APPENDIX A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 613

IN RE PIVOTAL SOFTWARE, INC. SECURITIES LITIGATION This Document Relates to: ALL ACTIONS	Case No. CGC-19-576750 ORDER DENYING DEFENDANTS' JOINT MOTION TO STAY DISCOVERY

(Filed Mar. 4, 2021)

INTRODUCTION

This matter came on regularly for hearing on February 18, 2021 in Department 613, the Honorable Andrew Y.S. Cheng, presiding. David W. Hall appeared for plaintiff Zhung Tran. Wesley A. Wong and Reed Kathrein appeared for plaintiff Alandra Mothorpe. John Jasnoch appeared for plaintiff Jason Hill. Jordan Eth, Mark RS Foster, Karen Leung and Randall D Zack appeared for defendants Pivotal Software Inc., Robert Mee, Cynthia Gaylor, Paul Maritz, Michael Dell, Zane Rowe, Egon Durban, William D. Green, Marcy S. Klevorn and Khozema Z. Shipchandler (collectively the "Pivotal Defendants"). Gavin M. Masuda and Elizabeth L. Deeley appeared for the Underwriter

Defendants.[1] Andrew T Sumner and Gidon Caine appeared for Dell Technologies, Inc. ("Dell").[2]

Having reviewed and considered the arguments, pleadings, and written submissions of all parties, the Court **DENIES** Defendants' joint motion to stay discovery.

BACKGROUND

This is a securities class action on behalf of all those who purchased or otherwise acquired Pivotal common stock, pursuant or traceable to the registration statement and prospectus (collectively, the "Offering Materials"), issued in connection with Pivotal's April 20, 2018 initial public offering (the "IPO" or "Offering"). (Compl. ¶ 1.) The Complaint asserts strict liability claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "Securities Act") against Pivotal, Dell, certain Pivotal and Dell officers and directors, and the underwriters of the IPO. (See *id.*)

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[1] Morgan Stanley & Co. LLC; Goldman Sachs & Co. LLC; Citigroup Global Markets Inc.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Barclays Capital Inc.; Credit Suisse Securities (USA) LLC; RBC Capital Markets, LLC; UBS Securities LLC; Wells Fargo Securities LLC; Keybanc Capital Markets Inc.; William Blair & Co., LLC; Mischler Financial Group, Inc.; Samuel A. Ramirez & Co., Inc.; Siebert Cisneros Shank & Co., LLC; and Williams Capital Group, L.P. (the latter two, which have since merged, renamed "Siebert Williams Shank & Co., LLC").

[2] The Pivotal Defendants, Dell and the Underwriter Defendants are collectively referred to as "Defendants".

On October 20, 2020, the parties filed a Joint Case Management Conference Statement. In the statement, Defendants requested that the Court stay discovery pursuant to the Private Securities Litigation Reform Act ("PSLRA"). Plaintiffs opposed this request.

At the October 27, 2020 Case Management Conference ("CMC"), this Court heard both sides' positions on the discovery stay issue. After the CMC, the Court issued its Order After October 27, 2020 Case Management Conference. In its Order, the Court denied Defendants' request for a discovery stay and ordered the parties to proceed with bilateral written discovery on all issues including both merits and class certification discovery. The Court also ordered Plaintiffs to file their consolidated amended complaint by January 15, 2021 and set a hearing on Defendants' demurrer(s) for June 16, 2021.

On December 14, 2020, Defendants filed a petition for writ of mandate requesting that the Court of Appeal (1) vacate this Court's Order denying Defendants' request for a discovery stay, and (2) grant Defendants' request for an immediate stay of discovery. The Court of Appeal denied the petition. The court noted that "[i]n sharp contrast to the briefing before [it], petitioners did not thoroughly present the positions urged in the present petition by way of a stay motion" and "[s]uch a motion represents another, unexhausted, adequate remedy at law available to petitioners." (Writ Order, 1.) On January 5, 2021, Defendants filed their joint motion pursuant to the discovery stay provision of the

PSLRA. (Defendants' Notice of Joint Motion and Joint Motion to Stay Discovery ["Motion"], 6.)

STATUTORY PROVISION AT ISSUE

The PSLRA's discovery stay provides "[i]n any private action arising under this subchapter [15 U.S.C. § 77a *et seq*.], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion for any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." (15 U.S.C. §77z-1, subd. (b)(1).)

DISCUSSION AND ANALYSIS

Defendants assert that the PSLRA's automatic discovery stay applies here as evidenced by (1) its plain language and (2) its legislative history. The Court disagrees.

I. The Plain Language of the Statute

a. Background Law

In interpreting a statute, the Court's fundamental task is to "ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321.) The Court "start[s] with the language of the statute, giving the words their usual and ordinary meaning, while construing them in light of the statute as a whole and the statute's purpose." (*Apple, Inc. v. Sup. Ct.* (2013) 56

Cal.4th 128, 135 [internal quotations and citation omitted].) "[T]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, *in the legal and broader culture.*" (*Hodges v. Sup. Ct.* (1999) 21 Cal. 4th 109, 114, 980 P.2d 433, 437 [emphasis in original] [internal quotations and citation omitted].) "The statute's structure and its surrounding provisions can reveal the semantic relationships that give more precise meaning to the specific text being interpreted, even if the text may have initially appeared to be unambiguous[.]" (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247 [citing *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1391 [conc. opn. of Cuéllar, J]].)

b. Application

i. The PSLRA

Defendants argue that by its plain terms, the PSLRA governs "any private action arising under" the Securities Act. Defendants argue that because a Securities Act suit in state court is just as much a "private action arising under" the Securities Act as a Securities Act suit in federal court, the provision applies to state actions like this one that bring claims under the Securities Act. The Court is unpersuaded. Defendants fail to cite a single reported decision in California holding the PSLRA's discovery stay applies to securities class actions filed in state court. Indeed, there is no legal

authority for the proposition. However, in *Diamond Multimedia Systems, Inc. v. Superior Court*, the dissenting opinion explained the PSLRA "adopts a number of measures intended by Congress to remove incentives to shareholder participation in what the [PSLRA]'s managers called class action litigation 'abuses' . . . [including] a mandatory stay of discovery in *federal court litigation* while a motion to dismiss is pending[.]" (*Diamond Multimedia Systems, Inc. v. Sup. Ct.* (1999) 19 Cal.4th 1036, 1069 [Brown, J., dissenting] [emphasis supplied].)

The Court finds the plain language of the discovery stay's surrounding provisions evidences that the provision only applies to federal court. The complete absence of any reference to state courts stands in contrast to other provisions in the PSLRA that do make explicit reference to state courts. (See, e.g., 15 U.S.C. §77z-1, subd. (a)(7)(b)(iii) ["A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding"]; 15 U.S.C. §21D(a)(7)(B)(iii) [same]; 15 U.S.C. §78u-4(a)(7)(B)(iii) [same].) This suggests that in drafting the PSLRA, Congress was explicit where it intended the statute's provisions to reach state courts. The sheer lack of any such express direction in the text of the PSLRA discovery stay strongly indicates that it was never intended to apply in state court. (See, *e.g.*, *Keene Corp. v. United States* (1993) 508 U.S. 200, 208 [courts must "refrain from reading into the statute a phrase that Congress has left it out"].)

Defendants' contrary interpretation isolates the phrase "any private action" without any regard to the provision as a whole, much less the overall statutory structure. Statutory language must be construed in light of the "statute as a whole" and the statute's purpose. (*Apple, supra*, 56 Cal.4th at 135.) Not only is the full provision itself silent on application to state court, but the statute as a whole consistently limits its procedural provisions to action under the Federal Rules of Civil Procedure and is replete with procedural devices and associated federal nomenclature. (*See*, *e.g.*, 15 U.S.C. §77z-1(a)(1); 15 U.S.C. §77z-1(a)(3)(A)(iii); 15 U.S.C. §77z-1(a)(3)(B)(iii)(cc); 15 U.S.C. §77z-1(a)(3)(B)(vi); 15 U.S.C. §77z-1(a)(7)(B)(iii); 15 U.S.C. §77z-1(c)(1); 15 U.S.C. §77z-1(c)(2); 15 U.S.C. §77z-1(c)(3)(A); 15 U.S.C. §77z-1(c)(3)(B); 15 U.S.C. §77z-1(c)(3)(C).) Nothing in the discovery stay provisions indicates any deviation from the statute's overarching focus on federal procedure in federal court.

ii. The Securities Litigation Uniform Standards Act of 1998

Interpreting the discovery stay provision to apply to state courts would also render the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and its discovery stay redundant. SLUSA amended the Securities Act to provide "[u]pon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this

subsection." (15 U.S.C. §77z-1, subd. (b)(4); see also *In re Dot Hill Systems Corp. Securities Litigation* (S.D. Cal. 2008) 594 F.Supp.2d 1150, 1165 ["The PSLRA imposes a discovery stay in *private federal securities litigation* during motion dismiss proceedings. When Congress enacted the [SLUSA] in 1988, "[t]he legislative history explains that the purpose of this provision is to prevent plaintiffs from circumventing the stay of discovery under the [PSLRA] by using State court discovery, which may not be subject to those limitations, in an action filed in State Court[.] [emphasis supplied] [citations omitted]; see also *In re Transcrypt Intern. Securities Litigation* (D.Neb. 1999) 57 F.Supp.2d 836, 841-842 ["In an effort to save beleaguered corporations from 'frivolous lawsuits,' Congress in 1995 passed the [PSLRA] by which it required, among other protections, a stay of discovery in securities fraud class actions brought in federal court . . . While the new provisions apparently had the desired effect of reducing the number of federal class actions brought against corporate defendants, the restrictions were later seen as responsible for a corresponding increase in the number of securities fraud cases brought in state court . . . Thus was born [Section 27(b)(1) of SLUSA]"].) If the PSLRA's discovery stay already provided for an automatic stay of discovery in state court securities cases, there would have been no need to enact Section 27(b)(1) of SLUSA to give federal courts the power to stay discovery in related state securities cases.

II. The Court's Interpretation Is Consistent with *Cyan, Inc. v. Beaver County Employees Retirement Fund*

The discovery stay provision does not explicitly reference the Federal Rules of Civil Procedure. Nonetheless, the Court finds that the discovery stay is of procedural nature as it (1) does not alter the range of conduct or the class of persons that the Securities Act punishes or (2) modify the elements of a Securities Act claim, and therefore only applies to actions filed in federal court. (See *In re Martinez* (2017) 3 Cal.5th 1216, 122; *Cyan, Inc. v. Beaver County Employees Retirement Fund* (2018) 138 S.Ct. 1061. ["The Reform Act included both substantive reforms, applicable in state and federal court alike, and procedural reforms, applicable only in federal court."]; *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1413 ["The general rule is that where an action founded on a federal statute is brought in a state court, the law of the state controls in matters of practice and procedure unless the federal statute provides otherwise."]; *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 851 [identifying discovery as a matter of procedure]; *Caranchini v. Peck* (D. Kansas 2018) 355 F.Supp.3d 1052 1061 [finding an act's mandatory discovery stay provisions are "strictly procedural in nature and do not affect the outcome of a case"].)

The Court's interpretation is consistent with *Cyan.* In *Cyan*, the U.S. Supreme Court identified the PSLRA "safe harbor" provisions as "substantive" and thus applicable even when a Securities Act claim is

brought in state court. (See *Cyan, supra*, 138 S.Ct. at 1072-1073.) The PSLRA safe harbor functions to exempt certain conduct from liability while imposing additional substantive elements on claims premised on certain forward-looking statements. The Court then identified that other PSLRA provisions, citing the statute's lead plaintiff provision as an example, "modified the procedures used in litigating securities actions, and applied only when such a suit was brought in federal court." (*Id.* at 1067.) The PSLRA lead plaintiff provisions do not impact liability under the Securities Act, but instead merely prescribe a process by which a plaintiff is appointed to lead the case.

Here, the timing of discovery does not alter the range of conduct or the class of person liable under the Securities Act. It does not modify the elements of the claims alleged in this case. Rather, it merely prescribes a process for gathering evidence to prove up those unaltered elements and thus determine whether a defendants' alleged conduct falls within the Securities Act's unaltered scope of liability. Consistent with *Cyan*, the PSLRA discovery stay is procedural, not substantive, and thus does not apply in state court. (See *Chavez, supra*, 34 Cal.App.4th at 1413; *Deaile, supra*, 40 Cal.App.3d at 851.)

III. Legislative History

The legislative history of the PSLRA supports the Court's conclusion. Federal Comments from the Minutes of the Civil Rules Advisory Committee from

February 1995 and April 1994 show that the PSLRA's discovery stay was viewed and intended as a procedural reform inapplicable to state courts. Third Circuit Judge Anthony Joseph Scirica and Duke Law Professor Thomas D. Rowe, Jr. – both members of the Advisory Committee on Civil Rules – informed the Advisory Committee that: "[o]ne directly procedural approach is to adopt heightened pleading requirements . . . and staying discovery during the pleading stage [subject to exceptions]." (Declaration of David W. Hall in Support of Plaintiffs' Opposition to Defendants' Joint Motion to Stay Discovery ["Hall Decl."], Ex. K [Advisory Committee on Civil Rules, Minutes, dated February 16-17, 1995].) The minutes also state the "central question posed by [the pending securities litigation legislation] is whether securities litigation is so unique that it needs *special procedural rules*[.]" (*Id.* [emphasis supplied].) Similarly, attorney Herbert M. Wachtell's testimony before the Advisory Committee characterized the PSLRA discovery stay as a procedural device. (See Hall Decl., Ex. L at 11-12 [Advisory Committee on Civil Rules, Minutes, dated April 28-29, 1994] [noting three procedural devices have been particularly effective in securities class actions, the third a "developing trend to stay discovery if a substantial motion is made under Rule 9(b) or 12(b)(6)"].) As discussed, *supra*, in *Cyan*, the Supreme Court explained the PSLRA's procedural reforms are only applicable in federal court.

Finally, no significant class action litigation was brought in state court prior to the PSLRA. (Committee on Commerce Report on H.R. 1689, Securities

Litigation Uniform Standards Act of 1998, H.R. Rep. No. 105-640, at 9-10 (July 21, 1998).) Thus, in enacting the PSLRA's discovery stay, Congress focused on remedying the problem of discovery abuses in federal courts, not state courts.

The Court finds that the PSLRA's discovery stay does not apply to this case.

CONCLUSION

Defendants' motion to stay discovery pursuant to 15 U.S.C. §77z-1, subdivision (b)(1) is **DENIED**.

IT IS SO ORDERED.

Dated: March 4, 2021 /s/ Andrew Y.S. Cheng
ANDREW Y.S. CHENG
Judge of the Superior Court