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, DAN NOLES and CD HOLDINGS, L.L.C. Defendants.	)	Civil Action No. 3128-VCN

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY

INTRODUCTION

On April 8, 2008, Defendants filed a Motion to Stay Discovery without any supporting brief, relying on the ground that they have pending a dispositive Motion to Dismiss. In their Motion, Defendants misstate the facts and misstate the law.

Stays of discovery are granted only when a party has pending a *credible* motion to dismiss. In other words, the mere filing of a motion to dismiss does not automatically grant a stay. Orloff, infra.[1] Instead, the moving party bears the burden of presenting to the Court a credible basis on which a dismissal could be granted. Id.; McCrory, infra. Here, there is no such showing.

[1] All unreported Opinions cited in Plaintiff's Memorandum in Opposition To Defendants' Motion to Stay Discovery are attached to Defendants' Motion to Stay Discovery.

STATEMENT OF FACTS

As to the motion to dismiss, pending before this Court is a bare bones motion which states in only the briefest of terms the grounds asserted: (1) the claims are barred by Chancery Rule 12(b)(6) for failure to state a claim, (2) are barred pursuant to Rule 23.1 for failure to make a demand and (3) are barred by the applicable statute of limitation and the doctrine of laches. Since filing this bar bones motion on February 5, 2008, over two months ago, nothing further has been provided in support of the motion.

Indeed, only after Plaintiff's counsel contacted Defendants' counsel did Defendants even suggest a briefing schedule. The Defendants proposed that they take until April 28, 2008 to file an opening brief, twelve weeks after filing their motion and over 100 days from the filing of the Amended Complaint. Plaintiff indicated it would be willing to agree to the schedule as long as Defendants would agree to meet their obligation to proceed with discovery. Defendants' response was to attack Plaintiff and to refuse to either agree to a shorter, more appropriate, schedule or to seek Court approval of their proposed schedule as required by Chancery Rule 171(b). Instead, apparently believing that their proposed three months would be a hard sell to the Court as well, the Defendants unilaterally picked the "due date" for their brief (without even any formal commitment) and informed Plaintiff that it could file a motion to challenge their flagrant disregard of the Rules. See Exhibit A. To date, Defendants have not sought to comply with Rule 171(b).

ARGUMENT

Unquestionably, the rules do not provide automatic stays of discovery. In a case relied upon by Defendants, In re: McCrory Parent Corp., C.A. No. 12006 (July 3, 1991) (Allen, C.) ("McCrory") the Court stated "in each instance, the Court must make a particularized judgment."

The Court noted that a stay is granted only if "the ground for the motion offers a reasonable expectation" of disposing of the litigation. Id. Discovery is not automatically stayed simply because a dispositive motion is pending. Orloff v. Shulman, C.A. No. 852-N (Feb. 2, 2005) (Lamb, VC) ("Orloff"). In that case the Court also stated the rule that "the moving party bears the burden of proving that a stay of discovery is appropriate." The Court also enumerated several instances where a stay would not be appropriate such as "where the motion does not offer a 'reasonable' expectation of avoiding further litigation." Id.

None of the grounds advanced by the Defendants provides a reasonable expectation of avoiding further litigation. Only one ground in Defendants' motion, that this action is time barred, has even been given the slightest articulation or explanation. That explanation came in the instant motion, not in a timely brief in support of the motion to dismiss. That argument, on its face, however, shows the argument to be unsustainable and without a credible basis.[2]

The Defendants concede that, even taking the approach most favorable to them, the appropriate date on which to commence application of a time barred doctrine in this case is the date on which Plaintiff was put on notice of these wrongs. Defendants Motion at ¶13. Defendants also concede that the first possible notice available to Plaintiff would have been the prospectus which is *dated* July 22, 2004. Id. However, simply putting a date on a document does not mean it was available to Plaintiff on that date. Attached as Exhibit B is a printout from the U.S. Securities and Exchange Commission's EDGAR website showing Gulfport Energy Corp.'s filings. The printout clearly shows that the prospectus, which *carried* a date of July 22, 2004, in fact was not filed until July 27, 2004.

Further, although Defendants did not see fit to inform the Court, Plaintiff's Amended Complaint specifically alleges the prospectus was not available until filed on July 27, 2004.

[2] It is fair to conclude that Defendants have advanced their strongest argument.

Amended Complaint at ¶13. These allegations must be accepted as true in a motion to dismiss. Desimone v. Barrows, Del. Ch., 924 A.2d 908, 928 (2007). Defendants concede this action was filed on July 27, 2007. Thus, even under the Defendants' own interpretation, this action was timely commenced and their motion to dismiss is meritless.[3] Therefore, neither the doctrine of laches nor any statute of limitations[4] could credibly be seen to barring this action on the record before the Court and the stay is not warranted on the basis of that assertion.

Defendants' assertion that the Complaint fails to state a claim for relief also does not provide any credible basis to stay discovery. The Defendants articulate nothing to support why this action would not state a claim for relief. Further, in this case, 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 minority shareholders because of the offering." Robotti & Co., LLC v. Gulfport Energy, 2007 WL 2019796 (Del. Ch. 2007) at page 3.

Similarly, Defendants' claim that Plaintiff has failed to make demand is not credible. That assertion is, in reality, a claim that this is not an individual claim but, instead, is a derivative claim. Again, Defendants have articulated absolutely no basis on which to suggest that this could be true. As before, this issue also was decided by this Court in the §220 action. Id. In its decision the Court clearly recognized that the claims raised are individual. In opposing Plaintiff's 220 rights, Gulfport argued there was no corporate injury and there was no shareholder injury. The Court rejected this latter argument stating "the point is not whether

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[3] Defendants claim that Plaintiff sat "idly" prior to filing is knowingly inaccurate as there is a long history of Plaintiff's pursuit of these claims using its rights under 8 Del. C. §220.

[4] As Defendants are well aware, while in applying the doctrine of laches the Court will look to an analogous statute of limitation, there is no "applicable" statute of limitations for this type of action in the Court of Chancery. e.g. State ex re Brady v. Petinaro Enterprises, 870 A.2d 513, 526 (2005).

Robotti's overall position was diluted, or that the controlling stockholders overall position was increased, but that Gulfport's *pre-offering* shares were generally diluted because of the triggering of anti-dilution provisions." Id. at 3. Unquestionable diminishing the value of a stockholder's shares is an individual claim and relief would go to that individual, particularly where the controlling stockholder and management did not suffer similar losses. Tooley v. Donald, Lufkin and Jenrett, Inc., Del. Supr., 845 A.2d 1031 (2004). "Robotti's allegations which turn on a decision to raise capital in a way that triggers a controlling shareholders contractual right in spite of either (i) a lack of necessity for the decision or (ii) a viable or preferable alternative to the financing that has a less negative impact *on minority shareholders* or the corporation." Id. at 3 (emphasis supplied).[5]

Defendants also raise several irrelevant arguments which do not warrant a stay. They complain that the discovery requests exceed the scope of documents this Court ordered Gulfport to produce under 8 Del. C. §220. However, it is settled law that the scope of discovery exceeds the scope of rights under 8 Del. C. §220 and the test for obtaining information pursuant to the rules of discovery is far different, and far less stringent. e.g. Highland Select Equity Fund, LP v. Motient Corp., 906 A.2d 156, 157 (2006). In any event, even were one or more of the requests subject to a proper objection, in whole or in part, (which they are not) that would not be a basis to stay discovery. At most, it would be proof that responding to the discovery requests will in fact not burden any of the Defendants as all they would have to do is object.

Similarly, Defendants assert that somehow a mutually agreed extension of time for Defendants to respond to the Amended Complaint, to which each Defendant consented and of

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[5] In any event, as the Amended Complaint alleges, the Board is unchanged since the Offering and each member personally profited from the decision, the Amended Complaint's allegations show demand would be excused, were the case a derivative one. Amended Complaint at ¶¶3-8.

which each Defendant took full advantage, somehow bars Plaintiff's pursuit of discovery under the rules. Needless to say, the Defendants cite no authority for this proposition.

Finally, one of the additional grounds for denying the stay is "special circumstances" such as the potential loss of rights or information. Orloff supra; McCrory supra. Here, as Defendants note, one of the participants in the alleged wrongs was an entity called CD Holding L.L.C. Plaintiff believed that it had served the appropriate entity by serving CD Holdings L.L.C., a Delaware limited liability company. However, Plaintiff received assurances from that organization, through counsel, that it is not the entity in the Complaint. Therefore, Plaintiff needs to pursue discovery in order to obtain the proper identification of that entity so that it can seek to assert the claims in the Complaint against it.[6]

In addition, this Court should note that Defendants here, are asserting a time bar to the claims. The trial of the §220 action was delayed well beyond the time such trials ordinarily would be held at the request of Defendants' counsel. Plaintiff agreed to accommodate Defendants' counsel's scheduling difficulties. Defendants again wish to delay briefing of their Motion to Dismiss and discovery in this case as a result of their counsel's busy schedule. While Plaintiff indicated it had no problem with a leisurely briefing of the Motion to Dismiss, Defendants' counsel's busy schedule should not serve as a basis for staying Plaintiff's discovery in this case.

[6] Defendants complained that entity remains in the caption, however they cite no authority for any requirement that it be removed from the caption. Indeed, once Plaintiff identifies the appropriate address of the entity, it will attempt service. Therefore while Plaintiff agrees that it has not served properly the entity named in the Complaint at this time, due to a lack of ability to identify a means to serve such entity despite all diligence, that is no reason to remove that entity from the caption or the Complaint.

For the foregoing reasons Defendants' Motion to Stay should be denied.

Respectfully submitted,

Dated: April 17, 2008

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