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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN FRANCISCO DIVISION

14 In re GILEAD SCIENCES SECURITIES
 LITIGATION,

) Master File No.: C-03-4999-MJJ

15 _____)

) CLASS ACTION

16 This Document Relates To:

) SPECIALLY APPEARING STATE
) COURT PLAINTIFFS' MEMORANDUM
) OF POINTS AND AUTHORITIES IN
) OPPOSITION TO DEFENDANTS'
) MOTION FOR STAY OF DISCOVERY IN
) FACTUALLY-RELATED STATE
) DERIVATIVE ACTION

17 ALL ACTIONS

) Date: October 5, 2004
) Time: 9:30 a.m.
) Dept.: Courtroom 11
) Judge: Honorable Martin J. Jenkins

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1 **I. INTRODUCTION**

2 Defendants have repeatedly attempted to stall the prosecution of plaintiffs' state court
3 derivative action (the "State Derivative Action"). Defendants forced plaintiffs to file two separate
4 motions to compel, unsuccessfully demurred to the complaint, filed a futile motion for protective
5 order seeking a stay of discovery, and have recently taken a writ on the state court's order overruling
6 their demurrer, which writ also asks the appellate court to stay the State Derivative Action. Despite
7 all of their efforts, the state court has properly ordered defendants to participate in the discovery
8 process. Nevertheless, defendants have not produced a single bit of responsive discovery. To date,
9 plaintiffs have not received substantive responses to their interrogatories nor documents responsive
10 to any of their outstanding document requests.

11 Now, in their continued desperation, defendants attempt to convince this Court to stay all
12 discovery in the State Derivative Action. However, a review of the procedural history reflects that
13 there is no valid basis for the interference of this Federal Court into the ongoing proceedings in the
14 state court. There is no factual or legal basis for defendants' Motion for Stay of Discovery (the
15 "Motion"), as none of the plaintiffs nor their counsel in the State Derivative Action are participating
16 in this federal court action. As such, it is without doubt that plaintiffs in the State Derivative Action
17 are not attempting to circumvent the Private Securities Litigation Reform Act of 1995's ("PSLRA")
18 discovery stay. As is evident by defendants' continual attempts to avoid participating in proper
19 discovery, this Motion is merely the result of a continued procedural tactic by defendants to delay
20 the diligent prosecution of the more-advanced State Derivative Action in which the complaint has
21 already been upheld against challenges to the pleadings and defendants have been ordered to
22 participate in discovery.

23 **II. PROCEDURAL HISTORY IN STATE DERIVATIVE ACTION**

24 On December 16, 2003, plaintiffs filed their shareholder derivative actions in San Mateo
25 Superior Court. On January 27, 2004, pursuant to C.C.P. §§2019 and 2031, plaintiffs issued their
26 first set of discovery requests. Defendants responded to these requests with only objections.¹ On
27

28 ¹ After engaging in numerous meet and confer discussions, plaintiffs filed two motions to compel.
The court denied both of plaintiffs' motions due to procedural defects.

1 June 2, 2004, plaintiffs personally served a notice of deposition on Gilead Sciences, Inc., which
2 included a demand for production of certain documents. The documents requested were the final
3 narrowly tailored version of the originally-served requests, as requested by plaintiffs in the prior
4 motions to compel. Defendants then filed their motion for protective order. On July 14, 2004, after
5 full briefing and oral argument, the state court denied defendants' motion and ordered them to
6 produce all relevant discovery. Despite the fact that their motion for protective order was denied
7 over a month ago, plaintiffs still have not received substantive responses or documents to any of
8 their outstanding discovery requests.

9 On February 19, 2004, plaintiffs filed their Consolidated Shareholder Derivative Complaint
10 (the "Consolidated Complaint"). After defendants' demurrer to the Consolidated Complaint was
11 sustained, plaintiffs filed their Consolidated Amended Shareholder Derivative Complaint. After
12 defendants again demurred, the state court denied defendants' demurrer and upheld all of the
13 allegations of the complaint. Defendants have recently taken a writ on the demurrer ruling. In light
14 of this writ, defendants have sought yet another stay of the State Derivative Action from the state
15 court. Moreover, in their writ, defendants have also asked the Court of Appeals to stay all
16 proceedings in the State Derivative Action, their fourth such request to stay discovery.

17 **III. THE STATE DERIVATIVE ACTION IS NOT SUBJECT TO A DISCOVERY STAY** 18 **UNDER SLUSA**

19 By this Motion, defendants seek to stay all discovery in the State Derivative Action based
20 upon the PSLRA and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").
21 However, the PSLRA only applies to federal securities law claims. Specifically, the PSLRA
22 provides:

23 *In any private action arising under this title*, all discovery and other proceedings
24 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.

25 15 U.S.C. §78u-4(b)(3)(B) (emphasis added). Clearly this statute relates *only* to actions brought
26 under certain sections of the federal securities laws. It is undisputed: *this case is not brought under*
27 *any "title" of those statutes*. There is simply no authority to support defendants' argument that the
28 PSLRA discovery stay provision applies to the State Derivative Action.

1 It is without doubt that, under the PSLRA, there is an automatic stay of discovery in federal
2 securities law class actions only. *Id.* Also, SLUSA added a provision to the PSLRA to address the
3 "problem" where plaintiffs in a state court action seek to circumvent the PSLRA discovery stay in
4 a federal court class action. This provision states:

5 ***Circumvention of stay of discovery.*** *Upon a proper showing*, a court may stay
6 discovery proceedings in any private action in a State court, as necessary in aid of
7 its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay
8 of discovery pursuant to this paragraph.

9 15 U.S.C. §78u-4(b)(3)(D) (emphasis added); Memorandum of Points and Authorities in Support
10 of Motion for Stay of Discovery in Factually-Related State Derivative Action ("Defs.' Mem.") at 9.
11 However, the mere existence of a derivative action in state court does **not** trigger this stay provision
12 of the SLUSA.²

13 It is clear that, for a federal court to stay discovery, defendants must make a proper showing
14 that the State Derivative Action was filed in an attempt to circumvent the discovery stay set forth
15 by the PSLRA. Indeed, the above quoted SLUSA section is captioned "Circumvention of stay of
16 discovery." 15 U.S.C. §78u-4(b)(3)(D); Defs.' Mem. at 8. As defendants have failed to make any
17 showing - let alone a proper showing - that plaintiffs in the State Derivative Action are seeking to
18 circumvent the PSLRA's discovery stay, this Court should deny defendants' Motion.

19 **IV. DEFENDANTS HAVE NOT DEMONSTRATED THE NEED FOR A STAY
20 OF DISCOVERY IN THE STATE DERIVATIVE ACTION**

21 Defendants have sought to have this Federal Court stay the discovery in the State Derivative
22 Action. However, this request has been heard and rejected on numerous occasion. *See In re Dynegy,*
23 *Inc. Sec. Litig.*, No. H-02-1571, slip op. (S.D. Tex. May 28, 2003); *In re Cisco Sys., Inc. Sec. Litig.*,
24 No. C 01-20418 JW, slip op. (N.D. Cal. Jan. 30, 2002); *Marcano v. Vertex Pharms., Inc.*, No. 1:03-
25 CV-11852-PBS, docket at Mar. 29, 2004 ("Electronic ORDER entered denying ... Motion for
26 Injunctive Relief and to Stay Discovery") and Apr. 14, 2004 ("Electronic ORDER entered denying
27 ... Motion for Reconsideration") (D. Mass.), attached to the Declaration of Marc M. Umeda as

28 ² Moreover, the stay provided by SLUSA is **not** automatic, but requires a strong showing similar
to that required for a federal stay of a state court proceeding under the Anti-Injunction Act 28 U.S.C
§2283 - as reflected in the parallel language of those statutes. Defendants have failed to make such
a showing in their pending Motion.

1 Exhibits A-C, respectively. This request should be rejected too.

2 **A. Plaintiffs Are Not Attempting to Circumvent the PSLRA's Discovery Stay**

3 The statutory language of the PSLRA and SLUSA, the legislative history of these statutes
4 and the case law cited by defendants make it abundantly clear that a federal court should stay
5 discovery in a state action pursuant to 15 U.S.C. §78u-4(b)(3)(D) only if the plaintiff in the state
6 action is attempting to circumvent the PSLRA's discovery stay. As plaintiffs in the State Derivative
7 Action are not seeking to circumvent the PSLRA's discovery stay- in fact, defendants cannot even
8 seriously allege it - a stay of discovery in the State Derivative Action is inappropriate.

9 **1. The SLUSA Discovery Stay Is Intended Solely to Prevent a
10 Circumvention of the PSLRA's Discovery Stay**

11 The SLUSA language upon which defendants rely clearly sets forth the purpose and intent
12 of Congress in allowing federal courts to stay discovery in certain state proceedings. The relevant
13 SLUSA section reads:

14 Circumvention of stay of discovery. Upon a proper showing, a court may stay
15 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 paragraph.

16 15 U.S.C. §78u-4(b)(3)(D); Defs.' Mem. at 9. Therefore, the clear meaning of this statutory
17 language shows that this discovery stay should only be considered by a federal court when plaintiffs
18 in state court are seeking to circumvent the PSLRA's discovery stay. Defs.' Mem. at 9 ("federal
19 courts were given this authority 'to prevent plaintiffs from circumventing the stay of discovery under
20 the [PSLRA]..."); see *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that
21 the meaning of a statute must, in the first instance, be sought in the language in which the act is
22 framed, and if that is plain ... the sole function of the courts is to enforce it according to its terms.")
23 (citations omitted).³

24
25 ³ Defendants also make a weak argument that this Court should stay discovery in the State
26 Derivative Action to avoid any "burden" on the defendants in this action. Defs.' Mem. at 9, 10, 12-
27 14. However, defendants do not face any burden in this action as discovery is stayed pursuant to
28 the PSLRA. Moreover, any supposed burden placed upon the parties to the State Derivative Action
is the same burden that all parties to litigation face. Lastly, plaintiffs in the State Derivative Action
will make available to the plaintiffs in this action a copy of any discovery produced in the State
Derivative Action, if defendants request such or this Court so orders. Thus, defendants' concern
about duplicative discovery is easily remedied.

1 Moreover, the legislative history of SLUSA - including the legislative history cited by
2 defendants - clearly demonstrates that this SLUSA provision was added solely to prevent
3 circumvention of the PSLRA's discovery stay.

4 [Section 78u-4(b)(3)(D)] amends Section 27(b) of the Securities Act of 1933 to
5 include a provision to prevent plaintiffs from circumventing the stay of discovery
under the Reform Act by using State court discovery

6 *Newby v. Enron Corp.*, No. H-01-3624, 2002 WL 1001056, at *2 (S.D. Tex. May 1, 2002)
7 (alteration in original). Also:

8 Because circumvention of the stay of discovery of the Reform Act is a key abuse that
9 this legislation is designed to prevent, the Committee intends that courts use this
10 provision liberally, so that the preservation of State court jurisdiction of limited
individual securities fraud claims does not become a loop hole through which the
trial bar can engage in discovery not subject to the stay of the Reform Act.

11 *Id.*; Defs.' Mem. at 9.

12 Thus, in order to establish that this Court should enjoin discovery in the State Derivative
13 Action, defendants must demonstrate that discovery in the State Derivative Action will be used to
14 circumvent the automatic stay of discovery provisions of the PSLRA. Defendants have not and
15 cannot make such a showing.

16 **2. Federal Courts Stay Discovery in State Actions Only if Plaintiffs Are**
17 **Attempting to Circumvent the PSLRA's Discovery Stay**

18 The two cases cited by defendants demonstrate that a federal court will, pursuant to SLUSA,
19 stay discovery in a state proceeding only if such discovery is sought to circumvent the PSLRA's
20 discovery stay. In *In re DPL Inc., Sec. Litig.*, 247 F. Supp. 2d 946, 947 (S.D. Ohio 2003), the court,
21 after quoting §78u-4(b)(3)(D), stated that "Section 78u-4(b)(3)(D) was added to prevent plaintiffs
22 from utilizing state court actions to circumvent the stay of discovery imposed by §78u-4(b)(3)(B)."
23 Further, the *DPL* court, in quoting the legislative history behind the SLUSA stay, stated that:

24 Congress explained in the legislative history: [Section 78u-4 (b)(3)(D)] amends
25 [Section 21D of the Securities Exchange Act of 1934] to include a provision to
26 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 any
action filed in State court.

27 *Id.*(alterations in original). See also *In re Transcript Int'l Sec. Litig.*, 57 F. Supp. 2d 836, 847 (D.
28 Neb. 1999) ("the whole purpose of the statute" is to prevent circumvention of the PSLRA discovery

1 stay).⁴ With this purpose in mind, the *DPL* court granted the stay because:

2 During oral argument, Stanley Chesley, an attorney representing some of the
3 Plaintiffs in these consolidated cases [the federal action] as well as the Plaintiffs in
4 Austern Trust [the state action], indicated that he anticipated sharing discovery
5 obtained in that state court proceeding with the other counsel representing Plaintiffs
6 in these consolidated actions. Therefore, it is apparent that the stay of discovery
7 required by §78u-4(b)(3)(B) will be circumvented, if state court discovery is not
8 stayed.

9 247 F. Supp. 2d at 950.⁵

10 *Newby*, the other case relied upon by defendants, affirms the district court's ability to stay
11 discovery in a state case "upon a proper showing." In that case, one law firm had initiated seven
12 different lawsuits alleging virtually the same facts and claims in both federal and state courts. 2002
13 WL 1001056 at *1. Given that there was one firm orchestrating all the state and federal lawsuits,
14 there existed a serious threat for abuse.⁶ Indeed it was clear that if the state plaintiffs were able to
15 obtain documents that the federal court held should not be produced, the documents would be shared
16 with the federal plaintiffs. Relying on the threat of shared discovery and the purpose of the SLUSA
17 discovery stay to prevent circumvention of the PSLRA's discovery stay, the *Newby* court enjoined
18 discovery in the state court actions. *Id.* at *3.⁷ By contrast, there is no sharing agreement here, and

19 ⁴ The district court in *Transcrypt*, 57 F. Supp. 2d at 847, also noted that the SLUSA discovery stay
20 provision is discretionary not mandatory, and thus should be used sparingly:

21 Moreover, the statute is discretionary, not mandatory; it says, "Upon a proper
22 showing, a court may stay discovery...." Such wording does not indicate that
23 Congress through the interests of protecting the besieged corporate defendants and
24 promoting "strong financial markets" were so paramount as to require erection of
25 impenetrable barriers around them, nor that allowing discovery to proceeding in state
26 court actions would pose a serious threat to them in all cases. If it had, it would not
27 have carved out so many exceptions to the general exclusivity of federal court
28 jurisdiction; it would have required, rather than permitted, a stay of discovery in state
court actions; and it would have used language more permissive than copying that
from the anti-junction statute, 28 U.S.C §2283.

⁵ In acknowledgment of the seriousness of granting the discovery stay, the *DPL* court ordered an
expedited schedule for considering the motion to dismiss in the federal action. *DPL*, 247 F. Supp.
2d at 951.

⁶ The court in *Newby* continued to cure the litigation abuses when it subsequently enjoined the same
law firm from filing any new related actions without leave of court. *Newby v. Enron Corp.*, 302
F.3d 295 (5th Cir. 2002).

⁷ The *Newby* court relied on *In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795 (8th Cir. 2001), in
enjoining the state court discovery. *Newby*, 2002 WL 1001056 at *3. In accordance with SLUSA's
legislative intent, the *BankAmerica* court enjoined the state court discovery as the plaintiffs in the
federal and state actions in *BankAmerica* were represented by the same counsel. *BankAmerica*, 263

1 the parties can easily prohibit the sharing of discovery with the federal class plaintiffs. In fact, the
2 parties to the State Derivative Action are close to agreeing upon a proper confidentiality agreement.
3 Such confidentiality agreement will contain a provision requiring plaintiffs to file any publicly
4 available documents under seal, a standard provision for these types of confidentiality agreements.
5 Thus, defendants' concern that a possible amended complaint in the State Derivative Action will be
6 "readily accessible to the Federal Plaintiffs," Defs.' Mem. at 11, is a red herring. Despite this fact,
7 defendants have chosen to seek to stay all discovery in the State Derivative Action by the federal
8 court after the state court has already ordered defendants to participate in the discovery process.⁸
9 But, no problem actually exists here because there are no overlapping representations of plaintiffs
10 between the state and federal courts.

11 Although defendants assert that a discovery stay of the State Derivative Action is required
12 to prevent a circumvention of the PSLRA discovery stay, Defs.' Mem. at 11-12, defendants do not,
13 and cannot, allege that either plaintiffs are seeking to circumvent the stay.⁹ First, and very
14 importantly, none of the counsel for the plaintiffs in the State Derivative Action are involved in the
15 federal securities action. Moreover, the discovery served in the State Derivative Action is brought
16 pursuant to and in compliance with California state laws. C.C.P. §§2016 *et. seq.* Therefore, as
17 plaintiffs in the State Derivative Action are merely prosecuting their action in accordance with
18 California law, and not attempting to circumvent the PSLRA's discovery stay, defendants' Motion
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F.3d at 798.

22 ⁸ Courts have restricted counsel from sharing discovery while a federal stay is in effect. For
23 example, in *Lapicola v. Alternative Dual Fuels, Inc.*, No. 3-02-CV-0299-G, 2002 WL 531545 (N.D.
24 Tex. Apr. 5, 2002), the court allowed discovery in the state securities action even while the PSLRA
25 stayed discovery in the federal action. Significantly, the individual plaintiffs seeking discovery in
26 the state securities action were the very same plaintiffs in the parallel federal action against the same
27 defendants. Nevertheless, the court deemed defendants adequately protected from plaintiffs' use of
28 discovery in the federal action by plaintiffs' representation that they would not use any discovery
obtained in the state action to amend their federal complaint before a ruling on defendants' motion
to dismiss the federal action.

⁹ In fact, the state court plaintiffs are working with defendants to ensure that the federal plaintiffs
do not receive information they should not.

1 must be denied.¹⁰

2 **V. DEFENDANTS HAVE NOT DEMONSTRATED THAT A STAY OF DISCOVERY**
3 **IN THE STATE DERIVATIVE ACTION BY THIS FEDERAL COURT IS**
4 **"NECESSARY IN AID OF ITS JURISDICTION" OR "TO PROTECT OR**
5 **EFFECTUATE ITS JUDGMENTS" IN THE FEDERAL CLASS ACTION**

6 The mere existence of related actions in state and federal court is not a sufficient showing
7 to stay state court discovery under SLUSA. Rather defendants must make a "proper showing" that
8 such a discovery stay by this federal court is "necessary in aid of its jurisdiction" or necessary "to
9 protect or effectuate its judgments" in a federal securities class action. 15 U.S.C. §78u-4(b)(3)(D).
10 Defendants have not demonstrated that discovery in the State Derivative Action will cause harm to
11 the jurisdiction of the federal court or protect or effectuate its judgments in the pending class action.

12 **A. A Stay Is Not Necessary in Aid of This Court's Jurisdiction**

13 "Although the discovery stay provisions are not limited to federal securities class actions,
14 the PSLRA's legislative history indicates that class actions were the main focus of the PSLRA."
15 *Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162, 166 n.4 (S.D.N.Y. 2001) (citations
16 omitted). In *Tobias*, the Southern District of New York held that where a plaintiff brings a federal
17 action alleging (i) federal securities law claims, with jurisdiction based upon federal question, and
18 (ii) state law claims, with jurisdiction independently based upon diversity, and not under pendent
19 jurisdiction, the same plaintiff may take discovery as to the state law claims despite the discovery
20 stay of federal claims under PSLRA. *Id.* at 168-69. *Tobias* is particularly helpful here, as the State
21 Derivative Action only alleges state law claims.

22 In denying the stay of discovery, the *Tobias* court noted the impropriety of staying a related
23 state court action, especially as the higher showing is required for such a stay:

24 Plaintiff could have brought its state claim in state court in a separate action. Such
25 an action would not be precluded by [SLUSA], which effectively precludes litigation
26 of securities class actions in state courts. Furthermore, if plaintiff did bring a separate
27 state court action for the common law non-fraud claims ***it is highly unlikely that***
28 ***discovery in that action would be halted by a federal court.*** While a federal court

26 ¹⁰ Defendants' assertion that the state court plaintiffs will not be prejudiced by a discovery stay is
27 wholly irrelevant to this Court's analysis. Nonetheless, plaintiffs would be prejudiced as defendants,
28 yet again, are seeking to dismiss the State Derivative Action while simultaneously seeking to avoid
producing relevant discovery to the state court plaintiffs which California law allows. The state
court has already rejected defendants' attempts, and this Court should too. Moreover, defendants'
argument that a stay is in Gilead's "best interests" is also irrelevant, and also previously rejected by
the state court.

1 does have the power to stay discovery in state court proceedings, the grounds on
2 which it may do so are quite limited: "Upon a proper showing, a court may stay
3 discovery proceedings in any private action in a State court as necessary in aid of its
4 jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of
5 discovery...." Here, *a federal court hearing only the federal securities claims
6 would have no basis on which to stay discovery in a parallel state action involving
7 non-fraud claims because the non-fraud claims would not interfere with the
8 jurisdiction of the federal court or threaten its judgments in any way.*

9 *Id.* at 168-69 (emphasis added and citations omitted).¹¹

10 **B. A Stay Is Not Necessary to Protect or Effectuate This Court's Judgments**

11 Plaintiffs are aware of no "judgments" in the federal class action - and thus no "judgments"
12 needing protection or effectuation. Accordingly, there is no basis for a stay of discovery in the State
13 Derivative Action which could be "necessary" "to protect or effectuate" a federal judgment. *See Atl.*
14 *Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 297 (1970) (United States
15 Supreme Court vacated district court injunction because "that court has not yet proceeded to a final
16 judgment in the case").¹²

17 **VI. CONCLUSION**

18 In light of the foregoing, state court plaintiffs Mark Peng and Aaron Kaufman respectfully
19 request that defendants' Motion for Stay of Discovery be denied in its entirety.

20 DATED: September 14, 2004

21 Respectfully submitted
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¹¹ Plaintiffs are aware that the courts in *DPL* and *Newby* held that the court's jurisdiction was affected by the discovery, but cite to *Tobias* as the more reasoned ruling on this issue.

¹² Although, the court in *Newby* declared that "to protect and effectuate its judgments it is necessary to enjoin all discovery" in the state court action, no reasoning was supplied. *Newby*, 2002 WL 1001056 at *3.

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