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Case No. 3128-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBOTTI & COMPANY, LLC, Plaintiff, v. GULFPORT ENERGY CORPORATION, MIKE LIDDELL, ROBERT E. BROOKS, DAVID L. HOUSTON, MICKEY LIDDELL and DAN NOLES, Defendants.	)	Civil Action No. 3128-VCN

REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO STAY DISCOVERY

On February 5, 2008, Defendants, Gulfport Energy Corporation ("Gulfport"), Mike Liddell, Robert E. Brooks, David L. Houston, Mickey Liddell and Dan Noles (collectively, "Defendants") moved to dismiss the Amended Verified Class Action Complaint of Robotti & Company, LLC ("Robotti" or "Plaintiff") because it fails to state a claim upon which relief can be granted under Court of Chancery Rule 12(b)(6) and fails to comply with Court of Chancery Rule 23.1, and because Plaintiff's claims are barred by the applicable statute of limitations and the doctrine of laches.[1] Two months after the motion to dismiss was filed, Plaintiff served discovery on Defendants. On April 8, 2008, Defendants moved to stay discovery pending the

[1] Defendants will file their Opening Brief in Support of Their Motion to Dismiss on April 28, 2008. On March 13, 2008, Defendants proposed a briefing schedule on the motion after learning that Plaintiff did not intend to amend its complaint, despite voluntarily dismissing CD Holdings, L.L.C. as a defendant. Exhibit A. On March 14, 2008, Plaintiff agreed to this schedule so long as Defendants agreed to move forward with discovery, though plaintiff had not even served any discovery. Exhibit B, Opp. at 2, 6. On March 14, 2008, Defendants rejected Plaintiff's condition. Exhibit C. Plaintiff's March 17, 2008 response did not propose an alternative briefing schedule. Exhibit D. On March 20, 2008, after hearing nothing further from Plaintiff, Defendants proposed a date to file its opening brief, and invited Plaintiff, if it disagreed, to seek a schedule that it found acceptable from the Court, as provided for in Court of Chancery Rule 171. Exhibit E. Plaintiff never sought an alternative briefing schedule.

Court's decision on its motion to dismiss. Plaintiff filed its opposition to the stay motion on April 17, 2008. This is Defendants' reply.

ARGUMENT

Plaintiff's argument that no stay of discovery is appropriate because the motion to dismiss is makeweight is plainly wrong. Defendants' motion to dismiss, if granted, is a case-dispositive motion. The time, effort and money necessary to respond to Plaintiff's discovery requests should be postponed until this Court has decided Defendants' motion. Gulfport should not be forced to spend its shareholders' money on improperly asserted shareholder claims unless and until this Court rules Plaintiff's claims are proper.

A. Plaintiff Misunderstands the Stay Standard

Plaintiff's opposition to a stay of discovery is premised on the erroneous proposition that the Court must predetermine that Defendants' motion to dismiss will be granted in order to find a stay is appropriate.[2] Thus, Plaintiff misdirects its efforts toward pre-arguing the merits of the motion to dismiss and makes no attempt to show that the motion, if granted, will not end this case. Nor does Plaintiff show any threat of injury if a stay is granted. In short Defendants' motion should be granted because Plaintiff has not even addressed the correct standards governing that motion.

1. Credible Basis for Dismissal Is Not the Standard

Plaintiff's repeated assertion that the standard on a motion to stay discovery is whether Defendants have provided a "credible basis" for dismissal is incorrect. Opp. at 1, 4. Plaintiff ignores that discovery is normally stayed pending the determination of a potentially case

[2] Plaintiff's Memorandum in Opposition to Defendants' Motion to Stay Discovery at 1 (hereinafter "Opp. at ___") or "Opposition").

dispositive motion, "absent special circumstances." [3] Instead, Plaintiff attacks the credibility of Defendants' motion to dismiss and asserts a nonsensical "special circumstance" requiring discovery as to a matter not addressed by Plaintiff's discovery requests. *See* Opp. at 4, 6. Defendants' request for a stay of discovery pending determination of its motion to dismiss is consistent with the policy favoring stays of discovery absent "special circumstances" to avoid the expense and time of responding to discovery that will be avoided if Defendants' motion to dismiss is granted.[4]

2. No "Special Circumstances" Exist to Warrant Denying the Stay

Plaintiff does not face the "special circumstances" it claims, *i.e.*, "the potential loss of rights or information." Opp. at 6. In both of the cases Plaintiff cites, the Court found there was no showing that information relevant to the actions might be unavailable if discovery was delayed for the "brief period required to hear and decide the dismissal motion."[5] Plaintiff does not allege it faces the loss of any information by postponing discovery until the motion to dismiss is decided. *See* Opp. at 6. The only discovery Plaintiff claims to need urgently is the identity of the party it attempted to add to its amended complaint.[6] Opp. at 6. Noticeably absent from Plaintiff's discovery requests, however, are any requests targeted to determine the "proper identification" of the entity it wishes to name as a defendant in the complaint. *Id.* Plaintiff does

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[3] *ABBA Flakt, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 731 A.2d 811, 815 (Del. 1991); *In re McCrory Parent Corp.*, 1991 WL 137145, at *1 (Del. Ch.).

[4] *See Orloff v. Shulman*, 2005 WL 333240, at *1 (Del. Ch.); *In re McCrory Parent Corp.*, 1991 WL 137145, at *1 (Del. Ch.).

[5] *Orloff v. Shulman*, 2005 WL 333240, at *2 (Del. Ch.); *McCrory*, 1991 WL 137145, at *1-*2 (finding there was no threat of irreparable injury to plaintiffs from the "relatively short stay of discovery," which it estimated would last "three to four months").

[6] Plaintiff continues to list in its caption an entity it voluntarily dismissed from this action on February 2, 2008 (DI 18). Generally, a party does not list another entity in a caption unless that entity is a party. Robotti "agrees that it has not served properly the entity named in the complaint at this time." Opp. at 6 n.6. Regardless of Robotti's intention to determine the proper entity and name it in the complaint, CD Holdings, L.L.C. is not a proper party, has been voluntarily dismissed and should be removed from the caption.

not, because it cannot, demonstrate an "emergency or other special circumstance" that would warrant forcing Defendants to bear the burden and expense of discovery at this stage where discovery may ultimately turn out to be unnecessary.[7]

3. Plaintiff's Delay Shows No Discovery Is Necessary

Plaintiff's sudden race to take discovery comes after a long history of delay. Not only did Plaintiff remain silent for months after it was aware of the purposed Rights Offering, it only made a proper § 220 demand on its fourth try and otherwise litigated its § 220 cases at a snail's pace. It also sat idly by after filing its complaint in this case. Plaintiff waited nineteen (19) weeks after it received the documents this Court ordered Gulfport to produce in the § 220 Action before filing an amended complaint. To pretend now that there is an emergency or other factor that warrants immediate discovery while Defendants' motion to dismiss is pending is disingenuous.

4. Plaintiff's Discovery Requests Are Unnecessary, Premature and Harassing

Plaintiff does not dispute that most of its document requests encompass the same areas as the documents it received in the § 220 action. Thus, Plaintiff is requesting documents it already has. Plaintiff's discovery requests even seek production of documents that this Court denied in the § 220 action because Robotti had not shown even a possibility of wrongdoing as to these matters.[8] Opp. at 5. Plaintiff's fishing expedition on these matters is barred by this Court's ruling. Plaintiff also seeks information that is publicly available, such as the market prices of Gulfport stock in January-September 2004 (Interrogatory 8; Request 10). It also makes

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[7] *Scattered Corp. v. Chicago Stock Exchange, Inc.*, 1995 WL 1791093, at *1 (Del. Ch.).

[8] *See* Motion to Stay Discovery ¶6. Plaintiff does not address in its Opposition, and therefore acknowledges, that its discovery requests seek categories of documents denied to it in its books and records action and discovery duplicating the documents it sought in the § 220 action.

discovery requests concerning experts and trial exhibits that are plainly premature (Interrogatories 13-14; Request 16).

B. There Are Credible Grounds for Dismissal

Even if Defendants were required to show "a credible basis on which dismissal could be granted," that standard is easily met here.

1. Plaintiff's Failure to Comply With Rule 23.1

Plaintiff refuses to recognize its dilution claim is derivative and demand was required on the board. Opp. at 4-5. Robotti's claim "is that Gulfport's pre-offering shares were generally diluted because of the triggering of anti-dilution provisions." Opp. at 5 (quoting *Robotti*, 2007 WL 2019796, at *3). Plaintiff is incorrect in stating that whether its claim was derivative or direct "was decided by this Court in the § 220 action" and that this "Court clearly recognized that the claims raised are individual." Opp. at 4. An action brought pursuant to 8 Del. C. § 220 is a summary proceeding and is not the proper forum for litigating a breach of fiduciary duties claim.[9] Indeed, the Court noted that one reason for allowing a stockholder to use § 220 to investigate possible mismanagement was so the stockholder "may institute derivative litigation."[10] *Robotti*, 2007 WL 2019796, at *2.

Robotti's suggestion that demand is excused because its "Amended Complaint alleges, the Board is unchanged since the Offering and each member personally profited from the decision" merely repeats a factually incorrect assertion. Opp. at 5 n.5; *see also* Am. Compl. ¶8. The identity of the members of Gulfport's board of directors is a matter of public record. If Robotti had made a proper attempt to comply with Court of Chancery Rule 23 before filing its Amended Complaint, it would have discovered that a majority of the members of Gulfport's board has changed since the Rights Offering. Moreover, the Amended Complaint has not

[9] *Khanna v. Covad Commc'n Group, Inc.*, 2004 WL 187274, at *6 (Del. Ch.).

[10] Robotti's original complaint did not contain even this conclusory (and erroneous) allegation.

alleged that a majority of the board at the time of the Rights Offering had a material financial interest. In fact, most of the directors had a handful of options and received no material benefit from the alleged "dilution caused by the anti-dilution provision of the options."

2. Plaintiff Fails to State a Claim

As discussed above, the Amended Complaint fails to allege a material financial interest or lack of independence on behalf of the Gulfport directors at the time of the Rights Offering. For that reason and others to be described in Defendants' briefs in support of their motion to dismiss, the Amended Complaint fails to state a claim. Plaintiff's assertion that "this Court has already found, in connection with Plaintiff's pursuit of its rights under § 220, that Plaintiff has articulated a theory which stated 'a violation of the fiduciary duty owed the [sic] minority shareholders because of the offering'" is typical of Plaintiff's misstatements. Opp. at 4 (quoting *Robotti*, 2007 WL 2019796, at *3). In actuality, the Court only found Robotti had "cobbled together enough evidence" that collectively was sufficient to meet § 220's low threshold that there be some basis for an inference of the "<u>possibility</u> of a violation of fiduciary duty owed to minority shareholders because of the offering."[11]

3. Plaintiff's Claims Are Time-Barred

Contrary to Plaintiff's characterizations,[12] Plaintiff lackadaisically asserted its § 220 rights and has not prosecuted this litigation with any more diligence than its § 220 action. While Plaintiff waited 40 weeks between its first defective § 220 demand and its second demand, over 11 weeks between its second defective § 220 demand and its third demand, and another 14 weeks before finally meeting the requirements of 8 <u>Del. C.</u> § 220 with its fourth demand. The most recent example of Plaintiff's delay is the nineteen (19) weeks Plaintiff took to amend its

[11] *Robotti*, 2007 WL 2019796, at *3 (emphasis added).
[12] Opp. at 4 n.3.

complaint after receiving documents from Gulfport pursuant to this Court's order in the § 220 action.

Plaintiff accuses Defendants of violations Court of Chancery Rule 171(b), when it was Plaintiff who refused to agree to a briefing schedule on Defendants' motion to dismiss and decided not to seek imposition of a schedule under Rule 171(b).

Despite Plaintiff's assertion otherwise, Opp. at 3, Plaintiff was, or should have been, aware of the alleged wrongs long before the July 22, 2004 prospectus. Plaintiff says the limitations period started to run on "the date on which Plaintiff was put on notice of these wrongs." Opp. at 3. However, Plaintiff's first notice of the Rights Offering was not the July 22, 2004 prospectus. Opp. at 3. The Court is not required to "blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences."[13] Exhibit B to Robotti's Opposition shows this allegation is incorrect. Plaintiff's Exhibit B to its Opposition lists numerous documents that informed Robotti of the Rights Offering and related matters long before the July 22, 2004 prospectus, Gulfport's Form 424B3, was filed on July 27, 2004.[14]

Plaintiff's citation to *State ex re Brady v. Petinaro Enters.*, 870 A.2d 526 (Del. 2005) to support its claim that "there is no 'applicable' statute of limitations for this type of action in the Court of Chancery" is unavailing. Opp. at 4 n.4. In applying the equitable doctrine of laches to

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[13] *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988).

[14] Gulfport's Form 10KSB, filed on April 14, 2004 at pages 19, F-20; Form Def 14C, filed on April 30, 2004 at pages 7-8; Form SB-2, filed on May 12, 2004 at pages i, 1-23, 28-29; Form 10QSB, filed on May 18, 2004 at pages 9, 12-13, 17, 21-22, Form PRE 14C, filed on May 18, 2004 at pages 5-6; Form SB-2/A, filed on June 21, 2004 at pages i, 1-4, 8-23; Form DEF 14C, filed on June 25, 2004 at pages 5-6 and the Form SB-2/A, filed on July 22, 2004 at pages i, 1-4, 8-23. The Court may consider Gulfport's public filings on Defendants' motion to dismiss because these documents "are required by law to be filed, and are actually filed, with federal or state officials." *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007) (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 n.28 (Del. 2004)).

fiduciary duty claims, the Court of Chancery analogizes to a three-year statute of limitations.[15] Defendants have properly raised this issue in their motion to dismiss.[16]

Plaintiff obviously recognized that it had run out of time when it hastily filed a complaint on July 27, 2007, to avoid what it perceived to be the end of the three-year limitations period for its claims, and artfully attempted to plead around the limitations period. *See* Opp. at 3; Am. Compl. ¶13. As set forth in Defendants' Motion to Stay and this Reply, Robotti knew or should have known about the alleged harm more than three years before it filed this action. The statute of limitations begins to run at the time the cause of action accrues, even if Plaintiff is unaware of the cause of action or the harm.[17] In *Tyson*, the Court dismissed plaintiffs' claims relating to all transactions revealed in the corporation's proxies more than three years before plaintiffs filed their complaint and held shareholders should have been able to discover their harms at the time the transactions were revealed in the company's public filings.[18] In their motion to dismiss, Defendants will invite the Court to do so here.

CONCLUSION

For the reasons set forth in Defendants' motion to stay and this reply, discovery in this action should be stayed pending resolution of Defendants' potentially case-dispositive motion to dismiss. Plaintiff has not presented any "special circumstances" that would enable this Court to find otherwise.

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[15] 10 *Del. C.* § 8106.

[16] *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007)(citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch.)).

[17] *See, e.g., In re Tyson Foods, Inc.*, 919 A.2d 563, 593-94 & n.79 (Del. Ch. 2007).

[18] *Id.*

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