1368 (11th Cir. 1997). *See, e.g.*, Solar Star Systems, LLC v. BellSouth Telecomm., Inc., No. 10-21105-CIV, 2011 WL 1226119, at *1 (S.D. Fla. Mar. 30, 2011) (citing *Chudasama* for the proposition that "[p]otentially dispositive motions filed prior to discovery weigh heavily in favor of issuing a stay"). The misinterpretation was noted in *Koock v. Sugar & Felsenthal*, LLP, No. 8:09-CV-609-T-17EAJ, 2009 WL 2579307, at *2 (M.D. Fla. Aug. 19, 2009) ("The holding in *Chudasama* does not establish the general rule that discovery should not proceed while a motion to dismiss is pending .... Instead, *Chudasama* and its progeny 'stand for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount.'"); *accord In re* Winn Dixie Stores, Inc. ERISA Litig., No. 3:04-cv-194-J-33MCR, 2007 WL 1877887, at *1 (M.D. Fla. June 28, 2007); *see also* Lori Andrus, *In the Wake of* Iqbal, 46 TRIAL 20, 29 (2010) (noting "the many federal decisions rejecting the pendency of a motion to dismiss as a basis for granting a blanket discovery stay").

25. *See* Hartnett, *supra* note 7, at 507 ("While the opinions in *Twombly*, as well as most commentators, seem to assume that surviving a 12(b)(6) motion is a prerequisite to discovery, this is simply not the case. The mere filing of a motion to dismiss does not trigger a stay of discovery."); Miller, *supra* note 8, at 109.

26. *See* Brooks v. Macy's, Inc., No. 10 CIV 5304 BSJ HBP, 2010 WL 5297756, at *1 (S.D.N.Y. Dec. 21, 2010).

27. FED. R. CIV. P. 26(c)(1) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... specifying terms, including time and place, for the disclosure or discovery[.]". *See also* FED. R. CIV. P. 34 advisory committee's note to 1970 Amendment ("[C]ourts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs."). Apart from their power under Rule 26(c), federal district courts may issue stays pursuant to their inherent authority to manage cases before them. *See* Clinton v. Jones, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); Shaw v. Allred, No. 10-cv-00156-MSK-MEH,

Good cause is not defined in that rule or in the accompanying Advisory Committee's Notes. However, federal courts frequently remark that Rule 26(c) discovery stays are disfavored.[28] Consistent with this prevailing view, courts strictly apply the good cause requirement.[29]

The mere filing of a case-dispositive motion, or the intent to file such a motion, does not constitute good cause.[30] Some courts have asserted that there are "universally recognized"[31] factors for evaluating good cause, but this is dubious. To determine good cause in connection with Rule 26(c), federal district courts have devised at least thirteen similar, but non-identical, multifactor tests. The number of factors identified in the various tests ranges from two to six. While most of the tests focus on the prejudice to the party opposing the stay and the burden on the party resisting discovery, this focus is not universal.[32]

2010 WL 2757357, at *1 (D. Colo. July 12, 2010); Power v. Williams, No. 3:09-cv-594-J-20HTS, 2010 WL 431921, at *1 (M.D. Fla. Feb. 5, 2010).

28. *See, e.g.*, Owens v. Donahoe, No. 10-cv-01886-WJM-KMT, 2011 WL 2014777, at *1 (D. Colo. May 23, 2011); Geiser v. Simplicity, Inc., No. 5:10-CV-21, 2011 WL 128776, at *3 (N.D. W. Va. Jan. 14, 2011); Smith v. Waverly Partners, LLC, No. 3:10CV28-RLV-DSC, 2010 WL 3943933, at *1 (W.D.N.C. Oct. 6, 2010); Coss v. Playtex Products, LLC, No. 08 C 50222, 2009 WL 1455358, at *1 (N.D. Ill. May 21, 2009).

29. *See, e.g.*, Buckwalter v. Nevada Bd. of Med. Examiners, No. 2:10-cv-02034-KJD-GWF, 2011 WL 841391, at *1 (D. Nev. Mar. 7, 2011) ("A party carries a heavy burden of making a 'strong showing' why discovery should be stayed."); Stone v. Lockheed Martin Corp., No. 08-cv-02522-REB-KMT, 2009 WL 267688, at *1 (D. Colo. Feb. 2, 2009) (quoting Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc., 713 F.2d 1377, 1484 (10th Cir. 1983)). *But see* Sanders v. City of Indianapolis, No. 1:09-cv-0622-SEB-JMS, 2010 WL 1410587, at *1 (S.D. Ind. Apr. 2, 2010) ("Although not mandatory, courts often stay discovery while a motion to dismiss the complaint is pleading."); *In re* Sulfuric Acid Antitrust Litig., 231 F.R.D. 331, 336 (N.D. Ill. 2005) ("Numerous cases in this circuit have allowed stays in the face of a Rule 12(b)(6) challenge."); Jonathan M. Jacobson & Joyce Choi, *Curtailing the Impact of Class Actions on Antitrust Policy*, 66 N.Y.U. ANN. SURV. AM. L. 549, 559 (2011) (asserting that most courts typically stay all discovery pending resolution of motions to dismiss in antitrust litigation).

30. Coyle v. Hornell Brewing Co., No. 08-2797 (JBS/JS), 2009 WL 1652399, at *3 (D.N.J. June 9, 2009); Gerald Chamales Corp. v. Oki Data Americas, Inc., 247 F.R.D. 453, 454 (D.N.J. 2007). State law is often in accord. *See, e.g.*, Orloff v. Shulman, 2005 WL 333240, at *1 (Del. Ch. Feb. 2, 2005) (noting that under Delaware law, there is no right to stay of discovery where a dispositive motion has been filed).

31. *See, e.g.*, Hall v. Town of Gilchrist, No. 11-cv-00327-REB-BNB, 2011 WL 1518667, at *1 (D. Colo. Apr. 20, 2011).

32. The first version considers "the pendency of dispositive motions, potential prejudice to the party opposing the stay, the breadth of discovery sought, and the burden that would be imposed on the parties responding to the proposed discovery." Anthracite Capital BOFA Funding, LLC v. Knutson, No. 09 Civ. 1603(LTS)(KNF), 2009 WL 4496050, at *2 (S.D.N.Y. Dec. 3, 2009) (citation omitted); Steuben Foods, Inc. v. Country Gourmet Foods, LLC, No. 08-CV-561S(F), 2009 WL 3191464, at *3 (W.D.N.Y. Sept. 30, 2009) (citation omitted); Ellington Credit Fund, Ltd. v. Select Portfolio Servs., Inc., No. 08 Civ. 2437(RJS), 2009 WL 274483, at *1 (S.D.N.Y. Feb. 3, 2009). A second version weighs the "balance [of] the harm produced by a delay in discovery against the possibility that the motion will be granted

and eliminate the need for such discovery." Gordon v. Mortg. Elec. Registration Sys., Inc., No. CV410-228, 2010 WL 5463165, at *1 (S.D. Ga. Dec. 29, 2010); *see also* Berry v. Canady, No. 2:09-cv-765-FtM-29SPC, 2011 WL 806230, at *1 (M.D. Fla. Mar. 2, 2011); Yerk v. People for the Ethical Treatment of Animals, No. 2:09-cv-537-FtM-29SPC, 2010 WL 1730754, at *1 (M.D. Fla. Apr. 28, 2010). A third version tracks the language of Rule 26(c) and specifies that good cause may exist when the party from whom discovery is sought would suffer annoyance, embarrassment, oppression, or undue burden or expense. Tostado v. Citibank (South Dakota), N.A., SA-09-CV-549-XR, 2009 WL 4774771, at *1 (W.D. Tex. Dec. 11, 2009). A fourth version provides that a court must consider "whether the movant is likely to prevail in the underlying proceeding; whether, absent a stay, any party will suffer substantial or irreparable harm; and, the public interests at stake." Stone v. Lockheed Martin Corp., No. 08-cv-02522-REB-KMT, 2009 WL 267688, at *1 (D. Colo. Feb. 2, 2009). A fifth version provides that good cause may exist if a "dispositive motion has been filed that could resolve the case and a stay does not unduly prejudice the opposing party." Parker v. Stryker Corp., No. 08–cv–01093–REB–MEH, 2008 WL 4457864, at *1 (D. Colo. Oct. 1, 2008). A sixth version considers whether the defendant has made a strong showing that the plaintiff's claim is unmeritorious, the breadth of discovery and the burden of responding to it, the risk of unfair prejudice to the party opposing the stay, the nature and complexity of the action, and whether some or all of the defendants have joined in the stay request. Morien v. Munich Reins. America, Inc., 270 F.R.D. 65, 67 (D. Conn. 2010); Rivera v. Inc. Village of Farmingdale, No. CV 06-2613(DRH)(ARL), 2007 WL 3047089, at *1 (E.D.N.Y. Oct. 17, 2007). A seventh version examines "(1) the plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on defendants; (3) the convenience to the court; (4) the interest of persons not parties to the civil litigation; and (5) the public interest." Owens v. Donahoe, No. 10-cv-01886-WJM-KMT, 2011 WL 2014777, at *1 (D. Colo. May 23, 2011); Meadows at Buena Vista, Inc. v. Town of Buena Vista, No. 10-cv-02871-MSK-KMT, 2011 WL 403344, at *1 (D. Colo. Feb. 3, 2011); Samson Res. Co. v. J. Aron & Co., No. 08-CV-752-TCK-SAJ, 2009 WL 1606564, at *1 (N.D. Okla. June 8, 2009). An eighth version considers the "type of motion and whether it is a challenge as a 'matter of law'" or to the "'sufficiency' of the allegations; the nature and complexity of the action; whether counterclaims and/or cross-claims have been interposed; whether some or all of the defendants" joined in the stay request; the litigation's procedural posture or stage; the "expected extent of discovery in light of the number of parties and complexity of the issues in the case; and any other relevant circumstances." Buckwalter v. Nevada Bd. of Med. Examiners, No. 2:10-cv-02034-KJD-GWF, 2011 WL 841391, at *1 (D. Nev. Mar. 7, 2011); Bragg v. United States, No. 2:10-0683, 2010 WL 3835080, at *1 (S.D. W. Va. Sept. 29, 2010); Hachette Distrib., Inc. v. Hudson Cnty. News Co., Inc., 136 F.R.D. 356, 358 (E.D.N.Y. 1991). A ninth version provides for a stay "where the case is likely to be finally concluded as a result of the ruling thereon; where the facts sought through uncompleted discovery would not affect the resolution of the motion; or where discovery on all issues of the broad complaint would be wasteful and burdensome." Woods v. Wyandotte Cnty. Dist. Att'y., No. 10-2362-JTM-DJW, 2010 WL 4361912, at *1 (D. Kan. Oct. 28, 2010); Wolf v. United States, 157 F.R.D. 494, 495 (D. Kan. 1994). A tenth version provides that good cause is shown "where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced." Dowdy & Dowdy P'ship v. Arbitron Inc., No. 2:09cv253 KS-MTP, 2010 WL 3893915, at *1 (S.D. Miss. Sept. 30, 2010) (citation omitted). An eleventh version considers the "potential for the dispositive motion to terminate all the claims in the case or all the claims against particular defendants, strong support for the dispositive motion on the merits, and irrelevancy of the discovery at issue to the dispositive motion." Somie v. GEO Grp., Inc., No. 5:09-CT-3142-FL, 2011 WL 1831695, at *1 (E.D.N.C. May 12, 2011) (citation omitted). A twelfth version considers the "breadth of discovery sought and the burden of responding to it, as well as the strength of the underlying motion." Eastman Kodak Co. v. Kyocera Corp., No. 10-CV-6334-CJS, 2011 WL 1432038, at *1 n.1 (W.D.N.Y. Apr. 14, 2011); Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc., No. 09 CV 5874(RPP), 2009 WL 2777076, at *1 (S.D.N.Y. Sept. 1, 2009); Spencer Trask Software & Information Servs., LLC v.

The discretionary use of numerous conflicting tests for "good cause" is both common and largely unreviewable. Neither the grant nor the denial of a motion for stay of discovery pending resolution of a motion to dismiss is an appealable order of the district court. In general, federal discovery orders are not immediately appealable because they do not end litigation on the merits.[33] If discovery is stayed, and then an action is dismissed without leave to amend pursuant to Rule 12(b)(6), the dismissal and stay is reviewable. However, the standard of review is abuse of discretion.[34] Moreover, on review, it is unlikely that an appellate court would find that a stay of discovery constituted reversible error.[35] If discovery is not stayed, and then a motion to dismiss is denied, there is no appealable order. If the matter proceeds to trial and the defendant wins, any errors in denying the stay and denying the motion to dismiss are unreviewable. If the defendant loses at trial, any error resulting from denying the stay will be harmless.[36]

In short, in federal civil litigation that does not fall within the PSLRA's ambit, there is no mandatory stay of discovery pending determination of a motion to dismiss. A discretionary stay under Rule 26(c) provides defendants potential relief, but such stays are disfavored and subject to an undefined good cause requirement that has yielded at least thirteen different and sometimes overlapping tests. In addition, the denial of a stay is essentially unreviewable.

II. THE BURDEN AND COST OF E-DISCOVERY

A decade ago, discovery accounted for approximately half the cost of civil litigation. In complex litigation, the share increased to

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RPost Int'l Ltd., 206 F.R.D. 367, 368 (S.D.N.Y. 2002). A thirteenth version weighs the "burden of proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery and to take into account any societal interests which are implicated by either proceeding or postponing discovery." Tarazi v. Oshry, No. 2:10-cv-793, 2011 WL 1437052, at *1 (S.D. Ohio Apr. 12, 2011).

33. Am. Bank v. City of Menasha, 627 F.R.D. 261, 264 (7th Cir. 2010) ("[D]iscovery orders, being interlocutory, generally are not appealable in the federal court system[.]"); Hernandez v. Tanninen, 604 F.3d 1095, 1101 (9th Cir. 2010).

34. *See* Sapp v. Mem. Hermann Healthcare Sys., No. 10-20340, 2010 WL 5395679, at *3 (5th Cir. Dec. 29, 2010) ("We review a decision to stay discovery pending a dispositive motion for abuse of discretion."); Mann v. Brenner, 375 F. App'x 232, 239–40 (3d Cir. 2010).

35. Hartnett, *supra* note 7, at 513.

36. *Id.* at 514.

90 percent in cases where discovery was actively conducted.[37] There is conflicting evidence on the issue of whether this share has declined significantly in the last decade, but it is clear that costs remain high.[38] E-discovery accounts for much of this cost.[39] For example, a substantial percentage of e-discovery costs is attributable to the sheer volume of electronically stored information (ESI). ESI comes in a variety of forms[40] and is stored on an ever-expanding range of devices and platforms.[41] Even a simple dispute can involve

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37. Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 340, 357 (2000).

38. *See* ABA REPORT, *supra* note 11, at 98 (reporting mean response of 3,300 surveyed attorneys that 65.6 percent of costs associated with cases that do not go to trial and are not dismissed on an initial 12(b)(6) motion are incurred in discovery); NAVIGANT CONSULTING, THE STATE OF DISCOVERY ABUSE IN CIVIL LITIGATION: A SURVEY OF CHIEF LEGAL OFFICERS 8 (2008) [hereinafter STATE OF DISCOVERY ABUSE], *available at* http://www.law.northwestern.edu/jep/symposia/documents/2008_CJS_Materials/5b_Kelly_eDiscovery.ppt (surveying Fortune 1000 chief legal officers to show that, on average in 2007, 45–50 percent of corporations' civil litigation costs related to discovery activities); EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NAT'L, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUD. CONF. ADVISORY COMM. ON CIVIL RULES 38–40 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf (reporting that lawyers who primarily represent defendants estimate that discovery accounts for 27 percent of total litigation costs, whereas lawyers who primarily represent plaintiffs estimate that discovery accounts for 20 percent of total litigation costs).

39. *See* ABA REPORT, *supra* note 11, at 105 (reporting that 76.5 percent of 3,300 surveyed attorneys agree or strongly agree that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery); STATE OF DISCOVERY ABUSE, *supra* note 38, at 8 (surveying Fortune 1000 chief legal officers to find that discovery of ESI accounts for, on average, 33–39 percent of total discovery costs).

40. There is no precise definition of ESI. *See* FED. R. CIV. P. 34(a) advisory committee's notes to 2006 Amendments (2011) ("The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of [ESI]."). But ESI is commonly understood to include at least e-mail and attachments; word processing files; spreadsheets; presentation documents (such as PowerPoint and Corel); graphics; animations; images; audio, video, and audiovisual recordings; and voicemail. *See* A.B.A. CIVIL DISCOVERY STANDARD § 29(a)(i) (2004), *available at* http://riaej.com/portal/index.php?option=com_docman&task=doc_view&gid=257&tmpl=component&format=raw&Itemid=38. Multinational corporations commonly have 2,000 or more such applications, "each with varying functionality bearing on the preservation, collection, analysis, review, and production of ESI." Daniel M. Kolkey & Chuck Ragan, *Reevaluating the Rules for e-Discovery*, L.A. DAILY J., May 21, 2010, *available at* http://www.gibsondunn.com%2Fpublications%2FDocuments%2FKolkey-ReevaluatingtheRulesfore-Discovery.pdf&rct=j&q=Reevaluating%20the%20Rules%20for%20e-Discovery&ei=VwSXTtSKCee3sQK075mpBA&usg=AFQjCNGAIBd10XRKB279TmEn66nYZimBGw&cad=rja.

41. These devices and platforms include databases; networks; computer systems (hardware and software); servers; archives; backup systems; tapes, magnetic and optical discs (including DVDs and CDs), drives (including thumb or flash), cartridges, and other storage media; desktops and laptops; Internet data; personal digital assistants (PDAs); handheld wireless devices (such as a BlackBerry); firewalls; mobile telephones; paging devices; and audio systems, including voicemail. *See* A.B.A. CIVIL DISCOVERY STANDARDS § 29(a)(ii) (2004), *available at* http://riaej.com/portal/index.php?option=com_docman&task=doc_view&gid=257&tmpl=component&format=raw&Itemid=38. Litigants often view data on

millions of electronic documents.[42] The volume of potentially discoverable ESI is much higher than traditional paper document productions, in part because of the substantial quantity of e-mails and instant messages (IMs) that define daily communication. Approximately 100 billion e-mails[43] and 12 billion IMs[44] are sent daily. The average employee sends and receives more than 135 e-mails each day.[45] Large corporations like Microsoft receive 300–400 million internal and external e-mails each month.[46] Moreover, by some measures, social networks already rival e-mails in importance. In 2009, time spent on social networks (Twitter, LinkedIn, Facebook, MySpace, and others) surpassed time spent on e-mail.[47] By 2014, the number of consumer and business social networking accounts worldwide is projected to reach 3.7 billion, virtually equal to the 3.8 billion worldwide e-mail accounts.[48] An estimated 25 billion

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"outlier" devices and platforms such as cellular telephones, PDAs, voicemail and IM systems, chat rooms, and websites as duplicative or insignificant. Edward H. Rippey & Skye L. Perryman, *Court Imposes Sanctions for Wiping BlackBerrys*, NAT'L L.J., Dec. 14, 2009, at 17. But this perception can have serious adverse litigation consequences, because federal courts increasingly have recognized a duty to preserve and produce outlier ESI even as they continue to disagree about the level of culpability necessary for an adverse inference jury instruction. *See, e.g.*, Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010) (noting circuit differences); Vagenos v. LDG Fin. Servs. LLC, No. 09-cv-2672(BMC), 2009 WL 5219021, at *2 (E.D.N.Y. Dec. 31, 2009) (ordering adverse inference instruction for failure to preserve relevant voicemail recording on cellular telephone); Se. Mech. Servs., Inc. v. Brody, Case No. 8:08-CV-1151-T-30EAJ, 657 F. Supp. 2d 1293 (M.D. Fla. 2009) (ordering adverse inference instruction for destruction of e-mails, calendar entries, and text messages stored on BlackBerries); *see also* Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 82 (2011) (noting increasing frequency of adverse jury instructions in federal e-discovery spoliation cases); Farrah Pepper, *Honey, I Forgot the Cell Phone: The 411 on 'Outlier' ESI*, LAW.COM (Jan. 27, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202439544884 (noting express or implied duty to preserve and produce outlier ESI in cases involving website, IM or chat room conversations, voicemail systems, cellular telephones, and PDAs).

42. Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237 n.5 (2009); *accord* Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH. 9, at 16 (2011) (noting "the increasing frequency of gigabytes and terabytes of data in litigated matters.").

43. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, at 12 (2007).

44. Gene J. Koprowski, *Instant Messaging Grew by Nearly 20 Percent in 2005*, TECHNEWSWORLD (Nov. 10, 2005, 9:00 AM), http://www.technewsworld.com/story/47270.html.

45. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONTLINES, 5 (2008) [hereinafter VIEW FROM THE FRONTLINES], *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf.

46. Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 879 (2008).

47. Teddy Wayne, *Social Networks Eclipse E-mail*, N.Y. TIMES, May 18, 2009, at B3.

48. *See* THE RADICATI GRP., INC., EMAIL STATISTICS REPORT, 2010 at 2–3 (Sara Radicati ed., 2010), *available at* http://www.radicati.com/wp/wp-content/uploads/2010/04/

tweets were sent on Twitter in 2010,[49] and 4 billion Facebook messages are sent each day.[50] While courts are just beginning to grapple with the discoverability of social network activity, a few courts already have held that such activity can be discoverable ESI.[51]

Overall, between 2005 and 2007, the average amount of data stored by a Fortune 1000 corporation grew from 190 terabytes (TBs)[52] to 1,000 TBs.[53] In the same period, the average size of data sets at 9,000 U.S. midsize companies increased from two to one hundred TBs.[54] In 2000, about 70 percent of corporate records were stored in electronic format,[55] and by 2008, this share increased to an estimated 90 percent.[56] Because this information is

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Email-Statistics-Report-2010-2014-Executive-Summary2.pdf. The number of IM accounts is projected to reach 3.5 billion in 2014. *Id.* The respective numbers of social network, e-mail, and IM accounts in 2010 were 2.2 billion, 2.9 billion, and 2.4 billion. *Id.*

49. *Internet 2010 in Numbers*, ROYAL PINGDOM BLOG (Jan. 12, 2011), http://royal.pingdom.com/2011/01/12/internet-2010-in-numbers/.

50. Brenna Ehrlich, *Facebook Messages by the Numbers*, MASHABLE.COM (Nov. 15, 2010), http://mashable.com/2010/11/15/facebook-messages-numbers/.

51. *See* Steven C. Bennett, *Look Who's Talking—Legal Implications of Twitter Social Networking Technology*, 81 N.Y. ST. B.A.J. 10 (2009) (noting disagreement as to whether Twitter messages are "stored" within the meaning of the FRCP); Kathrine Minotti, Comment, *The Advent of Digital Diaries: Implications of Social Networking Websites for the Legal Profession*, 60 S.C. L. REV. 1057, 1062–63 (2009) (arguing that courts should treat social networking information as ESI); Andrew C. Payne, Note, *Twitigation: Old Rules in a New World*, 49 WASHBURN L.J. 841 (2010) (arguing that courts should hesitate to analogize social networking information to traditional ESI); H. Christopher Boehning & Daniel J. Toal, *Social Networking Data Presents New Challenges*, N.Y.L.J., June 30, 2009, at 5.

52. A TB is a measure of computer storage capacity equal to 1,000 gigabytes (GB). One GB of data is equal to one billion bytes (10^9 bytes), so one TB of data equals one trillion (10^{12}) bytes. A petabyte is 1000 terabytes and an exabyte (EB) is one million terabytes. It has been estimated that the total volume of information generated worldwide in 1999 was two EB, by 2011 the world will create, capture, or replicate nearly 1,800 EB of information, and by 2020 the amount of digital information created and replicated in the world will grow to 35 trillion GB, or 44 times as much digital information as existed in 2009. HOW MUCH INFORMATION?, *supra* note 2, at 3–4; JOHN GANTZ & DAVID REINSEL, THE DIGITAL UNIVERSE DECADE—ARE YOU READY? 1 (2010), *available at* http://www.ifap.ru/pr/2010/n100507a.pdf; JOHN F. GANTZ ET AL., THE DIVERSE AND EXPLODING DIGITAL UNIVERSE: AN UPDATED FORECAST OF WORLDWIDE INFORMATION GROWTH THROUGH 2011 3 (2008), *available at* http://www.emc.com/collateral/analyst-reports/diverse-exploding-digital-universe.pdf.

53. Lucas Mearian, *A Zettabyte by 2010: Corporate Data Grows Fiftyfold in Three Years*, COMPUTERWORLD (Mar. 6, 2007, 12:00 PM), http://www.computerworld.com/s/article/9012364/A zettabyte_by_2010_Corporate_data_grows_fiftyfold_in_three_years.

54. *Id.*

55. Lori Enos, *Digital Data Changing Legal Landscape*, E-COMMERCE TIMES (May 16, 2000, 12:00 AM), http://www.ecommercetimes.com/story/3339.html.

56. *See* Lynne Marek, *Law Firms Begin to Hire 'E-Discovery Counsel'*, NAT'L L.J., Oct. 13, 2008, at 10.

potentially discoverable, resources associated with its preservation are a separate and often significant cost in the e-discovery process.[57]

ESI discovery is also significantly more complex than discovery of paper documents.[58] Many corporations, if not most, fail to store and organize their ESI in ways that facilitate efficient collection and review.[59] ESI is usually saved on backup tapes to guard against catastrophic computer failure. Backup tape characteristics—including large storage capacities, rapid transfer rates, and low power consumption—make tapes an ideal backup solution. However, they have other characteristics that render them less useful for e-discovery. For example, tapes contain vast amounts of duplicative data[60] and are frequently unlabeled and disorganized, rendering the search for information difficult and time-consuming.[61] Data on a tape are not organized for efficient retrieval of individual documents or files because the data are generally recorded and stored sequentially. To locate and access a specific document or file, all data preceding the target must be read first.[62] Moreover, much of the information stored on backup tapes is compressed, difficult to recover, and must be specially processed before it is usable.[63] Tapes are typically restored to hard drives and reformatted so they can be searched for responsive information.[64] The estimated cost of restoration varies considerably, but is usually at least

57. *See* Michael B. de Leeuw & Eric A. Hirsch, *E-Discovery's Oft-Overlooked Price Driver—Preservation Needs to Be Part of Any Cost-Shifting Dialogue*, N.Y.L.J., Nov. 15, 2010, at S4.

58. EFFECTIVE REFORM, *supra* note 10, at 12. E-discovery vendors, who are frequently hired to collect and process ESI in mid- to large-size cases, have adopted a variety of pricing models, including per page, per GB, per hour, or per custodian. In recent years, the most common model has shifted from per page to per GB, reacting to the wildly inaccurate page count estimates often associated with processing ESI. *See* Jeffrey S. Jacobson, *How to Spend Less on Electronic Discovery*, N.Y.L.J., June 10, 2010, at 7; Jason Krause, *Confusion Carries the Day in E-Discovery*, LAW. TECH. NEWS (Mar. 22, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202446546213. Some vendors use a tiered pricing model, charging one rate per GB to process ESI and a different rate per GB to host data following de-duplication, filtering, and searching. Marla S.K. Bergman & Steven C. Bennett, *Managing E-Discovery Costs: Mission Possible*, 20 PRAC. LITIGATOR, no. 4, July 2009, at 57, 59, *available at* http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT0907-Bergman-Bennett_thumb.pdf.

59. VIEW FROM THE FRONTLINES, *supra* note 45, at 19, 26.

60. Grant J. Esposito & Thomas M. Mueller, *Backup Tapes, You Can't Live with Them and You Can't Toss Them: Strategies for Dealing with the Litigation Burdens Associated with Backup Tapes Under the Amended Federal Rules of Civil Procedure*, 13 RICH. J.L. & TECH. 13, at *7 (2007).

61. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT U. DENV., THE EMERGING CHALLENGE OF ELECTRONIC DISCOVERY: STRATEGIES FOR AMERICAN BUSINESS 3 (2008) [hereinafter EMERGING CHALLENGE], *available at* http://www.du.edu/legalinstitute/pubs/EDiscovery-Strategies.pdf.

62. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 319 (S.D.N.Y. 2003).

63. EMERGING CHALLENGE, *supra* note 61, at 3.

64. *See* Zubulake, 217 F.R.D. at 314 (noting that UBS backed-up its e-mails on backup tapes and optical disks).

$1,000 per tape.[65] According to one estimate, the cost of collecting, processing, reviewing, culling, and producing one GB of data is between $5,000 and $7,000, assuming precise keyword searches have been employed.[66] If a typical mid-size case produces 500 GB of data, the production cost could be as high as $2.5 to $3.5 million.[67] Improvements in technology[68] and increased market

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65. *See, e.g.*, Toussie v. County of Suffolk, No. CV 01-6716(JS)(ARL), 2007 WL 4565160, at *4 (E.D.N.Y. Dec. 21, 2007) (estimated cost to restore 417 tapes was $418,000 to $963,500, or approximately $1,000 to $2,300 per tape); *Zubulake*, 217 F.R.D. at 313–14 (defendant's estimated cost to restore 94 tapes was $300,000, or almost $3,200 per tape); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 168 (E.D. La. 2002) (estimated cost to restore 93 tapes was $6.2 million, or almost $67,000 per tape); Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (estimated cost to restore 200 tapes was approximately $9.75 million, or more than $45,000 per tape). *Cf.* Behzad Behtash, *E-Discovery: How to Avoid Death by Backup*, INFORMATIONWEEK (Apr. 17, 2010, 12:00 AM), http://www.informationweek.com/story/showArticle.jhtml?articleID=224400402 (estimating that restoration of backup tapes typically costs $500–$1,000 per tape).

66. VIEW FROM THE FRONTLINES, *supra* note 45, at 5. *But cf.* Cynthia Cotts, *U.S. Companies' Electronic-Discovery Spending Tripled in 2009*, BLOOMBERG (Oct. 20, 2009 12:01 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a_qD_YdAZA7o ("The price for processing electronic data is all over the map, from $400 to $4,000 per gigabyte[.]").

67. VIEW FROM THE FRONTLINES, *supra* note 45, at 5, 25. A survey of Fortune 200 companies found that, for the period 2006–08, the average company paid average discovery costs per case of $681,880 to $2,993,567. Companies at the high end during the same period reported average per case discovery costs ranging from $2,354,868 to $9,759,900. *See* Statement of Civil Justice Reform Grp., Lawyers for Civil Justice and U.S. Chamber Inst. for Legal Reform to Comm. on Rules of Practice and Procedure of the Judicial Conf. of the United States, Litigation Cost Survey of Major Companies 3 (May 10–11, 2010), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement. A significant percentage of these costs can be attributed to ESI.

68. *See* Megan Jones, *Giving Electronic Discovery a Chance to Grow Up*, NAT'L L.J., Dec. 14, 2009, at 18 (reporting that between 2001 and 2009, the average price charged by e-discovery vendors to process, search, and export to a tool for review one GB of data declined from $2,000 to less than $400). The increasing use of more efficient cloud-based platforms for processing and hosting also has contributed to the per-unit price decline. George Socha & Tom Gelbmann, *Climbing Back*, LAW TECH. NEWS (Aug. 1, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202463900292. Clouds are third-party services that host computing workloads in data centers. Global spending on cloud services reached an estimated $68 billion in 2010, and was predicted to reach $95 billion by 2014. David McCann, *Be Clear About the Cloud*, CFO.COM (Dec. 1, 2010), http://www.cfo.com/printable/article.cfm/14540108; Robert W. Pass & Rebecca N. Shwayri, *When Cloud Computing Meets E-Discovery Obligations*, LAW360 (Sept. 14, 2010), http://www.law360.com/articles/184339/print?section=ip. The basic cloud pricing model is a flat fee based on capacity consumption. David McCann, *Six Costly Cloud Mistakes*, CFO.COM (Aug. 12, 2010), http://www.cfo.com/printable/article.cfm/14516478. It has been estimated that, over a 13-year life cycle, the total cost of implementing and sustaining a cloud environment may be as much as two thirds lower than maintaining a traditional, non-virtualized information technology data center. *See* TED ALFORD & GWEN MORTON, BOOZ, ALLEN & HAMILTON, THE ECONOMICS OF CLOUD COMPUTING 1 (2010), *available at* http://www.boozallen.com/media/file/Economics-of-Cloud-Computing.pdf. Cloud computing services, including e-mail, contain their own form of ESI, which may be discoverable. *See* Steven C. Bennett, *E-Discovery Meets the Cloud*, 83 N.Y. ST. B.J. 45 (2011) (noting that discoverability may depend

competition[69] have reduced the per-GB processing cost in recent years, but those savings have been more than offset by the exponential increase in ESI volume.[70]

The cumulative effect of the foregoing factors is that the non-attorney e-discovery market increased from $1.5 billion in 2006 to $2.8 billion in 2009,[71] and was expected to increase another 10–15 percent in both 2010 and 2011.[72] This estimate excludes costs associated with the attorney review of these documents for responsiveness and privilege, which can account for 75–90 percent of the increase in total cost of ESI production.[73] Document review is regularly performed manually, whether the information is paper or electronic, so that responsive and privileged materials

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on whether the user has a legal obligation to maintain cloud-stored records); Fernando M. Pinguelo & Bradford W. Muller, *Avoid the Rainy Day: Survey of U.S. Cloud Computing Caselaw*, B.C. INTELL. PROP. & TECH. F., at *7 (2011)("It is increasingly difficult for parties to hide behind their remote storage providers when fielding e-discovery requests, as courts find those servers to be within the party's 'possession, custody or control.'"); Fernando A. Bohorquez Jr. & Alberto Rodriguez, *How to Keep the 'Cloud' from Bursting in Litigation*, NAT'L L.J., Dec. 20, 2010, at 13 (identifying five different types of cloud services that may contain ESI).

69. Litigation can be counter-cyclical, with the result that a number of e-discovery vendors entered the market during the recession of 2007–09. *See* DEBRA LOGAN, ET AL., GARTNER RAS CORE RESEARCH NOTE G00171281, MARKETSCOPE FOR E-DISCOVERY SOFTWARE PRODUCT VENDORS (2009), *available at* http://www.gartner.com/technology/media-products/reprints/ca/vol2/article2/article2.html. By 2009, the market consisted of more than 600 e-discovery vendors. *See* George Socha & Tom Gelbmann, *Strange Times*, LAW TECH. NEWS (Aug. 1, 2009), http://www.law.com/jsp/law/PubArticlePrinterFriendly.jsp?id=1202435558482.

70. *See* Jason Krause, *When Is an E-Discovery Burden an Undue Burden?*, L. TECH. NEWS (June 1, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202458961735.

71. *See* George Socha & Tom Gelbmann, *Climbing Back*, L. TECH. NEWS (Aug. 1, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202463900292.

72. Socha & Gelbmann, *supra* note 71.

73. James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, RAND INST. FOR CIV. JUST. 3 (2008), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2008/RAND_OP183.pdf; *cf.* VRA PARTNERS, LLC, INDUSTRY REVIEW: LEGAL SUPPORT 6 (2009), *available at* http://www.vrapartners.com/pdf/legal-support-newsletter-0409.pdf (estimating that the ratio of e-discovery review costs to processing costs is 5:1).

can be identified.[74] Manual review of one GB of ESI[75] has an estimated average cost of $32,000–$40,000.[76]

Attorney review for privilege and the preparation of privilege logs constitute the single most costly steps in the e-discovery process.[77] The qualitative differences between electronic and paper documents account for part of this cost. Electronic documents tend to be more informal, use more abbreviations and shorthand, and are much more ambiguous than their paper counterparts.[78] This ambiguity forces additional review time. Costs also multiply

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74. *See* Maura R. Grossman & Gordon V. Commack, *Technology-Assisted Review in E-Discovery Can be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, at *6 (2011) ("In current practice, the problem of identifying responsive (or privileged) ESI, once it has been collected, is almost always addressed, at least in part, by a manual review process, the cost of which dominates the e-discovery process.").

75. One GB of ESI is the equivalent of approximately 80,000–100,000 typewritten pages of text. *See* Donald Wochna, *Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm*, 43 AKRON L. REV. 847, 853 (2010). A much higher conversion estimate of 500,000 pages of text per GB comes from THE MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004), but is subject to some dispute. *See* VIEW FROM THE FRONTLINES, *supra* note 45, at 5 & n.10; Craig Ball, *Expert Explodes Page Equivalency Myth*, L. TECH. NEWS, (Aug. 8, 2007), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1186477613170 ("Scholarly articles and reported decisions pass around the 500,000 pages per gigabyte value like a bad cold. Yet, 500,000 pages per gigabyte is not right. It's not even particularly close to right."). Page equivalency numbers vary considerably when they are not expressed in a common currency—the number of pages in a document file varies widely as a function of the file type and its characteristics. According to one estimate, the average number of pages per GB varies from a low of 17,552 for PowerPoint files to a high of 677,963 for text files. Word files average 64,782 pages and e-mail files average 100,099 pages. *See* LEXISNEXIS DISCOVERY SERVICES, HOW MANY PAGES IN A GIGABYTE?, (2008), *available at* http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf.

76. Wochna, *supra* note 75, at 853. This estimate can vary widely, depending on billable rates and the efficiency of the document reviewer. The stated estimate assumes an average billable rate of $200 per hour and that a single attorney can review 500 pages of data per hour with acceptable accuracy. *Id.* at 853; *see also* The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 192 (2007) (noting the huge cost differential between the $1 required to store a GB of data and the $30,000 required to review it).

77. Julie Grantham, *Managing E-Discovery Costs from the Vendor Perspective*, 51 THE ADVOC. (TEXAS) 57 (2010) ("The most expensive component of any e-discovery project is human document review . . . ."); Wochna, *supra* note 75, at 852–53; *see also* FULBRIGHT & JAWORSKI L.L.P., E-DISCOVERY TRENDS: E-DISCOVERY FINDINGS FROM THE 2005–2009 FULBRIGHT & JAWORSKI L.L.P. LITIGATION TRENDS SURVEY 4 (2009), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/main.nsf/$defaultview/F873BA28DC4854F38525767E004A4F9A/$File/Fulbright's%20E-Discovery%20trends.pdf?OpenElement (reporting that in a 2007 national survey of general counsel or senior litigation counsel from more than 300 corporations, more than 50 percent of respondents said privilege reviews accounted for more than 5 percent of their litigation spending in the previous 12 months, and 26 percent said that such reviews consumed between 20 percent and 50 percent of their annual litigation expenditure).

78. *See, e.g.*, Adam Hurwitz & Alon Israely, *Tweet This: Social Networking May Count in EDD*, NAT'L L.J., Dec. 20, 2010, at 14 (noting extreme challenge of searching messages on social-networking sites like Twitter and Facebook).

when e-mail strings are reviewed and logged. Each e-mail in the chain may need to be reviewed and logged separately[79] because only privileged communications that are adequately identified may properly be withheld from production of an e-mail chain.[80]

Costs multiply again when potentially privileged metadata are involved. Metadata are information describing the history, tracking, or management of an electronic file. They have no counterpart in the world of paper discovery. There are different types of metadata,[81] which can include privileged or confidential information. Metadata can serve to indicate the date an electronic file was created, its author, when and by whom it was edited, what edits were made, and in the case of e-mail, the history of its transmission.[82] Depending on the circumstances, metadata showing the date a document was created, altered, or transmitted may be important to claims or defenses. Metadata may also be useful to establish the authenticity of a document under the FRE and state rules.[83]

The word "metadata" does not appear in the FRCP. It is likely that the rules are deliberately silent, probably because the Advisory Committee did not feel sufficiently confident to establish a rule in this still-developing area of the law.[84] Nevertheless, litigants seeking the production of ESI increasingly target production of the accompanying metadata, and requests made early in a case are generally granted.[85] To the extent that production is required, this can dramatically increase the cost of e-discovery. The process of

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79. *See* John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 37–38 (2010).

80. *See* Muro v. Target Corp., 243 F.R.D. 301 (N.D. Ill. 2007).

81. *See* Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, at 83 (2008) (describing four types of metadata).

82. BARBARA J. ROTHSTEIN, RONALD J. HEDGES & ELIZABETH C. WIGGINS, FEDERAL JUSTICE CENTER, MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 3 (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.

83. *See* Philip J. Favro, *A New Frontier in Electronic Evidence: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L.J. 1, 11–12 (2007).

84. *See* Thomas Y. Allman, *The Impact of the Proposed Federal e-Discovery Rules*, 12 RICH. J.L. & TECH. 13, at 15 (2006) ("The Advisory Committee discussed the competing concerns at some length but ultimately decided that the best course of action was to remain silent and leave the issue to individual case law development.").

85. *See In re* Seroquel Prods. Liab. Litig., No. 1769, 2007 WL 219989, at *4 (M.D. Jan. 26, 2007); Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 656 (D. Kan. 2005) (requiring production of metadata); Tresa Baldas, *Metadata Grows in Legal Import—Litigation Demanding Production of Metadata is Roiling the Courts*, NAT'L L.J., Jan. 26, 2009, at 4. *But see* Autotech Techs. P'ship v. AutomationDirect.com, Inc., 248 F.R.D. 556, 559 (N.D. Ill. 2008) (denying request to require metadata production); Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, No. 05-138-WOB, 2006 WL 5097354 (E.D. Ky. Dec. 18, 2006) (rejecting *Williams* as "not persuasive").

extracting and reviewing metadata to identify and redact privileged information is very time-consuming.[86]

Accounting for the range of electronic discovery activities, revenues for the e-discovery industry as a whole, including records management and litigation-readiness plans, were expected to increase from $9.7 billion in 2006 to $21.8 billion in 2011.[87] In sum, the accelerating cost and importance of e-discovery in civil litigation are unmistakable.

III. THE 2006 AND 2008 AMENDMENTS FAILED TO SOLVE THE E-DISCOVERY COST PROBLEM

A. The 2006 Amendments

The FRCP were amended in 2006 (the 2006 Amendments) to address the dramatically expanding importance and cost of electronic discovery.[88] This was the tenth time that Rule 26[89] was amended since the FRCP were adopted in 1938, and the sixth time that Rule 37[90] was amended.[91] The amendments made three major

86. *See* CP Solutions PTE, Ltd. v. Gen. Elec. Co., No. 3:04 cv 2150 (JBA) (WIG), 2006 WL 1272615, at *4 (D. Conn. Feb. 6, 2006) (declining to order production of metadata because redaction for privilege would be unduly burdensome); Adam K. Israel, Note, *To Scrub or Not to Scrub: The Ethical Implications of Metadata and Electronic Data Creation, Exchange, and Discovery*, 60 ALA. L. REV. 469, 496 (2009) ("[T]he hours logged reviewing metadata for privileged or protected information will likely be extremely costly.").

87. VIEW FROM THE FRONTLINES, *supra* note 45, at 15–16.

88. *See* Emery G. Lee III, *Effectiveness of the 2006 Rules Amendments*, 11 SEDONA CONF. J. 191 (2010) (identifying objectives of the 2006 Amendments). E-discovery rule-making has not been limited to the national level. More than fifty federal district courts have adopted local rules to address e-discovery issues. *See* Lee H. Rosenthal, *Electronic Discovery—Is the System Broken? Can it be Fixed?*, 51 THE ADVOC. (TEX.) 8 (2010) (discussing problems associated with proliferation of local rules); AM. COLLEGE OF TRIAL LAWYERS, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 14 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008. In addition, by early 2011 at least thirty states had adopted some form of e-discovery rules. Susan Beck, *Judges are Imposing Fewer Sanctions for E-Discovery Violations, Report Says*, N.Y.L.J., Jan. 19, 2011, at 6. Many of these rules derive from uniform e-discovery rules for state courts developed by the National Conference of Commissioners on Uniform State Laws. These uniform rules track changes instituted at the federal level by the 2006 Amendments. VIEW FROM THE FRONTLINES, *supra* note 45, at 6.

89. FED. R. CIV. P. 26 (Rule 26 covers the duty to disclose and general provisions governing discovery).

90. FED. R. CIV. P. 37 (Rule 37 covers the failure to make disclosures or cooperate in discovery, and sanctions).

91. Rule 26 was amended in 1946, 1963, 1966, 1970, 1980, 1983, 1987, 1993, 2000, and 2006. Rule 37 was amended in 1948, 1970, 1980, 1987, 2000, and 2006. These amendments

changes: a two-tiered proportionality approach was applied to the scope of e-discovery, a safe harbor provision was created to protect parties from certain sanctions relating to e-discovery, and "quick peek" and "clawback" agreements to prevent inadvertent privilege waivers were endorsed. Each of these changes is discussed in detail below.

1. Proportionality

The 2006 amendments implemented a two-tiered proportionality approach to the scope of e-discovery. The proportionality principle states that a party is not required to provide discovery when the potential benefits are outweighed by the associated burdens or costs. Pursuant to Rule 26(b)(2)(B), a responding party is not required to produce ESI from sources that the party identifies as "not reasonably accessible because of undue burden or cost."[92] Common examples are backup tapes, which are often held to be inaccessible.[93] If a requesting party seeks discovery of ESI that is not reasonably accessible, that party has the burden of demonstrating good cause for production.[94] However, as in the case of Rule 26(c), good cause is undefined.[95] As a result, courts are required to balance the requesting party's need for the information and its relevance against the burden and expense imposed on the responding party under Rule 26(b)(2)(C)(i)–(iii). But courts are given limited guidance about how to weigh the competing interests.[96] Proportionality concerns are typically raised in a motion to compel or request for a protective order under Rule 26(c). A court

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included technical modifications. Both Rules 26 and 37 have been further amended since 2006. In 2006, amendments also were made to Rules 16, 33, 34, and 45.

92. FED. R. CIV. P. 26(b)(2)(B).

93. *See* Radian Asset Assur., Inc. v. Coll. of the Christian Bros. of New Mexico, No. CIV 09-0885, 2010 WL 4928866, at *5 (D.N.M. Oct. 22, 2010).

94. *See* David K. Isom, *The Burden of Discovering Inaccessible Electronically Stored Information: Rules 26(b)(2)(B) and 45(d)(1)(D)*, 3 FED. CTS. L. REV. 39, 55 (2009) ("Most courts that have addressed the Rule 26(b)(2)(B) allocation of burdens have held that, once the responding party proves inaccessibility, the seeking party has the burden of proving good cause for production of the inaccessible ESI.").

95. FED. R. CIV. P. 26(b)(2)(B).

96. FED. R. CIV. P. 26(b)(2)(C) (providing that the court must limit the frequency or extent of discovery if it determines that: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues").

that orders discovery from inaccessible sources for good cause may specify conditions, the most important of which is cost-shifting to mitigate costs.

Before the 2006 Amendments, there was no universally accepted framework for shifting ESI production costs. Instead, courts applied three primary tests, derived from three district court cases of the early 2000s: *McPeek v. Ashcroft*,[97] *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[98] and *Zubulake v. UBS Warburg LLC*.[99] Each of these cases involved requests for ESI available exclusively on backup tapes. *McPeek* applied a marginal utility analysis, holding that the more likely it is that ESI contains information that is relevant to a claim or defense, the fairer it is that the responding party pay search costs.[100] *Rowe*, a racial discrimination case, went one step further and listed eight factors to guide courts in deciding whether to shift costs.[101] *Zubulake*, a gender discrimination case, refined and prioritized the *Rowe* factors, reduced the list to seven,[102] and emerged as the most common approach to the cost-shifting issue.[103]

Amended Rule 26 does not codify any of the foregoing approaches. Indeed, the text of the rule does not mention cost-shifting. The Advisory Committee's Note does include, however, a list of seven factors that it considers relevant to a determination of whether good cause exists to require discovery of ESI that is not reasonably accessible.[104] This list liberally borrows from both *Rowe* and *Zubulake*, but is not coextensive with either.[105] The similarities to *Rowe* and *Zubulake* do not resolve the question of whether the list is designed to provide guidance in making a cost-shifting determination, in addition to providing guidance concerning good cause for the production of inaccessible ESI. To date, courts have not reached consensus on this issue.[106]

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97. 202 F.R.D. 31 (D.D.C. 2001).

98. 205 F.R.D. 421 (S.D.N.Y. 2002).

99. 217 F.R.D. 309 (S.D.N.Y. 2003).

100. 202 F.R.D. at 34.

101. 205 F.R.D. at 429.

102. 217 F.R.D. at 322-23.

103. Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 902 (2009) (noting that *Zubulake* "has not drawn universal adherence"); Bradley T. Tennis, Comment, *Cost-Shifting in Electronic Discovery*, 119 YALE L.J. 1113, 1114 (2010).

104. FED. R. CIV. P. 26 advisory committee's note (2006).

105. *See* Tennis, *supra* note 103, at 1118 ("[T]he *Zubulake* test and the amendment test exhibit significant differences that preclude straightforward harmonization.").

106. *See* Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1561–62 (2010).

2. Safe Harbor

The 2006 Amendments created a "safe harbor" provision in Rule 37(e): "Absent exceptional circumstances, a court may not impose sanctions [on a party] for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."[107] The drafters of Rule 37(e) designed the safe harbor to protect against sanctions "arising solely from the loss of ESI through the routine operation of electronic systems that automatically discard information."[108] "Good faith" is not defined in Rule 37, but the Advisory Committee's Notes state that good faith may require that a party intervene to modify or suspend certain routine features of a computer system to prevent the loss of information that is subject to a preservation obligation.[109]

3. Quick Peek and Clawback Agreements

The 2006 Amendments permit the parties to agree in advance that inadvertent production of privileged materials does not automatically waive privilege.[110] Specifically, amended Rule 26 endorses both "quick peek" and "clawback" agreements. Quick peek agreements allow the requesting party to "peek" at the producing party's ESI before any preproduction review. The requesting party then identifies the particular documents it wants and the producing party can limit its privilege review to those documents. In exchange, the requesting party agrees that it will not use or claim waiver over documents it examined during the quick peek. Clawback agreements provide that privileged or protected documents inadvertently produced during discovery will be returned without a waiver of privilege. While the text of Rule 26 does not mention quick peek or clawback agreements, the 2006 Advisory Committee's Note to Rule 26(f) discusses clawbacks as a way to reduce discovery costs and minimize the risk of privilege waiver.[111]

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107. FED. R. CIV. P. 37(e).

108. Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 824 (2010).

109. FED. R. CIV. P. 37 advisory committee's note (2006).

110. FED. R. CIV. P. 26(b)(5) advisory committee's note (2006) (noting that Rule 26(b)(5)(B) works in tandem with Rules 26(f) and 16(b) to permit parties to ask the court to include in an order agreements concerning privilege waiver).

111. FED. R. CIV. P. 26(f) advisory committee's note (2006).

4. The Changes Fail to Reduce E-Discovery Costs

Each of the three major changes to the 2006 amendments fails to significantly reduce the escalating cost of e-discovery. The proportionality standard incorporated into the Rule 26(b)(2) good cause requirement is likely to have little positive impact, based on prior experience with a substantially similar requirement incorporated into Rule 26(b) by amendment in 1983.[112] That requirement, designed to curb discovery abuses of the pre-ESI era, is generally regarded as a failure because courts ignored proportionality concerns following the amendment.[113] Because modern e-discovery presents a much broader and deeper array of challenges, there is no reason to assume that the 2006 Amendments will fare any better. One problem is the significant difficulty of assessing the cost of e-discovery before it has been conducted.[114] A second problem is the great difficulty judges have in deciding when the cost of discovery is proportional to the benefit. This is particularly true in cases that do not involve economic damages.

Further complicating the proportionality analysis, the good cause requirement of Rule 26(b)(2)(B) leaves judges with little guidance and virtually unfettered discretion to order discovery of ESI that is not reasonably accessible. Rule 26(b)(2)(B) does not define good cause and it does not provide that good cause can be derived from the seven factors identified in the Advisory Committee's Note or the limitations in Rules 26(b)(2)(C)(i)-(iii). Subsequent to 2006, neither the Civil Rules Advisory Committee nor the Federal Judicial Center has provided additional guidance concerning the meaning of good cause.[115] Moreover, the FRCP contains numerous good cause standards even within the limited framework of discovery rules. These standards are subject to significantly different interpretations by the courts. Not only do they fail to provide guidance concerning good cause under 26(b)(2)(B), but they also contradict the canon of statutory construction that a single term used multiple times in the same rule should receive the same interpretation.[116]

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112. *See* Moss, *supra* note 103, at 905.

113. *See id.* at 899–901.

114. *See Reduce the E-Discovery Burden—You and Your Law Firms' Anecdotal Evidence and Data Can Help*, METROPOLITAN CORP. COUNSEL, Apr. 2010, at 11 ("It is hard to apply the proportionality principle because it is very difficult to assess the cost of discovery up front.") (quoting interview with Thomas M. Mueller, Partner, Morrison & Foerster LLP).

115. *See* Henry S. Noyes, *Good Cause is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 71 & n.102 (2007).

116. *Id.* at 71–72.

Because Rule 26(b)(2)(B) provides no clear boundaries concerning good cause, it fails to provide any additional protection against the rising cost of e-discovery. The absence of boundaries may even encourage parties to seek broad e-discovery from sources which are difficult and expensive to search, driving up costs for their adversaries.[117] This danger is magnified because it is unclear whether the seven factors are designed to guide the cost-shifting determination, and it is further magnified by the increasing rarity of cost-shifting orders following the 2006 Amendments. A 2010 survey found that only thirty-five federal cases addressed cost-shifting since December 1, 2006, and only one of them yielded a contested cost-shifting order.[118] The rarity of cost-shifting orders further minimizes the incentive for parties to limit their discovery requests.[119]

The safe harbor provision in Rule 37(e) has not provided much protection to parties or counsel. The provision provides no guidance concerning what data must be preserved or the manner of preservation. Moreover, judges have tended to give the Rule the narrow application that the drafters intended. From the promulgation of Rule 37(c) on December 1, 2006, until January 1, 2010, only twenty-seven federal court decisions relating to discovery of ESI in civil cases cited the safe harbor provision.[120] Of these decisions, no more than eight invoked Rule 37(e) to deny sanctions in whole or in part.[121] Given the limited protection that Rule 37(e) provides, parties have no incentive to limit the costly preservation and production of potentially relevant evidence. Finally, as is explained in more detail in connection with the 2008 Amendments,[122] the quick peek and clawback agreements contemplated by amended

117. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 583 (2010).

118. *See* Vainberg, *supra* note 106, at 1565–66; *accord* Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 781-83 (2011) ("[T]he use of cost shifting remains extremely limited—if not all but nonexistent . . . . [C]ost shifting has proven more popular among scholars than among federal district court judges[.]").

119. *See, e.g.*, Roy W. Breitenbach & Alicia M. Wilson, *Managing the Fact Discovery Tsunami: Tips When Defending a Federal Antitrust Case*, N.Y.L.J., Jan. 18, 2011, at S8 (noting that absence of cost-shifting means "there is little incentive for antitrust plaintiffs to limit discovery").

120. Willoughby, *supra* note 108, at 825.

121. *Id.*; *see also* Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Disputes*, 79 GEO. WASH. L. REV. 860, 876 (2011) ("An examination of the caselaw makes apparent that, overall, courts have erred on the side of caution and have narrowly interpreted the protections of Rule 37(e).").

122. *See infra* text accompanying notes 139–141.

Rule 26 of the FRCP and new Rule 502 of the FRE offer only limited potential for cost savings.

The cumulative result is that the 2006 Amendments have not significantly reduced costs. Only 22.1 percent of the respondents in a 2010 survey of all U.S. magistrate judges reported that Rule 26(b)(2)(B) was frequently effective in limiting the cost and burden of discovery, and only 19.5 percent reported that Rule 26(b)(2)(C) frequently limited the cost and burden.[123] Two 2009 surveys of attorneys, limited to those who participated in e-discovery cases since December 1, 2006, also found that the new rules were ineffective in reducing costs.[124]

B. The 2008 Amendments

FRE Rule 502 was amended in 2008 to control the spiraling cost of preproduction privilege review in a discovery environment overwhelmed by ESI.[125] Rule 502, which is designed to be read in tandem with FRCP Rule 26(b)(5)(B), addresses the mechanics of privilege waiver for documents subject to attorney-client privilege and work-product protection. Before its enactment, there was no uniform approach to determine whether and to what extent privilege was waived upon the inadvertent disclosure of privileged information;[126] instead, the outcome in any diversity case turned on the applicable state privilege law.[127]

Rule 502 attempts to standardize the federal approach to the disclosure of a communication covered by attorney-client privilege or work-product protection.[128] Section (a) limits the scope of any

123. Emery G. Lee III & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 SEDONA CONF. J. 201, 205 (2010).

124. Roughly half of all attorneys surveyed by the ABA and ACTL Reports responded that the 2006 Amendments failed to provide cost-effective discovery of ESI in a majority of cases. Lee, *supra* note 88, at 198. Moreover, according to the ABA Report, 45.7 percent of defense attorneys responded that the 2006 Amendments never provide for cost-effective discovery of ESI. *Id.*

125. *See* Facciola & Redgrave, *supra* note 79, at 30 ("Rule 502 was enacted to meet the obvious concern that in a world where a four gigabyte 'thumb drive' now costs less than twelve dollars, the costs of review on a file-by-file basis of the contents of a client's hard drive or server would soon dwarf the actual value of the case.").

126. *See* Hopson v. Baltimore, 232 F.R.D. 228, 235–36 (D. Md. 2005) (discussing different tests used by federal courts).

127. In federal actions based on diversity jurisdiction, federal courts apply state substantive law, including state law of privilege. FED. R. EVID. 501.

128. *See* FED. R. EVID. 502 advisory committee's note (2008); *see also* Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a*

waiver to material inadvertently produced in a federal case or to a federal agency, thereby precluding broad subject matter waiver. Protection is lost if the producing party intentionally waived the privilege, the disclosed and undisclosed information concern the same subject matter, and the disclosed and undisclosed information should fairly be considered together.[129] For example, where a party deliberately discloses privileged information in an effort to gain a tactical advantage.[130]

Section (b) precludes waiver in a federal or state proceeding for information produced in a federal case or to a federal agency if the disclosure was inadvertent and the producing party took reasonable steps to prevent disclosure and retrieve the material upon discovering the disclosure.[131] The producing party has the burden of establishing each of the three factors.[132] In most cases, the key factor is likely to be the reasonableness of the steps taken to prevent disclosure.[133] The Advisory Committee's Note identifies some additional factors that pertain to the reasonableness of a party's actions to prevent disclosure, beyond those listed in the text of the rule.[134] Neither the Note nor the text of the rule addresses the question of whether waiver must be resolved by the federal court in which the disclosure occurred, or instead may be resolved in a subsequent federal or state proceeding.[135]

Sections (c)–(e) are designed to make non-waiver agreements enforceable in subsequent proceedings and against subsequent parties. Section (c) provides that disclosure at the state level will not waive privilege in a federal proceeding if it would not have constituted a waiver in federal court or under that state's law.[136] Section (d) provides that, if a federal court ordered that a privilege was not waived, the order is binding on all other federal and state

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Federal Stick, 66 WASH. & LEE L. REV. 673, 759 (2009) (referring to Rule 502 as "the first step in the federalization of state privilege law").

129. FED. R. EVID. 502(a).

130. GATX Corp. v. Appalachian Fuels, LLC, No. 09-41-DLB, 2010 WL 5067688, at *6 (E.D. Ky. Dec. 7, 2010).

131. FED. R. EVID. 502(b).

132. Dubler v. Hangsterfer's Labs., No. 09-5144 (RBK/JS), 2011 WL 90244, at *5 (D.N.J. Jan. 11, 2011); Peterson v. Bernardi, 262 F.R.D. 424, 427 (D.N.J. 2009).

133. *See, e.g.*, Conceptus, Inc. v. Hologic, Inc., No. C 09-02280, 2010 WL 3911943, at *2 (N.D. Cal. Oct. 5, 2010) (finding waiver where plaintiff acted promptly to retrieve privileged material but failed to take reasonable steps to prevent disclosure); Felman Prod., Inc. v. Indus. Risk Insurers, Civ. Action No. 3:09-0481, 2010 WL 2944777, at *4 (S.D. W. Va. July 23, 2010) (same).

134. FED. R. EVID. 502(b) advisory committee's note (2008).

135. Jonathan M. Redgrave & Jennifer J. Kehoe, *New Federal Rule of Evidence 502: Privileges, Obligations, and Opportunities*, 56 FED. L. 34 (2009).

136. FED. R. EVID. 502(c).

court proceedings.[137] Section (e) provides that a waiver agreement entered into by parties in a federal proceeding only binds the parties to the agreement unless it is incorporated into a court order.[138] Accordingly, if a quick peek or clawback agreement is incorporated into a federal court order, it binds both signatories and non-signatories in all other federal or state proceedings.

Rule 502 has a number of drawbacks that limit its cost-saving potential. First, the bell cannot be un-rung. Once privileged information is disclosed to an adversary, it cannot be retrieved—even if the documents themselves are subject to clawback agreements. Such disclosures have the potential to dramatically undermine a party's ability to effectively litigate a case. The privileged information can suggest and shape, *inter alia*, an adversary's written discovery requests, deposition questions, witness preparation, settlement and trial strategy, and trial examination questions.[139] Accordingly, prudent counsel may be reluctant to rely on quick peek or clawback agreements, and expensive preproduction privilege reviews will continue as before. Not surprisingly, in a 2010 survey of all U.S. magistrate judges, more than 80 percent of respondents reported that quick peek discovery is rarely used.[140] The magistrate judges reported that clawback agreements were used more often, but less than one-quarter of the judges reported that such agreements were used on a frequent basis.[141]

Second, while Rule 502 permits disclosure of privileged information, the rules of professional conduct forbid such disclosure absent fully informed consent by the client. Rule 1.1 of the ABA's Model Rules of Professional Conduct, which provide a template for the ethics codes of many states, requires a lawyer to use diligence and care in representation.[142] Entering into non-waiver agreements, absent client consent, could constitute a violation of this provision if privileged documents are produced and that production materially damages the client's case.[143]

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137. *Id.* 502(d).

138. *Id.* 502(e).

139. *See* VIEW FROM THE FRONTLINES, *supra* note 45, at 20 ("[P]rivileged information, once learned, cannot be unlearned and it can permeate and alter the course of a case.").

140. Lee & Withers, *supra* note 123, at 213.

141. *Id.*

142. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

143. *See* Noyes, *supra* note 128, at 743 ("In order to be effective, however, Rule 502 must preempt state rules of professional responsibility that impose duties on lawyers to zealously protect their clients' confidential information and to conduct this review before turning over the client's documents to a litigation adversary during discovery."); THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 37 (2004), *available at* http://www.thesedonaconference.org/content/miscFiles/SedonaPrinciples200401.pdf (noting that use

Third, while Rule 502(b) eliminates waiver for inadvertent disclosures when the disclosing party has taken reasonable steps to protect the privilege, the uncertain scope of what constitutes such steps vitiates the available protection. The Advisory Committee's Note refers to the five-factor test[144] previously used by most federal courts,[145] but the test is not codified in Rule 502. Moreover, courts have divergent views of what is reasonable, and they focus on and weigh the relevant factors differently. This was true before Rule 502 was enacted and it remains true post-enactment.[146] The result is that steps taken in one case may suffice to avoid waiver, but the same steps may be insufficient in another case.[147] Some pre-Rule 502 federal court decisions suggest that parties defending the reasonableness of their conduct face significant obstacles. These obstacles may include satisfaction of the strict expert witness requirements of FRE Rule 702[148] if parties are required to defend the reasonableness of their search methodology.[149] But even if Rule 702 need not be satisfied, various courts imposed a demanding "reasonable steps" standard before the passage of the 2008

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of clawback agreements may result in violations of the Model Rules of Professional Conduct).

144. The five factors are: (1) the reasonableness of steps taken to prevent disclosure; (2) the amount of time taken to remedy the inadvertent disclosure; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness or justice. *See* First American CoreLogic, Inc. v. Fiserv, Inc., No. 2:10-CV-132-TJW, 2010 WL 4975566, at *3 (E.D. Tex. Dec. 2, 2010).

145. FED. R. EVID. 502, Explanatory Note; American Coal Sales Co. v. Nova Scotia Power, Inc., No. 2:06-cv-94, 2009 WL 4677576, at *17 (S.D. Ohio Feb. 23, 2009).

146. Gareth T. Evans & Farrah Pepper, *Federal Rule of Evidence 502: Getting to Know an Important E-Discovery Tool*, 51 ORANGE COUNTY LAW., Nov. 2009, at 10. *See* Heriot v. Byrne, 257 F.R.D. 645, 655 (N.D. Ill. 2009) ("In applying FRE 502(b), the court is free to consider any or all of the five [] factors . . . ."). *Heriot* criticized the "rather peculiar" approach of another decision, *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 218–27 (E.D. Pa. 2008), which chose to adopt the five factors as a "wholesale test of inadvertent disclosure," rather than use the factors to supplement the required analysis under Rule 502(b). *Id.* at 655 n.7.

147. *See* Roger P. Meyers, *An Analysis of Federal Rule of Evidence 502 and Its Early Application*, 55 WAYNE L. REV. 1441, 1458 (2009) ("[T]he actual application of 502(b) is likely to be idiosyncratic in any given case. These are many of the same factors that courts had already been using to arrive at very different outcomes on closely analogous factual circumstances."); Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 219–20 (2010) (noting that FRE 502(b) "incorporates the same uncertainty and possibility of waiver" that existed before the 2008 Amendments); Robert D. Owen & Melissa H. Cozart, *FRE 502, One Year Later*, N.Y.L.J., Oct. 5, 2009, at S4.

148. *See* FED. R. EVID. 702.

149. *See* Jeane A. Thomas, David D. Cross & Courtney Ingraffia Barton, *Reducing the Costs of Privilege Review and Logs*, NAT'L L.J., Mar. 23, 2009, at S1.

Amendments.[150] If courts continue this practice following the enactment of Rule 502, litigants will be required to design and execute strict document review protocols that will fail to contain costs.[151]

Fourth, district courts have misconstrued Rule 502 by improperly grafting a "reasonableness" test onto sections of the rule where the test is absent from the text. One example of this misconstruction is provided by *Spieker v. Quest Cherokee, LLC*,[152] a district court case holding that quick peek and clawback agreements could not be endorsed by court order unless the producing party had taken reasonable steps to protect the privilege.[153] This decision is inconsistent with Rule 502(d)'s Explanatory Note, which makes clear that a confidentiality order "may provide for return of documents without waiver irrespective of the care taken by the disclosing party[.]"[154]

Another example of misconstruction is provided by district courts that have grafted a "reasonableness" test onto Rule 502(b), which addresses inadvertent disclosure. The rule provides for nonwaiver if: (1) the disclosure was inadvertent, (2) the disclosing party took reasonable steps to prevent disclosure, and (3) the disclosing party promptly took reasonable steps to rectify the error. Nothing in the text of the rule suggests that subsection (1) incor-

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150. *See, e.g.*, Victor Stanley Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 262 (D. Md. 2008) (holding that selection of methodology to search for privileged documents must be made with "utmost care" in order to avoid privilege waiver); *see also* Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has it Lived up to its Potential?*, 17 RICH. J.L. & TECH. 8, at 50 (2011) [hereinafter *FRE 502 Potential*] ("Rule 502 will never reach its intended goal of reducing the cost of ESI discovery and encouraging the use of computer analytical review methodology if courts demand near-perfection in preproduction precautions.")

151. *See* Thomas F. Munno & Benjamin R. Barnett, *New Federal Rule of Evidence Arrives*, N.Y.L.J., Dec. 1, 2008, at S2 ("FRE 502 does not define 'reasonable steps,' but case law before adoption of the Rule and common sense dictate that anything short of a document-by-document review of potentially privileged documents may not be reasonable. Thus, the reasonable step requirement imposes the very expense the Rule was designed to mitigate.").

152. Spieker v. Quest Cherokee, LLC, No. 07-1225-EFM, 2009 WL 2168892 (D. Kan. July 21, 2009).

153. *Id.* at *3 & n.6.

154. FED. R. EVID. 502(d) Explanatory Note; *see also* Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582, at *3 (D. Kan. July 22, 2010) (noting that under a clawback provision, "typically, the materials are returned irrespective of the care taken by the disclosing party"); *FRE Potential*, *supra* note 150, at 79 ("Rulings such as that rendered in *Spieker* fly in the face of the clear intent of Rule 502 and ignore the rule's explicit provisions."); H. Christopher Boehning & Daniel J. Toal, *Kansas Case Casts Doubt on Usefulness of Rule 502*, N.Y.L.J., Oct. 27, 2009, at 5 (arguing that *Spieker* decision is "entirely at odds with the purpose and history behind the adoption of Rule 502"). *But cf.* Jessica Wang, Comment, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1840 (2009) (arguing that courts should refuse to enforce nonwaiver agreements which seek to preserve privilege in the absence of document review or where the review has been grossly negligent).

porates a "reasonableness" evaluation, but several courts have nevertheless invoked a reasonableness standard to determine whether production of privileged documents was inadvertent.[155] This approach is cumbersome, redundant, and confusing.[156]

The 2008 Amendments have not reduced costs. In a 2009 national survey of general counsel or senior litigation counsel from approximately 300 corporations, 93 percent of respondents reported that Rule 502 had not resulted in any cost savings for their companies,[157] and none of the respondents reported that Rule 502 had produced significant savings.[158] Numerous commentators have reached the same conclusion.[159]

Neither the 2006 Amendments nor the 2008 Amendments have significantly curbed the rapidly growing cost of e-discovery. Most importantly, the Amendments fail to address the timing of e-discovery. They do nothing to curb the practice of imposing onerous e-discovery obligations on parties before motions to dismiss are resolved.[160] Thus, the optimal solution is to impose a mandatory stay on e-discovery, and the PSLRA provides a successful model.

IV. THE PSLRA DISCOVERY STAY

A. Background

Prior to the PSLRA's enactment in 1995, defendants in federal securities cases were required to participate in discovery during the

155. Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471-PAB-KMT, 2009 WL 4949959, at *11 (D. Colo. Dec. 14, 2009); Heriot v. Byrne, 257 F.R.D. 645, 655 n.7 (N.D. Ill. 2009).

156. *FRE 502 Potential*, *supra* note 150, at 37.

157. FULBRIGHT & JAWORSKI L.L.P., E-DISCOVERY TRENDS: E-DISCOVERY FINDINGS FROM THE 2005–2009 FULBRIGHT & JAWORSKI LITIGATION TRENDS SURVEY, 5 (2009), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/main.nsf/$defaultview/F873BA28DC4854F38525767E004A4F9A/$File/Fulbright's%20E-Discovery%20trends.pdf?OpenElement.

158. *Id.*

159. *See, e.g.*, *FRE 502 Potential*, *supra* note 150, at 99 (noting that FRE 502 has failed to fulfill its purpose, in large part because courts have not construed it consistently with its purpose or with each other); Noyes, *supra* note 128, at 752 ("In many ways, Rule 502 does not eliminate the cost of conducting a privilege review; it simply shifts that cost and burden to the requesting party."); Owen & Cozart, *supra* note 147, at S10 ("[Amended Rule 502] does not provide large cost savings.").

160. *See* Michael H. Gruenglas, Robert A. Fumerton & Patrick G. Rideout, *A Proposal to Prevent Blackmail at the Pleading Stage—Stay Discovery Pending Motions to Dismiss*, N.Y.L.J., Oct. 5, 2009, at S16 ("[N]one of these amendments addresses the timing of e-discovery costs or deters the use of e-discovery in meritless litigation to extract settlements from defendants. Indeed, by making e-discovery a focal point at the outset of every case, these amendments to Rule 26 not only ignore the ever-increasing *in terrorem* effect on defendants, but actually compound the problem.").

pendency of motions to dismiss. Defendants could avoid discovery only by moving for a protective order, requesting a stay, and showing good cause under FRCP Rule 26(c).[161] Such motions were typically denied.[162] However, the PSLRA substantially modified the rules of the game. The Act provides, in relevant part, that "[i]n 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."[163]

The Act's legislative history indicates that Congress included the mandatory stay provision for two primary reasons. The first was to prevent plaintiffs from filing securities class actions with the intent to use the discovery process to force coercive settlements.[164] The cost of discovery in class action securities litigation can be extraordinarily high, in both dollars and business resources, with coercive settlements a likely result. One estimate presented to Congress was that 80 percent of the cost of litigating securities class actions was associated with discovery.[165] Moreover, discovery costs in securities litigation are highly asymmetrical: they are borne largely by defendants.[166] Congress concluded that the high "cost of discovery often forces innocent parties to settle frivolous securities class actions."[167] The second justification was to prevent plaintiffs from

161. FED. R. CIV. P. 26(c).

162. Brian Philip Murray, *Lifting the PSLRA "Automatic Stay" of Discovery*, 80 N.D. L. REV. 405, 407 & n.19 (2004).

163. 15 U.S.C. § 77z-1(b)(1); 15 U.S.C. § 78u-4(b)(3)(B). The term "particularized discovery" modifies both the terms "preserve evidence" and "undue prejudice." Mishkin v. Ageloff, 220 B.R. 784, 792–93 (S.D.N.Y. 1998).

164. *In re* Thornburg Mortg., Inc. Sec. Litig., No. CIV 07-0815 JB/WDS, 2010 WL 2977620, at *6 (D.N.M. July 1, 2010).

165. *See* Brian P. Murray & Sharon Lee, *The 'Automatic Stay' of Discovery*, N.Y.L.J., Mar. 3, 2003, at 4.

166. *See* Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 582 (1998) ("Despite their voluminous discovery requests to defendants, plaintiffs have very little to offer in the form of reciprocal discovery . . . . [I]n the average securities case, the plaintiffs' document production consists solely of trading slips . . . ."). This asymmetry is not unique to securities litigation. *See, e.g.*, Eric P. Mandel & Mitchell J. Rapp, *E-Discovery Alignment in Antitrust Actions: Good Idea?*, LAW360 (Sept. 17, 2010), http://www.law360.com/articles/192265/print?section=competition ("Defendants in civil class action antitrust cases are producing the vast majority of discovery.").

167. H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 736; *see also* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SECURITIES LITIGATION COMMITTEE, SUBCOMMITTEE ON USE OF CONFIDENTIAL SOURCES, DIALOGUE ON THE CURRENT LAW AND PROPOSALS FOR REFORM ON THE USE OF INFORMATION FROM AND THE DISCLOSURE OF THE IDENTITY OF INFORMANTS 17–18 (2009), *available at* http://www.nycbar.org/pdf/report/uploads/20071798-UseofConfidentialSources.pdf ("The legislative history

commencing securities litigation to conduct discovery in the hopes of uncovering a sustainable claim.[168]

The PSLRA's stay applies equally to discovery of parties and non-parties[169] and whether the litigation has been commenced by individual plaintiffs or as a class.[170] The stay applies where plaintiffs have asserted only federal securities law claims or pendent state law claims in conjunction with federal securities law claims,[171] but not where plaintiffs have asserted only state law claims in federal court pursuant to diversity jurisdiction.[172] The stay applies in shareholder derivative actions that allege violations of federal law[173] and to state law derivative claims over which the federal court has asserted

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shows that Congress recognized that even weak cases surviving a motion to dismiss often resulted in coercive settlements because of the prohibitive cost of discovery .... Once a motion is denied, discovery moves forward and cases often acquire a settlement value regardless of the merits of the claim."). (The foregoing report includes separate sections written by plaintiffs' counsel and defense counsel. The foregoing quotation is taken from the plaintiffs' section). *But cf.* John P. Wunderlich, Tellabs v. Makor Issues & Rights, Ltd.: *The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 655, 658 (2008) ("[T]he actual costs of discovery have been sparsely quantified in empirical studies .... [A]vailable hard data suggests that discovery abuse is not rampant, but the misperception of it is.").

168. *In re* Thornburg Mortg., Inc. Sec. Litig., No. CIV 07-0815 JB/WDS, 2010 WL 2977620, at *6 (D.N.M. July 1, 2010).

169. Faulkner v. Verizon Communc., Inc., 156 F. Supp. 2d 384, 404 (S.D.N.Y. 2001); Powers v. Eichen, 961 F. Supp. 2d 233, 235 (S.D. Cal. Apr. 15, 1997). *But see In re* Flir Sys., Inc. Sec. Litig., No. Civ. 00-360-HA, 2000 WL 33201904 (D. Or. Dec. 13, 2000) (permitting plaintiffs to depose former employee of defendant in attempt to bolster their § 10(b) claim). *Flir* has been questioned by several courts. *See, e.g.*, *Faulkner*, 156 F. Supp. 2d at 403–04.

170. Band v. Ginn Companies, LLC, No. 3:09-cv-792-J-25TEM, 2011 WL 807396, at *3 (M.D. Fla. Mar. 2, 2011); Lindner v. American Express Co., No. 10 Civ. 2228(JSR)(JLC), 2010 WL 4537819, at *1 (S.D.N.Y. Nov. 9, 2010); Schnall v. Proshares Trust, No. 10 Civ. 3042(JGK), 2010 WL 1962940, at *1 (S.D.N.Y. May 17, 2010).

171. SG Cowan Sec. Corp. v. United States Dist. Ct. for the N. Dist. of Cal., 189 F.3d 909, 913 n.1 (9th Cir. 1999); Winer Family Trust v. Queen, No. Civ.A. 03-4318, 2004 WL 350181, at *2 (E.D. Pa. Feb. 6, 2004) ("[N]umerous courts have held that the PSLRA stay on discovery is applicable to pendent state law claims.").

172. *See* Koock v. Sugar & Felsenthal, LLP, No. 8:09-CV-609-T-17EAJ, 2009 WL 2579307 (M.D. Fla. Aug. 19, 2009) (refusing to stay discovery where plaintiffs asserted only state law claims); Hillis v. Heineman, No. CV-09-73-PHX-DGC, 2009 WL 798872, at *3 (D. Ariz. Mar. 25, 2009); Fazio v. Lehman Bros., Inc., No. 1:02CV157, 1:02CV370, 1:02CV382, 2002 WL 32121836, at *4 (N.D. Ohio May 16, 2002) (stating that relief from stay is warranted if diversity jurisdiction exists and Congressional policies behind PSLRA would not be furthered by maintaining stay); Tobias Holding, Inc. v. Bank United Corp., 177 F. Supp. 2d 162 (S.D.N.Y. 2001) (noting that stay does not apply to non-fraud state law claims unrelated to plaintiff's federal securities fraud claims). *But cf.* Angell Investments, L.L.C. v. Purizer Corp., No. 01 C 6359, 2001 WL 1345996 (N.D. Ill. Oct. 31, 2001) (indicating that stay applies to state law claims, even if jurisdiction is based on diversity, if factual bases for federal and state law claims are closely tied together); Trump Hotel Shareholder Derivative. Litig., No. 96 Civ. 7820 (DAB)(HBP), 1997 WL 442135, at *2 (S.D.N.Y. Aug. 5, 1997) (noting that exercise of diversity jurisdiction does not preclude application of stay to state law claims).

173. *See, e.g.*, *In re* Altera Corp. Derivative Litig., No. C 06-03447 JW, 2006 WL 2917578 (N.D. Cal. Oct. 11, 2006).

supplemental jurisdiction,[174] but not to derivative actions asserting solely state law claims.[175]

The stay is mandatory absent application of one of two statutory exceptions. Thus, according to a majority of courts, if a motion to dismiss by any defendant is pending or even contemplated,[176] discovery (expedited or otherwise) is stayed for the entire case, even if some defendants have already filed answers or had their motions to dismiss denied.[177] This includes motions to dismiss

174. *In re* Countrywide Fin. Corp. Derivative Litig., 542 F. Supp. 2d 1160, 1180 (C.D. Cal. 2008).

175. *See In re* First Bancorp Derivative Litig., 407 F. Supp. 2d 585 (S.D.N.Y. 2006); *In re* Firstenergy S'holder Derivative Litig., 219 F.R.D. 584, 586 (N.D. Ohio 2004); *In re* Tyco Int'l Ltd. Multidistrict Litig., MDL No. 02-1335-B, 2003 WL 23830479, at *3 (D.N.H. Jan. 29, 2003). Plaintiff shareholders have sometimes attempted to circumvent the PSLRA stay by pursuing their statutory right to inspect the books and records of the defendant corporation under Section 220 of the Delaware General Corporation Law, ostensibly to investigate a possible derivative suit relating to the same core facts present in the parallel federal suit. 8 DEL. C. § 220; Joseph M. McLaughlin, *Delaware Records Inspection Litigation and U.S. Securities Law*, N.Y.L.J., Oct. 9, 2009, at 5. In *Beiser v. PMC-Sierra, Inc.*, the court held that when the Section 220 action seeks records that would be discoverable in a pending federal securities action and the shareholder or counsel making the records demand is a party to the federal action or assisting a party to the federal action, the Section 220 action may not be pursued unless the party or counsel signs a confidentiality agreement ensuring that any materials produced in the Section 220 action will not be used in the federal action. CIV. A. 3893-VCL, 2009 WL 483321 (Del. Ch. Feb. 26, 2009).

176. Courts have reached different conclusions about whether the PSLRA's discovery stay applies before a motion to dismiss has been filed. The majority and better-reasoned view is that the stay is triggered by any defendant's indication of intent to file a motion to dismiss. *See* Friedman v. Quest Energy Partners LP, Nos. CIV-08-936-M, CIV-08-968-M, 2009 WL 5065690, at *2 n.2 (W.D. Okla. Dec. 15, 2009); Spears v. Metro. Life Ins., No. 2:07-CV-00088-RL-PRC, 2007 WL 1468697, at *3 (N.D. Ind. May 17, 2007); Sedona Corp. v. Ladenburg Thalmann, No. 03 Civ. 3120 LTSTHK, 2005 WL 2647945, at *2 n.1 (S.D.N.Y. Oct. 14, 2005) ("There is no dispute that the PSLRA stay of discovery applies when an initial motion to dismiss is contemplated, but has not yet been filed.").

177. *See* Lane v. Page, No. CIV 06-1071 JB/ACT, 2009 WL 1312896, at *1 (D.N.M. Feb. 9, 2009) ("The result may be harsh, but Congress has clearly expressed a desire that discovery not proceed in any securities litigation the PSLRA covers until all pending motions to dismiss have been resolved."); Sedona Corp. v. Ladenburg Thalmann, No. 03 Civ. 3120 LTSTHK, 2005 WL 2647945, at *4 (S.D.N.Y. Oct. 14, 2005); Fazio v. Lehman Bros., Inc., No. 1:02CV157, 1:02CV370, 1:02CV382, 2002 WL 32121836, at *2 (N.D. Ohio May 16, 2002) (explaining that stay applies "even as to discovery against co-defendants who have not filed motions to dismiss"); Jeff G. Hammel & Robert J. Malionek, *Some Courts: PSLRA Stay-Provision Language Ambiguous*, N.Y.L.J., Dec. 11, 2006, at 4. However, there is some dispute about this point. *See* Latham v. Stein, Civ. Action Nos. 6:08-2995-RBH, 6:08-3183-RBH, 2010 WL 3294722 (D.S.C. Aug. 20, 2010) (rejecting argument that all discovery must be stayed during pendency of any motion to dismiss filed in a case); *In re* Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100, 105 (D. Mass. 2002) (same).

amended complaints[178] and motions for reconsideration of dismissal motions.[179]

B. SLUSA

Three years after the PSLRA was enacted, Congress reinforced the mandatory stay by enacting the Securities Litigation Uniform Standards Act of 1998 (SLUSA).[180] SLUSA's primary objective was to federalize class action securities litigation. In the immediate post-PSLRA years, Congress perceived, not necessarily accurately, that plaintiffs were circumventing the Act. Plaintiffs were suspected of evading the PSLRA's strict pleading requirements[181] and discovery stay by asserting state law theories such as common law fraud, and increasingly filing such claims in state court.[182] SLUSA amended the Securities Act of 1933 (Securities Act)[183] and the Securities

178. Selbst v. McDonald's Corp., No. 04 C 2422, 2006 WL 566450, at *1 (N.D. Ill. Mar. 1, 2006). *Cf.* Beach v. Healthways, Inc., Nos. 3-08-0569, 3-08-0666, 2010 WL 145775 (M.D. Tenn. Jan. 8, 2010) (holding that PSLRA discovery stay does not apply during pendency of renewed motion for class certification); *In re* Salomon Analyst Litig., 373 F. Supp. 2d 252 (S.D.N.Y. 2005) (holding PSLRA discovery stay applies to renewed motions to dismiss).

179. McGuire v. Dendreon Corp., No. C07-800-MJP, 2009 WL 666863, (W.D. Wash. Mar. 11, 2009); Powers v. Eichen, 961 F. Supp. 2d 233, 235–36 (S.D. Cal. 1997). The stay does not apply to discovery determining the arbitrability of claims. *See* Sussex v. Turnberry/MGM Grand Towers, LLC, No. 2:08-cv-00773-RLH-PAL, 2011 WL 383793, at *2 (D. Nev. Feb. 3, 2011).

180. Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended at 15 U.S.C. § 78a (2000)).

181. The PSLRA imposed two distinct pleading requirements, both of which must be met in order for a complaint to survive a motion to dismiss. The complaint must specify each allegedly misleading statement, why the statement was misleading, and, if an allegation is made on information and belief, "all facts" supporting that belief with particularity. In addition, the complaint must, with respect to each act or omission alleged to violate the securities laws, state with particularity facts giving rise to a "strong inference" that the particular defendant acted with the requisite state of mind. *See* 15 U.S.C. § 78u-4(b)(1) and (2).

182. *See* Demings v. Nationwide Life Ins. Co., 593 F.3d 486, 490–91 (6th Cir. 2010) ("Congress found that 'plaintiffs and their representatives began bringing class actions under state law, often in state court,' thus subverting the purpose of PSLRA."); H.R. Rep. No. 105-803, at 11 (1998) (Conf. Rep.) (noting that decline in the level of federal class action securities litigation had been matched by an almost equal increase in the level of state court activity). This perception persists, in the courts and elsewhere. *See, e.g.*, Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc., 521 F.3d 1278, 1280 (10th Cir. 2008); Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 123 (2d Cir. 2003). However, the accuracy of this perception is subject to considerable dispute. *See* Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 9 nn.31–33 (1998) (reviewing studies contradicting findings presented to Congress concerning federal flight); William B. Snyder, Jr., Comment, *The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court*, 85 N.C. L. REV. 669, 696 n.183 (2007) (noting debate about existence of so-called "federal flight").

183. 15 U.S.C. § 77k(a).

Exchange Act of 1934 (Exchange Act)[184] in substantially identical ways,[185] precluding "covered class actions"[186] based upon the statutory or common law of any state where the actions involve allegations of untrue statements or omissions of material fact[187] in connection with the purchase or sale[188] of a "covered security,"[189] or allegations that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.[190] Under SLUSA, such class actions are removable to federal court and subject to dismissal.[191]

SLUSA also authorizes federal courts to stay discovery proceedings in any private securities action in state court (class actions or not)[192] in aid of their exercise of jurisdiction.[193] The Seventh Circuit has noted that the purpose of a discovery stay under SLUSA "is to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit."[194] In determining whether to stay state court discovery, relevant considerations include the risk of federal plaintiffs obtaining the state plaintiffs' discovery, the extent of factual and legal overlap between the ac-

184. 15 U.S.C. § 78j.

185. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 82 n.6 (2006).

186. *See* 15 U.S.C. § 78bb(f)(5)(B) (defining "covered class action" as, *inter alia*, actions in which damages are sought on behalf of more than 50 persons or prospective class members and common questions of law or fact predominate).

187. Non-fraud-based claims are precluded by SLUSA if they incorporate by reference allegations of false or misleading statements. Levinson v. PSCC Servs., Inc., No. 3:09-CV-00269, 2009 WL 5184363, at *13 (D. Conn. Dec. 23, 2009).

188. The Supreme Court has held that the "in connection with" requirement must be read expansively. It suffices that the fraud alleged coincides with a securities transaction, whether by the plaintiff or someone else. *Dabit*, 547 U.S. at 85; *see also* Appert v. Morgan Stanley Dean Witter, Inc., No. 08-CV-7130, 2009 WL 3764120, at *6 (N.D. Ill. Nov. 6, 2009) ("Post-*Dabit*, courts have consistently found SLUSA preemption applicable to broker-dealer claims based on allegations of deception or material omissions or misrepresentations concerning transaction fees, even where plaintiffs had painstakingly avoided alleging fraud.").

189. *See* 15 U.S.C. § 78bb(f)(5)(E) (2006) (defining "covered security" as one that is traded nationally and listed on a regulated national exchange, such as the New York Stock Exchange, NASDAQ, or the American Stock Exchange).

190. Securities Act § 16(b); Exchange Act § 28(f)(1).

191. 15 U.S.C. § 77p(b) (2006); Romano v. Kazacos, 609 F.3d 512, 518 (2d Cir. 2010). SLUSA also amended the jurisdiction and anti-removal provision of the Securities Act to make state court jurisdiction concurrent with federal jurisdiction except with respect to covered class actions, and amended the removal bar so that covered class actions involving covered securities may be removed. *See* 15 U.S.C. § 77v(a) (2006); Kenneth I. Schacter & Mary Gail Gearns, *Removing '33 Act Class Actions Under SLUSA and CAFA*, N.Y.L.J., Dec. 1, 2008, at S7.

192. Buettgen v. Harless, Nos. 3:09-CV-0791-K, 3:09-CV-0938-K, 3:09-CV-1049-K, 2010 WL 2573463, at *1 (N.D. Tex. June 25, 2010).

193. *See* 15 U.S.C. § 78u-4(b)(3)(D) (2006).

194. Am. Bank v. City of Menasha, 627 F.3d 261, 266 (7th Cir. 2010); Thorogood v. Sears, Roebuck & Co., 624 F.3d 842, 848-51 (7th Cir. 2010).

tions, and the burden of state court discovery on defendants.[195] SLUSA's legislative history specifies that the stay provision is to be used "liberally" by courts.[196] Accordingly, SLUSA stays have generally been granted at defendants' request.[197]

C. Exceptions to the PSLRA Stay

1. Particularized Discovery Is Necessary to Preserve Evidence

There are two statutory exceptions to the PSLRA's mandatory stay and both of them have been interpreted narrowly by federal courts. The first is when particularized discovery is necessary to preserve evidence. This exception presents a high hurdle for plaintiffs to clear. Congress itself cited a single viable example of required preservation: the deposition of a terminally ill witness,[198] a situation that was already covered by the FRCP.[199] Other scenarios will not clear the statutory hurdle. For example, the risk of document destruction is likely not enough to convince a court to lift the stay, given the possibility of civil and criminal sanctions and the less costly alternative of an order prohibiting destruction.[200] In order to satisfy the standard, the plaintiff must demonstrate that the loss of evidence is imminent and not merely speculative.[201] Accordingly,

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195. *In re* Regions Morgan Keegan Sec., Derivative & ERISA Litig., Nos. 07-02830, MDL 2009, 2010 WL 596444, at *3 (W.D. Tenn. Feb. 16, 2010); *In re* Dot Hill Sys. Corp. Sec. Litig., 594 F. Supp. 2d 1150, 1165 (S.D. Cal. 2008); *In re* Crompton Corp. Sec. Litig., No. 3:03-cv-1293(EBB), 2005 WL 3797695, at *3 (D. Conn. July 22, 2005).

196. *See* H.R. Rep. No. 105-640, at 17–18 (1998).

197. *See* Matthew L. Mustokoff, *Shareholder Discovery, the PSLRA and SLUSA in Parallel Securities and Derivative Actions*, 35 SEC. REG. L.J. 143, 144 (2006).

198. H.R. Conf. Rep. 104-369, at 31, *reprinted in* 1995 U.S.C.C.A.N. 730, 736.

199. *See* FED. R. CIV. P. 27.

200. Gary L. Cutler, *PSLRA Stay Does Not Always Halt the Process*, N.Y.L.J., June 19, 2006, at S8, S9. In addition, the PSLRA protects against document destruction by requiring parties to treat evidence in their custody or under their control as if it were the subject of a continuing discovery request while the stay is in place. *See* 15 U.S.C. § 78u-4(b)(3)(C)(i); *In re* Merrill Lynch & Co. Research Reports Sec. Litig., No. 02 MDL 1484(MP), 01 CV 6881(MP), 2004 WL 305601, at *1 (S.D.N.Y. Feb. 18, 2004) (refusing to lift stay because defendants avowed they had taken all necessary steps to preserve all potentially relevant electronic evidence); *In re:* CFS-Related Sec. Fraud Litig., AUSA v. Bartmann, 179 F. Supp. 2d 1260, 1265 (N.D. Okla. 2001) (refusing to lift stay where motions to dismiss had been pending for more than one year, on basis that such a delay failed to establish significant risk of evidence loss); *In re* Carnegie Int'l Corp. Sec. Litig., 107 F. Supp. 2d 676, 684 (D. Md. 2000). *But see* Koncelik v. Savient Pharm., Inc., No. 08 Civ. 10262(GEL), 2009 WL 2448029, at *2 (S.D.N.Y. Aug. 10. 2009) (partially lifting stay to permit service of document preservation subpoenas).

201. Band v. Ginn Cos., No. 3:09-cv-792-J-25TEM, 2011 WL 807396, at *2 (M.D. Fla. Mar. 2, 2011); *In re* Vivendi Universal, S.A., Sec. Litig., 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003). In *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246, 251 (D. Md. 2004), the

the mere fact that a defendant debtor corporation faces possible liquidation or reorganization does not suffice to establish imminent document destruction.[202] If the subject documents have already been produced, courts usually find no risk of loss.[203]

2. Particularized Discovery Is Necessary to Prevent Undue Prejudice

Plaintiffs are only marginally more successful with the second statutory exception to the mandatory stay, where particularized discovery is necessary to prevent undue prejudice to the party seeking relief. The requirement of particularized discovery has been accurately described by several courts as "nebulous"[204] and courts have differed greatly in their definitions of a particularized discovery request under the PSLRA.[205] Moreover, neither the statute nor the legislative history indicates what may constitute "undue prejudice." In the absence of statutory and legislative guidance, the majority of federal courts considering the issue have construed the standard to require plaintiffs seeking relief from the stay to show exceptional circumstances involving improper or unfair treatment, amounting to something less than irreparable harm.[206]

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court lifted the stay because a wide-ranging corporate re-organization involving divestitures of key subsidiaries created a reasonable concern that documents might be lost.

202. *In re* Colonial BancGroup, Inc. Sec. Litig., No. 2:09cv104-MHT, 2009 WL 4585928, at *2 (M.D. Ala. Dec. 2, 2009).

203. *See, e.g., In re* Williams Sec. Litig., No. 02-CV-72H(M), 2003 WL 22013464, at *1–2 (N.D. Okla. May 22, 2003); *In re Vivendi*, 381 F. Supp. 2d at 130. Courts have been somewhat more willing to partially lift the stay to permit discovery from third parties and thereby preserve evidence that might otherwise be destroyed. *See, e.g., In re* Tyco Int'l, Sec. Litig., No. 00MD1335, 2000 WL 33654141, at *3 (D.N.H. July 27, 2000) (partially lifting stay to permit third-party subpoenas, after plaintiffs produced evidence that "large corporations typically overwrite and thereby destroy electronic data in the course of performing routine backup procedures."); *In re* Grand Casinos, Inc. Sec. Litig., 988 F. Supp. 1270, 1272–73 (D. Minn. 1997) (lifting stay to permit service of third party document preservation subpoenas).

204. Winer Family Trust v. Queen, No. Civ.A. 03-4318, 2004 WL 350181, at *6 (E.D. Pa. Feb. 6, 2004) (quoting Mishkin v. Ageloff, 220 B.R. 784, 793 (S.D.N.Y. 1998)).

205. *In re* Spectranetics Corp. Sec. Litig., Civ. Action Nos. 08-cv-02048-REB-KLM, 08-cv-02055-CMA-CBS, 08–cv–02078–MSK–BNB, 08–cv–02267–MSK–CBS, 08–cv–02420–PAB, 08–cv–02603–MSK–BNB, 2009 WL 3346611, at *2 (D. Colo. Oct. 14, 2009). A request is not particularized when it covers all documents that would be discoverable in a non-PSLRA case. *Id.*

206. *See, e.g.*, Ohio Pub. Employees Ret. Sys. v. Fed. Home Loan Mort. Corp., No. 4:08CV0160, 2010 WL 1628059, at *3 (N.D. Ohio Apr. 22, 2010); Brigham v. Royal Bank of Can., No. 08 CV 4431(WHP), 2009 WL 935684, at *1 (S.D.N.Y. Apr. 7, 2009); *In re* Smith Barney Transfer Agent Litig., No. 05 Civ. 7583(WHP), 2006 WL 1738078, at *2 (S.D.N.Y. June 26, 2006). *Cf.* Sara S. Gold & Richard L. Spinogatti, *Are the PSLRA Discovery Stay Exceptions Swallowing the Rule?*, N.Y.L.J., Dec. 9, 2009, at 1 ("Although the majority of federal district courts appear to have required 'unique' or 'exceptional' circumstances to exist be-

Undue prejudice does not arise from a delay in the collection of evidence or the development of settlement or litigation postures, because such delay is inherent in every mandatory PSLRA stay.[207] Plaintiffs have found some success when defendants are insolvent: in several cases, courts have found undue prejudice and lifted the stay,[208] reasoning that because multiple parties were competing for shares of a limited settlement fund, class action plaintiffs would be at a serious disadvantage without the requested discovery.[209]

The most common basis for a claim of undue prejudice is the existence of parallel litigation or criminal or regulatory investigations that require class action defendants to produce documents to other plaintiffs, the government, or an investigating entity.[210] Parallel investigations are common.[211] Notwithstanding their frequency, or in part because of it, plaintiffs seeking modification of the PSLRA's mandatory stay to obtain documents produced to

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fore permitting an exception to the discovery stay, as the PSLRA appears to require, a significant minority of courts seem [sic] to have strayed from the plain language of the provision to permit discovery without exceptional circumstances[.]").

207. *Brigham*, 2009 WL 935684, at *1; *In re* Refco, Inc. Sec. Litig., No. 05 Civ. 8626(GEL), 2006 WL 2337212, at *2 (S.D.N.Y. Aug. 8, 2006). *But cf.* Vacold LLC v. Cerami, No. 00 CIV. 4024(AGS), 2001 WL 167704, at *7 (S.D.N.Y. Feb. 16, 2001) (finding undue prejudice and lifting stay); Global Intellicom, Inc. v. Thomson Kernaghan & Co., No. 99 CIV 342(DLC), 1999 WL 223158, at *2 (S.D.N.Y. Apr. 16, 1999) (finding undue prejudice where stay might prevent plaintiff from seeking redress for alleged violations).

208. *See, e.g.*, *In re* Delphi Corp., MDL No. 1725, 2007 WL 518626, at *7 (E.D. Mich. Feb. 15, 2007) (lifting stay where plaintiffs would be left without a settlement if their class action litigation did not keep pace with bankruptcy and SEC actions); *In re* WorldCom, Inc. Sec. Litig., 234 F. Supp. 2d 301, 305–06 (S.D.N.Y. 2002) (lifting stay where defendants were insolvent and other investigations and proceedings were "moving apace"); *In re* Enron Corp. Sec., Derivative. & ERISA Litig., No. 01-3642, 2002 WL 31845114, at *1 (S.D. Tex. Aug. 16, 2002). *Cf.* Singer v. Nicor, No. 02 C 5168, 2003 WL 22013905, at *2 (N.D. Ill. Apr. 23, 2003) (rejecting defendants' attempt to distinguish *Enron* and *WorldCom*).

209. *See In re* Royal Ahold N.V. Sec. & ERISA Litig., 220 F.R.D. 246, 252 (D. Md. 2004); *In re WorldCom*, 234 F. Supp. 2d at 305–06. *But cf.* Friedman v. Quest Energy Partners LP, Nos. CIV-08-936-M, CIV-08-968-M, 2009 WL 5065690 (W.D. Okla. Dec. 15, 2009) (refusing to lift stay because allegations that defendants' future as going concerns was not guaranteed were speculative).

210. Debra M. Torres, *PSLRA Mandatory Stay Can Be Heavy Lifting*, N.Y.L.J., June 18, 2007, at S6. Another basis for a claim of undue prejudice is where discovery is necessary to resolve the issue of class certification. *See* Taddeo v. Am. Invsco Corp., No. 2:08-CV-01463-KJD-RJJ, 2011 WL 2531141 (D. Nev. June 24, 2011).

211. For example, during the period 2006–2010, 188 federal securities class action filings had some form of involvement by the SEC, including formal or informal investigations, 109 filings had some form of involvement by the United States Department of Justice (DOJ), including investigations, and 74 filings had both SEC and DOJ involvement. GRACE LAMONT & NEILL KEENAN, PRICEWATERHOUSECOOPERS, 2010 SECURITIES LITIGATION STUDY 32–33 (2011), *available at* http://10b5.pwc.com/PDF/NY-11-0484%20SEC%20LIT%20STUDY_V6BONLINE.pdf.

government regulators and investigators usually fail.[212] District courts presented with applications for modification have typically, but not always, concluded that undue prejudice has not been demonstrated.[213] Courts have refused to lift the stay while simultaneously acknowledging that granting plaintiffs' applications would not frustrate the PSLRA's goals. Specifically, district courts have

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212. *See, e.g.*, Kuriakose v. Fed. Home Loan Mort. Co., 674 F. Supp. 2d 483 (S.D.N.Y. 2009) (refusing to lift stay where about 400,000 documents were produced by the lead defendant during active investigations conducted by the SEC, the U.S. Attorney's Office, and the House Committee on Oversight and Government Reform). The court stated: "Contrary to Plaintiffs' assertion, courts do not routinely lift the PSLRA discovery stay when the requested documents have already been provided to government investigators." *Id.* at 487; *accord In re* Sunrise Senior Living, Inc., 584 F. Supp. 2d 14, 18 (D.D.C. 2008) (refusing to lift discovery stay in part because "an SEC investigation occurring contemporaneously with private litigation is not at all an uncommon occurrence . . . ."). *But see In re WorldCom*, 234 F. Supp. 2d at 301; *In re* Enron Sec., Derivative. & ERISA Litig., No. Civ. A H-01-3624, 2002 WL 31845114 (S.D. Tex. Aug. 16, 2002). In both of those high-profile cases, the stay was lifted with respect to documents that had already been produced to the government by insolvent defendants. The stay also was partially lifted in the high-profile securities class action litigation involving Bank of America's acquisition of Merrill Lynch, permitting discovery of documents produced in active investigations by the SEC, Congress, the New York Attorney General, and the North Carolina Attorney General. *See In re* Bank of Am. Corp. Sec., Derivative & ERISA Litig., No. 09 MDL 2058(DC), 2009 WL 4796169 (S.D.N.Y. Nov. 16, 2009); Susan Beck, *Key Ruling in BofA Securities Class Action Gives Plaintiffs Access to Treasure Trove of Documents*, LAW.COM, Nov. 11, 2009, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202435619585.

213. *See, e.g.*, *In re* Spectranetics Corp. Sec. Litig., Nos. 08–cv–02048–REB–KLM, 08–cv–02055–CMA–CBS, 08–cv–02078–MSK–BNB, 08–cv–02267–MSK–CBS, 08–cv–02420–PAB, 08–cv–02603–MSK–BNB, 2009 WL 3346611, at *7 (D. Colo. Oct. 14, 2009) (refusing to find undue prejudice where three of five referenced regulatory bodies were not actively proceeding against defendant); *In re* Merck & Co., Inc. Vytorin/Zetia Sec. Litig., No. 08-2177, 2009 WL 1456615 (D.N.J. May 22, 2009); *In re* Schering-Plough Corp./Enhance Sec. Litig., No. 08-397, 2009 WL 1470453 (D.N.J. May 22, 2009); *In re* Asyst Tec., Inc. Derivative. Litig., No. C-06-04669 EDL, 2008 WL 916883 (N.D. Cal. Apr. 3, 2008). The stay was lifted in *Waldman v. Wachovia Corp.*, No. 08 Civ. 2913(SAS), 2007 WL 86763, at *2 (S.D.N.Y. Jan. 12, 2009), a class action involving the underwriting, marketing, and sale of auction rate securities. Such securities are bonds or preferred stock with interest or dividend rates established by periodic auctions. In *Waldman*, the Court concluded that maintaining a discovery stay with regard to documents already produced to state and federal authorities would unduly prejudice plaintiffs because the documents could help resolve plaintiffs' decision whether to pursue the case. *Id.* The stay was not lifted in the same federal district in at least two other class actions involving auction rate securities, based on the same arguments raised in *Waldman*. *See* Brigham v. Royal Bank of Can., No. 08 CV 4431(WHP), 2009 WL 935684, at *1 (S.D.N.Y. Apr. 7, 2009); *In re* UBS Auction Rate Sec. Litig., No. 08 Civ. 2967(LMM), 2008 WL 5069060, at *1 (S.D.N.Y. Nov. 21, 2008). Likewise, the stay was not lifted in a different federal district, in a class action involving auction rate securities. *See* Zisholtz v. SunTrust Banks, Inc., No. 1:08-CV-1287-TWT, 2009 WL 3132907, at *7 (N.D. Ga. Sept. 24, 2009). As mentioned *supra*, in order to lift the stay, plaintiffs must show both the existence of undue prejudice and that their discovery requests are sufficiently particularized. Courts disagree about whether a request is sufficiently particular if it is limited to documents already produced to the government. At least two courts have answered that question in the negative. *See In re* Am. Funds Sec. Litig., 493 F. Supp. 2d 1103 (C.D. Cal. 2007); *In re* Fannie Mae Sec. Litig., 362 F. Supp. 2d 37, 39 (D.D.C. 2005).

refused to lift the stay where parallel SEC or DOJ investigations have revealed that plaintiffs' claims may be meritorious. Courts have rejected the argument that the PSLRA's policy goal of preventing plaintiffs from filing frivolous strike suits would not be thwarted under such circumstances.[214] No federal appellate court had considered the issue as of mid-2011.

The outcome with respect to parallel litigation has been mixed. Courts occasionally accept the argument that, whereas the primary function of the stay is to eliminate the high cost of discovery before the potential merits of a securities fraud case are assessed, the cost is sharply reduced when defendants have already found, reviewed, and organized the requested documents in parallel litigation.[215] Courts likewise sometimes accept this argument if the plaintiff offers to pay the defendant's costs to produce the documents. Other courts disagree.[216]

Overall, with some isolated exceptions, plaintiffs have generally been unsuccessful in their efforts to lift the PSLRA's mandatory stay of discovery. The results are similar even when a confidentiality agreement is present. In several cases, plaintiffs have asked the court for orders limiting the scope of confidentiality agreements signed by former employees of defendants, and/or lifting the discovery stay, to permit the former employees to be interviewed by plaintiffs' counsel. Defendants have argued in response that such motions are encompassed by the PSLRA's stay of "all discovery and other proceedings," which includes witness interviews.[217] While nothing in the PSLRA prohibits interviewing prospective witnesses, and the Act's elevated pleading standard "encourages plaintiffs to

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214. *See, e.g.*, *Brigham*, 2009 WL 935684, at *2 ("[T]he mere fact that the PSLRA's goals would not be frustrated . . . is not sufficient to warrant lifting the stay." (quoting 308544 Can., Inc. v. Aspen Tech., No. 07 Civ. 1204(JFK), 2007 WL 2049738, at *2 (S.D.N.Y. July 18, 2007))); *see also In re* Spectranetics, 2009 WL 3346611, at *8 ("Although courts may consider whether policies behind the PSLRA discovery stay are frustrated by lifting that stay . . . nothing in the statute requires such a consideration nor allows an exception to the stay based merely on policy considerations.").

215. *See, e.g.*, Westchester Putnam Heavy & Highway Laborers Local 60 Benefit Fund v. Sadia S.A., No. 08 Civ. 9528(SAS), 2009 WL 1285845, at *1 (S.D.N.Y. May 8, 2009) (partially lifting stay to permit discovery of investigative report produced in parallel litigation the day *after* plaintiffs respond to defendants' motion to dismiss); *In re* LeBranche Sec. Litig., 333 F. Supp. 2d 178, 183 (S.D.N.Y. 2004).

216. *See In re Sunrise*, 584 F. Supp. 2d at 17 ("[T]he ease with which the defendant can produce the documents is not the standard for assessing whether a discovery request is particularized[.]"); Ross v. Abercrombie & Fitch Co., Nos. 2:05-cv-0819, 2:05-cv-0848, 2:05-cv-0860, 2:05-cv-0879, 2:05-cv-0893, 2:05-cv-0913, 2:05-cv-0959, 2:05-cv-0964, 2:05-cv-0998, 2:05-cv-1084, 2006 WL 2869588, at *2 (S.D. Ohio Oct. 5, 2006).

217. *See In re* JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1134 (N.D. Cal. 2002); 15 U.S.C. § 78u-4(b)(3)(B).

do *more* investigation before filing a complaint, not less,"[218] several district courts have refused to lift the stay and permit interviews of former employees bound by confidentiality agreements.[219]

D. Salutary Effects of the PSLRA Stay

The PSLRA discovery stay has achieved its two primary objectives. Thus, its record of success suggests that an extension of the stay to all federal civil litigation would be beneficial. Extension of the stay to preclude e-discovery during the pendency of motions to dismiss would achieve a number of benefits. A mandatory stay would result in significant cost savings by deferring e-discovery until after meritless claims are dismissed. Cost savings will be greatest where complaints are dismissed with no leave to amend, but savings will also result from partial dismissals that narrow the claims and scope of relevant discovery. A narrowed scope of discovery will result in fewer and less costly discovery disputes. The Federal Judicial Center found that each reported type of dispute over ESI increased a party's overall litigation costs by 10 percent, controlling for other factors. This was true for both plaintiffs' and defendants' reported costs.[220] Fewer disputes will translate to lower litigation costs for both plaintiffs and defendants. The judicial system will benefit from an increased level of efficiency, as discovery disputes diminish.

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218. *In re* JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1134 (N.D. Cal. 2002).

219. *See, e.g.*, *In re* Spectrum Brands, Inc. Sec. Litig., No. 1:05-cv-02494-WSD, 2007 WL 1483633, at *5 (N.D. Ga. May 18, 2007). *But see In re* First Horizon Pharm. Corp. Sec. Litig., No. 1:02-cv-2332 (N.D. Ga. Aug. 1, 2003) (Order available on Pacer at https://ecf.gand.uscourts.gov/doc1/0551331754) (granting relief to plaintiffs where defendant sent threatening reminder letters about confidentiality agreements to potential witnesses, thus chilling their willingness to speak); *In re* JDS Uniphase, 238 F. Supp. 2d 1127 (N.D. Cal. 2002) (holding that confidentiality agreements did not prohibit former employees from responding to interview questions, because such agreements conflict with public policy in favor of allowing current employees to assist in securities fraud investigations); Anderson v. First Sec. Corp., 157 F. Supp. 2d 1230 (D. Utah 2001) (lifting stay where confidentiality agreement prevented plaintiffs from obtaining specific information prior to filing complaint); *see also In re* Flir Sys., Inc. Sec. Litig., No. Civ. 00-360-HA, 2000 WL 33201904 (D. Or. Dec. 13, 2000) (permitting plaintiffs to depose former employee of defendant in attempt to bolster their § 10(b) claim). In the parallel context of government investigations, neither current nor former employees are bound by confidentiality agreements that restrict their ability to provide information concerning misconduct to investigators. *See, e.g.*, SEC v. Lipson, No. C 2661, 1997 WL 801712 (N.D. Ill. Oct. 28, 1997).

220. *See* EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS—REPORT TO THE JUDICIAL CONF. ADVISORY COMM. ON CIVIL RULES 5, 7 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costcivl.pdf/$file/costcivl.pdf.

A mandatory stay will also significantly reduce front-loaded discovery costs and decrease the coercive pressure that defendants face to settle cases prior to disposition of motions to dismiss. The reduced pressure to settle has been observed in securities litigation following the enactment of the PSLRA[221] and a similar reduction can be expected in other civil litigation.[222]

Finally, a stay is likely to decrease the incidence of frivolous civil litigation: research establishes that frivolous securities litigation has declined since the passage of the PSLRA.[223] This decline should be mirrored in non-securities cases.

In short, the same policies that justified adoption of the PSLRA stay justify extension of that stay to e-discovery in all federal civil cases. Given the significant potential benefits, it is unsurprising that support among attorneys for a stay is high. In a 2010 survey of 403 senior corporate counsels, 79 percent of the respondents agreed that the FRCP should be modified to limit e-discovery in civil actions.[224] In addition, a clear majority of the more than 3,300 attorneys surveyed in a 2009 ABA Report agreed that there should be an automatic stay of discovery in all cases, pending determination of a threshold motion to dismiss.[225]

V. *TWOMBLY* AND *IQBAL*

Enactment of a mandatory stay of e-discovery during the pendency of motions to dismiss in all federal civil litigation is likely to

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221. *See, e.g.*, Richard H. Walker, David M. Levine & Adam C. Pritchard, *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641, 665 (1997) ("[D]efendants [in securities fraud class action litigation] are now extremely reluctant to settle before a motion to dismiss has been decided.").

222. *See* EFFECTIVE REFORM, *supra* note 10, at 30 ("An automatic stay [of discovery] would greatly reduce the *in terrorem* value of lawsuits . . . ."); Michael H. Gruenglas, Robert A. Fumerton & Patrick G. Rideout, *A Proposal to Prevent Blackmail at the Pleading Stage—Stay Discovery Pending Motions to Dismiss*, N.Y.L.J., Oct. 5, 2009, at 1 ("By deferring all e-discovery until after the legal sufficiency of a complaint has been tested, plaintiffs will no longer be able to use frivolous lawsuits to extract settlements by holding the prospect of e-discovery over defendants' heads.").

223. *See* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 623 (2007) (concluding that PSLRA has operated to reduce incidence of both nuisance litigation and meritorious litigation); *see also* Beisner, *supra* note 117, at 593 ("Because judges must now evaluate the merits of a securities class-action suit before subjecting a defendant to expensive civil discovery, there is little incentive for plaintiffs to file frivolous claims.").

224. FULBRIGHT & JAWORSKI L.L.P., SEVENTH ANNUAL LITIGATION TRENDS SURVEY REPORT 2, 52 (2010), *available at* http://www.fulbright.com/images/publications/7thLitigationTrendsReport.pdf.

225. ABA REPORT, *supra* note 11, at 99.

have significant salutary effects. But do the benefits outweigh the costs? The most significant potential cost is preclusion of meritorious litigation. In this regard, it is imperative to consider *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal.* In *Twombly*, decided in 2007, the Supreme Court overruled its fifty-year-old decision in *Conley v. Gibson*[226] and established a new standard for pleading in federal court. *Conley* held that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[227] *Twombly* rewrote that standard in a 7-2 decision. The Supreme Court, confronted with a consumer antitrust class action, concluded that *Conley* was "best forgotten as an incomplete, negative gloss on an accepted pleading standard"[228] that had "earned its retirement."[229] *Conley*'s standard was replaced in *Twombly* with a requirement that a pleading set forth "enough facts to state a claim to relief that is plausible on its face."[230] Two years later the Supreme Court held in *Iqbal* that the *Twombly* pleading standard applies to all civil cases, and not just antitrust cases.[231] Neither decision defines plausibility or specifies what factual allegations would comprise a plausible claim.[232]

The Supreme Court's motivation for adopting a stricter pleading standard was a need to require some level of plausibility "lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'"[233] The Court repeatedly emphasized the high costs of discovery, particularly

226. 355 U.S. 41 (1957).

227. *Id.* at 45–46.

228. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007).

229. *Id.*

230. *Id.* at 570.

231. 129 S. Ct. at 1937, 1953–54 (2009). The majority of federal district courts that have considered the issue have held that *Twombly*'s plausibility standard also applies to affirmative defenses. Manuel John Dominguez, William B. Lewis & Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of* Twombly *and* Iqbal *to Affirmative Defenses*, 84 FLA. B.J. 77, 77 (2010); *see also* Anthony Gambol, Note, *The* Twombly *Standard and Affirmative Defenses: What is Good for the Goose is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173, 2176 (2011) (noting district court split on this issue).

232. *See* Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 645 (2011) (noting that "[f]ew Supreme Court opinions are as deeply inscrutable" as *Twombly* and *Iqbal*); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 131 (2011).

233. 550 U.S. at 557–58 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)); *see also* Suja A. Thomas, *Oddball* Iqbal *and* Twombly *and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 219 (2011) ("[H]igh cost and significant asymmetry in costs drove the new plausibility standard in *Twombly*.").

in private securities and antitrust litigation,[234] and underscored the "common lament that the success of judicial supervision in checking discovery has been on the modest side."[235]

Twombly and *Iqbal* have been influential, but probably less so than many critics have suggested.[236] It is true that *Twombly* is on-track to become the most-cited Supreme Court case of all-time, unless it is surpassed by *Iqbal.* By March 2010, *Twombly,* already ranked seventh on the all-time list of most-cited Supreme Court cases by federal courts and tribunals; *Iqbal,* decided in 2009, already ranked seventy-sixth. By comparison, *Conley,* decided fifty years before *Twombly,* ranked fourth.[237] And *Twombly* and *Iqbal* have been the subject of a flood of academic commentary,[238] much of it negative.[239] The two decisions have been criticized on a range of

234. *See Twombly,* 550 U.S. at 560 n.6. Private enforcement of the antitrust laws is significantly more common than public enforcement. There are approximately ten private federal cases for each case brought by the DOJ or Federal Trade Commission. Daniel A. Crane, *Optimizing Private Antitrust Enforcement,* 63 VAND. L. REV. 675, 675–76 (2010). The cost of discovery in antitrust cases can be enormous. *See* DSM Desotech Inc., No. 08 CV 1531, 2008 WL 4812440, at *2 (N.D. Ill. Oct. 28, 2008); Roy W. Breitenbach & Alicia M. Wilson, *Managing the Fact Discovery Tsunami: Tips When Defending a Federal Antitrust Case,* N.Y.L.J., Jan. 18, 2011, at S8 ("In complex antitrust disputes, the amount of ESI often is so vast, and the preservation and production issues so complex, that e-discovery issues quickly spin out of control and destroy the entire defense budget."). One indicator of the potential scope of antitrust discovery is that between 2003 and 2008 the DOJ's antitrust division increased its electronic storage capacity from 12 to 70 TB. TRACY GREER, E-DISCOVERY INITIATIVES AT THE ANTITRUST DIVISION 1 (2009), *available at* http://www.justice.gov/atr/public/electronic_discovery/243194.htm. *But cf.* Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error,* 20 CORNELL J.L. & PUB. POL'Y 1, 18 & n.84 (2010) ("[In *Twombly,* t]he Court did not rely on quantitative analysis of discovery expense in antitrust suits, which does not appear to exist in current literature.").

235. *Twombly,* 550 U.S. at 559 (citing Frank H. Easterbrook, *Discovery as Abuse,* 69 B.U. L. REV. 635, 638 (1989)); *see also* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases,* 14 LEWIS & CLARK L. REV. 65, 107 (2010) ("There is no doubt that one of the Supreme Court's primary rationales for retiring *Conley*'s permissive pleading standard was the Court's desire to reduce time-consuming, costly, and burdensome discovery.").

236. *See, e.g.,* Thomas, *supra* note 233, at 216 ("[T]he new standard will likely have a revolutionary impact on cases[.]").

237. Adam N. Steinman, *The Pleading Problem,* 62 STAN. L. REV. 1293, 1295, 1357 & n.9 (2010); *see also* Reinert, *supra* note 232, at 133 n.71 ("At last count, *Iqbal* had been cited in more than fourteen thousand decisions, but this does not tell us much about its impact. After all, most courts are presumably citing *Iqbal* because it is the most recent Supreme Court decision addressing pleading.").

238. See Steinman, *supra* note 237, at 1295–96 & n.10 (listing scholarly commentary).

239. *See, e.g.,* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems,* 95 IOWA L. REV. 821, 823 (2010) ("[T]hese decisions do more than redefine pleading rules. By inventing a new and foggy test for the threshold stage of every lawsuit, they have destabilized the entire system of civil litigation."); Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in* Ashcroft v. Iqbal, 62 FLA. L. REV. 951, 959 (2010); Robert D. Owen & Travis Mock, *The Plausibility of Pleading After* Twombly *and* Iqbal, 11 SEDONA CONF. L.J. 181, 187 (2010).

grounds. The primary criticism is that the stricter pleading standard will significantly increase the incidence of pre-trial dismissals and thereby restrict access to justice for plaintiffs with meritorious civil claims.[240]

To date, however, the empirical evidence does not support the notion that dismissals have significantly increased.[241] In particular, while a major concern of some critics has been that *Twombly* and *Iqbal* will bar civil rights cases,[242] a March 2011 study by the Administrative Office of the United States Courts examined the 94 federal district court dockets and found no significant increase in the dismissals of civil rights cases. *Twombly* was decided in May 2007 and *Iqbal* was decided in May 2009. During the pre-*Twombly* period of January–March 2007, federal district courts granted 39.58 percent of motions to dismiss filed in civil rights employment cases.[243] During the post-*Iqbal* period of July 2009–December 2010, federal district courts granted 37.40 percent of motions to dismiss filed in civil rights employment cases.[244] The results were very similar for other civil rights cases, which are typically based on statutory causes of action such as alleged violations of the Employee Retirement Income Security Act[245] or the Fair Labor Standards Act.[246] During the pre-*Twombly* period of January–March 2007, federal district courts granted 39.54 percent of motions to dismiss that were filed in such cases.[247] During the post-*Iqbal* period of July 2009–December 2010, federal district courts granted 37.25 percent of such motions.[248] In short, the percentage of motions to dismiss that

240. *See, e.g.*, Thomas, *supra* note 233, at 216 ("Because the new standard is akin to summary judgment with much less information, more dismissals are likely to occur at the motion to dismiss stage.").

241. *See* John G. McCarthy, *An Early Review of* Iqbal *in the Circuit Courts*, 57 FED. L. 36, 36 (2010) ("In most circuits, the application of the pleading requirements expressed in *Iqbal* to specific complaints have achieved the same results as would have been reached under pre-existing case law."); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1145 (2010) ("[T]he limited studies and reports on the impact of *Twombly* and *Iqbal* suggest no radical sea change or general denial of access to the courts for specific groups of plaintiffs.").

242. *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 931 (2010).

243. *See* STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MOTIONS TO DISMISS: INFORMATION ON COLLECTION OF DATA 2 (2011) [hereinafter MOTIONS TO DISMISS], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/NOS-Motions%20Quarterly%20December_031611.pdf.

244. *Id.*

245. 29 U.S.C. §§ 1101–1461 (2006).

246. 29 U.S.C. §§ 201–219 (2006).

247. *See* MOTIONS TO DISMISS, *supra* note 243, at 2.

248. *See id.*

have been granted in civil rights cases has *declined* post-*Iqbal*, as compared with the pre-*Twombly* era.

Moreover, the foregoing statistics likely overstate the significance of post-*Iqbal* dismissals. They do not reveal whether motions were granted with or without leave to amend, and, if with leave, whether the case continued with an amended complaint.[249] Other studies with smaller subsets of data have found more significant increases in post-*Iqbal* dismissal rates, but much of the increase is attributable to grants of motions to dismiss with leave to amend.[250]

The data from the Administrative Office suggest that *Twombly* and *Iqbal* mostly confirmed the historical practice of federal courts. A December 2010 review of cases applying *Twombly* and *Iqbal* concluded that, "the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency."[251] Instead, application of *Iqbal* has been context-specific. Under this approach, courts apply the *Iqbal* analysis more leniently in cases where pleading with more detail may be difficult. For example, courts have continued to emphasize that *pro se* pleadings[252] are evaluated more leniently than others, and they continue to find pleading on "information and belief" to be appropriate when permitted under applicable civil procedure rules and relevant case law.[253]

Courts also continue to provide leave to amend when motions to dismiss are granted. Antitrust litigation provides an example: a

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249. *See id.*

250. *See, e.g.*, Hatamyar, *supra* note 242, at 556 ("[T]he rate at which such motions were granted increased from *Conley* to *Twombly* to *Iqbal*, although grants *with* leave to amend accounted for much of the increase."); *Cf.* Schneider, *supra* note 9, at 535 ("There are also numerous employment and civil rights cases in which district courts have granted leave to amend.").

251. Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to Civil Rules Committee and Standing Rules Committee 4 (Dec. 15, 2010) [hereinafter Kuperman Memorandum], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf; *see also* REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S SPECIAL COMMITTEE ON PLEADING STANDARDS IN FEDERAL LITIGATION 18 (2010), *available at* http://www.nysba.org/Content/NavigationMenu42/June192010HouseofDelegatesMeetingAgendaItems/StandardsforPleadingFinalReport.pdf ("[B]ut for patent cases, *Iqbal* has not had an appreciable effect on the percentage of motions to dismiss that have been granted and denied in the federal courts."); Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415, 434 (2010) ("[B]y and large, federal courts are not dismissing more cases following *Iqbal*.").

252. *Pro se* pleadings are increasingly common in federal court. *See* Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 591–93 (2011) ("[F]ederal courts have recently experienced a staggering increase in the proportion of pro se cases on their dockets . . . . Presently, pro se litigants appear in approximately thirty-seven percent of all federal court cases . . . . [A]pproximately sixty-two percent of all civil appeals are presently pursued pro se[.]").

253. Kuperman Memorandum, *supra* note 251, at 5.

2010 study found that motions to dismiss were granted post-*Twombly* in 65.3 percent of 170 antitrust cases filed in federal district court. But most of these decisions dismissed the complaint at issue without prejudice, adjudicated a previously amended complaint, or dismissed the complaint but granted leave to amend.[254] Similarly, a 2011 study of 264 post-*Iqbal* decisions resolving dispositive pleading motions (most of which were motions to dismiss) in pharmaceutical and medical device litigation found that only 5.3 percent of the dismissals were with prejudice, consistent with pre-*Twombly* dismissal rates.[255] The Federal Judicial Center provided additional evidence concerning the frequency of grants of leave to amend in the comprehensive study it released in March 2011. The study found no post-*Twombly* increase in motions to dismiss granted without leave to amend, apart from motions in cases challenging financial instruments.[256]

The focus by *Twombly* and *Iqbal* on the reduction of costly discovery is consistent with this Article's central argument, which is that e-discovery should be stayed in civil cases pending the resolution of motions to dismiss. The empirical evidence cited above shows that those cases have not resulted in a statistically significant increase in dismissals. However, even if *Twombly* and *Iqbal* have not yet operated to bar access to the federal courts for plaintiffs with meritorious claims, are they more likely to do so in the future, if e-discovery is stayed while courts resolve motions to dismiss? Probably, yes. Research has revealed that the PSLRA, which codified

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254. HEATHER LAMBERG KAFELE & MARIO M. MEEKS, SHEARMAN & STERLING LLP, ANTITRUST DIGEST: DEVELOPING TRENDS AND PATTERNS IN ANTITRUST CASES AFTER *Bell Atlantic Corp. v. Twombly* AND *Ashcroft v. Iqbal* 8, 15, (2010), *available at* http://www.shearman.com/Antitrust-Digest-04-20-2010/; *accord* Michael P. Lehmann, Twombly *and Antitrust Class Action Plaintiffs*, LAW360 (Jan. 27, 2011), http://www.law360.com/articles/219599/print?section=competition ("In sum, in many recent major antitrust class actions, while *Twombly* has sometimes had the effect of lengthening the period in which dismissal motions are considered (and, on occasion, has necessitated the filing of amended complaints), more often than not, motions to dismiss were ultimately denied (or sometimes reversed on appeal)."). For an example of this phenomenon, see *In re* Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010) (affirming denial of motion to dismiss second amended complaint in antitrust class action).

255. William M. Janssen, Iqbal *'Plausibility' in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 610-11 (2011). The study concluded: "In short, during the first 15-and-a-half months after *Iqbal*, claimants were having roughly the same rate of success in completely fending off pleading motions in pharmaceutical and medical device cases as all federal pleaders had before *Iqbal* (and, indeed, before *Twombly*)." *Id.* at 603.

256. *See* JOE S. CECIL, ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES 13, 21 (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf. This study does not reveal whether complaints were amended following the grant of leave and, if so, whether the amendments were successful. *Id.* at 14.

both a discovery stay and tightened pleading standards, has operated to bar some meritorious securities claims[257] and a similar effect might well result if a discovery stay is widely applied in civil cases.

While some meritorious claims might be barred, it is likely that this adverse effect would be limited. First, the proposal set forth herein does not suggest a stay of all discovery pending resolution of motions to dismiss. It merely suggests a stay of e-discovery. Under this proposal, the parties would still be permitted to engage in traditional paper-based discovery, depositions, and physical and mental examinations, consistent with the FRCP. Moreover, as some commentators have noted, the decreasing severity of information asymmetries between plaintiffs and defendants have made informal methods of investigation cheaper and more effective, thereby reducing the importance of taking formal discovery prior to the disposition of motions to dismiss.[258] In *Twombly*, for example, "much of the information that was relevant to the ultimate disposition of that case was publicly available to both parties at the outset of the litigation."[259]

Second, this Article's proposal does not suggest a stay of all e-discovery. Rather, the two statutorily recognized exceptions to the mandatory PSLRA stay would be extended to all civil litigation. Plaintiffs could seek to have the stay lifted if particularized discovery was necessary to preserve evidence or to prevent undue prejudice. While it is true that plaintiffs in securities actions have generally failed to lift stays under either of those exceptions, their failure is due at least in part to the unduly narrow construction federal district courts have given to the undue prejudice requirement. As indicated *supra*, federal courts have declined to lift the stay where parallel litigation or SEC or DOJ investigations have revealed that plaintiffs' claims may be meritorious. These courts have rejected the argument that the PSLRA's policy goal of preventing

257. *See* Choi, *supra* note 223, at 623 (concluding that PSLRA has operated to reduce incidence of both nuisance litigation and meritorious litigation).

258. *See* Colin T. Reardon, Note, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170, 2208 (2010) ("While critics of *Twombly* and *Iqbal* have rightly noted that certain types of cases will be disproportionately impacted by the plausibility standard because of information asymmetries, they have ignored how much information plaintiffs *do* have access to because of modern technological advances and the rise of informational regulation.").

259. Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 202 (2011). Similarly, in *Starr v. Sony BMG Music Entm't*, 592 F.3d 314 (2d Cir. 2010), the Second Circuit reinstated plaintiffs' price-fixing Sherman Act claim. Professor Epstein noted: "What was clear was the amount of public evidence that could be arrayed against the defendants prior to discovery." Epstein, *supra*, at 202.

plaintiffs from filing frivolous strike suits would not be thwarted under such circumstances.[260]

If an e-discovery stay is extended to all civil litigation, but courts acknowledge that the stay should be lifted where parallel litigation or investigations reveal that plaintiffs' claims may have merit, the danger that access to the courts will be blocked can be minimized. Private antitrust litigation is instructive. Historically, such litigation has often been sparked by government investigations and prosecutions. By the time private litigation commences, counsel for defendants have often already produced documents to government investigators and retained electronic copies for themselves. There is no significant cost to defendants to provide additional copies to plaintiffs in the parallel litigation. Accordingly, stays should be lifted in these cases if the documents suggest that plaintiffs' claims have merit.[261]

Third, given the absence of empirical evidence establishing that *Twombly* and *Iqbal* have resulted in a significant increase in the dismissal of meritorious claims, there is little reason to assume that an e-discovery stay will add more significantly to such dismissals. A memorandum prepared in October 2009 for the Advisory Committee on Civil Rules noted: "[I]t is difficult to determine from case law whether meritorious claims are being screened under the *Iqbal* framework or whether the new framework is effectively working to sift out only those claims that lack merit earlier in the proceedings."[262] If a modest increase in dismissals of meritorious cases does result from a mandatory stay of discovery, this is likely to be significantly outweighed by the benefits that will flow from such a stay.

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260. *See, e.g.*, Brigham v. Royal Bank of Canada, No. 08 CV 4431(WHP), 2009 WL 935684, at *2 (S.D.N.Y. Apr. 7, 2009) ("[T]he mere fact that the PSLRA's goals would not be frustrated . . . is not sufficient to warrant lifting the stay.") (quoting 380544 Canada, Inc. v. Aspen Tech., Inc., 07 CIV. 1204(JFK), 2007 WL 2049738 (S.D.N.Y. July 18, 2007)).

261. *But see In re* Graphics Processing Units Antitrust Litig., No. C 06-07417 WHA, MDL No. 1826, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007) (granting defendants' motion to stay discovery in post-*Twombly* antitrust multi-district litigation even where the requested documents had already been produced to DOJ).

262. *See* Memorandum from Samuel F. Abernathy, Chair, Special Comm. on Pleading Standards in Fed. Litigation, to the Executive Comm. & House of Delegates of the N.Y. State Bar Ass'n, Report of the Special Committee on Pleading Standards in Federal Litigation 3 (June 2, 2010) (quoting Oct. 2, 2009 version of Kuperman Memorandum, *supra* note 251), *available at* http://www.nysba.org/Content/NavigationMenu42/June192010HouseofDelegatesMeetingAgendaItems/StandardsforPleadingReportMemo.pdf; *see also* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 24 (2009) ("[I]t is unknowable whether a dismissed claim was nonetheless meritorious in an absolute sense.").

CONCLUSION

Unless a discretionary stay is imposed, the FRCP allows discovery to proceed while motions to dismiss are pending. This allows plaintiffs with non-meritorious cases to compel defendants to incur massive discovery expenses before federal district courts rule on motions to dismiss. Much of this expense stems from the need to engage in electronic discovery, which dominates discovery in modern litigation. The overall effect is that plaintiffs with non-meritorious cases are able to extract extortionate settlements from defendants unwilling to incur the front-loaded cost of electronic discovery. In an effort to address e-discovery issues, the FRCP and FRE were amended in 2006 and 2008. That effort has failed: costs have not been reduced to a significant degree and the timing of discovery has not been addressed. The most effective solution to the problem of electronic discovery during the pendency of motions to dismiss is a mandatory stay of such discovery. Pursuant to the PSLRA, since 1995 there has been a mandatory stay of all discovery during the pendency of motions to dismiss in actions alleging violations of the securities laws, absent application of one of two statutory exceptions. That stay, which has largely accomplished its primary goals in securities litigation, should be extended to e-discovery in all federal civil litigation, with the same exceptions. Application of a mandatory stay of e-discovery prior to the disposition of motions to dismiss is the most equitable and effective solution to the ongoing problem of coercive settlements stemming from prohibitive discovery expense.