DOCKET NO X08 FST CV 18 6038160 S	:	SUPERIOR COURT
CITY OF LIVONIA RETIREE HEALTH AND DISABILITY BENEFITS PLAN, Individually and on Behalf of Others Similarly Situated	:	COMPLEX LITIGATION DOCKET
v.	:	AT STAMFORD
PITNEY BOWES INC., et al.	:	MAY 15, 2019

MEMORANDUM OF DECISION RE DEFENDANTS' MOTIONS FOR PROTECTIVE ORDER STAYING DISCOVERY PURSUANT TO 15 U.S.C. SECTION 77z-1(b) (1) (#135 AND #143)

Currently before the court are the motions of the defendants Pitney Bowes Inc. and various officers (the Pitney Bowes defendants) and of Goldman Sachs & Co. LLC and various underwriters (the Underwriter defendants) (collectively, the defendants) for a protective order to enforce an automatic stay of discovery during the pendency of a "motion to dismiss," pursuant to § 77z-1(b) (1) of the Securities Act of 1933, 15 U.S.C. § 77a-77aa (the Securities Act). The plaintiff maintains that this section pertains only to actions pending in federal court and is not applicable to proceedings pending in state court. All parties agree that this is a question of first impression in Connecticut.

For the reasons more fully set forth below, the court finds that 15 U.S.C. § 77z-1(b) (1) is applicable to this state action under the Securities Act and that defendants have demonstrated good cause in support of their motion for a protective order. Accordingly, the motion is granted and discovery in this action is stayed during the pendency of the defendants' motion to strike.

Background

This action was commenced on or about August 24, 2018 on behalf of the plaintiff City of Livonia Retiree Health and Retiree Health and Disability Benefits Plan against the defendants as a purported securities class action under the Securities Act on behalf of purchasers of two series of Pitney Bowes notes offered in connection with an initial public offering on September 13, 2017. The complaint alleges harm arising from misrepresentations and omissions contained in the relevant registration statement and prospectus. The complaint alleges subject matter jurisdiction pursuant to § 52-1 of the Connecticut General Statutes and § 22 of the Securities Act.

The instant motions to enforce the automatic stay were filed on December 21, 2018, along with memoranda of law and supporting exhibits. The plaintiff filed its memorandum in opposition on January 11, 2019. The defendants filed reply memoranda on February 1, 2019, along with motions to strike the complaint. The instant motions were heard on April 5, 2019, and the plaintiff filed a sur-reply on April 12, 2019.

Contentions of the Parties

The defendants contend that they have demonstrated good cause for the granting of a protective order staying discovery during the pendency of their motions to strike the complaint because they have demonstrated entitlement under the Securities Act and because discovery in this securities class action could be very extensive, but also unnecessary if the motions to strike are granted. The defendants contend that the motion to strike the complaint under Section 10-39 (a) of the Connecticut Practice Book is equivalent to a motion to dismiss under Section 12(b)(6) of the Federal Rules of Civil Procedure.

The plaintiff contends that the automatic stay provision applies only to actions pending in federal court and that federal law should not supersede state procedural law. Plaintiff also argues that the federal motion to dismiss is not comparable to the Connecticut motion to strike because the latter permits the losing respondent to attempt to replead to correct the defects on which the motion to strike was granted. Finally, plaintiff asserts that defendants have failed to demonstrate good cause sufficient to justify the requested protective order.

Discussion

15 U.S.C. Section 77z-1(b)(1) provides, "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."

In a recent decision, the Unites States Supreme Court provided useful context to this provision:

> In the wake of the 1929 stock market crash, Congress enacted two laws, in successive years, to promote honest practices in the securities markets. The 1933 Act required companies offering securities to the public to make "full and fair disclosure" of relevant information. Pinter v. Dahl, 486 U.S. 622, 646, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988). And to aid enforcement of those obligations, the statute created private rights of action. Congress authorized both federal and state courts to exercise jurisdiction over those private suits. See § 22(a), 48 Stat. 86 ("The district courts of the United States ... shall have jurisdiction[,] concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title"). More unusually, Congress also barred the removal of such actions from state to federal court. Id., at 87 ("No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States"). So if a plaintiff chose to bring a 1933 Act suit in state court, the defendant could not change the forum.

Congress's next foray, the Securities Exchange Act of 1934 (1934 Act), operated differently. See 48 Stat. 881, as amended, 15 U.S.C. § 78a et seq. That statute regulated not the original issuance of securities but instead all their subsequent trading, most commonly on national stock exchanges. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 752, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). The 1934 Act, this Court held, could also be enforced through private rights of action. See id., at 730, and n. 4, 95 S.Ct. 1917. But Congress determined that all those suits should fall within the "exclusive jurisdiction" of the federal courts. § 27, 48 Stat. 902–903. So a plaintiff could never go to state court to litigate a 1934 Act claim.

In 1995, the Private Securities Litigation Reform Act (Reform Act), 109 Stat. 737, amended both the 1933 and the 1934 statutes in mostly identical ways. Congress passed the Reform Act principally to stem "perceived 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, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006). Some of the Reform Act's provisions made substantive changes to the 1933 and 1934 laws, and applied even when a 1933 Act suit was brought in state court. For instance, the statute created a "safe harbor" from federal liability for certain "forward-looking statements" made by company officials. 15 U.S.C. § 77z–2 (1933 Act); § 78u–5 (1934 Act). Other Reform Act provisions modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court. To take one example, the statute required a lead plaintiff in any class action brought under the Federal Rules of Civil Procedure to file a sworn certification stating, among other things, that he had not purchased the relevant security "at the direction of plaintiff's counsel." § 77z–1(a)(2)(A)(ii) (1933 Act); § 78u–4(a)(2)(A)(ii) (1934 Act).

But the Reform Act fell prey to the law of "unintended consequence[s]." Dabit, 547 U.S., at 82, 126 S.Ct. 1503. As this Court previously described the problem: "Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law." Ibid. That "phenomenon was a novel one"—and an unwelcome one as well. Ibid. To prevent plaintiffs from circumventing the Reform Act, Congress again undertook to modify both securities laws.

The result was SLUSA [the Securities Litigation Uniform Standards Act of 1998], whose amendments to the 1933 Act are at issue in this case.

Cyan, Inc. v. Beaver County Employees Ret. Fund, 138 S. Ct. 1061, 1066–67, 200 L. Ed. 2d 332 (2018) ("*Cyan*"). In *Cyan,* the Court held that private causes of action under the Securities

Act filed in state court were not barred by the Reform Act or by SLUSA. Id., 138 S. Ct. 1078 ("SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations.") The Court did not directly address the stay provision at issue here.

In order to interpret the meaning of the phrase "In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss," the court is guided by consistent federal and state principles of statutory interpretation, in particular, the Plain Meaning Rule. As recently stated by our supreme court, "Because these questions require that we interpret a federal statute, we begin by setting forth the rules and principles that govern our interpretation of federal law. 'With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule. . . .'" *CCT Communications, Inc. v. Zone Telecom, Inc.*, 327 Conn. 114, 140 (2017). This approach is consistent with that mandated by Connecticut General Statute Section 1-2z with regard to the interpretation of Connecticut statutes using the Plain Meaning Rule.[1] "Accordingly, our analysis of the federal statutes in the present case begins with the plain meaning of the statute. . . . If the text of a statute is ambiguous, then we must construct an interpretation consistent with the primary purpose of the statute as a whole.... [*United States v. Ripa*, 323 F.3d 73, 81 (2d Cir.2003)]; see also *In re Caldor Corp.*, 303 F.3d 161, 167–68 (2d Cir.2002) ([a]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond

[1] Conn. Gen. Stat. § 1-2z (Plain Meaning Rule) provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

the plain language of the statute ...)." *Szewczyk v. Dep't of Social Services*, 275 Conn. 464, 476 (2005).

Analysis

A. The Plain Meaning of 15 U.S.C. § 77z-1(b) (1)

Applying the principles of statutory construction set forth above as to the Plain Meaning Rule, the court parses the phrase in 15 U.S. C. § 77z-1(b) (1), "In any private action arising under this subchapter," as follows:

1. "This subchapter" refers to Title 15, Chapter 2A – Securities and Indentures, Subchapter I – Domestic Securities, which is the Securities Act of 1933 and confers concurrent jurisdiction on state and federal courts.
2. "[A]ny private action arising under this subchapter" is to be contrasted with the language of subsection 77z-1(a) (Private Class Actions) (1), which provides, "The provisions of this subsection shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." This language makes clear that 77z-1(a) (1) applies only to actions commenced in federal court. Accord, *Cyan,* supra, 138 S Ct. 1066. Because 77z-1(b) (1) does not contain the same language, the inference is strong that it is not limited to actions commenced pursuant to the Federal Rules of Civil Procedure, i.e., in federal court. See *Clay v. United States*, 537 U.S. 522, 528–29, 123 S. Ct. 1072, 1077, 155 L. Ed. 2d 88 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we have recognized, it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion.") (Internal citations, quotation marks omitted).

3. Section 77z-2 (c)(1) provides a "safe harbor" "in any action arising under this subchapter," using language identical to the language at issue in this case in Section 77z-1(b)(1). As noted above, the U.S. Supreme Court in *Cyan* said "Some of the Reform Act's provisions made substantive changes to the 1933 and 1934 laws, and applied even when a 1933 Act suit was brought in state court. For instance, the statute created a "safe harbor" from federal liability for certain "forward-looking statements" made by company officials. 15 U.S.C. § 77z–2 (1933 Act)." *Cyan,* supra, 138 S. Ct. 1061. Because the Supreme Court held that language identical to that at issue here applies to both state and federal actions commenced under the Securities Act, the inference is strong that Section 77-1(b)(1) was meant to apply to actions pending in state court as well as in federal court.
4. Notably, a Safe Harbor provision, 77z-2 (f) (Stay pending decision on motion), provides that, "In any private action arising under this subchapter, the court shall stay discovery (other than discovery that is specifically directed to the applicability of the exemption provided for in this section) during the pendency of any motion by a defendant for summary judgment that is based on [enumerated] grounds. . . ." Accordingly, this section, which the Supreme Court expressly held applies to state as well as federal actions, also contains a stay of discovery during the pendency of a motion relevant to a determination of the merits of the action.

As a result of the foregoing, the court concludes that 15 U.S.C. Section 77z-1(b) (1) is not ambiguous and that its plain meaning compels the conclusion that the statute, providing for a stay

of discovery during the pendency of a motion to dismiss, applies to actions commenced in state court under the Securities Act, as well as such actions commenced in federal court.

B. Other considerations

The plaintiff notes that the federal motion to dismiss contained in Federal Rule of Civil Procedure 12(b)(6) and the Connecticut motion to dismiss contained in Practice Book Section 10-30 are profoundly different, the former dealing with, inter alia, a failure to state a claim for which relief can be granted, and the latter dealing with a challenge to jurisdiction. However, our Supreme Court in *DeLaurentis v. City of New Haven*, 220 Conn. 225, 239–40 (1991) held, "The District Court had granted the defendants' motion to dismiss DeLaurentis' federal action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Such a motion is similar to our motion to strike; Practice Book § 152 [now codified at § 10-39]; and permits the court to dismiss the complaint for failure 'to state a claim upon which relief can be granted.'" Accordingly, this court holds that the difference in nomenclature between a federal motion to dismiss and Connecticut's motion to strike is a distinction without a difference. The plaintiff's point that the losing party may be allowed to replead after losing a motion to strike does not alter the nature of the rule, which is a challenge to the merits of the claim based on the pleading contained in the complaint, which is also the purpose of a federal motion to dismiss under FRCP 12(b)(6).

The plaintiff also contends that state law should govern whether a stay of discovery is to be granted because it is a procedural issue and not a substantive one. The short answer to that contention is that the U.S. Supreme Court in *Cyan* recently held that the Safe Harbor statute, containing a stay of discovery pending a summary judgment motion, is applicable to state proceedings under the Securities Act. As our Supreme Court recently held in *Mangiafico v. Farmington*, 2019 WL 1591526 at *12 (released April 12, 2019) ("This does not mean, of course,

that state courts hearing [federal] claims are free to depart from United States Supreme Court precedent governing the construction and application of the federal statute. Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 315–23, 5 L. Ed. 257 (1821)." As result, the court is bound by the decision in *Cyan* approving the application to a state court action of a provision of the Securities Act that stays discovery during the pendency of a substantive pretrial motion. [2]

C. Good cause

Practice Book Section 13-5 provides, "Upon motion by a party from whom discovery is sought, and for good cause shown, the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; [and] (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place . . . ." The court finds that the defendants have shown good cause justifying a protective order staying discovery during the pendency of their motion to strike because of the application of 15 U.S.C. Section 77x-1(b)(1), because the requested discovery is extensive and may be unnecessary given the pendency of the motion to strike, and because the plaintiff has not

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[2] On April 9, 2019, the parties provided copies of several unreported decisions, some of which reached contrary decisions. Those decisions by California state courts predated the Supreme Court's decision in *Cyan*, which controls this court's decision, with one exception. That California case, *Switzer v. W.R. Hambrecht & Co., LLC*, 2018 WL 4704776 (Cal. Super. Ct., September 19, 2018) held in a one paragraph ruling that the provision at issue applies only to actions pending in federal court; however it does not appear that *Cyan* was brought to the court's attention.

On April 13, 2019, the plaintiff filed a sur-reply in which it additionally cited an unreported decision by a Michigan Circuit Court, *In re Ally Financial Securities Litigation,* Case No. 2016-013616–CB, slip op. at 3-4 (Aug. 1, 2018). In that case, the court denied without argument the defendants' motion for a stay pending a decision on their motion to dismiss. The court acknowledged the application of *Cyan*, but also noted the exception to the automatic stay in Section 77z-1(b) (1), "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." Noting that the events at issue in the case occurred in 2014, plaintiffs' suits were filed in 2016 and 2017, and a prior stay was granted awaiting the decision in *Cyan*, the court held, "The delay exposes plaintiffs to faded memories and prejudices. The court concludes under state law, and the circumstances of this case, do not warrant a further stay." Id., at *3. Here, the public offering occurred on September 13, 2017, and the action was commenced less than a year thereafter. As a result, the court finds different circumstances from those found by the court in the *Ally Financial* decision.

demonstrated any prejudice arising from the stay. *Coss v. Steward*, 126 Conn. App. 30, 47 (2011) (protective order staying discovery during pendency of summary judgment motion affirmed, no prejudice shown).[3]

Conclusion

For the reasons set forth above, the court grants a stay of pretrial discovery during the pendency of the motions to strike (Docket Nos. 146 and 149). If the motions to strike are denied, defendants' motions for a protective order may be reclaimed for reconsideration on their merits.

Charles T. Lee

Hon. Charles T. Lee

Decision entered in accordance with the foregoing May 15, 2019. Supp-Court Affrs All Counsel notified

[3] The plaintiff places considerable reliance on the decision in *Contreras v. Enerlume Energy Management Corp*, Complex Litigation Docket at Waterbury, Docket No. X10 UWY 06 64013754, 2008 WL 642968 (Feb. 22, 2008), which denied a stay of discovery during the pendency of an imminent motion to strike, despite a stay in a parallel federal proceeding pursuant to Section78u-4(b) (3)(B), because defendants did not provide any evidence as to the extent of the requested discovery in the state action. The court finds reliance on this case misplaced. Section 78u-4(b) (3) (B) amends the Securities Exchange Act, which provides for exclusive jurisdiction in federal court, so that section was plainly not binding on the state court. The court stated, "Defendant concedes that this court is not bound by the federal statute," which is not the case here. Further, the defendants in this case have provided information relating to the extensive discovery they and their auditor would face if a stay is not granted in this action. See Exhibits C, D and E to the motion of the Pitney Bowes defendants for a protective order staying discovery, D.N. 138, 139 and 140.