IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WALLACE J. DESMARAIS, JR., on behalf of Himself and All Others Similarly Situated, Plaintiff, v. FIRST NIAGRA FINANCIAL GROUP, INC., NATHANIEL D. WOODSON, G. THOMAS BOWERS, GARY M. CROSBY, GEORGE M. PHILIP, CARL A. FLORIO, PETER B. ROBINSON, CARLTON L. HIGHSMITH, ROXANNE J. COADY, AUSTIN A. ADAMS, and SUSAN S. HARNETT, Defendants.	)	Civil Action No. 15-1226-LPS-CJB

MEMORANDUM ORDER

1. Before the Court is a Motion to Expedite Discovery ("Motion") filed in the instant case by Plaintiff Wallace J. Desmarais, Jr. ("Plaintiff"). (D.I. 6) In this case, Plaintiff, a shareholder of First Niagra Financial Group, Inc. ("First Niagra"), asserts claims on behalf of himself and all others similarly situated, pursuant to Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 and United States Securities and Exchange Commission Rule 14a-9. (D.I. 1) In his Complaint, *inter alia*, Plaintiff alleges that individual Defendants Nathaniel D. Woodson, G. Thomas Bowers, Gary M. Crosby, George M. Philip, Carl A. Florio, Peter B. Robinson, Carlton L. Highsmith, Roxanne J. Coady, Austin A. Adams, and Susan S. Harnett (referred to herein, along with First Niagra, as "Defendants") authorized the release of a preliminary proxy statement (the "Proxy") for First Niagra's shareholders that contained incomplete and materially misleading information regarding the process that led to a Merger

Agreement between First Niagra and KeyCorp. (*Id.* at ¶¶ 4, 88-102) A shareholder vote on the proposed merger is said to be scheduled for March 23, 2016, and Plaintiff has indicated that he intends to soon file a motion in the instant case to preliminarily enjoin that vote. (D.I. 7 at 1) With the instant Motion, Plaintiff asks the Court to lift the automatic discovery stay provision of the Private Securities Litigation Reform Act ("PSLRA" or "the Act") and require Defendants to produce certain documents that have already been provided in discovery to various First Niagra stockholders in six New York State court actions ("the New York State Court Actions"). (*Id.*) For the reasons set forth below, Plaintiff's request for expedited discovery is DENIED.

2. In securities-fraud actions, the PSLRA provides that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B); *see also Dipple v. Odell*, 870 F. Supp. 2d 386, 389 (E.D. Pa. 2012). "'Congress enacted the discovery stay in order to minimize the incentives for plaintiffs to file frivolous securities . . . actions in the hope either that corporate defendants will settle those actions rather than bear the high cost of discovery . . . or that the plaintiff will find during discovery some sustainable claim not alleged in the complaint.'" *Dipple*, 870 F. Supp. 2d at 390 (quoting *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 305 (S.D.N.Y. 2002)); *see also Sarantakis v. Gruttaduaria*, No. 02 C 1609, 2002 WL 1803750, at *1 (N.D. Ill. Aug. 5, 2002). In light of this, it was Congress's intent that the PSLRA's automatic stay provision would apply in all cases except those involving "exceptional circumstance[s.]" S. REP. NO. 104-98, at 14 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 693; *see also SG Cowen Sec. Corp. v. U.S. Dist. Court for N. Dist. of Cal.*, 189 F.3d 909, 911-12

(9th Cir. 1999); *Dipple*, 870 F. Supp. 2d at 391 (requiring a showing of "extraordinary circumstances" to warrant the lifting the automatic stay); *Winer Family Trust v. Queen*, No. CIV.A. 03-4318, 2004 WL 350181, at *1-2 (E.D. Pa. Feb. 6, 2004) (same).[1]

3. As noted above, the showing Plaintiff must make to warrant lifting the automatic stay has a few different components to it, including that Plaintiff demonstrate that the requested discovery is "necessary to preserve evidence or to prevent undue prejudice to" him. 15 U.S.C. § 78u-4(b)(3)(B). Here, Plaintiff is not asserting that the discovery is needed to preserve any evidence. And his failure to establish "undue prejudice" is what is fatal to his Motion.

4. Courts interpreting the PSLRA have held that "undue prejudice" means "improper or unfair treatment amounting to something less than irreparable harm." *Lusk v. Life Time Fitness, Inc.*, Civil No. 15-1911 (JRT/JJK), 2015 WL 2374205, at *2 (D. Minn. May 18, 2015) (internal quotation marks and citations omitted); *Dipple*, 870 F. Supp. 2d at 392. "Prejudice caused by the delay inherent in the PSLRA's discovery stay cannot be 'undue' prejudice because it is prejudice [that] is neither improper nor unfair." *Dipple*, 870 F. Supp. 2d at 392 (internal quotation marks and citations omitted). For at least the three reasons set out

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[1] In addition to the need for Plaintiff to satisfy the PSLRA's requirements for the lifting of the automatic stay, any party seeking discovery prior to satisfying certain requirements of Federal Rule of Civil Procedure 26(f) (as Plaintiff is here) must obtain authorization for such discovery from the Court. Fed. R. Civ. P. 26(d)(1). In non-PSLRA cases, the Court has looked to a "reasonableness" standard to determine whether expedited discovery should be permitted under Rule 26. *See Williams v. Ocwen Loan Servicing, LLC*, Civil Action No. 14-1096-LPS-CJB, 2015 WL 184024, at *2 (D. Del. Jan. 13, 2015). Here, both parties agree that because the test for lifting the PSLRA's automatic stay is more rigorous than the Rule 26 "reasonableness" test, it makes sense to focus, as an initial matter, on the former, not the latter. That is, if Plaintiff cannot demonstrate that the PSRLA's automatic stay should be lifted pursuant to the applicable case law, then any question as to whether the "reasonableness" test could be satisfied would be moot.

below, the Court finds that Plaintiff has failed to demonstrate that he will suffer undue prejudice were he denied expedited discovery in this matter.

5. First, courts addressing this issue have focused "on whether failing to lift the stay will leave the plaintiff without redress, or will leave the plaintiff unable to litigate effectively[,]" *Lusk*, 2015 WL 2374205, at *2, and Plaintiff has not made that showing here. Were Plaintiff's request for expedited discovery denied, he would still have the ability to file a preliminary injunction motion in the instant case seeking to enjoin the First Niagra/KeyCorp merger vote. In doing so, he could still rely on, *inter alia*, the legal and factual matter that is referenced in his 33-page Complaint (or in any forthcoming Amended Complaint). And separate and apart from his ability to file a preliminary injunction motion, Plaintiff and other First Niagra shareholders like him would not be left "without redress" to seek relief for the alleged misconduct if the instant Motion were denied. For example, Plaintiff has sought various forms of relief in this action other than injunctive relief—such as an order rescinding and setting aside any future merger, or one "awarding rescissory damages to Plaintiff and the Class." (D.I. 1 at 32; *see also* D.I. 11 at 8); *see also Lusk*, 2015 WL 2374205, at *2 (denying a shareholder plaintiff's claim for expedited discovery under the PSLRA, where the discovery was to be used to support a motion to enjoin a shareholder vote on a proposed merger, and noting that the plaintiff was not "unable to seek redress absent immediate discovery" in part because his "complaint asks for relief whether or not the Court's decision precedes the shareholder vote"); *Dipple*, 870 F. Supp. 2d at 393 n.7 (same). Additionally, as Defendants note, (D.I. 11 at 8), and as Plaintiff acknowledges, the Delaware General Corporation Law bestows upon shareholders certain appraisal rights, with which Plaintiff (and other shareholders like him who dissent to the merger) could seek "an appraisal by

the Court of Chancery of the fair value of [their] shares of stock under [certain] circumstances[.]" 8 Del. C. § 262; *see also Ala. By–Prods. Corp. v. Cede & Co. on behalf of Shearson Lehman Bros., Inc.*, 657 A.2d 254, 258-59 (Del. 1995); *cf. Lusk*, 2015 WL 2374205, at *2 (finding that the plaintiff was not without redress absent immediate discovery for the additional reason that Minnesota law provided appraisal rights to a shareholder dissenting to a merger). Lastly, various First Niagra shareholders are currently pursuing additional forms of relief in state courts relating to the proposed merger. Those shareholders have filed putative class action claims against Defendants in the six New York State Court Actions and in another case in the Court of Chancery of the State of Delaware; in all of those cases, the plaintiffs, *inter alia*, challenge the merger. (D.I. 11 at 3)

6. Of course, these alternative avenues for relief each implicate different legal hurdles. And some might be more or less advantageous than others. But on this record, Plaintiff has certainly not established that, despite the existence of these multiple forms of redress, "*no adequate* remedy exists absent the lifting of the stay." *Lusk*, 2015 WL 2374205, at *2 (emphasis added); *see also Dipple*, 870 F. Supp. 2d at 393 n.7 (finding insufficient plaintiffs' complaint that were their motion for expedited discovery denied, this "may make their preferred remedy unavailable[,]" and noting that plaintiffs did "not establish undue prejudice such as where the stay would prevent 'relief in *any* form.'") (emphasis in original) (quoting *Fisher v. Kansas*, No. 06-CV-1187 (ADS)(ETB), 2006 WL 2239038, at *3 (E.D.N.Y. Aug. 4, 2006)).

7. Second, the PSLRA cases in which district courts have permitted expedited discovery have tended to involve unique circumstances not present here. For example, in *In re WorldCom*, the district court partially lifted the stay to allow the securities plaintiffs in

consolidated cases to have access to certain documents and materials. *In re WorldCom*, 234 F. Supp. 2d at 306. But under the "unique circumstances" there, the securities plaintiffs had been ordered by a court to pursue settlement discussions with the bankrupted defendant and with other plaintiffs; absent the permitted discovery, the securities plaintiffs would have been the "only major interested party" without access to these "core" materials, and thus would have been "severely disadvantaged" in those court-mandated settlement discussions. *Id.* at 305-06. In *In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178 (S.D.N.Y. 2004), the district court also lifted the stay, but it did so in a case where the defendant corporation had *already agreed* to a sizeable settlement of related claims with federal regulators. *In re LaBranche*, 333 F. Supp. 2d at 183. In that circumstance, the district court found that were the stay to have remained in place, the plaintiffs would "be the only interested party without access to [the] documents and [would] be prejudiced by their inability to make informed decisions about their litigation strategy in this rapidly shifting landscape." *Id.* at 183-84 (distinguishing the decision therein from cases where courts found it "premature" to lift the discovery stay in favor of an "impending" settlement, and noting that, in the instant case, there had been an "*actual* settlement") (emphasis in original).[2]

8. This case, in contrast, lacks any distinguishing feature such as those present in *In re WorldCom* or *In re LaBranche*. Instead, it involves a scenario that would seem to arise not that infrequently—a plaintiff files a complaint subject to the PSLRA, then files (or states that it

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[2] *See also Kuriakose v. Fed. Home Loan Mortg. Co.*, 674 F. Supp. 2d 483, 488 (E.D.N.Y. 2009) (finding that the "'unique circumstances'" at play in *In re WorldCom* or *In re LaBranche* were what justified the lifting of the automatic stay there, and noting that in contrast, a plaintiff's claim that it needed access to discovery to assist in potential settlement negotiations or to plan litigation strategy, standing alone, would not amount to a showing of "undue prejudice").

intends to file) a preliminary injunction motion to stop a forthcoming corporate event, and then seeks discovery in advance of that motion (in order to bolster some of the arguments it plans to make at a preliminary injunction hearing). *See, e.g.*, *Lusk*, 2015 WL 2374205, at *1; *Dipple*, 870 F. Supp. 2d at 388-89. The Court is concerned that were a request for expedited discovery granted here, it would need to be granted in nearly every such case—not only in cases involving truly "extraordinary circumstances."[3]

9. Third, the Court concludes that granting a motion to expedite discovery in these circumstances would amount to an end-run around Congress's considered judgement as to how PSLRA actions should primarily be litigated. The PSLRA's automatic stay "does not apply to

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[3] Plaintiff also cites approvingly to two cases—*In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, Nos. MDL-1446, Civ.A. H-01-3624, 2002 WL 31845114 (S.D. Tex. Aug. 16, 2002) and *Nichting v. DPL Inc.*, No. 3:11-cv-141, 2011 WL 2892945 (S.D. Ohio July 15, 2011)—where district courts lifted the automatic stay in circumstances that do not appear to be particularly unique or extraordinary. (D.I. 7 at 7 & 8 n.4) The *In re Enron* Court's decision, for example, appeared to be motivated by the fact that the sought-after discovery had already been provided to parties in other proceedings by the relevant defendant. *In re Enron*, 2002 WL 31845114, at *2. The *Nichting* Court, for its part, appears to have focused on the fact that there were tight "time constraint[s]" between the date of its decision and a pending preliminary injunction hearing, and on the fact that the allegations in the underlying complaint "troubl[ed] the Court." *Nichting*, 2011 WL 2892945, at *4. To the extent these factors were the impetus for the decisions in these cases, the Court simply disagrees with the reasoning applied therein. Indeed, *In re Enron*, a case where the stay was lifted "without an express finding of undue prejudice" and after "no analysis of the [PSLRA's] textual requirements[,]" has been noted to be "an anomaly in this area[.]" *In re Spectranetics Corp. Sec. Litig.*, Civil Action No. 08-cv-02048-REB-KLM, 2009 WL 3346611, at *8-9 (D. Col. Oct. 14, 2009); *see also Osher v. JNI Corp.*, Civil No. 01-0557J(NLS), 2003 WL 2579762, at *3 (S.D. Cal. May 21, 2003). As for *Nichting*, its decision relied in significant part on *Woodward & Lothrop, Inc. v. Schnabel*, 593 F. Supp. 1385 (D.D.C. 1984), *see Nichting*, 2011 WL 2892945, at *4, a pre-PSLRA case involving procedurally inapposite circumstances as compared to the setting here, *see Dipple*, 870 F. Supp. 2d at 393. Courts have also noted that the decision in *Nichting* failed to meaningfully discuss whether monetary damages or an appraisal process provided an adequate remedy to the plaintiff seeking expedited discovery. *See Lusk*, 2015 WL 2374205, at *3. For all of these reasons as well, the Court does not find *In re Enron* or *Nichting* persuasive.

actions such as government investigations, bankruptcy proceedings, internal investigations, or non-PSLRA actions[,]" but it does apply to cases like this one. *Dipple*, 870 F. Supp. 2d at 394 (internal quotation marks and citations omitted). That fact is "not evidence of undue prejudice, but rather is evidence of Congress's judgment that PSRLA actions should be treated differently than other actions." *Id.* (internal quotation marks and citations omitted). And again, part of the reason for that rule is Congress's desire to "avoid the situation in which a plaintiff sues without possessing the requisite information to satisfy the PSLRA's heightened pleading requirements, then uses discovery to acquire that information and resuscitate a complaint that would otherwise be dismissed." *Sarantakis*, 2002 WL 1803750, at *1; *see also Dipple*, 870 F. Supp. 2d at 393 ("Congress enacted the PSLRA automatic-stay provision to protect defendants from financially burdensome fishing expeditions until the sufficiency of the primary complaint ha[d] been tested [by a motion to dismiss].") (internal quotation marks and citation omitted).

8. It seems particularly appropriate to keep Congress' intent in mind in light of the procedural history in this case. Here, after Plaintiff chose to file his Complaint in this Court, Defendants did in fact promptly challenge the adequacy of that Complaint—by filing a motion to dismiss. (D.I. 4) But instead of responding to that motion straightaway, Plaintiff sought to push back the briefing schedule. (D.I. 10; D.I. 11 at 5) And while delaying that challenge to the merits on the one hand, Plaintiff is on the other hand now seeking (via the instant Motion) the very type of discovery that Congress intended, in almost every case, to *post-date* a merits challenge. It is hard to believe that in passing the PSLRA, Congress intended to countenance that kind of approach. *See In re Am. Funds Sec. Litig.*, 493 F. Supp. 2d 1103, 1106-07 (C.D. Cal. 2007) ("If Plaintiffs are allowed to take discovery before the Court has sustained the legal

sufficiency of the Consolidated Complaint, Plaintiffs might attempt to use the information in addressing a motion to dismiss or amending their claims in direct contravention of one of the purposes of the PSLRA.").

9. For these reasons, the Court ORDERS that Plaintiff's Motion be DENIED.

Dated: February 26, 2016

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE