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

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

PIVOTAL SOFTWARE, INC. et al.,

Petitioners,

v.

SUPERIOR COURT FOR
THE CITY AND COUNTY
OF SAN FRANCISCO,

Respondent;

JASON HILL et al.,

Real Parties in Interest.

A162228
San Francisco No. CGC19576750

(Filed Mar. 23, 2021)

BY THE COURT:*

The petition for writ of mandate and accompanying stay request are denied.

Date 03/22/2021 **Simons, J.** Acting P.J.

ACTING P.J.

* Before Simons, Acting P.J., Burns, J. and Seligman, J. (Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution)

APPENDIX C

Court of Appeal, First Appellate District,
Division Five – No. A162228

S267949

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PIVOTAL SOFTWARE, INC. et al., Petitioners,

v.

SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Respondent;

JASON HILL et al., Real Parties in Interest.

(Filed Apr. 14, 2021)

The requests to appear as counsel pro hac vice are granted.

The petition for review and application for stay are denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX D

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 AFTER OCTOBER 27, 2020 CASE MANAGEMENT CONFERENCE (Filed Oct. 27, 2020)

This matter came on regularly for a case management conference in the above matter on October 27, 2020. David W. Hall appeared for plaintiff Zhung Tran. Danielle Smith appeared for plaintiff Alandra Mothorpe. John Jasnoch appeared for plaintiff Jason Hill. Jordan Eth and Mark Foster appeared for defendant Pivotal Software Inc. Gavin M. Masuda and Elizabeth L. Deeley appeared for defendant Morgan Stanley L & W Global. Having considered the joint case management conference statement, the arguments of the parties, and all relevant pleadings, the Court orders as follows:

1. Plaintiffs shall file their consolidated amended complaint no later than **January 15, 2021**. Defendants shall file their response to the consolidated amended complaint no later than **March 17, 2021**.

2. A hearing on Defendants' demurrer(s) is set for **June 16, 2021, at 9:00 a.m.**

3. The next case management conference is set for **February 18, 2021, at 10:30 a.m.** The parties' joint CMC statement is due no later than **February 11, 2021**.

4. Defendants' request for a discovery stay is denied. The parties shall proceed with bilateral written discovery on all issues including both merits and class certification discovery. Any other form of discovery (depositions) will require the Court's authorization.

IT IS SO ORDERED.

Dated: October 27, 2020 /s/ Andrew Y.S. Cheng
ANDREW Y.S. CHENG
Judge of the Superior Court

APPENDIX E

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

PIVOTAL SOFTWARE, INC., et al, Petitioners, v. SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO, Respondent; ZHUNG TRAN, et al., Real Parties in Interest.	A161571 (San Francisco Super. Ct. No. CGC-19-576750)

(Filed Dec. 17, 2020)

BY THE COURT:*

The petition for writ of mandate and accompanying stay request are denied. Having considered the petition's arguments and other circumstances made apparent by the record in this case, the court declines to review the issue raised in the petition by extraordinary writ. While not an exhaustive statement of

* Before Simons, Acting P.J., Burns, J. and Reardon, J. (Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution)

the court's reasons for denying the petition, the court observes that the petition challenges a ruling that was made based on the parties' summary arguments in a case management conference statement. In sharp contrast to the briefing before this court, petitioners did not thoroughly present the positions urged in the present petition by way of a stay motion filed in the superior court. Such a motion represents another, unexhausted, adequate remedy at law available to petitioners. Additionally, and irrespective of the foregoing, the petition does not persuasively demonstrate that petitioners will suffer cognizable irreparable harm absent writ review. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269, 1271-1274; *Ordway v. Superior Court* (1988) 198 Cal.App.3d 98, 101, fn. 1, disapproved on other grounds, *Knight v. Jewett* (1992) 3 Cal.4th 296.)

Date 12/16/2020 Simons, J., Acting P.J.

APPENDIX F

15 U.S.C. § 77z-1. Private securities litigation

(a) Private class actions

(1) In general

The provisions of this subsection shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this subchapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this subchapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or

wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal rules

Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider

any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

(iii) Rebuttable presumption

(I) In general

Subject to subclause (II), for purposes of clause (i), the court shall

adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence

The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery

For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel

The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs

Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) Recovery by plaintiffs

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be

construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.

(5) Restrictions on settlements under seal

The terms and provisions of any settlement agreement of a class action shall not be filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

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, other than an action or proceeding arising out of such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating, which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.

(8) Attorney conflict of interest

If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) Stay of discovery; preservation of evidence

(1) In general

In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) Preservation of evidence

During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(3) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with paragraph (2) may apply to the court for an order awarding appropriate sanctions.

(4) Circumvention of stay of discovery

Upon 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.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this subchapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or

attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) Defendant's right to written interrogatories

In any private action arising under this subchapter in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

15 U.S.C. § 77z-2. Application of safe harbor for forward-looking statements

(a) Applicability

This section shall apply only to a forward-looking statement made by—

(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 78m(a) or section 78*o*(d) of this title;

(2) a person acting on behalf of such issuer;

(3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or

(4) an underwriter, with respect to information provided by such issuer or information derived from information provided by the issuer.

(b) Exclusions

Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement—

(1) that is made with respect to the business or operations of the issuer, if the issuer—

(A) during the 3-year period preceding the date on which the statement was first made—

(i) was convicted of any felony or misdemeanor described in clauses (i)

through (iv) of section 78*o*(b)(4)(B) of this title; or

(ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that—

(I) prohibits future violations of the antifraud provisions of the securities laws;

(II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or

(III) determines that the issuer violated the antifraud provisions of the securities laws;

(B) makes the forward-looking statement in connection with an offering of securities by a blank check company;

(C) issues penny stock;

(D) makes the forward-looking statement in connection with a rollup transaction; or

(E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is—

(A) included in a financial statement prepared in accordance with generally accepted accounting principles;

(B) contained in a registration statement of, or otherwise issued by, an investment company;

(C) made in connection with a tender offer;

(D) made in connection with an initial public offering;

(E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or

(F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 78m(d) of this title.

(c) Safe harbor

(1) In general

Except as provided in subsection (b), in any private action arising under this subchapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual

results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity, was—

(I) made by or with the approval of an executive officer of that entity, and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) Oral forward-looking statements

In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 78m(a) or section 78*o*(d) of this title, or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied—

(A) if the oral forward-looking statement is accompanied by a cautionary statement—

(i) that the particular oral statement is a forward-looking statement; and

(ii) that the actual results could differ materially from those projected in the forward-looking statement; and

(B) if—

(i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to differ materially from those in the forward-looking statement is contained in a readily available written document, or portion thereof;

(ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and

(iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) Availability

Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) Effect on other safe harbors

The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g).

(d) Duty to update

Nothing in this section shall impose upon any person a duty to update a forward-looking statement.

(e) Dispositive motion

On any motion to dismiss based upon subsection (c)(1), the court shall consider any statement cited in the complaint and cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant.

(f) Stay pending decision on motion

In any private action arising under this subchapter, the court shall stay discovery (other than discovery that is specifically directed to the applicability of the exemption provided for in this section) during the pendency of any motion by a defendant for summary judgment that is based on the grounds that—

(1) the statement or omission upon which the complaint is based is a forward-looking statement within the meaning of this section; and

(2) the exemption provided for in this section precludes a claim for relief.

(g) Exemption authority

In addition to the exemptions provided for in this section, the Commission may, by rule or regulation, provide exemptions from or under any provision of this subchapter, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public

interest and the protection of investors, as determined by the Commission.

(h) Effect on other authority of Commission

Nothing in this section limits, either expressly or by implication, the authority of the Commission to exercise similar authority or to adopt similar rules and regulations with respect to forward-looking statements under any other statute under which the Commission exercises rulemaking authority.

(i) Definitions

For purposes of this section, the following definitions shall apply:

(1) Forward-looking statement

The term "forward-looking statement" means—

(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;

(C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or

in the results of operations included pursuant to the rules and regulations of the Commission;

(D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);

(E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or

(F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

(2) Investment company

The term "investment company" has the same meaning as in section 80a-3(a) of this title.

(3) Penny stock

The term "penny stock" has the same meaning as in section 78c(a)(51) of this title, and the rules and regulations, or orders issued pursuant to that section.

(4) Going private transaction

The term "going private transaction" has the meaning given that term under the rules or regulations of the Commission issued pursuant to section 78m(e) of this title.

(5) Securities laws

The term "securities laws" has the same meaning as in section 78c of this title.

(6) Person acting on behalf of an issuer

The term "person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

(7) Other terms

The terms "blank check company", "rollup transaction", "partnership", "limited liability company", "executive officer of an entity" and "direct participation investment program", have the meanings given those terms by rule or regulation of the Commission.