UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MISLAV BASIC, NATHAN GRUBER, KEVIN BOUDREAU, DANIEL SCHWAIBOLD, and KEITH ZACHARSKI, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BPROTOCOL FOUNDATION, LOCALCOIN, LTD., GALIA BEN-ARTZI, GUY BEN-ARTZI, EYAL HERTZOG, YEHUDA LEVI, and BANCOR DAO,

Defendants.

Case No: 1:23-cv-00533-ADA

REPLY IN SUPPORT OF NON-PARTY JENNIFER ALBERT'S MOTION FOR A PROTECTIVE ORDER TO ENFORCE THE STATUTORY STAY OF DISCOVERY

ARGUMENT

Plaintiffs' opposition confirms the impropriety of their effort to obtain discovery from Ms. Albert. They cannot deny that their purpose in seeking discovery is to cure pleading failures that led to dismissal of their claims as to every defendant other than a non-existent partnership. To that end, Plaintiffs demanded extensive discovery from Ms. Albert expressly targeting the dismissed defendants and the very issues upon which the dismissal was based. Plaintiffs' tactic is improper and would impose an undue burden on Ms. Albert.

Strikingly, Plaintiffs still point to *no* securities cases in which a court has granted merits discovery based on a complaint that fails to meet the pleading threshold. This Court should not be the first. Instead, Plaintiffs make three arguments: (i) that no stay applies because no motion to dismiss is pending; (ii) that Ms. Albert has not demonstrated good cause for a protective order; and (iii) that the Court has an "affirmative duty" to assess jurisdiction. All three arguments fail.

I. Plaintiffs Cannot Evade the Stay of Discovery Imposed By Congress.

Courts routinely enforce the Private Securities Litigation Reform Act of 1995 ("PSLRA") stay of discovery until the complaint has been tested, even if no motion to dismiss is pending. As explained in Ms. Albert's motion, courts in this Circuit recognize that the statutory stay "has been interpreted to mean that discovery is stayed from the filing of the complaint until the court has determined the sufficiency of the plaintiff's pleading, unless the plaintiff can establish one of the exceptions." *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 709 (S.D. Tex. 2002) (enforcing the stay even while no motion to dismiss was pending). To grant "discovery before the court has decided whether [plaintiffs] have satisfied the PSLRA's heightened pleading standard would eviscerate that heightened pleading standard." *Davis v. Duncan Energy Partners L.P.*, 801 F. Supp. 2d 589, 595 (S.D. Tex. 2011). The same logic applies with greater force here, where the complaint failed to withstand a dispositive motion on grounds that apply equally to the one remaining defendant.

In response, Plaintiffs fail to point to even a single securities case permitting discovery while the sufficiency of the complaint remains at issue. Instead, Plaintiffs argue that the Court should ignore the Congressional purpose and hold that no stay technically applies.[1] But their argument is contradicted by the only securities case they cite from within this Circuit, *Dartley v. Ergobilt, Inc.*, No. CIV.A.3:98-CV-1442, 1998 WL 792500 (N.D. Tex. Nov. 4, 1998). In *Dartley*, the district court affirmed the magistrate's decision to allow narrow discovery under one of the PSLRA's narrow exceptions (to preserve evidence) after concluding that the "intent [of the PSLRA] would not be frustrated" by allowing a single deposition of a willing deponent who otherwise resided beyond the subpoena power of the court. *Id.* at *2. Here, by contrast, Plaintiffs do not argue the stay's exceptions apply, and transparently seek discovery for precisely the purpose that Congress sought to prevent. (*See also* Mot. Protective Order at 7-8.)

Plaintiffs are not saved by their out-of-circuit securities cases permitting discovery in aid of class certification or a class settlement (Opp. at 5-6), as none of those cases permit merits discovery before the complaint withstands analysis on a pleading standard. Indeed, those cases demonstrate the limited scope of permissible discovery even after the sufficiency of the complaint is no longer at issue, and thus provide no support Plaintiffs' attempt to flout the intent of Congress by opening discovery to cure pleading failures that would otherwise require dismissal. Finally, Plaintiffs' absurd results argument does not hold up (Opp. at 7) as the stay merely operates to stay discovery ***until*** the sufficiency of the complaint has been tested via a motion for default judgment.

[1] Plaintiffs' non-securities cases cited in support of a purely textual reading have nothing to do with securities cases, and thus say nothing about whether a stay of discovery is either necessary or appropriate to effectuate the clear Congressional purpose of the PSLRA. *See United States v. Moore*, 71 F.4th 392, 395 (5th Cir. 2023) (discussing statute criminalizing sexual exploitation of children); *Franco v. Mabe Trucking Co., Inc.*, 3 F.4th 788, 792 (5th Cir. 2021) (discussing statute requiring transfer based on lack of jurisdiction).

II. Ms. Albert has Established Good Cause for a Protective Order.

Ms. Albert has shown good cause for a protective order because the discovery sought is not warranted in aid of default judgment and is precisely what Congress sought to prevent in securities cases and thus imposes an undue burden unless Plaintiffs first adequately state a claim.

Plaintiffs question Ms. Albert's standing, but they issued their proposed subpoena to Ms. Albert, do not deny that they would seek to reissue that subpoena to her if their motion to open discovery were granted, and cannot dispute that a motion for protective order is the proper mechanism for a non-party to protect itself from such unwarranted discovery. *See Fund Texas Choice v. Deski*, No. 22-CV-859, 2023 WL 8532404, at *1-2 (W.D. Tex. Dec. 8, 2023) (granting non-party a protective order when preliminary issues might dispose of the case).

Plaintiffs next argue that Ms. Albert fails to establish good cause for a protective order because she has not separately contested the burden of each of the myriad requests in the Proposed Subpoena. (Pls.' Opp. to Mot. for a Protective Order at 3 ("Opp."), Dkt. No. 84). But Plaintiffs cite no authority to suggest that good cause must be unique to each request, and they rely on cases where discovery was open and the only question was the proper scope. *See Humphries v. Progressive Corp.*, No. 20-cv-548, 2022 WL 1018404 (N.D. Tex. Apr. 5, 2022); *Anzures v. Prologis Texas I LLC*, 300 F.R.D. 316 (W.D. Tex. 2012). Here, by contrast, Plaintiffs filed a motion seeking leave to conduct discovery as none would otherwise be permitted under the law. Because Congress has made clear that imposing discovery obligations in a securities case before Plaintiffs sufficiently state a claim is an undue burden, and because the Complaint has already been held deficient by this Court, any burden on Ms. Albert is an undue burden and good cause exists for a protective order. (*See* Non-Party Jennifer Albert's Motion for a Protective Order to Enforce the Statutory Stay of Discovery at 1, 4-8, ("Protective Order Mot."), Dkt. No. 82).

While Plaintiffs dispute the strict application of the statutory stay, they cannot refute Congress' clear purpose to prevent securities plaintiffs from seeking discovery to meet their pleading burden. (*See* Protective Order Mot. at 7-8 (citing *In re Cassava Scis., Inc. Sec. Litig.*, No. 21-cv-00751, 2023 WL 28436, at *2, 4 (W.D. Tex. Jan. 2, 2023)). Plaintiffs' response that those courts extended the stay as a matter of discretion rather than strict application of the statute (*see* Opp. at 3-4), simply confirms that courts routinely effectuate Congress's stated purpose by finding that good cause exists not to grant discovery under comparable circumstances.[2]

III. Plaintiffs' Anticipated Motion for Default Judgment Will Be Properly Considered Based on the Allegations Without Discovery.

Plaintiffs misconstrue the standard on a motion for default judgment to dispute that their motion should be judged on a pleading standard and to assert that the Court has an "affirmative duty" to investigate personal jurisdiction. *See* Opp. at 5-9, 9 n.4.

First, Plaintiffs' authority confirms that default judgment is properly determined on the pleadings. *See Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 & n.3 (5th Cir. 2015). Plaintiffs cite *Wooten* to argue that the Fifth Circuit "decline[d] to import Rule 12 standards into the default judgment context," but they misrepresent *Wooten*. Rule 12 is a procedural rule for when and how defenses are presented. *Wooten* expressly assessed the sufficiency of the pleadings under the applicable standard in that case, Fed. R. Civ. P. 8(a), and explained that plaintiffs must meet that standard even if not invoked through the standard of a Rule 12 motion to dismiss. *See id.* Taking the same approach here, the pleading must be assessed on the standards set out in Rule 9(b) and the PSLRA (applicable to securities fraud cases), regardless of the procedural posture.

[2] Plaintiffs' argument that Ms. Albert has not met the standard to justify a stay of discovery relies entirely on cases that arise outside the securities context. *See Griffin v. Am. Zurich Ins. Co.*, No. 14-CV-2470, 2015 WL 11019132, at *1-2 (N.D. Tex. Mar. 18, 2015) (no securities claims); *Sw. Bell Tel., L.P. v. UTEX Commc'ns Corp*, No. 07-CV-435, 2009 WL 8541000, at *1 (W.D. Tex. Sept. 30, 2009) (same); *In re Terra Int'l, Inc.*, 134 F.3d 302, 305-06 (5th Cir. 1998) (same).

Second, Plaintiffs argue that the Court has an affirmative duty to investigate personal jurisdiction. (Opp. at 7-8.) But that rule provides for an evidentiary hearing to confirm Plaintiffs' allegations or establish damages, not a license for discovery. Fed. R. Civ. P. 55(b)(2)(B), (C). In other words, the Court's duty is to test the sufficiency and validity of well plead allegations, *not* to sanction fishing expeditions where the allegations fall short.

Plaintiffs' authority confirms the point. In *Box v. Dallas Mexican Consulate General*, 487 F. App'x 880, 885 (5th Cir. 2012), the court distinguished a case where plaintiffs had failed to allege facts that would establish jurisdiction, and agreed that "discovery should be ordered circumspectly and only to verify allegations of specific facts . . . ." *Id.* (finding discovery would be appropriate on a "discrete issue" where the defendant contested a factual allegation).[3]

Plaintiffs cite no case in which the Court permits a fishing expedition into jurisdiction or merits discovery based on a complaint that fails to plead sufficient facts. And this cart-before-the-horse approach directly contravenes the will of Congress, where seeking discovery to meet the PSLRA's pleading burden is an impermissible purpose. *See* Protective Order Mot. at 1-2, 7-9.

CONCLUSION

The Court should grant Ms. Albert's Motion for a Protective Order.

[3] The remainder of Plaintiffs' cases confirm that a court's duty on a default judgment is to test whether Plaintiffs' well-plead allegations are sufficient, not to open discovery in a hunt for new facts. In *LMC Properties, Inc. v. Prolink Roofing Systems, Inc.*, No. 23-11090, 2024 WL 4449421, at *6 (5th Cir. Oct. 9, 2024), the court held that it was error to enter default judgment without addressing jurisdiction. Here too it would be error to ignore Plaintiffs' failure to plead a basis for jurisdiction. And *Viahart, LLC v. Chickadee Business Solutions, LLC*, No. 19-CV-406, 2021 WL 6333033 (E.D. Tex. July 2, 2021) and *Orr Auto, Inc. v. Autoplex Extended Services, LLC,* No. 24-CV-00029, 2024 WL 4901519 (E.D. Tex. Oct. 21, 2024), assess personal jurisdiction based on the pleadings, recognizing that on a default motion "a plaintiff can only offer evidence it can discover on its own." And in *Mwani v. bin Laden*, the case the *Viahart* court cited for this rule, the D.C. Circuit affirmed the district court's denial of jurisdictional discovery. 417 F.3d 1, 17 (D.C. Cir. 2005).

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Travis C. Barton*
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