SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

———————————————————————————X

IN RE DENTSPLY SIRONA, INC. SHAREHOLDERS LITIGATION

Plaintiff,

- v -

XXX,

Defendant.

———————————————————————————X

INDEX NO. 155393/2018

MOTION DATE 01/07/2019, 04/05/2019

MOTION SEQ. NO. 002 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 101, 102, 103, 110, 111, 112, 159, 160 were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 114, 115, 116, 117, 118, 119, 120, 121, 137, 138, 139, 140, 141, 142, 143, 145, 155, 158, 165, 166, 167, 168, 171, 172 were read on this motion to/for STAY.

Upon the foregoing documents, it is

In this action alleging violations of the Securities Act of 1933 ("'33 Act"), defendants Dentsply Sirona Inc. ("Dentsply Sirona"), Jeffrey Solvin ("Solvin"), Bret W. Wise ("Wise"), Christopher T. Clark ("Clark"), Michael C. Alfano ("Alfano"), Eric K. Brandt ("Brandt"), Paula H. Cholmondeley ("Cholmondeley"), Michael J. Coleman ("Coleman"), Willie A. Deese ("Deese"), William F. Hecht ("Hecht"), Francis J. Lunger ("Lunger"), John L. Miclot ("Miclot"), John C. Miles, II ("Miles"), Thomas Jetter ("Jetter"), David Beecken ("Beecken"), William K. Hood ("Hood"), Arthur D. Kowaloff ("Kowaloff"), Harry M. Jansen Kraemer, Jr. ("Kraemer") and Timothy P. Sullivan ("Sullivan") (collectively, the "Individual Defendants" and together with Dentsply

Sirona, "Defendants") move, pursuant to CPLR 2201 and CPLR 3211(a)(4), to stay this putative class action case brought by plaintiffs John Castronovo and Irving Golombeck (together, "Plaintiffs") pending final disposition of an action currently pending in federal court.[1] Defendants also move, pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1(b)(1) (the "PSLRA"), CPLR 3214(b) and Commercial Division Rule 11(d), for an order staying discovery pending resolution of any motions to dismiss this action.

Dentsply International Inc. ("Dentsply Intl.") and Sirona Dental Systems, Inc. ("Sirona") were dental equipment companies founded in the late 1800s. Both companies designed, developed, manufactured and marketed dental products and services and sold their products to distributors, which in turn sold the products to dentists.

Three distributors – Henry Schein, Inc. ("Henry Schein"), Patterson Companies, Inc. ("Patterson") and Benco Dental Supply Co. ("Benco") (together, the "Distributors") – controlled up to 85% of the U.S. distribution channel for dental supplies and did business with Dentsply Intl. and Sirona. Plaintiffs allege that from 2008, the Distributors "engaged in an illicit scheme to control the distribution of dental products, limit competition and artificially inflate prices by intimidating and undermining smaller distributors and potential new competitors" (the "Anticompetitive Scheme"). As per the consolidated amended complaint ("CAC"), Dentsply Intl. and Sirona were aware of, and

[1] The federal action, *Boynton Beach General Employees' Pension Plan v. Dentsply Sirona, Inc., et al.*, No. 18-cv7253, is pending in the United States District Court for the Eastern District of New York (the "EDNY Action").

complicit in, the Anticompetitive Scheme. The CAC further alleges that the Anticompetitive Scheme enabled the Distributors to maintain unusual and artificially high profit margins.

On September 15, 2015, Dentsply Intl. announced that it would acquire Sirona in an all-stock transaction, subject to shareholder approval, under which Sirona shareholders would exchange their Sirona shares for Dentsply Intl. shares. A prospectus ("Prospectus") and joint proxy statement ("Proxy") were filed in connection with the Acquisition (together, the "Registration Statement") and the SEC declared the Registration Statement effective on December 7, 2015.

Dentsply Intl.'s acquisition of Sirona took place on February 29, 2016 (the "Acquisition") and its common stock closed at $60.96 per share on that date. As a result of the Acquisition, a combined company, Dentsply Sirona, was formed. Dentsply Sirona is a Delaware corporation with headquarters in Pennsylvania.

The CAC alleges that the Registration Statement made statements about demand, inventory and industry competition but failed to disclose material information regarding each of these topics.

Plaintiffs allege that despite Defendants' knowledge and participation in the Anticompetitive Scheme (discussed above), the Registration Statement did not disclose facts regarding this scheme, or how Dentsply Intl. and Sirona benefitted from it (*e.g.* selling their products at higher prices). Further, the Registration Statement incorporated by reference Dentsply Intl.'s and Sirona's SEC filings such as 10-Ks which highlighted the competitive nature of the industry and represented that industry fragmentation

increased competition. Plaintiffs state that the Registration Statement's favorable portrayal of Dentsply Intl. and Sirona did not disclose that a material source of their growth and success was attributable to the Anticompetitive Scheme. The CAC alleges that the Anticompetitive Scheme artificially inflated the financial results, goodwill and intangible assets of both Dentsply Intl. and Sirona in addition to the value of Dentsply Sirona's goodwill and intangible assets. The Anticompetitive Scheme also allegedly rendered Dentsply Intl.'s Sarbanes-Oxley Certifications, which the Registration Statement incorporated, misleading in that the certifications represented that Dentsply Intl. had "fairly present[ed]" its financial condition.

The CAC also alleges that since 1998, Patterson was the exclusive distributor for some of Sirona's products[2] and that the agreements governing this relationship were scheduled to expire in September 2017 and required Patterson to make substantial minimum purchases to maintain exclusivity. Plaintiffs state that, at the time of the Registration Statement's effective date, Patterson's purchases had outpaced its sales and, as a result, the channel for the products was "stuffed" with surplus inventory.

Plaintiffs allege that despite the importance of the Patterson exclusivity agreement to Sirona and Dentsply Sirona, the Registration Statement failed to disclose that: 1) the distribution channels for certain products were overstocked with excess inventory; 2) Patterson was unlikely to renew its agreements given the excess inventory and minimum

[2] The products included Sirona's dental computer-aided design/computer-aided manufacturing system ("CAD/CAM") and its company-branded imaging products and equipment.

purchase requirements; and 3) it would take more than a year for the channel's excess inventory to be sold. Further, the Registration Statement was allegedly misleading because it touted growing demand and the "predictability" of Sirona's revenues as a benefit to the combined company while Defendants knew that Dentsply Sirona would be unable to maintain or grow its sales or revenue from the affected product lines. The Registration Statement also mischaracterized the minimum purchase requirements as "benchmark thresholds" which "do not create minimum purchase obligations under a take-or-pay arrangement."

The CAC alleges that by mid-2016, Patterson informed Dentsply Sirona that it could not accept any more products and that it would take over one year to sell its existing inventory. In the fall of 2016, Patterson terminated the exclusivity agreements with Dentsply Sirona. On March 1, 2017, Dentsply Sirona disclosed that the "termination of exclusivity" had negatively impacted sales for the 2016 fourth quarter.

Plaintiffs allege that at the time of the Acquisition, there was also undisclosed inventory buildup and channel stuffing outside the U.S. Sirona inventory levels in Italy, the United Kingdom and France exceeded what Dentsply Intl. considered normal or desirable which was allegedly problematic for Henry Schein because it was a major distributor of products outside the U.S. and channel stuffing prevented it from selling the products.

On August 9, 2017, Dentsply Sirona reported a goodwill and intangible asset impairment charge of nearly $1.1 billion, which it attributed to the termination of its exclusivity agreements with Patterson, the excess inventory levels in the distribution

channels, lower sales and "an increase in competition." Dentsply Sirona also disclosed its receipt of an SEC request for information regarding its "accounting and disclosures relating to transactions with a significant distributor . . . " Dentsply Sirona's common stock price dropped over 8% from its close of $61.41 per share on August 8, 2017, to $56.23 per share on August 9, 2017.

On October 2, 2017, Dentsply Sirona announced the departure of three of its top executives – defendants Solvin, Clark and Wise – and its common stock dropped 6% to $56.33 per share.

Dentsply Sirona's Form 10-Q, filed on August 7, 2018, further explained events with an adverse impact on the company's revenue. The 10-Q stated, among other things, that:

> [t]he equipment reporting units were negatively affected in connection with the continued transition of the Company's distribution relationships primarily in the U.S. from exclusive to non-exclusive. The Company's expectations for revenue growth from its non-exclusive distribution relationships, which replaced its former long-term exclusive distribution relationship, were not met. As a result, the Company's forecasts of current and future third-party demand have been reduced as the Company's U.S. distributors continue to offer and promote competitive alternatives to the Company's full CAD/CAM systems and lower-priced alternatives to the Imaging reporting units' products.

Plaintiffs allege that Patterson's decision not to renew its exclusivity agreement had a continuing adverse effect on Dentsply Sirona which Defendants knew or should have known about before the effective date of the Registration Statement yet did not disclose. Plaintiffs also allege that "the public revelation that competition had increased and

had an adverse impact on Dentsply's business exposed the anticompetitive conduct among the Distributors that had existed since well before the effective date of the Registration Statement."

The CAC states that Plaintiffs acquired Dentsply Intl. common stock in exchange for their shares of Sirona common stock pursuant to the Acquisition. Castronovo filed a complaint on June 7, 2018 and Golombeck filed a complaint on August 9, 2018. The CAC, filed on November 2, 2018, brought claims for violations of Sections 11, 12(a)(2) and 15 of the of the Securities Act of 1933 (the "'33 Act").

On December 19, 2018, the EDNY action, asserting claims under Sections 11, 12 and 15 of the '33 Act as well as claims under the Securities Exchange Act of 1934 (the "'34 Act"), was filed.

This decision addresses two motions presently before the Court: 1) Defendants' motion to stay discovery pending resolution of their motion to dismiss; and 2) Defendants' motion to stay this action pending final disposition of the EDNY Action.

Discussion

This Court has subject matter jurisdiction over this matter pursuant to *Cyan, Inc. v. Beaver County Employees Ret. Fund*, 138 S.Ct. 1061, 1075 (2018).

I. Single-Motion Rule

In their opposition to Defendants' motion to stay, Plaintiffs contend that this motion is precluded by CPLR 3211(e), the single-motion rule.

CPLR 3211(e) states, in pertinent part, that

> [a]t any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in subdivision (a), and no more than one such motion shall be permitted.

Thus, "this 'single motion rule prohibits parties from making successive motions to dismiss a pleading' pursuant to CPLR 3211 (a)." *Bailey v. Peerstate Equity Fund, L.P.*, 126 A.D.3d 738 (2d Dept. 2015) (citation omitted).

Here, Defendants brought their motion to dismiss prior to the filing of the EDNY Action. After the EDNY Action was filed, Defendants then brought a separate motion to stay pursuant to CPLR 2201 and CPLR 3211(a)(4).[3] Plaintiffs have not cited, nor have I found, any case that supports their position that the single-motion rule is violated in these circumstances.

First, CPLR 3211(e) only applies to motions brought under CPLR 3211(a) and is therefore not applicable to a motion brought under CPLR 2201. Second, the single-motion rule is not violated by Defendants' assertion of an additional grounds for dismissal, CPLR 3211(a)(4), that was not raised in their original motion to dismiss. New York courts have held that "additional" motions to dismiss – which were filed after the original motion to dismiss but on different grounds that did not exist when the original motion was filed – do not violate the single-motion rule. *See, e.g., Held v. Kaufman*, 91 N.Y.2d 425, 430 (1998) (finding that additional grounds for dismissal raised in a reply affidavit did not violate the single-motion rule where the arguments could not have been raised earlier due to the "indefiniteness" of plaintiff's initial complaint); *Lemberg v.*

[3] CPLR 3211(a)(4) states that a party can move for dismissal on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires."

Blair Communications, 258 A.D.2d 291, 292 (1st Dept. 1999). Defendants' original motion to dismiss in this case could not have requested a stay or sought dismissal based on CPLR 3211(a)(4) because it pre-dated the existence of the federal action. Thus, I find that the single-motion rule does not preclude the motion before me.

II. Motion to Stay Action Pursuant to CPLR 2201

Under CPLR 2201, "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Further, a trial court's decision on a CPLR 2201 motion is discretionary. *Mook v. Homesafe America, Inc.*, 144 A.D.3d 1116, 1117 (2d Dept. 2016).

Courts consider a variety of factors when determining whether to issue a stay including: 1) which forum will offer a more complete disposition of the issues; 2) which forum has greater expertise in the type of matter; 3) which action was commenced first and the stage of the litigations; 4) whether there is substantial overlap between the issues raised in each court; 5) whether a stay will avert "duplication of effort and waste of judicial resources;" and 6) whether plaintiffs have demonstrated that they would be prejudiced by a stay. *Asher v. Abbott Laboratories*, 307 A.D.2d 211, 211-212 (1st Dept. 2003); *see also Reaves v. Kessler*, No. 654485/2015, 2017 WL 2482948 (Sup. Ct. N.Y. Cty. June 8, 2017).

A. Identity of Parties, Substantial Overlap and Complete Relief

Defendants first note that a "majority" of the Defendants are named in both actions. Plaintiffs counter that the EDNY Action omits six of the individual defendants

named in this action.[4] The fact that several of the Defendants are not named in the EDNY Action weighs in favor of proceeding with the action in this Court.

Next, Defendants argue that there is substantial overlap between this case and the EDNY Action because both suits assert claims under Sections 11, 12(a)(2) and 15 of the '33 Act and seek money damages. Further, Defendants argue that a complete disposition of all claims can only be obtained in the EDNY Action.

In opposition, Plaintiffs argue that the '33 Act claims in the EDNY Action are time-barred and therefore this Court is the only forum in which those claims can be litigated and a complete disposition reached.

If, as indicated by Plaintiffs, the '33 Act claims are time-barred in the EDNY Action, then this Court is the only forum that can resolve those claims. Moreover, in light of the probability that only the '34 Act claims survive in federal court, there will be less overlap of issues. Therefore, consideration of party identity, substantial overlap of issues and complete disposition do not support a stay in this action.

B. Expertise

Defendants argue that prior to *Cyan*, the majority of federal courts in New York barred plaintiffs from proceeding with '33 Act actions in state court and that New York courts "recognize that federal courts have greater experience and familiarity with federal securities class claims." *Cyan*, however, clearly endowed state courts with the

[4] The federal action does not include defendants Jetter, Beecken, Hood, Kowaloff, Kraemer and Sullivan.

jurisdiction to "adjudicate class actions alleging only 1933 Act violations," and the pre-*Cyan* cases cited by Defendants are irrelevant. *Cyan*, 138 S.Ct. at 1078.

Further, as I and others have held, specialized commercial courts are especially well-suited to review the type of claims brought here, unlike federal courts which review a wide variety of criminal and civil cases. In sum, consideration of expertise weighs in favor of keeping this action in the commercial division. *See Asher*, 307 A.D.2d at 211; *Araujo v. Uxin Ltd.*, No. 650613/2019, 2019 WL 3250017 at *1 (Sup. Ct. N.Y. Cty. July 15, 2019); *Hoffman v. AT&T Inc.*, No. 650797/2019, 2019 WL 2578360 at *2 (Sup. Ct. N.Y. Cty. June 24, 2019) (stating that '33 Act claims are "less complex than issues the Commercial Division" regularly resolves).

C. First to File

Defendants argue that the first to file rule does not require denial of a stay because the other factors heavily favor a stay.

The "general rule in New York is that 'the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere.'" *In re Topps Co., Inc. S'holder Litig.*, No. 600715/07, 2007 WL 5018882, at *3 (Sup. Ct. N.Y. Cty. June 8, 2007) (citation omitted). However, the first to file rule is not dispositive, in and of itself, and should not be applied mechanically irrespective of other considerations. *AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 89 A.D.3d 495, 496 (1st Dept. 2011).

Here, the action was filed in June 2018 while the EDNY Action was filed six months later in December 2018. The fact that this action was filed first is significant in

weighing whether or not to grant a stay. *See Certain Underwriters at Lloyds, London v. Millennium Holdings LLC*, No. 600626/06, 2006 WL 2546202, at *7 (Sup. Ct. N.Y. Cty. Aug. 8, 2006) (holding that where a case was first filed is not dispositive but is "significant"). Importantly, the first to file rule is still viable in New York. Indeed, were the rule to be ignored, *Cyan* would be rendered meaningless because then New York state courts could not hear '33 Act cases when later filed federal court actions assert other claims together with '33 Act claims. *See Cyan*, 138 S.Ct. at 1075; *Hoffman*, 2019 WL 2578360 at *2 (stating that "the 'first filed' rule must have some vitality in a *post-Cyan* world"). Hence, consideration of when these actions were commenced favor denial of a stay.

D. Prejudice

It is Defendants' position that, absent a stay, they will be prejudiced due to duplicate efforts to litigate in both courts and the risk of inconsistent rulings. Defendants also argue that there would be no prejudice to Plaintiffs if a stay is granted.

Plaintiffs rightly note that if the federal plaintiffs' complaint is sustained, overlapping discovery can be coordinated to reduce Defendants' costs. When weighing whether a stay should be granted, the "possibility or actuality of two trials is of no importance." *Mt. McKinley Ins. Co. v. Corning Inc.*, 33 A.D.3d 51, 59 (1st Dept. 2006) (citation omitted).

E. Conclusion

I have considered Defendants' remaining arguments in favor of a stay and find them unavailing. There is no basis for a stay in this action.

III. Motion for Discovery Stay

Defendants assert that the PSLRA imposes a mandatory stay of discovery pending a motion to dismiss. Moreover, Defendants argue that nothing in the *Cyan* decision "suggests that the PSLRA's discovery stay provisions do not apply in state courts."

The PSLRA states that "[i]n 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." 15 U.S.C. § 77z-1(b)(1).

Cyan failed to address whether the PSLRA's automatic stay applies to state court '33 Act cases and state courts that have considered its applicability are divided. *See, e.g. Switzer v. W.R. Hambrecht & Co.*, Nos. CGC-18-564904, CGC-18-565324, 2018 WL 4704776, at *1 (Cal. Super. Ct. Sept. 19, 2018) (stating that "[t]he Court finds that the PSLRA's provision for a discovery stay is of a procedural nature, and therefore only applies to actions filed in federal court, not state court."); *cf. City of Livonia Retiree Health and Disability Benefits Plan v. Pitney Bowes Inc.*, No. X08-FST-CV-18-6038160-S (Conn. Super. Ct. May 15, 2019) (concluding that the plain meaning of the phrase "any private action arising under this subchapter" in the PSLRA means that the discovery stay applies to securities claims brought in state courts).

As I recently held (on a motion to stay based on the PSLRA),[5] to hold that the PSLRA automatic stay applies to state court actions would undermine *Cyan*'s holding that '33 Act cases can proceed in state courts. *Cyan*, 138 S.Ct. at 1078. Thus, the PSLRA's automatic discovery stay is not applicable to state court actions.

Lastly, Defendants urge that a stay should be granted based on Commercial Division Rules as well as policy considerations. However, it is the presumption of the Commercial Division that discovery continues during motion practice. I therefore decline to stay discovery in this case.

In accordance with the foregoing, it is

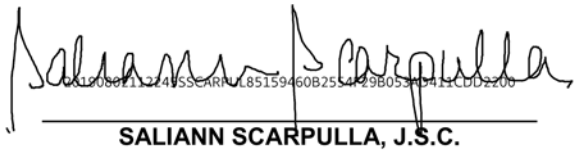
ORDERED that the motion by Defendants to stay Plaintiffs' action is denied; and it is further

ORDERED that the motion by Defendants for an order staying discovery pending resolution of any motions to dismiss is denied; and it is further

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, Room 208 on September 25, 2019 at 2:15pm.

[5] *Matter of PPDAI Group Securities Litigation*, No. 654482/2018, 2019 WL 2751278, (Sup. Ct. N.Y. Cty. July 1, 2019).

This constitutes the decision and order of the Court.



8/2/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE