

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS J. PRIMO; and EVAN POWELL,
individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

PACIFIC BIOSCIENCES OF
CALIFORNIA, INC.; HUGH C. MARTIN;
SUSAN K. BARNES; BRIAN B. DOW;
WILLIAM ERICSON; BROOK BYERS;
MICHAEL HUNKAPILLER; RANDALL
LIVINGSTON; SUSAN SIEGEL; DAVID
SINGER; J.P. MORGAN SECURITIES
LLC; MORGAN STANLEY & CO., INC.;
DEUTSCHE BANK SECURITIES, INC.;
and PIPER JAFFRAY & CO.,

Defendants.

No. C 11-6599 CW

ORDER DENYING
DEFENDANTS' MOTION
TO STAY (Docket
No. 73) AND
DENYING
PLAINTIFF'S CROSS-
MOTIONS TO ENJOIN
STATE COURT
PROCEEDINGS AND
LIFT THE PSLRA
DISCOVERY STAY
(Docket No. 80)

United States District Court
For the Northern District of California

Defendants Pacific Biosciences of California, Inc. (PacBio);
Hugh C. Martin, Susan K. Barnes, Brian B. Dow, William Ericson,
Brook Byers, Michael Hunkapiller, Randall Livingston, Susan Siegel
and David Singer (collectively, the PacBio Defendants); and J.P.
Morgan Securities LLC, Morgan Stanley & Co., Deutsche Bank
Securities Inc., Piper Jaffray & Co. (collectively, the
Underwriter Defendants) move for a temporary stay of this action
pending the final approval of a settlement in state court which,
if approved, will extinguish the class claims in this case in
their entirety. Lead Plaintiff Thomas J. Primo and Plaintiff Evan
Powell (collectively, Plaintiffs) oppose the motion to stay and
cross-move to enjoin the state court proceedings and to lift
partially the Private Securities Litigation Reform Act of 1995

1 (PSLRA) discovery stay. See 15 U.S.C. § 78u-4(b)(3)(B).
2 Defendants oppose the cross-motions. Having considered the
3 parties' papers and the entire record in this case, the Court
4 DENIES Defendants' motions to stay (Docket No. 73) and DENIES
5 Plaintiffs' cross-motions to enjoin the state court litigation and
6 lift the PSLRA discovery stay (Docket No. 80).

7 BACKGROUND

8 I. Federal Action

9 Plaintiffs bring this putative class action suit against
10 PacBio, nine of its officers and directors and four underwriting
11 firms, on behalf of themselves and all persons or entities that
12 purchased PacBio common stock between October 27, 2010, the day of
13 PacBio's initial public offering (IPO), and September 20, 2011.
14 Plaintiffs allege that the offering materials filed in connection
15 with PacBio's IPO contained false and materially misleading
16 statements in violation of federal securities laws: sections 10(b)
17 and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a));
18 Rule 10b-5 promulgated under section 10(b), 17 C.F.R. § 240.10b 5;
19 and sections 11, 12(a)(2) and 15 of the Securities Act of 1933, 15
20 U.S.C. §§ 77k, 771(a)(2) and 77o). Second Amended Complaint(2AC)
21 at ¶ 9. On April 26, 2012, the Court granted Plaintiff Primo's
22 motion to be appointed as Lead Plaintiff. Docket No. 18. On
23 April 15, 2013, the Court granted Defendants' motion to dismiss
24 Plaintiffs' First Amended Complaint and granted Plaintiffs leave
25 to amend their complaint within sixty days. Docket No. 72. On
26 June 13, 2013, one day before Plaintiffs' 2AC was due, Defendants
27 filed the instant motion for a temporary stay and the parties
28 stipulated that Defendants' response to the 2AC would not be due

1 until thirty days after any denial of the motion to stay.
2 Defendants' motion to stay is based on the preliminary approval of
3 an earlier-filed state court action discussed below. Plaintiffs
4 filed their 2AC on June 14 and, on July 18, Plaintiffs filed an
5 opposition to Defendants' motion to stay and filed their cross-
6 motions to enjoin the state court proceedings and partially lift
7 the PSLRA discovery stay.

8 II. State Action

9 Three state court putative class actions making similar
10 allegations have been filed against Defendants. Those cases have
11 been consolidated into a single case alleging violations of
12 sections 11, 12(a)(2) and 15 of the Securities Act. In re Pacific
13 Biosciences of California, Inc. Securities Litigation, San Mateo
14 County Superior Court, Case No. CIV509210. On June 3, 2013, the
15 state court entered an order preliminarily approving a settlement
16 and setting a final approval hearing for October 25, 2013. The
17 parties do not dispute that approval of the settlement as proposed
18 would "extinguish all claims in this litigation, including
19 Plaintiffs' Exchange Act claims." Plaintiffs' Opposition and
20 Cross-Motion at 4.

21 LEGAL STANDARD

22 It is well-established that "the power to stay proceedings is
23 incidental to the power inherent in every court to control the
24 disposition of the causes on its docket with economy of time and
25 effort for itself, for counsel, and for litigants." Landis v.
26 North Am. Co., 299 U.S. 248, 254 (1936); see also Ethicon, Inc. v.
27 Quigg, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988) ("Courts have
28

1 inherent power to manage their dockets and stay proceedings.") As
2 the Ninth Circuit instructs,

3 A trial court may, with propriety, find it is efficient
4 for its own docket and the fairest course for the
5 parties to enter a stay of an action before it, pending
6 resolution of independent proceedings which bear upon
7 the case. This rule applies whether the separate
8 proceedings are judicial, administrative, or arbitral in
9 character, and does not require that the issues in such
10 proceedings are necessarily controlling of the action
11 before the court.

12 Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863-
13 64 (9th Cir. 1979).

14 In determining whether to grant a stay, courts generally
15 consider the following competing interests: "the possible damage
16 which may result from the granting of a stay, the hardship or
17 inequity which a party may suffer in being required to go forward,
18 and the orderly course of justice measured in terms of the
19 simplifying or complicating of issues, proof, and questions of law
20 which could be expected to result from a stay." Lockyer v. Mirant
21 Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted).

22 DISCUSSION

23 I. Motion to Stay

24 Defendants argue that the Court should temporarily stay this
25 action until the settlement is finalized in state court because
26 the release in the state court case would extinguish all of
27 Plaintiffs' claims. Accordingly, Defendants argue, allowing the
28 case to proceed in this Court would be duplicative and a waste of
judicial and party resources. Plaintiffs counter that staying
their Exchange Act claims would be an improper abdication of this
Court's exclusive jurisdiction over such claims. See 15 U.S.C.

1 § 78aa ("The district courts of the United States and the United
2 States courts of any Territory of other place subject to the
3 jurisdiction of the United States shall have exclusive
4 jurisdiction of violations of this chapter or the rules and
5 regulations thereunder . . .").

6 Plaintiffs cite Silberkleit v. Kantrowitz, in which a
7 district court had stayed a "federal action involving two claims
8 within exclusive federal jurisdiction . . . based on grounds of
9 'wise judicial administration.'" 713 F.2d 433 (9th Cir. 1983).
10 The Ninth Circuit reversed the stay, noting that the "'wise
11 judicial administration' exception to the exercise of jurisdiction
12 is invoked only 'when both the federal and state courts have
13 concurrent jurisdiction over particular claims.'" Id. (quoting
14 Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 820-21 (9th
15 Cir. 1982)). The Silberkleit court concluded that "a district
16 court has no discretion to stay proceedings involving claims
17 within exclusive federal jurisdiction." Id.

18 Defendants argue that Silberkleit concerns abstention rather
19 than a temporary stay. Moreover, Defendants argue that they only
20 seek a stay until the state court acts, at which point the stay
21 will be automatically lifted. Nonetheless, as the parties agree,
22 Plaintiffs' claims will be extinguished if the state court grants
23 final approval of the state court action and Plaintiffs do not opt
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1 out.¹ If Plaintiffs do opt out of the state court case, there is
2 no reason to stay their individual claims in this Court.

3 The Court declines to exercise its discretion to stay this
4 case. Defendants' motion to stay is DENIED. However, to manage
5 this case in the most efficient manner possible, the Court sets
6 the following deadlines. If either or both Plaintiffs opt out of
7 the state court action, Defendants' response to the 2AC will be
8 due within two weeks of the date the opt-out form is received by
9 Defendants. If neither Plaintiff opts out and the settlement is
10 not finally approved by the state court, Defendants' response to
11 the 2AC shall be due within two weeks of the date of the state
12 court's order rejecting the settlement. If neither Plaintiff opts
13 out and the settlement is finally approved by the state court, the
14 parties shall file a stipulated order of dismissal within one week
15 of the date of the final approval.

16 II. Cross-Motion to Enjoin the State Court Proceedings

17 Plaintiffs have filed a cross-motion to enjoin the state
18 court settlement to the extent that it would release or extinguish
19 the state class members' Exchange Act claims. Plaintiffs cite
20 various cases in support of their argument that the Anti-
21 Injunction Act, 28 U.S.C. § 2283, would not prohibit such an
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23 ¹ In their motion to stay, Defendants state that if the
24 settlement "is finally approved, the Federal Plaintiffs may opt
25 out of the State Action settlement and individually pursue
26 litigation in this forum." However, the exhibit Defendants cite
27 in support of this statement clearly states that any request for
28 exclusion from the class must be received at least thirty days
prior to the final approval hearing. Moreno Dec. Ex. 2 at ¶ 12.
Contrary to Defendants' statement, Plaintiffs cannot opt out after
the settlement is finally approved.

1 injunction, and that the All Writs Act, 28 U.S.C. § 1651(a),
2 provides the Court with authority to issue such an injunction.
3 However, to the extent the Court has the authority to issue such
4 an injunction, it declines to do so. Plaintiffs have not even
5 moved to certify the class in this case. Accordingly, any request
6 for this Court to act can only be made in their individual
7 capacities. If Plaintiffs wish to pursue their Exchange Act
8 claims, they may opt out of the state court settlement and pursue
9 their individual claims in this Court.

10 The fact that Plaintiff Primo has been appointed Lead
11 Plaintiff in this action does not change the analysis. Plaintiffs
12 assert that allowing the state court settlement to go forward will
13 interfere with Lead Plaintiff's "fiduciary duty to monitor, manage
14 and control the litigation." In re Terayon Comm'ns Sys., Sec.
15 Litig., 2004 U.S. Dist. LEXIS 3131, at *17 (N.D. Cal.) (internal
16 quotation omitted).

17 Plaintiffs cite In re BankAmerica Corp. Securities
18 Litigation, a case in which a court in the Eastern District of
19 Missouri enjoined state court proceedings. 95 F. Supp. 2d 1044
20 (E.D. Mo. 2000). However, as Defendants point out, BankAmerica is
21 distinguishable from this case on multiple grounds, primarily
22 because the federal class in BankAmerica had already been
23 certified and there were problems with the certification of the
24 later filed state action. In contrast, Plaintiffs in this federal
25 action have not yet filed a motion to certify the class. Indeed
26 Defendants intend to file a motion to dismiss the 2AC.
27 Moreover, the state action Plaintiffs seek to enjoin in this case
28 was earlier filed, and, according to the complaints in each case,

1 the named plaintiffs in the state action own significantly more
2 shares than Plaintiffs in this case. This is a far cry from
3 BankAmerica where "competing state court plaintiffs, representing
4 a significantly smaller number of shares [sought to] institute
5 premature settlement negotiations which threaten[ed] the orderly
6 conduct of the federal case and which could result in the release
7 of the federal claims." 95 F. Supp. 2d at 1049.

8 Accordingly, the Court DENIES Plaintiffs' motion to enjoin
9 the state court proceedings.

10 III. Motion to Lift the PSLRA Discovery Stay

11 Plaintiffs further argue that the Court should partially lift
12 the PSLRA Discovery stay to permit "discovery as to the names and
13 contact information of shareholders who obtained shares in the
14 IPO." Plaintiffs' Opposition and Cross-Motion at 16. Plaintiffs
15 explain that such "information will permit Plaintiffs to identify
16 persons for contact who may wish to serve as additional plaintiffs
17 in the Federal Action to enforce the Section 12 claims pursuant to
18 the Securities Act." ²

19 However, the PSLRA provides that "all discovery and other
20 proceedings shall be stayed during the pendency of any motion to
21 dismiss, unless the court finds upon the motion of any party that
22 particularized discovery is necessary to preserve evidence or to
23 prevent undue prejudice to that party." 15 U.S.C. § 78u-

24 _____
25 ² In its order dismissing the 1AC, the Court found that
26 "neither named Plaintiff has standing to assert the § 12(a)(2)
27 claim." Docket No. 72 at 36. It granted leave to amend only
28 "with a new named Plaintiff who has standing to assert his claim."
Id. In their 2AC, Plaintiffs again allege a § 12(a)(2) claim, but
they have not added any new named plaintiffs.

1 4(b)(3)(B). "Congress clearly intended that complaints in these
2 securities actions should stand or fall based on the actual
3 knowledge of the plaintiffs rather than information produced by
4 the defendants after the action has been filed." Medhekar v.
5 United States Dist. Ct., 99 F.3d 325, 328 (9th Cir. 1996).

6 Plaintiffs state that they "will be prejudiced without access
7 to documents already produced to the plaintiffs in the State
8 Action" and cite various cases in which courts have found undue
9 prejudice when requested documents have already been produced to
10 other entities. Plaintiffs' Opposition and Cross-Motion at 13.
11 However, Plaintiffs do not provide any additional information
12 regarding the prejudice they will suffer. Accordingly, the Court
13 DENIES Plaintiffs' motion to lift the PSLRA discovery stay.

14 CONCLUSION

15 For the reasons set forth above, the Court DENIES Defendants'
16 motion to stay (Docket No. 73) and DENIES Plaintiffs' motions to
17 enjoin the state court action and to lift the PSLRA discovery stay
18 (Docket No. 80).

19 IT IS SO ORDERED.

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21 Dated: 8/20/2013

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23 CLAUDIA WILKEN
24 United States District Judge
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