UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXAS PACIFIC LAND TRUST and, solely in their respective capacities as trustees for Texas Pacific Land Trust, DAVID E. BARRY and JOHN R. NORRIS III, Plaintiffs, v. ERIC L. OLIVER, Defendant. and ERIC L. OLIVER, SOFTVEST, L.P., HORIZON KINETICS LLC, and ART-FGT FAMILY PARTNERS LIMITED, Counterclaim Plaintiffs, v. DAVID E. BARRY and JOHN A. NORRIS III, in their individual capacities and in their capacities as trustees for the Texas Pacific Land Trust, Counterclaim Defendants.	Case No. 3:19-CV-01224-B

COUNTERCLAIM PLAINTIFFS' BRIEF IN RESPONSE
TO PLAINTIFFS' MOTION TO LIFT PSLRA DISCOVERY STAY

GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6911
Telephone: (214) 698-3100
Facsimile: (214) 698-3400

Attorneys for Counterclaim Plaintiffs Eric L. Oliver, SoftVest, L.P., Horizon Kinetics LLC, and ART-FGT Family Partners Limited

July 22, 2019

TABLE OF CONTENTS

Page Toc14682024

TABLE OF CONTENTS
(Continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes

TABLE OF ABBREVIATIONS

AC	Plaintiffs' Amended Complaint, dated May 22, 2019 (Dkt. 15)
Broadridge	Broadridge Financial Solutions, Inc.
DoT	Declaration of Trust, dated February 1, 1888 (Dkt. 15, Ex. A)
EM Decl.	Declaration of Ed McCarthy, dated June 25, 2019 (Dkt. 38, App. 8–19)
EO Decl.	Declaration of Eric L. Oliver, dated June 25, 2019 (Dkt. 38, App. 181–90)
Horizon	Horizon Kinetics LLC
Incumbents	David E. Barry and John R. Norris III
JK Decl.	Declaration of Jay Kesslen, dated June 24, 2019 (Dkt. 38, App. 1–2)
Kelley Drye	Kelley Drye & Warren LLP
NYSE	New York Stock Exchange
PBr.	Plaintiffs' Memorandum of Law in Support of Expedited Motion for Limited Discovery Related to Counter-Plaintiffs' Declaratory Judgment and Preliminary Injunction Motion (Dkt. 55)
PSLRA	Private Securities Litigation Reform Act of 1995, as amended
RJN	Defendant Eric L. Oliver's Request for Judicial Notice, dated June 17, 2019 (Dkt. 21)
SEC	U.S. Securities and Exchange Commission
SoftVest	SoftVest, L.P. and SoftVest Advisors, LLC
Tessler LPs	ART-FGT Family Partners Limited and Tessler Family Limited Partnership
TPL or Trust	Texas Pacific Land Trust
Wu Decl.	Declaration of Aric H. Wu, dated July 22, 2019 (filed concurrently with this Brief)

INTRODUCTION

On June 25, 2019, Counterclaim Plaintiffs, shareholders of Plaintiff Texas Pacific Land Trust, moved for a declaratory judgment and preliminary injunction (the "DJ/PI Motion," Dkt. 36). The legal issues raised in the DJ/PI Motion concern the scope of the authority and obligations of TPL's trustees: (i) whether they were required to hold a special meeting of shareholders to elect a trustee after one of TPL's trustees resigned; (ii) whether they have the authority to determine that a shareholder nominee for trustee is "disqualified" from ever becoming a trustee; and (iii) whether they have the authority, without prior approval from TPL shareholders or a court, to postpone a noticed special meeting of shareholders to elect a successor trustee (and, if not, whether shareholders were entitled to proceed with the meeting).

Because the powers and duties of TPL's trustees are governed by TPL's constitution, its Declaration of Trust—not any documents or information in Counterclaim Plaintiffs' possession—Counterclaim Plaintiffs explained in their motion papers that no discovery was needed to resolve the motion and sought an expedited hearing in early August 2019. Dkt. 41 at 8. But Plaintiffs and Counterclaim Defendants John A. Norris III, a TPL trustee, and David E. Barry, a purported TPL trustee, refused to agree to any expedition until Counterclaim Plaintiffs agreed to (i) voluntarily produce 15 categories of documents; (ii) voluntarily produce four witnesses (and direct a non-party to produce a fifth witness) for deposition; (iii) voluntarily respond to 24 interrogatories; and (iv) provisions allowing the parties to move for compulsory production of additional documents, depositions, or interrogatory responses and a continuance of the (late September 2019) hearing date due to any "delay" resulting from additional discovery. In a good faith effort to resolve the matter, Counterclaim Plaintiffs agreed.

Because Counterclaim Plaintiffs maintain that no discovery is required to resolve the DJ/PI Motion, they do not seek compulsory production of any discovery from Plaintiffs.

By contrast, TPL and Messrs. Norris and Barry now seek to impose on Counterclaim Plaintiffs the additional unnecessary cost and burden of responding by August 1, 2019 to what they euphemistically call "limited discovery," but that collectively amounts to 59 additional document requests and 13 additional interrogatories. PBr. Ex. 1. Plaintiffs profess that "*Counter-Plaintiffs Hold All Relevant Evidence*," PBr. 17 (emphasis in original), but never explain in their motion why *any* evidence regarding the scope and authority of TPL's trustees would be in Counterclaim Plaintiffs' possession, rather than TPL's possession.

In reality, the discovery Plaintiffs seek is not related to the legal issues raised in the DJ/PI Motion. Instead, Plaintiffs seek to bolster their federal securities claims against Defendant Eric Oliver and fish for information from which to manufacture new claims against Mr. Oliver or other parties, all while causing further delay and continuing to frustrate the rights of TPL's shareholders. On June 17, Mr. Oliver filed a Rule 12(c) motion against Plaintiffs' Amended Complaint. Dkt. 19. On June 25, the Court entered an order holding that "Defendant's 12(c) motion triggers the automatic discovery stay of the PSLRA," explained that the purpose of the stay is to "prevent costly extensive discovery and disruption of normal business activities, until a court could determine whether a filed suit has merit," and stayed "all discovery" until resolution of the Rule 12(c) motion. Dkt. 42 ("Stay Order") at 2 (internal citations omitted).

To lift the PSLRA discovery stay, Plaintiffs bear the burden of showing the discovery they seek to impose on Counterclaim Plaintiffs is "particularized" and "necessary" to "prevent undue prejudice." Stay Order at 2 (quoting 15 U.S.C. § 78u-4(b)(3)). But Plaintiffs' 59 document requests and 13 interrogatories are not "particularized," and none of the documents or interrogatory responses sought are needed to resolve the legal issues raised in the DJ/PI Motion.

Plaintiffs' Document Requests Relating To Communications With Shareholders: In their Amended Complaint, Plaintiffs assert claims under the Securities Exchange Act for alleged misstatements by Mr. Oliver in connection with the solicitation of proxies for his election as a TPL trustee. Attempting to justify their requests "related to communications with shareholders," Plaintiffs contend that the issues raised in the DJ/PI Motion are the "mirror image" of the issues raised in their Amended Complaint. PBr. 11, 14-15. Not so. Whether Mr. Oliver violated the federal securities laws is distinct from the scope of the authority and obligations of TPL's trustees under TPL's DoT, and the DJ/PI Motion does *not* seek "a declaratory judgment on the merits of Plaintiffs' claims," or any relief relating to the "false and misleading statements during the proxy campaign" alleged in the Amended Complaint. PBr. 15. Unless and until a court rules that the allegations in Plaintiffs' Amended Complaint are adequate to survive Mr. Oliver's Rule 12(c) motion, Plaintiffs are not entitled to burden Mr. Oliver and the other Counterclaim Plaintiffs with 30 documents requests in order to ascertain "whether Counter-plaintiffs engaged in illegal or misleading activity in connection with the solicitation of proxies." PBr. 11.

***Plaintiffs' Document Requests And Interrogatories Regarding Mr. Oliver's Qualifications*:** Plaintiffs put the cart before the horse when they seek to burden Counterclaim Plaintiffs with "discovery regarding Defendant's qualifications to serve as a trustee." PBr. 12. Whether Mr. Oliver is, in Plaintiffs' subjective view, "qualified" to serve as a trustee is entirely separate from the antecedent issue of whether TPL's trustees have the authority, under the DoT, to determine that a shareholder nominee is "disqualified" from ever becoming a trustee. The DJ/PI Motion concerns the antecedent issue of whether TPL's trustees have the power to disqualify a shareholder nominee, and none of the requests for production and interrogatories that Plaintiffs seek to impose on Counterclaim Plaintiffs is relevant to the resolution of that issue.

***Plaintiffs' "Procedural" Interrogatories*:** Plaintiffs do not argue, nor could they, that responses to their four "procedural" interrogatories are needed for resolution of the legal issues raised in Counterclaim Plaintiffs' motion. In addition to not being "necessary" to "prevent undue prejudice," the four interrogatories serve no purpose when each of the Counterclaim Plaintiffs have already agreed to voluntarily produce representatives for deposition.

Because the legal issues raised in Counterclaim Plaintiffs' motion are of paramount importance to the rights of TPL shareholders—over 15,000 of them—and the governance of TPL, a publicly traded entity with a market capitalization of over $6 billion, there should be no reason to delay their resolution. But that is precisely what Plaintiffs seek to do here. They hope to impose on Counterclaim Plaintiffs costly and burdensome discovery they know is not needed to resolve the legal issues raised in Counterclaim Plaintiffs' DJ/PI Motion, and to further delay a hearing on the motion if Counterclaim Plaintiffs are unable to fulfill Plaintiffs' 59 additional document requests and 13 additional interrogatories by August 1.

FACTUAL BACKGROUND

I. After One Of TPL's Trustees Resigns, Incumbents Acknowledge That Mr. Oliver Is A Qualified Candidate, But Nominate Preston Young Instead

TPL is "governed by [a] Declaration of Trust dated February 1, 1888." AC ¶ 18, Ex. A. The DoT "requires three Trustees." AC ¶ 19. On February 25, 2019, Maurice Meyer III resigned from TPL's Board, leaving Messrs. Norris and Barry ("Incumbents") as the purported remaining trustees. AC ¶ 19, Ex. C. Under TPL's DoT, upon Mr. Meyer's resignation, Incumbents were required to call a special shareholder meeting, at which "a successor shall be elected . . . by a majority in the amount of the certificate holders present in person or by proxy." AC Ex. A, § 3.

Following Mr. Meyer's resignation, Allan Tessler, a beneficial owner of TPL shares through the Tessler LPs, asked Mr. Barry to consider Mr. Oliver as a nominee to succeed Mr.

Meyer. AC ¶ 25. Mr. Oliver is 60 years old and the President of SoftVest Advisors, LLC, and SoftVest L.P., a SoftVest Advisors client, is TPL's fourth-largest investor. AC ¶ 13, Ex. D at 10. Messrs. Barry and Norris requested that Mr. Oliver provide a short bio, which Mr. Oliver delivered on February 28, 2019. AC ¶ 26, Ex. C at 5.

On March 4, Incumbents announced their nomination of 39-year-old Preston Young to a lifetime appointment as trustee, but did not disclose that Mr. Young is the regional managing partner of a company that manages buildings owned by Sidra Real Estate, Inc., where Mr. Barry is President. RJN Ex. 1 at 2–3, 13; AC Ex. C at 3–4.

Incumbents did not send Mr. Oliver any questionnaire or request that he complete one so that they could ascertain if he was qualified to be a trustee. Instead, Incumbents acknowledged in an email to Mr. Oliver that he was one of several "qualified candidates." EO Decl. Ex. B.

II. After Owners Of More Than 25% Of TPL's Shares Disclose An Agreement To Support The Election Of Mr. Oliver As Trustee, Incumbents Assemble A Team Of Professional Advisors To Wage A Proxy Contest Against Mr. Oliver

On March 15, 2019, SoftVest publicly disclosed in a Schedule 13D filing its nomination of Mr. Oliver for trustee, AC ¶ 27, and its intent to "solicit proxies from beneficial owners of Shares to vote for the election of Mr. Oliver." RJN Ex. 55 at 9. SoftVest further disclosed that it had entered into a "Cooperation Agreement" with the Tessler LPs and Horizon, TPL's largest shareholder, to support the election of Mr. Oliver (collectively, the "Investor Group"), and that the Investor Group owns more than 25% of TPL's outstanding shares. *Id.*

Although TPL's DoT limits Incumbents' role in an election to calling and noticing a special shareholder meeting, AC Ex. 1, § 3, and contains no provision authorizing them to impose their preferred candidate on shareholders, Incumbents promptly assembled a team of professional advisors to defeat Mr. Oliver, including two law firms (Kelley Drye and Sidley

Austin), an investment bank (Stifel), a proxy solicitation firm (MacKenzie Partners), and a public relations firm (Abernathy MacGregor). EO Decl. ¶ 13.

On March 26, Sidley Austin sent out a tweet announcing that the firm had been hired to represent TPL "in its #proxycontest defense against a group of dissident shareholders." EO Decl. Ex. E. At 11:00 p.m. on March 27, Sidley Austin and Kelley Drye emailed Mr. Oliver a 66-page "Trustee Questionnaire." AC ¶ 41, Ex. F; EO Decl. Ex. G. Although Sidley Austin announced on March 26 that it had been hired to represent TPL in a proxy contest *against* Mr. Oliver, EO Decl. Ex. E, the questionnaire sent to Mr. Oliver on March 27 stated that its purpose was to collect information for "preparation of [TPL's] Proxy Statement." AC Ex. F at 1. Less than 24 hours later, however, March 28, TPL filed a preliminary proxy statement stating that "[t]he Trustees do not endorse Mr. Oliver" and "strongly recommend" that shareholders elect Mr. Young. RJN Ex. 3 at 3. Mr. Oliver responded in a publicly filed letter that the questionnaire was unnecessary since the trustees had been already rejected his candidacy, and that he would include all required information in his publicly filed proxy materials. *See* RJN Ex. 57 at 4.

III. Incumbents File A Definitive Proxy Statement, Provide Notice Of A May 22, 2019 Special Meeting To Elect A Successor Trustee, And Solicit Proxies To Vote For Their New Nominee, Donald G. Cook

On April 8, 2019, Incumbents filed a definitive proxy statement and provided notice that a special meeting of shareholders would be held "on May 22, 2019 at 10:00 a.m. Central Time in Room 20502 of the offices of Sidley Austin LLP at 2021 McKinney Avenue, Suite 2000, Dallas, TX 75201." RJN Ex. 4 at 2. The proxy statement did not mention Mr. Young, and instead identified retired General Donald G. Cook as their nominee. *Id.*

Between April 8 and May 22, Incumbents filed at least 49 different proxy solicitation materials that attacked Mr. Oliver's character directly and through innuendo, RJN Exs. 4–52, including press releases, letters, tweets, presentations, and a video. *See*, *e.g.*, RJN Ex. 32 at 6

("DID YOU KNOW that Eric Oliver refused to provide any answers to his . . . criminal history, and bankruptcies?"); RJN Ex. 36 at 3 ("Mr. Oliver has displayed a worrying lack of concern for proper governance, transparency and legal compliance"); RJN Ex. 29 at 3 ("HERE ARE JUST A FEW OF THE THINGS MR. OLIVER HAS NOT TOLD YOU ABOUT HIMSELF").

IV. Incumbents Attempt To Postpone The May 22 Special Meeting To Buy More Time For Their Proxy Campaign Against Mr. Oliver

During a contested proxy solicitation, most beneficial owners of a security cast their votes by providing their preferred voting form to Broadridge, which, in turn, provides each side interim voting results. EM Decl. ¶¶ 12–13. As proxy votes for the election were submitted to, collected, and tabulated by Broadridge, it quickly became clear that TPL's shareholders overwhelmingly preferred the Investor Group's nominee, *id.* ¶¶ 14–15.

On May 8, Incumbents announced they would convene the May 22 special meeting as noticed, but would not allow TPL's shareholders to cast their votes on May 22; instead, the meeting would immediately be adjourned until June 6, 2019. RJN Ex. 39 at 2. Incumbents claimed the adjournment was needed because the SEC had "required" them to supplement their proxy statement, *id.*, but two days later, Incumbents admitted that the filing of their supplement was voluntary and made "out of an abundance of caution." RJN Ex. 42 at 4.

Under TPL's DoT, once a shareholder meeting to elect a successor trustee has been noticed, incumbent trustees are not empowered to adjourn, postpone, or otherwise delay the meeting without prior approval from TPL's shareholders or a court. AC Ex. A. On May 10, the Investor Group publicly announced that (i) Incumbents lacked authority to "unilaterally postpone or cancel the Special Meeting, as it has already been properly called and noticed"; and (ii) it intended to "submit the Election Proposal to a vote of the holders of Shares present in person or by proxy at the Special Meeting on May 22, 2019." RJN Ex. 64 at 4.

V. Less Than A Week Before The May 22 Special Meeting, Incumbents Claim For The First Time That They Can Disqualify Mr. Oliver From Election

On the evening of Thursday, May 16, more than two months after the Investor Group announced its intent to support Mr. Oliver, Incumbents abruptly—and for the first time—declared in a public letter that Mr. Oliver's failure to respond to Incumbents' 66-page "Trustee Questionnaire" would "disqualify [him] from serving as a trustee." RJN Ex. 46 at 3. Incumbents' May 16 letter also demanded that Mr. Oliver provide by Monday, May 20, answers to various questions about Mr. Oliver's professional and family background. *Id.* at 5.

On May 20, Mr. Oliver provided a response to each of the questions in Incumbents' letter regarding his professional and family background. RJN Ex. 65. With respect to Incumbents' suddenly rekindled interest in the "Trustee Questionnaire," Mr. Oliver stated:

> Your May 16, 2019 letter very vaguely implies that completion of your questionnaire is a pre-requisite to serve as trustee of TPL. This is not a position you had previously stated, and is certainly nowhere disclosed in your public filings, which raises a host of historical disclosure and fiduciary issues for you and your predecessor trustees and their estates. . . .[1]
>
> **If you indeed currently take the position that you must demand a [response to the] questionnaire, I assume your legal counsel has conducted extensive legal research in support of such claim. In order to expedite this dialogue and reduce costs to TPL, I respectfully request that you provide me and all shareholders with legal authority, such as case law or treatises, APPLICABLE TO TPL, that support such claim.**

RJN Ex. 65 at 7 (emphasis added).

Neither Incumbents nor their counsel provided any legal authority or other feedback in response. On the night of May 20, Broadridge provided a voting summary showing Mr. Oliver still had an insurmountable lead over Incumbents' nominee. EM Decl. ¶ 16.[2]

---

[1] During a meet-and-confer call on July 9, 2019, Plaintiffs' counsel confirmed that no "trustee questionnaire" was provided to, or completed by, Mr. Barry prior to his nomination and purported election as a TPL trustee.

[2] Incumbents instructed Broadridge not to release an official vote to the Investor Group in advance of the May 22 meeting, but Broadridge delivered proxy vote counts to each side on May 21. EM Decl. ¶¶ 19–22.

VI. On The Eve Of The May 22 Special Meeting, Plaintiffs File This Lawsuit And Attempt To Indefinitely Postpone The Meeting

On the afternoon of May 21, less than 24 hours before the noticed special meeting, Incumbents filed this lawsuit and announced that they had postponed the meeting "until further notice." RJN Ex. 50. Although Incumbents publicly claimed that "in no way" was it their "goal to prevent shareholders from having their say" about whether Mr. Oliver should be elected as trustee, RJN Ex. 51, the Complaint professed Incumbents not only had the power, but also a duty, to veto Mr. Oliver's candidacy if they deemed him "disqualified." AC ¶¶ 114–15.

On May 21, the Investor Group "publicly filed with the SEC a copy of the Trustees' disclosure complaint so shareholders c[ould] review it on their own." AC Ex. I; RJN Ex. 66. The Investor Group also reiterated that Incumbents had no authority to adjourn the May 22 special meeting, and that they would move forward with the election as scheduled. AC ¶ 47, Ex. I.

VII. At The May 22 Special Meeting, TPL's Shareholders Overwhelmingly Vote To Elect Mr. Oliver As Trustee

On the morning of May 22, Sidley Austin refused to allow any TPL shareholders into the elevator bank for its offices, and so the building owner (together with building security and Sidley Austin's office manager) directed that Mr. Oliver and other TPL shareholders be allowed to meet at a conference room on the fifth floor of the building. EO Decl. ¶¶ 53–54, Ex. L.

The May 22 special meeting was convened at 10:00 a.m. CT, and video-recorded. *Id*. ¶ 55. Several of Incumbents' attorneys attended the meeting. *Id*. ¶ 57. A duly sworn inspector of election was appointed, and shareholders cast their votes. *Id*. at 13:35–13:58; 20:57–21:08; 22:05–22:22. The Investor Group's proxy holder, acting as proxy on behalf of the holders of 3,731,756 shares (48.1% of all outstanding shares) and per their instructions, voted 3,660,812 shares (47.2% of all outstanding shares) in favor of Mr. Oliver's election, 57,725 shares (0.7%) against, and 13,219 shares (0.2%) as abstaining. EM Decl. ¶ 23.

Incumbents elected not to vote their proxies, and Mr. Oliver received 98.1% of the votes cast by shareholders present in person or by proxy. *Id.* ¶ 25. The outcome would not have been different if Incumbents had voted their proxies. As is standard, Broadridge delivered to each side on May 21 the official final proxy card, which showed that only 1,994,267 shares (25.7% of all outstanding shares) had been voted in favor of General Cook's election, *id.* ¶ 21; AC Ex. K, while 222,411 shares (2.9%) had been voted against General Cook. EM Decl. ¶ 21. Between the 47.2% voting for Mr. Oliver and the 2.9% who voted against General Cook, a majority (50.1%) of all outstanding shares had affirmatively rejected General Cook's candidacy. *Id.* ¶¶ 23, 26.

VIII. Plaintiffs File An Amended Complaint To Invalidate The Shareholder Vote And Purport To Indefinitely Suspend The Proxy Solicitation

Following the May 22 meeting, Incumbents filed an Amended Complaint, seeking to have the votes cast at the May 22 meeting deemed "invalid, null, and void." AC ¶ 117. Moreover, to press the fiction that there was never any vote, notwithstanding that Incumbents solicited proxies for more than six weeks and had their legal counsel attend the May 22 meeting, Incumbents issued press releases to "remind shareholders that the proxy solicitation is suspended while the litigation is pending," RJN Ex. 54 at 5, but that "shareholders may revoke any previously-submitted proxies at any time by delivering a written notice." EO Decl. Ex. N at 18.

IX. In June 2019, The Investor Group Learns That Mr. Barry Was Never Duly Elected A TPL Trustee

On June 12, 2019, the Investor Group learned that Mr. Barry was never duly elected a TPL trustee. Here is the background. At a January 12, 2017 special meeting, Mr. Barry was the only candidate for a vacant trustee position. According to TPL, 6,905,319 shares were present in person or by proxy at the meeting, of which 4,421,776 voted for Mr. Barry and 2,483,543 voted against him. EO Decl. Ex. O. Because it appeared he had received votes from a majority of "holders present in person or by proxy," AC Ex. A, § 3, Mr. Barry was declared a TPL trustee.

The Investor Group learned, via a June 12 email from an NYSE representative, that the shares voted in favor of Mr. Barry's election were *not* all lawfully cast by "holders present in person or by proxy" at the January 2017 meeting; instead, many were improperly cast by retail brokers—through which more than 60%, or nearly 5,000,000, of TPL's shares are held, EM Decl. ¶¶ 27–28—acting without authorization from the holders of those shares. NYSE Rule 452 permits brokers to cast votes on "routine" proposals without direction from the beneficial owners of the shares, but brokers are not permitted to vote without shareholder instruction on "non-routine" matters, such as the election of a trustee. In the June 12 email, the NYSE representative confirmed that the January 2017 election had been erroneously classified as a "routine" proposal at the time. JK Decl. Ex. B. This is an error that should have been apparent to TPL and its proxy solicitor in 2017, but was never reported to shareholders or, apparently, the NYSE. As a result, many votes for which shareholders had provided no proxies were improperly cast for Mr. Barry.

X. Incumbents Form An Illegitimate Board Comprised Of Mr. Norris And Three Individuals Who Were Never Elected By TPL's Shareholders

On June 24, 2019, Incumbents announced the formation of a four-member "committee"—comprised of themselves, Donald Cook, and Dana McGinnis, the sole TPL shareholder to openly oppose Mr. Oliver's candidacy—to evaluate whether TPL "should be converted into a C-corp," as the Investor Group has been advocating, or instead "should remain a business trust," as Incumbents desire. Thus, instead of conducting discussions among, and securing recommendations from, a three-member Board of Trustees comprised of individuals duly elected by TPL's shareholders, Incumbents have convened what amounts to an illegitimate board and empowered unelected individuals (including the very same person that one month before was expressly rejected by a majority of TPL shares to sit as trustee) to act as if they were elected TPL trustees, with full access to TPL's confidential information and advisors.

PROCEDURAL BACKGROUND

In their Amended Complaint filed on May 22, 2019, Plaintiffs assert federal securities claims for alleged misstatements by Mr. Oliver in connection with the solicitation of proxies for his election as a TPL trustee, and seek a declaration that "Defendant is ineligible to be considered for election as a trustee until 60 days after he provides full and accurate disclosures requested by the Trustees, and is thereafter found by the Trustees not be disqualified to serve as a trustee, and issues and mails corrective disclosures to all shareholders." AC ¶ 117.

On May 28, Mr. Oliver answered the Amended Complaint, and, with the other Counterclaim Plaintiffs, filed counterclaims against Incumbents. Dkt. 17.

On June 5, Plaintiffs served Counterclaim Plaintiffs a total of 210 document requests, seeking "all documents and communications," over at least 5 years, and in some instances 10 years or more, relating in any way to a broad range of topics. On June 17, 19, and 21, 2019, Incumbents served Counterclaim Plaintiffs with 52 interrogatories, and notice of subpoenas to 28 non-parties (including the children of Messrs. Oliver and Tessler) encompassing a total of 375 document requests.

I. The Court's PSLRA Discovery Stay Order

On June 17, Mr. Oliver filed a Rule 12(c) motion for judgment on the pleadings dismissing the federal securities claims asserted in the Amended Complaint. Dkt. 19. On June 18, Counterclaim Plaintiffs amended their counterclaims to reflect their recent discovery that Mr. Barry was never duly elected a TPL trustee. Dkt. 22.

In a Rule 26(f) report filed on June 21, Plaintiffs argued that (i) Mr. Oliver's Rule 12(c) motion was "prematurely filed" even though Mr. Oliver had filed his Answer to the Amended Complaint on May 28, because Messrs. Norris and Barry had not yet responded to the

counterclaims; and (ii) the PSLRA discovery stay should not be triggered by Mr. Oliver's "procedurally improper" Rule 12(c) motion. Dkt. 25 at 7–12 & n.2.

On June 25, Counterclaim Plaintiffs filed their motion for a declaratory judgment and preliminary injunction. The DJ/PI Motion does not seek any relief relating to the disclosure claims asserted in Plaintiffs' Amended Complaint. Instead, as to the 2019 election of trustee to succeed Mr. Meyer, the DJ/PI Motion seeks the Court's determination of the scope of the authority and obligations of TPL's trustees: (i) whether Incumbents were required to hold a special meeting of shareholders to elect a trustee to succeed Mr. Meyer; (ii) whether Incumbents have the authority to determine that a shareholder nominee for trustee is "disqualified" from ever becoming a trustee; and (iii) whether Incumbents have the authority, without prior approval from TPL shareholders or a court, to postpone a noticed special meeting of TPL shareholders to elect a successor trustee (and, if not, whether TPL shareholders were entitled to proceed with the May 22, 2019 special meeting that had been noticed). Dkt. 40. As to the 2017 election of a successor trustee, the DJ/PI Motion seeks the Court's determination of whether Mr. Barry was validly elected. Counterclaim Plaintiffs sought an expedited hearing in early August 2019. *Id*.

On June 25, the Court entered an order holding that "Defendant's 12(c) motion triggers the automatic discovery stay of the PSLRA," staying "all discovery" until resolution of the Rule 12(c) motion, and directing that "[r]equests for additional affirmative relief, such as relief from the stay, shall be made by motion." Stay Order at 2–3.

II. Although The Legal Issues Raised In The DJ/PI Motion Are Governed By Documents In TPL's Possession, Custody, And Control, Counterclaim Plaintiffs Voluntarily Agree To Produce Documents, Witnesses, And Interrogatory Responses To Avoid Any Conceivable Prejudice To Plaintiffs

On June 27, notwithstanding the Stay Order, Plaintiffs sent a proposed schedule for the DJ/PI Motion that would have required Counterclaim Plaintiffs and third parties to respond by July 30 to the discovery requests Plaintiffs had served. Wu Decl. Ex. A.

On June 29, Counterclaim Plaintiffs reminded Plaintiffs that, pursuant to the Stay Order, "neither [Counterclaim Plaintiffs] nor any third parties are duty-bound at this time to respond to [Plaintiffs'] sweeping discovery requests," and that those requests were not necessary to the resolution of the legal issues raised in the DJ/PI Motion. *Id.* Nevertheless, "without conceding that discovery is needed," and in an effort "to avoid any possible prejudice from the resolution of the legal issues presented in" the DJ/PI Motion, Counterclaim Plaintiffs stated that they would agree to voluntarily produce (i) six categories of documents; (ii) any non-duplicative documents from the same categories on behalf of 19 affiliated non-parties; and (iii) produce Mr. Oliver and the Investor Group's proxy solicitor for deposition. *Id.*

On July 7, Plaintiffs responded by demanding that Counterclaim Plaintiffs also respond to an additional 103 document requests and 33 interrogatories, have their 19 non-party affiliates respond to an additional 257 document requests, and produce four additional witnesses for deposition. In addition, Plaintiffs stated that they intended to serve additional discovery requests relating to "the 2017 election of David Barry," *id.*, and eventually served an additional 32 such document requests and 8 interrogatories on July 11, 2019.

On July 15, Plaintiffs agreed to a late September 2019 hearing date for the DJ/PI Motion, but only if Counterclaim Plaintiffs agreed to (i) voluntarily produce 15 categories of documents (from the parties *and* 19 affiliated non-parties); (ii) voluntarily produce four witnesses (and

direct a non-party to produce a fifth witness) for deposition; (iii) voluntarily respond to 24 interrogatories; and (iv) provisions allowing the parties to move for compulsory production of additional documents, depositions, or interrogatory responses and a continuance of the hearing date due to any "delay" resulting from additional discovery. Dkt. 53 at 2–3, Ex. A. In response to Counterclaim Plaintiffs' request for at least some mutuality in the parties' respective burdens, Plaintiffs agreed to voluntarily produce 10 categories of documents, two witnesses for depositions, and responses to five interrogatories. *Id.*

III. Plaintiffs Move To Lift The Discovery Stay And Impose On Counterclaim Plaintiffs An Additional 59 Document Requests And 13 Interrogatories

On July 18, Plaintiffs filed their motion to lift the discovery stay and impose on Counterclaim Plaintiffs an additional 59 document requests and 13 interrogatories. Plaintiffs group the document requests into two categories: (i) "Counter-Plaintiffs' communications with TPL shareholders"; and (ii) "Defendant's qualifications to serve as trustee, including his potential conflicts of interest." PBr. 11–12. Nine of the interrogatories are also grouped into the "Defendant's qualifications" category, and the remaining interrogatories seek to require each of the Counterclaim Plaintiffs to "[i]dentify each Person" that participated in answering any interrogatory or "has knowledge of, or who provided information and Documents used in connection with," responding to any interrogatory or request for document production.

ARGUMENT

I. Plaintiffs Bear The "Heavy Burden" Of Showing The Discovery They Seek Is Both "Particularized" And "Necessary" To "Avoid Undue Prejudice"

Plaintiffs bear the "heavy burden" of showing "extraordinary circumstances" that justify lifting the PSLRA discovery stay. *Davis v. Duncan Energy Partners L.P.*, 801 F. Supp. 2d 589, 592 (S.D. Tex. 2011); *see also Gardner v. Major Automotive Cos.*, 2012 WL 1230135, at *3–4 (E.D.N.Y. Apr. 12, 2012) (PSLRA stay raises a "strong presumption that *no* discovery should

take place until a court has affirmatively decided that a complaint *does* state a claim"); *In re Fannie Mae Sec. Litig.*, 362 F. Supp. 2d 37, 38 (D.D.C. 2005) ("The burden of establishing the need for a partial lifting of the discovery stay, not surprisingly, is a heavy one.").

Counterclaim Plaintiffs' DJ/PI Motion does *not* "seek a declaratory judgment on the merits of Plaintiffs' claims," PBr. 15, and its filing does not justify lifting the discovery stay. *See In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 760 (N.D. Cal. 1997) (rejecting argument that defendant's summary judgment motion was "procedurally improper given the automatic stay" and finding that "[i]n enacting the discovery stay, Congress intended to limit abusive discovery, or 'fishing expeditions,' which can impose such high costs on defendants that it is often more economical to settle a defensible case than to litigate it . . . [not] to insulate plaintiffs from non-frivolous motions").

Instead, to satisfy their "heavy burden," Plaintiffs must show that the discovery they seek is both "particularized" *and* "necessary to preserve evidence or to prevent undue prejudice." 15 U.S.C. § 78u–4(b)(3)(B). Plaintiffs have not come close to meeting their burden.

II. The Additional 59 Document Requests And 13 Interrogatories Plaintiffs Seek To Impose On Counterclaim Plaintiffs Are Not "Particularized"

Requests seeking "all documents and communications" relating to broad topics, or the kind of general discovery that might be sought in the absence of a stay, are not "particularized." *See Davis*, 801 F. Supp. 2d at 593–94 (requests for "all documents and communications" relating to transaction at issue were "neither limited nor particularized"); *Herrley v. Frozen Food Exp. Indus., Inc.*, 2013 WL 4417699, at *3 (N.D. Tex. Aug. 19, 2013) (same); *Benbow v. Aspen Tech., Inc.*, 2003 WL 1873910, at *4 (E.D. La. Apr. 11, 2003) (rejecting "general discovery addressing all of the plaintiffs' claims"). Thus, a party seeking to lift a discovery stay must keep any requests "narrow," *Botton v. Ness Techs. Inc.*, 2011 WL 3438705, at *2 (D.N.J. Aug. 4, 2011),

and "specif[y] the target of the requested discovery and the types of information needed," *Davis*, 801 F. Supp. 2d at 592; *Herrley*, 2013 WL 4417699, at *2.

Here, Plaintiffs' repeated incantation of the phrase "limited discovery," PBr. 2, 8–10, 16, cannot obfuscate the broad and far-reaching discovery they seek to impose on Counterclaims Plaintiffs. Although the legal issues raised in Counterclaim Plaintiffs' DJ/PI Motion are governed by documents in TPL's possession, and although Counterclaim Plaintiffs have nonetheless agreed to an extensive voluntary production of documents, witnesses, and interrogatory responses, Plaintiffs seek to impose on Counterclaim Plaintiffs the cost and burden of responding to an additional 59 requests and 13 interrogatories on an expedited basis.

Plaintiffs' purported offers to incrementally limit certain of their overbroad discovery requests[3] does not make them "particularized." *See Botton*, 2011 WL 3438705, at *3 (even where plaintiff reduced his requests in number, "a cursory review of the 'narrowed' discovery requests reveal[ed] that the requests [we]re not particularized"). Numerous discovery requests call for "All Documents or Communications" relating to a number of broad subject matters; many cover periods of five or ten years, and others fail to include any time limitation whatsoever. For example, RFP No. 39 to Mr. Oliver, as "limited" by Plaintiffs, demands "All Documents and Communications Relating to any entities . . . that You control . . . serve as an Executive Officer, partner, or director for; or of which You hold 5.0% or more of the voting securities." PBr. Ex. 1 at 4. That RFP, as "limited," requires, *at a minimum*, *every document and communication* relating to Mr. Oliver's SoftVest family of businesses for the past five years.

[3] Most of the "Limitations Offered by Plaintiffs" listed in Exhibit 1 to Plaintiffs' motion were never actually "offered" to Counterclaim Plaintiffs prior to the filing of the motion.

Courts routinely reject such overbroad and unnecessary requests. *See, e.g.*, *Davis*, 801 F. Supp. 2d at 592 (denying request to lift discovery stay where plaintiffs sought "a vast number of documents" necessitating "extensive electronic discovery which, by its nature, would likely be burdensome"); *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1181 (C.D. Cal. 2008) (denying "exceedingly broad and far-reaching requests" going back several years that "simply [could not] be viewed as particularized"); *Herrley* 2013 WL 4417699, at *2 (finding requests for "all documents and communications" related to certain topics to be not sufficiently particularized); *Botton*, 2011 WL 3438705, at *3 (similar).

Plaintiffs' reliance on *In re Royal Ahold N.V. Securities & ERISA Litigation*, 220 F.R.D. 246, 250 (D. Md. 2004), is misplaced. In *Royal Ahold*, the court distinguished "cases rejecting virtually unlimited discovery requests," and permitted limited discovery only because plaintiff requested a "clearly defined universe of documents" that *had previously been produced to other parties*. *Id.* ("the burden of producing the materials should be slight, considering that the defendants have previously produced them to other entities").

Here, by contrast, Plaintiffs seek the type of overbroad discovery that will require collecting and reviewing, in less than two weeks, documents regarding disparate matters covering time periods spanning many years, and would result in the excessive cost and effort the PSLRA's automatic stay was enacted to prevent. *See* Stay Order at 2 ("[T]he rationale behind the PSLRA's discovery stay is to 'prevent costly extensive discovery and disruption of normal business activities, until a court could determine whether a filed suit has merit.'").

Moreover, unlike the complex and fact-intensive nature of the claims in *Royal Ahold*—which was critical (220 F.R.D. at 250 (permitting request where the 430-page complaint alleged "multibillion dollar accounting errors" spanning entities in four continents))—the DJ/PI Motion

concerns straightforward questions of law governed by the TPL's DoT. *See Davis*, 801 F. Supp. 2d at 592 ("whether a discovery request is sufficiently 'particularized' depends on the 'nature of the underlying litigation'"). To the extent certain issues require anything more (they do not), Counterclaim Plaintiffs' agreement to voluntarily produce 15 categories of documents, five witnesses for deposition, and responses to 24 interrogatories more than satisfies that need.

Plaintiffs' requests are also not "particularized" because they seek information wholly unrelated to the issues raised in the DJ/PI Motion, and are instead plainly intended either to bolster the federal securities claims that are the subject of Mr. Oliver's Rule 12(c) motion, or to fish for information from which to manufacture new claims or new attacks against Mr. Oliver.

For example, Plaintiffs seek to impose on Counterclaim Plaintiffs 29 document requests and nine interrogatories "relating to Defendant's candidacy and conflicts of interest," which Plaintiffs argue is intended to probe Mr. Oliver's "qualifications to serve as a trustee, including his potential conflicts of interest . . . and other potentially disqualifying conduct." PBr. 12. But *neither side in this case* is asking the Court to determine whether Mr. Oliver is "qualified" or "disqualified" to serve as trustee. The DJ/PI Motion—which is all that is relevant here—seeks only a decision as to whether the trustees are *legally authorized* to make that determination. And Plaintiffs' Amended Complaint seeks, as ultimate relief, an order compelling Mr. Oliver to make certain disclosures so that Incumbents can determine whether Mr. Oliver is "qualified." ¶ 117. Here, Plaintiffs demand information purportedly to discern Mr. Oliver's "qualifications" before the Court has determined that they are permitted to do so. In fact, the discovery now sought is far *broader* than the purported disclosures sought in the Amended Complaint, and would seek voluminous material without *any* assurances that *any* of it would be relevant to his "qualifications." *See, e.g.*, PBr. Ex. 1 at 4 (RFP No. 39, seeking "all documents and

communications" relating to "any entities" in which Mr. Oliver holds more than 5% of voting securities or for which Mr. Oliver is the owner, director, officer, or partner).

There is likewise no basis for Plaintiffs' attempt to impose on Counterclaim Plaintiffs 30 document requests "related to communications with shareholders, persons attending the May 22, 2019 meeting, and others." PBr. 11. During the proxy solicitation between April 8 and May 21, 2019, TPL shareholders submitted proxies to Broadridge. At the May 22 special meeting, the Investor Group's proxy holder, Ed McCarthy of D.F. King & Co. Inc., voted proxies. No one else voted at the meeting. Counterclaim Plaintiffs have already agreed to voluntarily produce all their communications with Broadridge and D.F. King, Dkt. 53, Ex. A, and Plaintiffs fail to explain why communications with others "who attended the invalid meeting," PBr 11, are relevant. Indeed, that Plaintiffs claim such discovery is "critical" to ascertain "whether Counter-plaintiffs engaged in illegal or misleading activity in connection with the solicitation," *id.*, only underscores that the discovery sought is either related to the federal securities claims that are the subject of Mr. Oliver's Rule 12(c) motion or part of a fishing expedition in search of a claim. Neither is a permissible ground for lifting the PSLRA discovery stay.

III. The Additional Document Requests And Interrogatories Plaintiffs Seek To Impose On Counterclaim Plaintiffs Are Not "Necessary" To "Avoid Undue Prejudice"

Plaintiffs advance three theories as to why they would be prejudiced without the additional document requests and interrogatories they seek to impose on Counterclaim Plaintiffs. PBr. 14–18. Each of Plaintiffs' theories is meritless.

A. Plaintiffs Do Not Identify Any Additional Discovery Necessary To Respond To The DJ/PI Motion

Beyond offering mere conclusions, Plaintiffs fail to explain how any of the 59 document requests or 13 interrogatories they seek to impose on Counterclaim Plaintiffs is actually

necessary to respond to the DJ/PI Motion. *See Rampersad v. Deutsche Bank Sec. Inc*., 381 F. Supp. 2d 131, 133 (S.D.N.Y. 2003) (declining to lift discovery stay where plaintiff "failed to show any particularized discovery that would affect his ability to respond to" motion at issue). Contrary to Plaintiffs' contention, the DJ/PI Motion does *not* seek "a declaratory judgment on the merits of Plaintiffs' claims," and does *not* seek any relief relating to the "false and misleading statements during the proxy campaign" alleged in Plaintiffs' Amended Complaint. PBr. 15.

Instead, the DJ/PI Motion concerns the scope of the authority of TPL's trustees: (i) whether Incumbents were required to hold a special meeting of shareholders to elect a trustee to succeed Mr. Meyer; (ii) whether Incumbents have the authority to determine that a shareholder nominee for trustee is "disqualified" from ever becoming a trustee; and (iii) whether Incumbents have the authority, without prior approval from TPL shareholders or a court, to postpone a noticed special meeting to elect a successor trustee (and, if not, whether TPL shareholders were entitled to proceed with the May 22, 2019 special meeting that had been noticed).[4]

These are all legal questions, answerable by reference to TPL's governing documents. And even if Plaintiffs *could* articulate a factual dispute necessitating discovery on these issues (which they cannot), Counterclaim Plaintiffs have volunteered, on an expedited basis, to produce a broad swath of documents and communications relating to the proxy solicitation leading to the May 22 meeting, the May 22 meeting itself, the votes cast at that meeting, and *all* documents and communications otherwise relating to the validity of Mr. Oliver's election or the Incumbents' authority to postpone a special meeting. Dkt. 53, Ex. A. Counterclaim Plaintiffs have also

[4] Plaintiffs misleadingly frame this question as "whether the Trustees were *justified* in postponing the special meeting." PBr. 7. But the declaration sought by the DJ/PI Motion is that "Incumbents had no authority to unilaterally postpone the special meeting they had noticed." *See* Dkt. 36 at 4. The answer, under TPL's DoT, is that they did *not*, and whatever "justification" they may concoct for that unauthorized act is irrelevant.

agreed to produce four representatives of the Investor Group, *including* Mr. Oliver, for deposition, and to direct their proxy solicitor to voluntarily appear for deposition.[5] *Id.*

The only other issue raised in the DJ/PI Motion is whether, in light of a misclassification under NYSE rules, the 2017 election of Mr. Barry was valid. DJ/PI Motion at 2. Plaintiffs fail to explain why Counterclaim Plaintiffs, as opposed to Plaintiffs themselves, might have information relevant to the 2017 election in which they were not involved—one of many reasons their assertion that "*Counter-Plaintiffs Hold All Relevant Evidence*" is absurd. PBr. 17 (emphasis in original).[6] In any event, Counterclaim Plaintiffs have volunteered to produce everything that they have related to this issue, and not to oppose a deposition of a NYSE representative. Dkt. 53, Ex. A.

B. Plaintiffs' Bare Assertions That Counterclaim Plaintiffs May Be "Shielded From Liability," Or Of Hypothetical "Irreparable Harm" To Shareholders, Do Not Establish Undue Prejudice

Plaintiffs do not, and cannot, explain how proceeding to a hearing on the DJ/PI Motion without the discovery they seek might "shield" Counterclaim Plaintiffs from liability. The DJ/PI Motion does *not* seek "a declaratory judgment on the merits of Plaintiffs' claims," PBr. 15, does *not* seek relief relating to the "false and misleading statements during the proxy campaign" alleged in the Amended Complaint, *id.*, and would not preclude the Court from finding that Mr. Oliver violated the securities laws.[7]

---

[5] By contrast, Plaintiffs have made no promises about whether their proxy solicitor from MacKenzie Partners will appear for deposition, stating that they will "request that [a] representative of MacKenzie Partners . . . voluntarily appear for deposition, but cannot compel its attendance." Dkt. 53, Ex. A at 4.

[6] Similarly absurd is the notion that Counterclaim Plaintiffs might have evidence not available to Plaintiffs concerning the May 22 meeting, which was *attended by Plaintiffs' counsel*, held in a room to which a representative of Plaintiffs' counsel had directed shareholders, and was video-recorded.

[7] Thus, this case is wholly unlike *Vacold LLC and Immunotherapy, Inc. v. Cerami*, 2001 WL 167704 (S.D.N.Y. Feb. 16, 2001), where a stay was lifted solely as to a specific determinative fact (the timing of a transaction) because it was central to whether defendants could be sued and because defendants had affirmatively withheld it even upon the court's request. *See Faulkner v. Verizon Communications, Inc.*, 156 F. Supp. 2d 384, 406

Nor does the specter of "irreparable harm," based on a hypothetical shareholder vote, constitute undue prejudice. No such vote has been scheduled, and, in fact, Counterclaim Plaintiffs contend in the DJ/PI Motion that *no further vote* is needed. Dkt. 37 at 5, 21, 26. Moreover, Plaintiffs, unlike the plaintiffs in *Malon v. Franklin Fin. Corp*, 2014 WL 5795730 (E.D. Va. Nov. 6, 2014), have *not* filed for an injunction to prevent "irreparable harm." *See Desmarais v. First Niagra Fin. Grp., Inc.,* 2016 WL 768257, at *3 (D. Del. Feb. 26, 2016) ("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 [shareholder] vote.").

But even if a vote *were* imminent (it is not), courts routinely "reject[] the argument that the risk of an uninformed stockholder vote on a proposed transaction by itself creates undue prejudice." *City of Birmingham Ret. & Relief Sys. v. Armstrong*, 2016 WL 880503, at *2 n.1 (D. Del. Mar. 1, 2016) (citing cases). As the court in *City of Birmingham* explained, the "rare" contrary holding in *Ryan v. Walton,* 2010 WL 3785660 (D.D.C. Mar. 9, 2010), cited by Plaintiffs, was based "entirely on a pre-PSLRA case" and "has never been followed, only criticized, because . . . it did not fully address or analyze the undue prejudice standard articulated under PSLRA cases." 2016 WL 880503, at *2 n.1; *see also Alaska Laborers Employers Ret. Fund v. Mays Clear Channel Commc'ns, Inc., 2*007 WL 9710527, at *4 (W.D. Tex. Feb. 14, 2007) (denying discovery despite impending shareholder vote on challenged transaction); *Med. Imaging Centers of Am., Inc. v. Lichtenstein*, 917 F. Supp. 717, 722 (S.D. Cal. 1996) (argument

(S.D.N.Y. 2001) (distinguishing *Vacold*, where "undue prejudice" was found "[b]ecause of the lack of candor"); *Rampersad*, 381 F. Supp. 2d at 133 (also distinguishing *Vacold*). *Global Intellicom, Inc. v. Thomson Kernaghan & Co.*, 1999 WL 223158 (S.D.N.Y. Apr. 16, 1999) is similarly inapposite, as the court there permitted certain discovery where defendants, who were engaged in an illegal short-selling scheme, were taking actions in other forums that, if successful, would moot plaintiffs' ability to seek redress in that court. *Id.* at *2. Moreover, even in the circumstances in *Global Intellicom*, the court denied plaintiffs' request for discovery of defendants' "communications" because discovery of information contained in communications "is more appropriately reserved for any discovery period to follow this Court's ruling on the motion to dismiss." *Id.*; *compare* PBr. Ex. 1 (listing numerous RFPs seeking all "communications").

that plaintiff "will be unable to complete discovery prior to the [shareholder] vote" is "true in a majority of cases involving contests for corporate control, and thus does not constitute an 'undue' burden").

C. Conclusory Assertions That Plaintiffs Will Be "Disadvantaged in Formulating a Strategic Defense" Do Not Constitute Undue Prejudice

Plaintiffs border on the nonsensical when they argue that their "inability to pursue" an additional 59 document requests and 13 interrogatories from Counterclaim Plaintiffs places them "at a severe disadvantage in formulating their litigation and settlement strategy." PBr. 17.

Plaintiffs do not identify *any* documents or information relating to the issues raised in the DJ/PI Motion that is "within the sole possession of Counter-Plaintiffs," *id.*, or otherwise unavailable to Plaintiffs. Indeed, Plaintiffs were central participants in the "proxy campaign and contested election," called the May 22 meeting at which the election was held, were *represented by counsel* at that meeting, had access to the same election results and related information, through Broadridge, as Counterclaim Plaintiffs, and should understand their own authority and obligations as trustees better than anyone. Further, Counterclaim Plaintiffs have agreed to voluntarily produce *extensive* material concerning the proxy campaign and contested election.

Plaintiffs make *zero* effort to explain which of the 59 document requests and 13 interrogatories are "specifically tailored to enable Plaintiffs to challenge Counter-Plaintiffs' factual assertions" in a manner that they are not already able. PBr. 17. In fact, all of the information sought by Plaintiffs—including in particular through the myriad document requests and interrogatories purportedly seeking to investigate Mr. Oliver's "qualifications"—are wholly irrelevant to the DJ/PI Motion. *See* Argument § II, *supra*.

Indeed, it appears that Plaintiffs are reduced to simply parroting, without explanation, buzzwords from wholly inapposite cases. In each of *Royal Ahold*, *In re WorldCom, Inc. Sec.*

Litig., 234 F. Supp. 2d 301 (S.D.N.Y. 2002), and *In re LaBranche*, 333 F.Supp.2d 178 (S.D.N.Y.2004), plaintiffs were permitted access to particularized documents that *had already been provided* to regulators and third parties that were not subject to the stay, and that had, or were in the process of, settling claims with the defendant, so that the plaintiff would not be "severely disadvantaged" vis-à-vis those other interested parties. *See Desmarais*, 2016 WL 768257, at *3 (distinguishing the "unique circumstances" in *WorldCom* and *LaBranche*); *In re Odyssey Healthcare, Inc.*, 2005 WL 1539229, at *2 (N.D. Tex. June 10, 2005) (noting that *WorldCom* found "undue prejudice" where "securities plaintiffs faced the prospect of competing for a limited pool of assets with other parties not subject to the stay").

Putting aside the fact that Plaintiffs demand a universe of documents and materials of as-yet-unknown size and scope, and not "a clearly defined universe of documents" that had been "previously produced," *Royal Ahold*, 220 F.R.D. at 250, Plaintiffs do not identify any "strategic disadvantage" similar to that at issue in the cases cited. *See 380544 Canada, Inc. v. Aspen Tech., Inc.*, 2007 WL 2049738, at *4 (S.D.N.Y. July 18, 2007) ("the mere fact that the discovery stay will prevent Plaintiffs from collecting evidence to assist in potential settlement negotiations or plan their litigation strategy does not constitute undue prejudice").[8]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to lift the discovery stay should be denied.

[8] Plaintiffs attempt to bolster their argument by asserting that permitting discovery here would not contravene the purpose of the PSLRA stay or cause prejudice to Mr. Oliver. PBr. 15, 18–19. Contrary to these baseless claims, as detailed herein, Plaintiffs' sweeping demands—including "all documents and communications" related to a host of topics of many years—for information that is largely irrelevant, is *precisely* the sort of prejudicial abuse of the discovery process that the PSLRA is intended to prevent. In any event, both points, even if they were true (they are not) are irrelevant to the PSLRA stay analysis. *See 380544 Canada*, 2007 WL 2049738, at *2 ("the mere fact that the PSLRA's goals would not be frustrated . . . is not sufficient to warrant lifting the stay"); *Sarantakis v. Gruttaduaria*, 2002 WL 1803750, at *4 (N.D. Ill. Aug. 5, 2002) ("plaintiffs' argument that lifting the stay will not prejudice the defendants is irrelevant and does not relieve the plaintiffs of their burden to establish that they will suffer undue prejudice if the stay is not lifted").

Dated: July 22, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Robert C. Walters*
Robert C. Walters
SBN 20820300
RWalters@gibsondunn.com
Olivia Adendorff
SBN 24069994
OAdendorff@gibsondunn.com
Russell H. Falconer
SBN 24069695
RFalconer@gibsondunn.com

2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6911
Telephone: (214) 698-3100
Facsimile: (214) 698-3400

GIBSON, DUNN & CRUTCHER LLP
Adam H. Offenhartz (*pro hac vice*)
Aric H. Wu (*pro hac vice*)
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Attorneys for Counterclaim Plaintiffs Eric L. Oliver, SoftVest, L.P., Horizon Kinetics LLC, and ART-FGT Family Partners Limited

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, a true and correct copy of the foregoing document was served through the Court's CM/ECF System on all counsel of record.

/s/ Robert C. Walters
Robert C. Walters