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Strategically Limiting Discovery in Class Litigation: Tactics for Defense Counsel

Leveraging Motions to Stay, Bifurcation Motions, and Cost-Shifting Motions to Reduce Discovery Time and Expense

THURSDAY, FEBRUARY 3, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Steptoe

Strategically Limiting Discovery in Class Litigation

February 3, 2022

ALSTON & BIRD

Strategically Limiting Discovery in Class Litigation

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Liz Cassady is a trial-ready commercial litigator. She represents financial institutions and other major companies in a full slate of business-critical litigation. Liz also provides pre-litigation counseling to clients in order to avoid costly disputes.

Liz has successfully defended clients in individual and class actions alleging securities, antitrust, RICO, Commodities Exchange Act, Title VII, and breach of contract claims, as well as claims of fraud and other business torts, including litigation stemming from the financial crisis and multiple litigations related to alleged manipulation of benchmark rates.

Liz is a strong team leader who is particularly skilled at navigating cases through the pre-trial phase, including fact and expert discovery, class certification and summary judgment briefing. Liz's deep understanding of both substantive and procedural law, combined with her practical experience, allows her to develop targeted litigation strategies for clients, efficiently manage e-discovery, and reduce costly and unnecessary motion practice.

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Program Overview

- Motions to stay discovery pending dispositive motions
- Bifurcation: certification vs. merits
- Cost-shifting motions
- Other strategies to limit discovery

MOTIONS TO STAY

Motions to Stay – Quick Snapshot

Sources of law

- The court's inherent discretion
- Judicial Doctrine (e.g., primary jurisdiction)
- Statute (e.g., PSLRA)

The Court's Discretion

A court has "broad discretion" to order a stay

- [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.
  - *Landis v. N. Am. Co.*, 299 U.S. 248 (1936).
- The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.
  - *Clinton v. Jones*, 520 U.S. 681 (1997).

There is no universally-accepted standard for granting stays

Cautionary Tale - *Jackson v. Miami Beer Ventures, LLC*, No. 1:20-cv-23392 (S.D. Fla. 2020)

- Complaint filed August 14, 2020
- Motion to Dismiss filed September 28
  - Granted in part (1/22/21), and the court allowed plaintiffs to filed an amended complaint by February 12
- Discovery Conference set for February 4, 2021
- Motion to Stay filed February 5
- Denied on February 10

What Went Wrong?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-23392-BLOOM/Louis

BRYON JACKSON and MARIO MENA, JR.,

Plaintiffs,

v.

ANHEUSER-BUSCH INBEV SA/NV, LLC
and MIAMI BEER VENTURES, LLC,

Defendants.
_____/

ORDER

applicable law, and is otherwise fully advised. For the reasons set forth below, the Motion is denied.

A district court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). Motions to stay discovery "are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997). "[D]iscovery stay motions are generally denied except where a specific showing of prejudice or burdensomeness is made." *Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV, 2014 WL 2807617,

at *2 (S.D. Fla. June 20, 2014). The party moving for a stay of discovery has "the burden of showing good cause and reasonableness." *Feldman*, 176 F.R.D. at 652.

What Went Wrong?

As an initial matter, however, the Court does not find that Defendants have demonstrated that discovery would be unduly burdensome, much less made a "specific showing" of prejudice or difficulty that is required to impose a stay on discovery. *See Montoya*, 2014 WL 2807617 at *2

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(conclusory statements regarding burdensome discovery could not support stay); *Ray*, 2012 WL 5471793, at *3 (rejecting stay where defendant "ha[d] not identified in any specific and tangible way the unreasonable discovery burdens it will face absent a stay").

Moreover, Defendants' reliance on *Chudasama* is misplaced. *Chudasama* does not state a general rule that discovery should be stayed pending resolution of a motion to dismiss. *Reilly v. Amy's Kitchen, Inc.*, No. 13-21525-CIV, 2013 WL 3929709, at *1 (S.D. Fla. July 31, 2013) ("[T]here is no general rule that discovery be stayed while a pending motion to dismiss is resolved."); *Gannon v. Flood*, No. 08-60059-CIV, 2008 WL 793682, at *1 (S.D. Fla. Mar. 24,

Unlike the exceptional circumstances presented in *Chudasama*, where the district court did not rule on a motion to dismiss for over a year and a half, here, Defendants have yet to file a motion to dismiss. This fact alone essentially renders *Chudasama* inapposite; without a motion to dismiss before it, there is nothing for the Court to take a "preliminary peek" at in order to determine if this case presents the kind of "especially dubious" claim faced by the *Chudasama* court such that

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dismissal will avoid needless and extensive discovery. *See Ray*, 2012 WL 5471793, at *2. Indeed, the Court is unable to even assess the allegations that are at issue, as Plaintiffs have yet to file their amended pleading. Without the benefit of Plaintiffs' pleading and full briefing on Defendants' anticipated motion to dismiss, the instant Motion falls well short of placing the Court in a position to determine that a motion to dismiss by the Defendants would be both granted and case dispositive. *See Bocciolone*, 2008 WL 2906719, at *2 ("[A] motion to stay discovery . . . is rarely appropriate unless resolution of the motion will dispose of the entire case."). The Court will address any motion to dismiss filed by Defendants in due course, but for now, discovery may proceed.

What Went Wrong? A Pro Forma Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-23392-CIV-BLOOM

BYRON JACKSON and MARIO MENA, JR.,

Plaintiffs,

v.

ANHEUSER-BUSCH COMPANIES, LLC, and
MIAMI BEER VENTURES, LLC,

Defendants.
_____/

DEFENDANTS' *UNOPPOSED* MOTION TO STAY DISCOVERY

Defendants, Anheuser-Busch Companies, LLC ("A-B") and Miami Beer Ventures, LLC ("MBV") (collectively, "Defendants"), hereby file this *unopposed* motion for the Court to enter a stay of discovery and suspend the deadlines set forth in the Court's September 23, 2020 and November 23, 2020 scheduling orders. Defendants request that the stay be entered until after Plaintiffs file their anticipated second amended complaint, which is due February 12, 2021, and the Court rules on Defendants' anticipated motion to dismiss that pleading. Alternatively, if Defendants elect to answer instead of moving to dismiss the second amended complaint, Defendants request that discovery be stayed until after their answer is filed. Plaintiffs do not oppose a stay of discovery provided that the deadlines set forth in the Court's scheduling orders are extended accordingly.[1] In support of this Motion, Defendants state as follows:

4. Defendants anticipate moving to dismiss Plaintiffs' forthcoming second amended complaint on various grounds. Good cause exists to stay discovery for several other reasons. These

[2] Three of those claims were dismissed out of hand because Plaintiffs conceded in their opposition that they failed to state a claim. ECF No. 41 at 3.

include that Plaintiffs do not oppose a stay of discovery and their prior complaint was held not to satisfy pleading requirements. Staying discovery will reduce the cost and burden on all parties until any pleading issues are resolved. It is thus both logical and efficient to postpone additional discovery and any necessary litigation on the Parties' current discovery disputes until the scope of the case is determined, particularly given the nature of Defendants' burden and proportionality objections. For all these reasons, good cause exists to stay discovery.

Lessons Learned – *Silva v. Connected Investors, Inc.*, No. 7:21-cv-00074 (E.D.N.C. 2021).

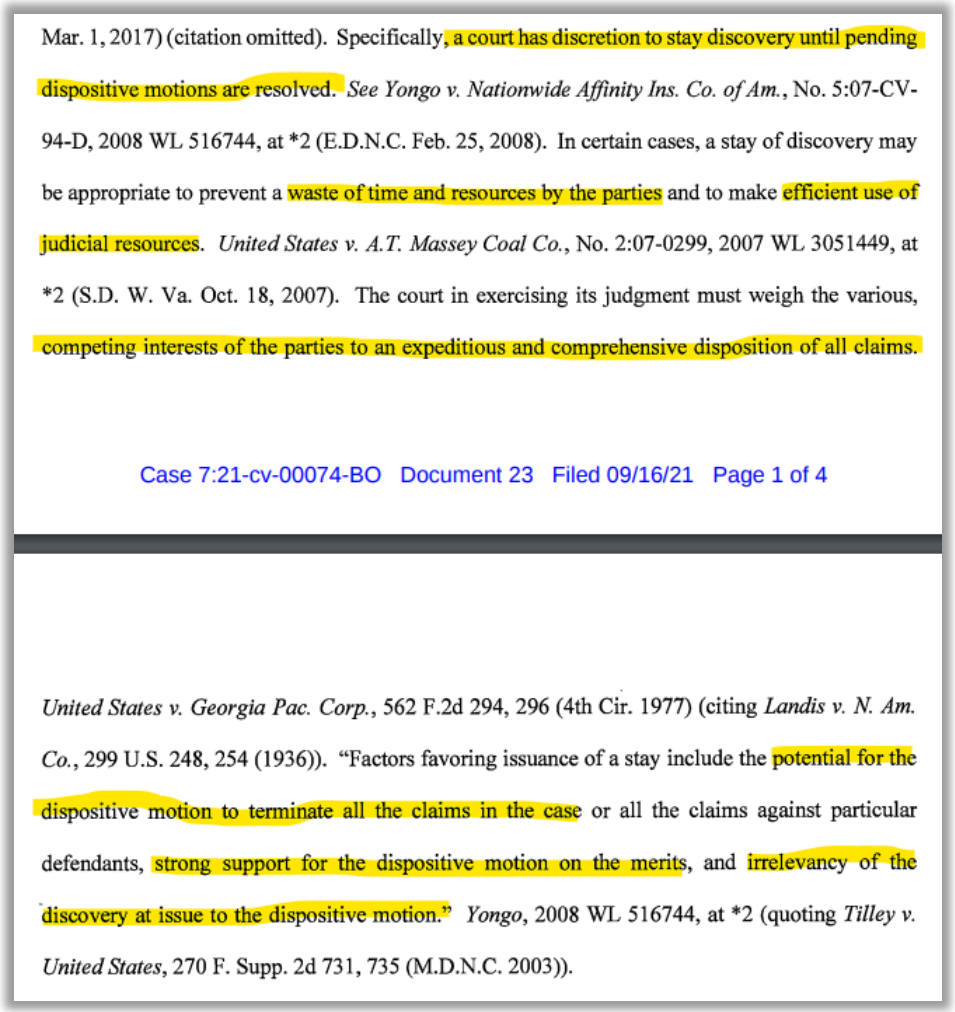
Background

- Complaint filed April 26, 2021
- Answer filed June 24, 2021
- Rule 26(f) Report submitted July 25, 2021
- Scheduling Order July 27
- Motion for Judgment on the Pleadings and **Motion to Stay** filed August 11
  - Motion to Stay was opposed
- Motion to stay **granted** on September 16

Differences from *Miami Beer Ventures*

- Pending dispositive motion
  - Facially apparent that would dispose of the entire case
- Defendant did not file a pro forma motion
  - Discussion on prejudice to movant
  - Nature of action
  - Discussion on the strength of the arguments for dismissal

What Went Right? – The Court's Order (Dkt. 26)



Mar. 1, 2017) (citation omitted). Specifically, a court has discretion to stay discovery until pending dispositive motions are resolved. *See Yongo v. Nationwide Affinity Ins. Co. of Am.*, No. 5:07-CV-94-D, 2008 WL 516744, at *2 (E.D.N.C. Feb. 25, 2008). In certain cases, a stay of discovery may be appropriate to prevent a waste of time and resources by the parties and to make efficient use of judicial resources. *United States v. A.T. Massey Coal Co.*, No. 2:07-0299, 2007 WL 3051449, at *2 (S.D. W. Va. Oct. 18, 2007). The court in exercising its judgment must weigh the various, competing interests of the parties to an expeditious and comprehensive disposition of all claims.

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United States v. Georgia Pac. Corp., 562 F.2d 294, 296 (4th Cir. 1977) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "Factors favoring issuance of a stay include 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." *Yongo*, 2008 WL 516744, at *2 (quoting *Tilley v. United States*, 270 F. Supp. 2d 731, 735 (M.D.N.C. 2003)).

- The Motion would be case dispositive
- The Motion was cogent ("strongly contested")
- No need for additional discovery
- Balance of the equities favors granting a stay

Motions to Stay: Guidelines

Case dispositive

- *Syngenta Seeds, Inc. v. BTA Branded, Inc.*, 2007 U.S. Dist. LEXIS 81767 (N.D. Ill. Nov. 1, 2007).

Need for discovery

- Discovery is unlikely to produce relevant substantive facts.
  - *Jarvis v. Regan*, 833 F.2d 149 (9th Cir. 1987).
- Dispositive legal question.
  - *Bilal v. Wolf*, 2007 U.S. Dist. LEXIS 41983 (N.D. Ill. June 6, 2007).

Cogent motion to dismiss

- "Preliminary peek"
- *Miami Beer Ventures*
- *Syngenta Seeds, Inc.*

Timeliness

- *Pass & Seymour, Inc. v. Hubbell, Inc.*, 532 F. Supp. 2d 418 (N.D.N.Y. 2007).
- *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404 (W.D.N.Y. 1999).
- *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 2014 U.S. Dist. LEXIS 62168 (C.D. Ill. May 6, 2014).

Prejudice

- To nonmovant.
  - *O'Sullivan v. Deutsche Bank AG*, 2018 U.S. Dist. LEXIS 70418 (S.D.N.Y. Apr. 26, 2018).
- To movant.
  - *Miami Beer Ventures.*
  - *Nexstar Broad., Inc. v. Granite Broad. Corp.*, 2011 U.S. Dist. LEXIS 105056 (N.D. Ind. Sept. 15, 2011).

Practical Considerations & Guardrails

- **Promptly file**
- **Stress the strength and case-dispositive nature of the motion**
- **Stress the value of staying the case**
- **Lack of opposition does not establish good cause**
- **Moving to stay deadlines that impact discovery**
- **Do your homework**

Judicial Doctrines

- Qualified and absolute immunity
  - *Siegert v. Gilley*, 500 U.S. 226 (1991).
- Primary Jurisdiction
  - *Clark v. Time Warner Cable,* 523 F.3d 1110 (9th Cir. 2008).
- Abstention Doctrines (*e.g., Colorado River, Younger*)
  - *Quackenbush v. Allstate Ins. Co.* , 517 U.S. 706 (1996).

Motions to Stay Discovery: Securities Class Actions & the PSLRA

- Congress enacted the Private Securities Litigation Reform Act (PSLRA) in 1995 to curb "abuses of the class-action vehicle in litigation involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).
- The PSLRA codified a number of procedural and substantive safeguards, one of which is an automatic stay of discovery while a motion to dismiss is pending.
- 15 U.S.C. § 77z-1(b)(1):
  - "In any private action arising under this subchapter, 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."

Motions to Stay Discovery: Securities Class Actions & the PSLRA

- To circumvent the PSLRA's procedural reforms, including the discovery stay provision, plaintiffs began filing class actions alleging violations of state securities laws in state courts.
- In response, Congress passed the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 112 Stat. 3227, which, *inter alia*, prohibits plaintiffs from filing certain securities class actions brought under state law in federal or state court.

But what about securities class actions brought under *federal law* that are filed in state court?

Do state courts have jurisdiction? Does the PSLRA's discovery stay apply?

Motions to Stay Discovery: Securities Class Actions & the PSLRA

- The U.S. Supreme Court addressed the first question—whether state courts have jurisdiction—in *Cyan, Inc.* v. *Beaver County Employees Retirement Fund,* 138 S. Ct. 1061 (2018).
- There, the Court unanimously held that (1) class actions alleging claims under the Securities Act of 1933 may be brought in state court, and (2) such actions are not removable to federal court.
- This led to what many have described as a peculiar result: class actions asserting solely federal claims cannot be heard in federal court whenever the plaintiff first brings them in state court.
- It also left open the second question: the application of the PSLRA's discovery stay to cases brought in state court that allege federal securities law claims. State courts have continued to split on this issue following *Cyan*.

Motions to Stay Discovery: Securities Class Actions & the PSLRA

- It looked like we were finally going to get an answer when the Supreme Court granted certiorari last term in *Pivotal Software, Inc. v. Superior Court of California.*
- At bottom, the case presented an issue of statutory interpretation: does the PSLRA's automatic stay provision—which states that discovery shall be stayed during the pendency of any motion to dismiss "[i]n any private action arising under this subchapter"—really mean *any* private action, whether brought in state or federal court?
- In late August 2021, the case was removed from the Court's calendar at the request of the parties after a settlement was reached.
- The applicability of the PSLRA's discovery stay provision to federal securities class actions brought in state court remains uncertain.

Motions to Stay Discovery: Securities Class Actions & the PSLRA

- The number of federal securities class actions filed in state court has declined since *Cyan*.
- This is in part because, following *Cyan,* companies began adopting federal forum selection provisions requiring that '33 Act claims be brought in federal court.
- In March 2020, the Delaware Supreme Court issued a landmark decision in *Salzberg* v. *Sciabacucchi,* 227 A.3d 102 (Del. 2020), and upheld the validity of federal-forum provisions in certificates of incorporation of Delaware corporations.

Motions to Stay Discovery: Securities Class Actions & the PSLRA

- California has since upheld federal forum provisions in three cases filed in state court.
- In fall 2021, New York Supreme Court dismissed case on the basis that the federal forum provision in the company's charter was valid and enforceable. Even though the court applied Delaware law, it found that principles of New York law would require the enforcement of the forum selection clause, unless such enforcement would be unreasonable and unjust. *See Hook v. Casa Systems, Inc.*, No. 654548/019, 2021 WL 3884063 (N.Y. Sup. Ct. Aug. 30, 2021).

Significant because the majority of '33 Act cases filed in state court have been brought in California and New York

BIFURCATION: CERTIFICATION VS. MERITS

Bifurcation of Discovery – Class Certification v. Merits Discovery

- Know your jurisdiction
- The Class Action Fairness Act ("CAFA") does not eliminate state court jurisdiction over class actions
  - In some states, the trial court is expected to bifurcate discovery
    - E.g., under Alabama's class action statute, a defendant is entitled to a virtually automatic bifurcation of discovery that limits discovery to class certification issues in the first instance. ALA. CODE § 6-5-641.
- In federal cases, the court has inherent authority to manage discovery.
  - May bifurcate discovery into two phases – (1) discovery relevant to class certification; (2) merits discovery, if a class is certified.

Bifurcation of Discovery – Class Certification v. Merits Discovery

- Federal Rule of Civil Procedure 23(c)(1):

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

Bifurcation of Discovery – *Wal-Mart Stores, Comcast & Halliburton*

- Prior to the U.S. Supreme Court's decision in *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), courts routinely bifurcated discovery between class certification issues and those relating to the merits of the asserted claims.
- In a series of decisions starting with *Wal-Mart*, the Court blurred the line between class and merits discovery.
  - *Wal-Mart:*
    - Lower courts must conduct a "rigorous analysis" to ensure that the requirements of Rule 23 are met.
    - "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."

Bifurcation of Discovery – *Wal-Mart Stores, Comcast & Halliburton*

- *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013):
  - In reversing class certification, the Supreme Court stated that "[b]y refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry." (emphasis added)
- *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 284 (2014):
  - The Supreme Court held that securities defendants can rebut the presumption of reliance under a fraud-on-the-market theory during the class certification stage.
  - "[D]efendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock."

Bifurcation of Discovery – *Wal-Mart Stores, Comcast & Halliburton*

- Following *Wal-Mart*, *Comcast & Halliburton*, some courts have been reluctant to bifurcate discovery.
  - *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 298 (S.D.N.Y. 2012) (*Wal-Mart* does not "militate in favor of bifurcating discovery prior to certification" but, if anything, "illustrates the need to develop the record fully before a class motion is considered.");
  - *Id.* at 300 ("[B]ecause of the 'rigorous analysis' required by [*Wal-mart*], courts are reluctant to bifurcate class-related discovery from discovery on the merits.") (collecting cases).

Bifurcation of Discovery – *Wal-Mart Stores, Comcast & Halliburton*

- Does not mean that there are no limits on merits discovery prior to class certification. And the decision to bifurcate still rests within the discretion of the district court.
  - *See, e.g., Reid v. Unilever U.S., Inc.,* 964 F. Supp. 2d 893, 933 (N.D. Ill. 2013) (finding "that bifurcated discovery would allow the Court to reach a decision on the issue of class certification more expeditiously than it otherwise would")
    - "While the Court recognizes that the boundary between a class determination and the merits may not always be easily discernible, it is possible to discern the general lines in this action." (cleaned up).

Bifurcation of Discovery – *Wal-Mart Stores, Comcast & Halliburton*

- But it is often difficult to determine – and opposing parties are unlikely to agree on – where the line falls.
  - *See, e.g., Ahmed v. HSBC Bank USA, Nat'l Ass'n,* No. ED CV 15-2057 FMO (SPx), 2018 WL 501413, at *3 (C.D. Cal. Jan. 5, 2018) ("[T]he distinction between class certification and merits discovery is murky at best and impossible to determine at worst.").

Bifurcation of Discovery – Targeted Bifurcation on Dispositive Issues

- One approach that parties have taken post-*Wal-Mart* is to determine whether there are issues that are determinative of class certification and, if so, bifurcate on that basis.
- *Wal-Mart* and *Chen-Oster* are good examples. Both involved claims that a uniform, class-wide policy or practice existed. In the absence of such a policy, no class could be certified.
- May be applicable in other employment and consumer class actions.

Bifurcation of Discovery – Targeted Bifurcation on Dispositive Issues

- Other examples:
  - *Akselrod v. MarketPro Homebuyers LLC*, No. CCB-20-2966, 2021 WL 100666, at *2 (D. Md. Jan. 12, 2021) (granting motion to bifurcate discovery and limiting discovery to potentially dispositive issues)
    - "As to the bifurcation of liability and class discovery, the court considers (1) the overlap between individual and class discovery, (2) whether bifurcation will promote Federal Rule of Civil Procedure 23's requirement that certification be decided at 'an early practicable time,' (3) judicial economy, and (4) any prejudice reasonably likely to flow from the grant or denial of a stay of class discovery."
    - "Limited discovery has the potential to simplify the case and to save both parties the time and expense of class discovery, which can be particularly resource intensive." (citation omitted)

Bifurcation of Discovery – Targeted Bifurcation on Dispositive Issues

- *Loreaux v. ACB Receivables Mgmt., Inc.*, No. 14-710 (MAS), 2015 WL 5032052, at *4 (D.N.J. Aug. 25, 2015) (granting motion to bifurcate discovery)
  - "[T]he Court agrees with ACB that a narrow, potentially dispositive issue exists concerning whether ACB's correspondence to Plaintiffs violated the FDCPA's prohibition against deceptive and false communications."

Bifurcation of Discovery – Creative Case Management Plans

- Post-*Wal-Mart*, parties may also be able to strategically limit discovery through creative case management plans.
  - *See, e.g.*, *Singh v. Lenovo (U.S.) Inc.*, No. CCB-20-1082, 2021 WL 1516032, at *4 (D. Md. Apr. 16, 2021):
    - "But neither is the court ordering that *all* merits discovery be completed prior to the class certification determination; indeed, it may be efficient to defer some merits discovery where it does not plausibly overlap with any of the Rule 23 certification requirements. Counsel are expected, as always, to collaborate and to look to proportionality as their guiding principle."
- Prioritization of production of certain documents and data
- Deadlines to ensure that class certification briefing can proceed prior to completion of merits discovery

Motions to Bifurcate

- Target discovery on specific, dispositive issues
  - Evidence and your proffer can make a difference
- Success can turn on the subject matter and Circuit
  - Food & Beverage labeling class actions
  - TCPA class actions
    - *Akselrod v. MarketPro Homebuyers LLC,* 2021 U.S. Dist. LEXIS 5253 (D. Md. Jan. 12, 2021).
    - *Kinzer v. Lifeaid Bev. Co*., 2021 U.S. Dist. LEXIS 237052 (N.D. Cal. Dec. 9, 2021).
    - *Physicians Healthsource Inc. v. Janssen Pharmaceuticals Inc.,* 2014 U.S. Dist. LEXIS 13523 (D.N.J. Feb. 4, 2014).
    - *Ahmed v. HSBC Bank USA, Nat'l Ass'n*, 2018 U.S. Dist. LEXIS 2286 (C.D. Cal. Jan. 5, 2018)
  - Other Exs: FDCPA & FCRA class actions

COST-SHIFTING MOTIONS

Historical Rule—Pay Your Own Way

- The ***presumption*** is that a party must ordinarily pay its own costs to respond to discovery.
  - *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).
- Federal Rule 26(c)
  - "[U]ndue burden or expense"

Historical Rule—*Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003)

Background

- E-discovery case
  - Cost of producing backed up emails ~$300,000

Court's Analysis and Test

- E-Discovery does not unlock the possibility of cost-shifting
- Gating question: *accessibility*

Factors:

- The extent the request is tailored to discover relevant information
- The availability of such information from other sources
- The total cost of production, compared to:
  - The amount in controversy
  - The resources available to each party
- The relative ability of each party to control costs and its incentive to do so
- The importance of the issues
- The relative benefit of the information

Zubulake and *Oppenheimer's* Legacy

2015 Amendments to Rule 26:

- Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and ***proportional to the needs of the case***, considering the ***importance of the issues*** at stake in the action, the ***amount in controversy***, the ***parties' relative access*** to relevant information, the parties' resources, the ***importance of the discovery*** in resolving the issues, and whether the ***burden*** or expense of the proposed discovery ***outweighs its likely benefit***.

- The 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 ***or the allocation of expenses***, for the disclosure or discovery.

- A party need not ***provide discovery of electronically stored information from sources*** that the party identifies as ***not reasonably accessible because of undue burden or cost***. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. . . . The ***court may specify conditions for the discovery***.

Lawson v. Spirit AeroSystems, 2020 U.S. Dist. LEXIS 106817 (D. Kan. June 18, 2020)

Background

- Breach of contract (retirement agreement with a noncompete)
- Spirit ran Plaintiff's search terms on 4 custodians
  - 320,000 documents
    - 400 document sample; 5% were responsive and largely irrelevant
- Discovery Dispute
  - Search terms on sample set from 10 custodians: **7.8% responsiveness rate**
  - New search terms tailored to custodian: **5.1% responsiveness rate**
- Spirit produced 39,000 pages the "old-fashioned way" (i.e., custodian interviews, collections, and linear review)
- Lawson wanted Spirit to use TAR:
  - **3.3% responsiveness rate**
  - **$600,000**

Motion to Shift Costs

- Spirit moved "to shift all costs and attorneys' fees associated with the TAR to Lawson under Rule 26(c) … in order to enforce proportionality standards."

Lawson v. Spirit AeroSystems - **Court's Order:**

- Comparative analysis
  - Given the amount in controversy ($39-53MM), the TAR expenses were not unreasonable
    - But the TAR expenses were not the only document production expenses
    - Spirit complied with discovery obligations and had "borne its fair share"($150K in ESI)
- "Needless discovery" and a "fishing expedition"
- Discovery only tangentially related to issues.
- Lawson had only himself to blame
  - His proposed search terms
  - He pursued TAR even though advised of the low responsive rate

The Tab

- $754,029.46 in TAR expenses
- $94,407.25 in attorneys' fees

Cost-Shifting under Rule 54(d)

Rule:

- "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Federal Rule 54(d)(1).
  - "Costs" is not defined
- The universe of taxable costs is defined by 28 U.S.C. § 1920:
  - Filing fees
  - Deposition costs
  - Printing and witness fees
  - "Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case"
  - Docket fees under 28 U.S.C. § 1923
  - "Compensation of court appointed experts," interpreters, and other interpretation services.

Process:

- File substantiated bill of costs with the court clerk
  - Presumption arises that recovery is proper
- Courts still have discretion to reduce any award

Cost-Shifting under Rule 54(d) – E-Discovery Costs?

Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873 (2019).

- "A statute awarding costs will not be construed as authorizing an award of litigation expenses beyond the six categories listed in 28 U.S.C. §§ 1821 and 1920, absent an explicit statutory instruction to that effect."

Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012).

- Bill of costs itemized over $365,000 in e-discovery charges (collection, processing, TIFF conversion, OCR, and production)
- Holding: to be taxable under § 1920(4), e-discovery costs must be incurred for the "physical preparation and duplication of documents."
  - Rule 54 cannot be used to tax the cost of all the services that precede the making of an electronic copy, such as "gathering, preserving, processing, searching, culling, and extracting ESI."

Other Courts:

- Fourth Circuit: *Country Vintner of N.C. LLC v. Gallo Winery, Inc.*, 718 F.3d 249 (4th Cir. 2013)
- Ninth Circuit: *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914 (9th Cir. 2015)
- D.C. Circuit: *Barko v. Halliburton Co.*, 954 F.3d 307 (D.C. Cir. 2020)

The Other Side of the Coin – Rule 45

- "A party or attorney responsible for issuing and serving a subpoena must take ***reasonable steps to avoid imposing undue burden or expense*** on a person subject to the subpoena."
  - Federal Rule 45(d)(1).
- Compliance with a subpoena "may be required only as directed in the order, and ***the order must protect a person who is neither a party*** nor a party's officer ***from significant expense*** resulting from compliance."
  - Federal Rule 45(d)(2)(B).
- *Legal Voice v. Stormans Inc.*, 738 F.3d 1178 (9th Cir. 2013):
  - Where a court compels complete or partial compliance with a subpoena, cost-shifting under Rule 45(d) is mandatory whenever a non-party incurs "significant expense" in responding.

Practical Considerations & Guardrails

- **Get ahead of the issue**
  - Rule 26 > Rule 54
- **Be proactive**
  - Discovery obligations
  - Propose alternatives
- **Paper the record**
- **Sampling is an effective tool**
- **Comparative analysis:** the benefit versus the cost
- **Be mindful of your ask**
- **Expect the court to split the middle**

OTHER STRATEGIES TO LIMIT DISCOVERY

Bifurcation of Discovery – Creative Case Management Plans

E. Pre-Class Certification Motion Fact Discovery

a. The parties may serve Requests for Production ("RFP") beginning on March 27, 2020.

b. Document productions in response to RFPs shall be made on a rolling basis. To the extent formally requested by Plaintiffs, and not objected to, Defendants will prioritize the production of documents and data (a) previously produced to government regulators, if any, and (b) responsive to Plaintiffs' document requests designated to be prioritized.

c. Follow up RFPs related to class certification issues must be served on or before September 15, 2020 or within 30 days of production of documents. The production of documents responsive to Plaintiffs' prioritized requests must be substantially complete by December 18, 2020. The issuance of a follow up RFP or the production of documents after December 18, 2020 does not impact the briefing schedule for class certification motions unless a party's production of documents responsive to the prioritized requests was not substantially complete by December 18, 2020.

Other Strategies to Limit Discovery

- Reliance on proportionality requirement of Federal Rules of Civil Procedure Rule 26:

(b) DISCOVERY SCOPE AND LIMITS.

- (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Motion to Strike Class Allegations

Rule:

- The court may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly."
  - Federal Rule 23(d)(1)(D).

Standard:

- "The complaint itself demonstrates that the ***requirements for maintaining a class action cannot be met***," and "***no amount of discovery will demonstrate that the class can be maintained***."
  - *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 284 F.R.D. 238 (E.D. Pa. 2012).

Practical Guidelines:

- Tool that should be used sparingly
- Often denied to allow plaintiffs an "adequate opportunity to conduct formal discovery in support of class certification"
  - *Sousa v. 7-Eleven Inc.*, 2020 U.S. Dist. LEXIS 204290 (S.D. Cal. Nov. 2, 2020).

Motion to Strike – Strategies & Arguments

Typicality

- *Bund v. Safeguard Props., LLC*, 2016 U.S. Dist. LEXIS 198793 (W.D. Wash. Mar. 2, 2016).

Predominance

- Standing
  - *Cashatt v. Ford Motor Co.*, 2020 U.S. Dist. LEXIS 73749 (W.D. Wash. Apr. 27, 2020).
- Causation
  - *Duvio v. Viking Range Corp.*, 2013 U.S. Dist. LEXIS 38592 (E.D. La. Mar. 20, 2013).
  - *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1152 (N.D. Cal. 2010).
- Differences in substantive law
  - *Sultanis v. Champion Petfoods United States Inc.*, 2021 U.S. Dist. LEXIS 145293 (N.D. Cal. Aug. 3, 2021).

Inadequate class definition

- Vague
  - *Conigliaro v. Norwegian Cruise Line Ltd.*, 2006 U.S. Dist. LEXIS 95576 (S.D. Fla. Sept. 1, 2006).
- Fail-Safe
  - *Bell v. Cheswick Generating Station, Genon Power Midwest LP*, 2015 U.S. Dist. LEXIS 9791 (W.D. Pa. Jan. 28, 2015).
  - *Tomaszewski v. Circle K Stores Inc.*, 2021 U.S. Dist. LEXIS 123798 (D. Ariz. Jan. 12, 2021).
- Overbroad
  - *Shabaz v. Polo Ralph Lauren Corp.*, 586 F. Supp. 2d 1205 (C.D. Cal. 2008).

Ascertainability

- *In re Vioxx Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 78954 (E.D. La. June 6, 2012).

Special Masters

- Rule 53 – Court may appoint special master
- Benefits:
  - Case manager
    - Oversees the discovery process in a neutral manner, litigants demonstrate that they are committed to participating in discovery in good faith.
    - Creation of a logical discovery plan, such as the scope of preservation, collection, and access.
  - Neutral arbiter
    - Facilitates agreement and compromise between parties to mutual advantage.
    - Provides parties an opportunity to resolve disputes without either party compromising its litigation strategy.

Cautionary Tale - *In re Pradaxa Products Liability Litigation*, 2013 U.S. Dist. LEXIS 173674 (S.D. Ill. Dec. 9, 2013).

- Class-action product liability case
- Financial sanctions against a pharmaceutical company for:
  - Failure to preserve certain records, and
  - Failure to implement adequate litigation holds.
- The court ruled in favor of the plaintiffs, characterizing the defendants' litigation hold as "grossly inadequate for a litigation of [such] scope and size."