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Case No. 9710-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CHENIERE ENERGY, INC. STOCKHOLDERS LITIGATION	))	CONSOL. C.A. No. 9710-VCL

DEFENDANT CHENIERE ENERGY, INC.'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY OR DISMISS PLAINTIFFS' VERIFIED CLASS ACTION AND DERIVATIVE COMPLAINT

Edward P. Welch (ID No. 671)
Edward B. Micheletti (ID No. 3794)
Sarah R. Martin (ID No. 5230)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000 (Telephone No.)
(302) 651-3001 (Facsimile No.)

Attorneys for Defendant Cheniere Energy, Inc.

OF COUNSEL:

Susan L. Saltzstein
Joseph N. Sacca
Jeffrey S. Geier
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000 (Telephone No.)

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Defendant Cheniere Energy, Inc. ("Cheniere" or the "Company") respectfully submits this memorandum of law in support of Defendants' Motion to Stay this action in deference to the action filed by Cheniere under 8 *Del. C.* § 205, or to Dismiss the Verified Class Action and Derivative Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1 (the "Motion").

INTRODUCTION

On May 29, 2014, a purported Cheniere stockholder filed an action seeking to enjoin Cheniere's annual stockholder meeting scheduled for June 12, 2014, and seeking to invalidate an amendment to Cheniere's 2011 Incentive Plan (the "2011 Plan") voted on by Cheniere stockholders at Cheniere's February 1, 2013 stockholder meeting.[1] Shortly after this Action was filed, Cheniere postponed its June 12, 2014 annual stockholder meeting until September 11, 2014. On June 16, 2014, Cheniere filed an application pursuant to newly enacted 8 *Del. C.* § 205, asking the Court to declare valid the stock issued and to be issued pursuant to the 2011 Plan amendment ("Amendment No. 1") challenged by Plaintiffs. *See In re Cheniere Energy, Inc.*, C.A. No. 9766-VCL (the "Section 205 Action").

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[1] Two other purported Cheniere stockholders filed suit shortly thereafter. The actions have now been consolidated into the above-captioned action (the "Action").

The Company's Section 205 Action should be given primacy, and Plaintiffs' class and derivative claims ought to be stayed to avoid interference with the procedure prescribed by the legislature. The Section 205 Action would be one of the first cases to substantively address and apply recently enacted 8 *Del. C.* § 205, and this Court should be afforded the opportunity to hear and decide such issues in the proper context. Moreover, any determination in the Section 205 Action would have significant effect on, and potentially be dispositive of, this case – indeed, Plaintiffs have admitted as much. Therefore, this Action should be stayed in its entirety pending disposition of the Section 205 Action.

If this Action is not stayed, it should be dismissed because it fails to state a claim or comply with demand futility requirements. Most significantly, Plaintiffs fail to allege *any* facts – conclusory or otherwise – that call into question the Cheniere board's duty of loyalty. For example, Plaintiffs fail to allege any facts suggesting that the Cheniere board knowingly and intentionally approved Amendment No. 1 believing a stockholder vote had not been passed, or knew that the disclosures issued in connection with that vote were somehow wrong.

Additionally, for the reasons set forth in the Application filed by the Company in the Section 205 Action, Plaintiffs have failed to state a claim because no vote concerning Amendment No. 1 was required by Cheniere's bylaws, Certificate of Incorporation, or Delaware law. Rather, a vote was held because

Cheniere believed it to be required by the rules of the NYSE MKT LLC ("NYSE MKT"), the exchange on which Cheniere's common stock trades. The vote was tallied pursuant to NYSE MKT Rules, which require approval of a majority of "votes cast" by stockholders. Under a "votes cast" standard, abstentions are not counted. Plaintiffs have therefore failed to state any viable challenge to the stockholder vote concerning Amendment No. 1.

Moreover, the vast majority of Plaintiffs' claims are moot. Through this action, Plaintiffs seek to delay Cheniere's 2014 annual stockholder meeting, enjoin Cheniere stockholders from voting on Proposals 3 and 4 at the annual stockholder meeting regarding approval of a 2014-2018 Long-Term Incentive Compensation Program and an additional amendment to the 2011 Plan, and ask this Court to determine the validity of the stockholder vote on Amendment No. 1 and stock awarded thereunder. Since this Action was filed, Cheniere's 2014 annual stockholder meeting has been rescheduled, the Company will not be including Proposals 3 and 4 in the proxy materials for the 2014 annual meeting, and the Company has taken action via the Section 205 Action asking this Court to declare valid the issuance, whether occurring in the past or future, of shares issued under Amendment No. 1. The vast majority of Plaintiffs' claims therefore are moot.

Plaintiffs' claims also should be dismissed because of Plaintiffs' lengthy delay in filing this Action, and the fact that numerous constituencies have relied on the validity of Amendment No. 1, which has been in effect for more than a year. Cheniere issued a proxy statement in late 2012 indicating that abstentions would not be counted and publicly disclosed the results of the vote (including the number of abstentions) on February 5, 2013. Plaintiffs sat idly by while Cheniere awarded more than 17 million shares, all premised on the validity of Amendment No. 1. Dismissal pursuant to the doctrine of laches is eminently appropriate here, where Plaintiffs' inaction resulted in the reliance of not only the Company, but also hundreds of its employees, and the stock market at large. As a matter of equity, Plaintiffs should not now be rewarded for their lethargic stir to action by allowing their Complaint to proceed.

The Complaint also fails to comply with the demand futility requirements of Court of Chancery Rule 23.1. Had Plaintiffs taken the time to make a demand on the Cheniere board, the Cheniere board would have responded, and taken the very action it did here – postponed the June 12, 2014 stockholder meeting and filed suit asking this Court to declare valid the issuance, whether occurring in the past or in the future, of shares issued under Amendment No. 1. The actions actually taken demonstrate that demand on the Cheniere board would

not have been futile. Plaintiffs' demand futility allegations are therefore insufficient, and the Complaint should also be dismissed pursuant to Rule 23.1.

For these reasons and the reasons set forth below, this Action should be stayed pending disposition of the 205 Action. If this Action is not stayed, it should be dismissed with prejudice pursuant to Court of Chancery Rules 12(b)(6) and 23.1.

BACKGROUND

A. The 2011 Incentive Plan.

In 2011, Cheniere adopted the 2011 Incentive Plan that provided for stock to be awarded to Cheniere executives and employees. The 2011 Plan was approved by an overwhelming majority of Cheniere's stockholders on June 16, 2011, and provided for a share reserve of 10 million shares. (Compl. ¶ 23.)[2]

B. Amendment No. 1 To The 2011 Plan.

As of December 31, 2012, only approximately 100,000 shares of common stock remained available for issuance under the 2011 Plan. The depletion of the shares originally allocated under the 2011 Plan was, in part, the result of restricted stock awards granted on August 9, 2012, upon the issuance of a full

[2] Citations to "Compl." are to the complaint originally filed in the action captioned *Jones v. Souki*, C.A. No. 9710-VCL. Two additional actions have now been consolidated into this Action; however, no consolidated complaint has been filed to date.

notice to proceed being issued in connection with a portion of the liquefaction project at the Louisiana facility. A portion of these awards vested immediately, and the remainder were to vest in four annual installments.

On December 7, 2012, the Cheniere board adopted Amendment No. 1. Upon approval by the stockholders, Amendment No. 1, among other things, increased the number of shares of common stock available for issuance under the 2011 Plan from 10 million shares to 35 million shares. (Compl. ¶ 26.)

No stockholder vote was required to approve the additional issuance under Cheniere's charter, bylaws, or Delaware law. Rather, a stockholder vote was held because Cheniere believed a stockholder vote was necessary to comply with the NYSE MKT Rules. Rules 710 and 711 of the NYSE MKT (i) require, in part, a stockholder vote for any material amendment to (including a material increase in shares reserved under) an equity compensation plan for directors, officers and employees "*regardless of whether . . . such authorization is required by law or the company's charter*." and (ii) specify that the NYSE MKT vote is "*a majority of votes cast*."[3] Under a "votes cast" standard, *abstentions do not count*.

[3] Although not required by the tax code, a stockholder vote on Amendment No. 1 could also have certain tax benefits for the Company. *See* 26 U.S.C. § 162(m). For tax purposes, the vote standard is "a majority of the votes cast on the issue (including abstentions to the extent abstentions are counted as voting under applicable state law) are cast in favor of approval." 26 C.F.R. § 1.162-27(e)(4)(vii).

Cheniere submitted Amendment No. 1 to the 2011 Plan to stockholders pursuant to a proxy statement that expressly stated that "'*Abstentions* . . . *represented by submitted proxies will not be taken into account in determining the outcome of [the Amendment No. 1 proposal]*.'" (Compl. ¶ 2.)

Plaintiffs allege that this statement is consistent with the proxy statement disclosures that the Company had been making since 2011. (*See* Compl. ¶ 39 ("[I]n 2011, Cheniere began reporting in its proxy statements that for other votes, not dealing with director elections, 'Abstentions and broker non-votes represented by submitted proxies will not be taken into account….'").)

The result of the stockholder vote on Amendment No. 1 was as follows: For – 77,011,739; Against – 57,907,345; Abstentions – 36,252,581. (Compl. ¶ 27.) The Company reported the results to the NYSE MKT, which, in turn, authorized the 25 million shares that were the subject of Amendment No. 1 for listing. The Company also registered the shares by filing a Form S-8 with the Securities and Exchange Commission (the "SEC"). And, on February 5, 2013, the Company filed a Form 8-K publicly disclosing the exact vote (including the number of abstentions) and that "'stockholders voted in favor of Amendment No. 1 to the 2011 Plan….'" (*Id.* ¶ 28.) As evident from the face of the Form 8-K, Cheniere disregarded abstentions in calculating whether a majority of the "votes cast" had approved the proposal. Thereafter, and in accordance with the 2011

Plan, equity awards have been made by Cheniere using shares reserved pursuant to Amendment No. 1. As a result of Cheniere's continued extraordinary performance, including successfully beginning construction of a multi-billion dollar expansion of its liquefaction project, more than 17 million shares have been awarded in reliance on Amendment No. 1. (*Id.* ¶ 43.)

C. The Bylaw Amendments And 2014 Annual Meeting.

On April 3, 2014, Cheniere amended its bylaws to, among other things, address the ability of the board to schedule annual meetings, regulate proposals for director nominations, and clarify voting standards, including the treatment of abstentions in the case of director elections. (Compl. ¶ 45.) The bylaws also clarified that the effect of abstentions and broker non-votes would be determined based on the vote required, such as a vote that was required under the NYSE MKT. (*Id.*)

On April 28, 2014, Cheniere issued a proxy statement in advance of its scheduled June 12, 2014 annual meeting. Among other proposals, the proxy statement sought stockholder approval for a second increase to the 2011 Plan share reserve.

D. The June 12, 2014 Annual Meeting Is Postponed And Proposals 3 And 4 Will Not Be Included In The Proxy Materials.

On May 29, 2014, June 6, 2014, and June 13, 2014, purported Cheniere stockholders filed actions in this Court seeking, among other things, to

enjoin the scheduled June 12, 2014 stockholder meeting, and have the Court declare invalid Amendment No. 1 and stock issued thereunder.

On June 2, 2014, Cheniere announced that it would be postponing its 2014 annual meeting of stockholders scheduled for June 12, 2014, until September 11, 2014. The proxy statement announcing the postponement stated "[w]e have decided to postpone the Annual Meeting in light of a complaint that has been filed in the Delaware Court of Chancery of the State of Delaware styled *Jones v. Souki, et al.*, C.A. No. 9710-VCL," and attached a copy of the Complaint to an 8-K filed the same day. (*See* June 2, 2014 Schedule 14A and Form 8-K.)

Further, Proposals 3 and 4 will not be included in the proxy materials for consideration at the 2014 annual stockholder meeting. Proposals 3 and 4 had sought to approve the 2014-2018 Long-Term Incentive Compensation Program and Amendment No. 2 to the 2011 Plan, respectively.

E. Cheniere Files The Section 205 Action.

On June 16, 2014, Cheniere filed the Section 205 Action. The Section 205 Action asks the Court to declare that the stock issued and to be issued pursuant to Amendment No. 1 is valid because, among other reasons, (i) Amendment No. 1 was validly approved by Cheniere's stockholders at the February 1, 2013 meeting; and (ii) excluding abstentions from consideration was appropriate because, among other reasons, the stockholder vote was held in order to comply with the NYSE

MKT Rules, and the NYSE MKT Rules uses a "votes cast" standard that does not take abstentions into account. Alternatively, the Section 205 Action asks that even if the Court were to conclude that abstentions should have been considered as "no" votes in connection with the February 1, 2013 vote, the Court should still declare any stock issued or to be issued pursuant to Amendment No. 1 valid. Thus, the Section 205 Action involves all of the same underlying facts and questions as this Action.

ARGUMENT

I. THIS ACTION SHOULD BE STAYED IN DEFERENCE TO THE SECTION 205 ACTION.

All of the proceedings in this Action should be stayed in deference to the Section 205 Action and pending disposition of the Section 205 Action. "This Court possesses the inherent power to manage its own docket, including the power to stay litigation on the basis of comity, efficiency, or simple common sense." *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009) (staying action); *Cummings v. Estate of Lewis*, C.A. No. 6948-VCP, 2013 WL 979417, at *10 (Del. Ch. Mar. 14, 2013) (staying case where resolution of similar case would either render issues in the case ripe or moot). "Stays most frequently are granted to avoid duplication of efforts and waste of resources when the same cause of action is being litigated by the same parties in more than one court. ***Stays, however, may also be granted in deference to another proceeding even though the other***

proceeding is not between the same parties and the issues are not identical." *Christiana Town Ctr., LLC v. New Castle Cnty.*, C.A. No. 729-N, 2005 WL 2622706, at *3 (Del. Ch. Oct. 5, 2005) (staying action pending resolution of action before it requiring resolution of similar issues) (emphasis added). A stay is "appropriate if it will either resolve or greatly simplify the issues in the action to be stayed." *Id. See also Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1122-23 (Del. Ch. 1985) (a stay "serves to promote judicial efficiency and to avoid conflicting opinions which can occur if multiple cases are allowed to go forward separately where there are common controlling issues," and granting stay of action pending before it in deference to another Chancery action).

A stay of this Action is eminently appropriate. *First*, as a matter of policy, this Court should give primacy to a Section 205 proceeding brought by a corporation rather than to actions brought by putative company stockholders challenging the same issues that are raised in the context of a Section 205 application. Section 205 provides a statutory recognition that a corporation should be entitled to bring an action to determine the validity of its stock. *See* 8 *Del. C.* § 205(a) ("*upon application by the corporation*…the Court of Chancery may…(4) Determine the validity of any corporate act or transaction and any stock, rights or options to acquire stock;" *id.* § 205(c) ("no other party [other than the corporation] need be joined in order for the Court of Chancery to adjudicate the matter")

(emphasis added). An action by a corporation to resolve questions regarding the validity of its stock should be respected. Allowing a putative stockholder of the corporation to duplicate a Section 205 proceeding via a fiduciary duty action or derivative suit undermines the legislative intent and purpose of Section 205.[4] The fact that every single stockholder in this Action has sought to intervene in the Section 205 Action reinforces that they themselves believe that the Section 205 Action has important consequences for this Action.

Second, the Section 205 Action raises issues, the resolution of which could dispose of many or all of the issues in this Action. For example, the Section 205 Action alleges that a vote on Amendment No. 1 was taken pursuant to the NYSE MKT Rules, and that no Cheniere stockholder vote was required by either the bylaws, Certificate of Incorporation or Delaware law. (Section 205 Application ¶ 38.) Under the NYSE MKT Rules, a vote is passed by a "majority of votes cast." (*Id.* ¶ 41.) Thus, the Section 205 Action alleges that it was proper under the votes cast standard to exclude abstentions, and because the number of stockholder votes in favor of Amendment No. 1 exceeded votes against, the matter

[4] Robert Shenker's Motion to Intervene in the Section 205 Action impliedly suggests that this Court should conflate a Section 205 action with a derivative suit and impute the demand futility requirements of a derivative suit into Section 205. Nothing in Section 205 suggests that is appropriate, or was intended. Indeed, Section 205 expressly gives corporations the right to bring suit to validate actions taken, suggesting the exact opposite.

was approved pursuant to the NYSE MKT Rules. (*Id.* ¶ 48.) Therefore, the Section 205 Action asks this Court to declare that the shares awarded pursuant to Amendment No. 1 are valid.

This Action raises similar factual and legal questions to the Section 205 Action, and indeed, many of the issues that Plaintiffs raise here will be resolved in a disposition of the Section 205 Action. Plaintiffs in this Action raise issues including (i) whether a vote on Amendment No. 1 was required by Cheniere's bylaws; (ii) whether it was appropriate for the Cheniere board to disregard abstentions in calculating stockholder votes in favor of Amendment No. 1; and (iii) whether stock issued pursuant to Amendment No. 1 is valid. Given this overlap, the Court "cannot, as a practical matter," resolve the issues in the Section 205 Action without "directly confronting questions" involved in this Action. *Christiana Town Ctr., LLC*, 2005 WL 2622706, at *2. Plaintiffs themselves admit as much. *See In re Cheniere Energy, Inc.*, C.A. No. 9766-VCL, Motion to Intervene of Robert Shenker, Transaction ID 55606745, at ¶ 6 ("The §205 Petition seeks a ruling of validity as to the same Board action that forms the basis of a substantial number of claims in the [Action]."); Letter from Peter B. Andrews, Transaction ID 55602829, at 4 (asserting that there are questions "squarely at issue in this case and Cheniere's §205 application").

Finally, allowing this Action to proceed simultaneously with the Section 205 Action would be duplicative and wasteful of the parties' resources and time, as well as that of this Court. *See Stepak v. Columbia Pictures Entm't, Inc.*, C.A. No. 9620, 1988 WL 55307, at *2 (Del. Ch. May 27, 1988) (staying one Court of Chancery action in deference to another where "absent a stay, it is clear that duplication, waste and delay will inevitably result"). Because resolution of the questions in the Section 205 Action "carries substantial consequences for this litigation," it would be a "waste of resources" to determine these questions "in separate actions." *Christiana Town Ctr., LLC*, 2005 WL 2622706, at *4.

For these reasons, the Court should stay all proceedings in this Action pending disposition of the Section 205 Action.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM.

In the event this Action is not stayed in deference to the Section 205 Action, it should be dismissed because it does not state a claim upon which relief can be granted.

A. Plaintiffs' Complaint Fails To State A Claim.

Plaintiffs' Complaint is most notable for what it does not say. Nowhere does the Complaint state non-conclusory facts that would state a claim for a breach of the duty of loyalty. For that reason alone, the fiduciary duty claims must be dismissed. *McMillan v. Intercargo Corp.*, 768 A.2d 492, 502-03 (Del. Ch.

2000) ("Absent well-pled facts supporting an inference of such disloyalty, the defendant directors are entitled to dismissal.")

While Plaintiffs spill much ink alleging that the stock awards were invalid, they do not allege any facts demonstrating that the directors acted in bad faith, as is necessary to state a claim for breach of the duty of loyalty. Similarly, Plaintiffs fail to allege that the amendments to Cheniere's bylaws were taken in bad faith. "[A] failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence)." *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006). "Examples of this include situations where the fiduciary intentionally breaks the law, 'where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation,' or 'where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.'" *In re Goldman Sachs Grp., Inc. S'holder Litig.*, C.A. No. 5215-VCG, 2011 WL 4826104, at *13 (Del. Ch. Oct. 12, 2011) (quoting *In re Walt Disney Co. Derivative Litig*., 906 A.2d 27, 67 (Del. 2006)). Plaintiffs have alleged no such facts here.

Likewise, Plaintiffs' disclosure claims do not state a claim for breach of the duty of loyalty. Plaintiffs have not alleged any non-conclusory facts demonstrating that the directors *knew* that any of the disclosures regarding the

voting standards or stock issued under the 2011 Plan were false (and indeed, they were not). "'A mere conclusory allegation that the alleged disclosure violations also constitute a violation of the duty of loyalty is not sufficient to survive a motion to dismiss . . . .'" *In re NYMEX S'holder Litig.*, C.A. Nos. 3621-VCN, 3835-VCN, 2009 WL 3206051, at *12 (Del. Ch. Sept. 30, 2009) (citations omitted). *See In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 134 (Del. Ch. Feb. 24, 2009) (finding of bad faith requires allegations of "what the directors knew and when," and noting that the lack of specific allegations of knowledge or bad faith was most important in dismissing plaintiff's disclosure claims); *see also Wood v. Baum*, 953 A.2d 136, 142 (Del. 2008) (fact that board members signed off on proxy statements "is insufficient to create an inference that the directors had actual or constructive notice of any illegality"); *Raul v. Astoria Fin. Corp.*, C.A. No. 9169-VCG, 2014 WL 2795312, at *9-10 (Del. Ch. June 20, 2014) (finding failure to disclose how board considered results of a say-on-pay frequency vote did not violate the duty of candor, and that there was no "basis to infer that, assuming the Astoria board did in fact violate disclosure requirements under Dodd-Frank, it did so intentionally").

Indeed, the very facts in the Complaint belie any inference that the directors knew or believed the disclosures regarding the voting standard and the successful vote on Amendment No. 1 were false (and they were not). Plaintiffs

allege that the proxy statements disclosed that abstentions would not be counted, and the Company in fact did not count abstentions in tabulating the vote on Amendment No. 1. Nothing in the Complaint suggests the directors knew the vote was invalid, and regardless issued disclosures that the vote was valid. The fact that the Company issued stock under Amendment No. 1 – and the NYSE MKT listed that stock – demonstrates that the directors believed the vote on Amendment No. 1 was successful, that stock had been validly issued, and the disclosures Plaintiffs point to are consistent with that.

At most, Plaintiffs have attempted to state a breach of the duty of care. However, money damages for any breach of the duty of care, whether in connection with the issuance of stock under Amendment No. 1 or the disclosures in connection therewith, are prohibited by Cheniere's Section 102(b)(7) charter provision. *See Wayne Cnty. Emps.' Ret. Sys. v. Corti*, C.A. No. 3534-CC, 2009 WL 2219260, at *10 (Del. Ch. July 24, 2009), *aff'd*, 996 A.2d 795 (Del. 2010) (TABLE); *Astoria Fin. Corp.*, 2014 WL 2795312, at *10 (finding 102(b)(7) provision barred derivative plaintiffs' claims for money damages, and "even if Astoria's 102(b)(7) provision did not prevent the Plaintiff from pursuing a duty of care claim against the Astoria board, his Demand and Complaint contain no allegations indicating that the Asotira directors acted with gross negligence – reckless indifference to their responsibilities – sufficient to constitute a breach of

the duty of care"); *In re NYMEX*, 2009 WL 3206051, at *12 ("[T]o the extent the Plaintiffs' disclosure claims are rooted in the duty of care, they must be dismissed because they are barred by the exculpatory clause. And, to the extent that the Plaintiffs attempt to tie them to the duty of loyalty, they must also be dismissed."); *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 360 (Del. Ch. 2008) ("[W]here a breach of the disclosure duty does not implicate bad faith or self-interest, both legal and equitable monetary remedies (such as rescissory damages) are barred on account of the exculpatory provision authorized by 8 *Del. C.* § 102(b)(7).").

Additionally, Plaintiffs fail to state a claim regarding the stockholder vote on Amendment No. 1, the disclosures issued in connection therewith, and the validity of the stock awarded under Amendment No. 1. For the reasons set forth in Cheniere's Section 205 Action, neither Cheniere's bylaws, nor Delaware law, required a vote on Amendment No. 1. Rather, this vote was conducted pursuant to the NYSE MKT Rules, under which Cheniere's treatment of abstentions was appropriate, and Cheniere's stockholders approved Amendment No. 1 – as evidenced by the fact that the NYSE MKT subsequently listed the shares issued pursuant to Amendment No. 1. For this reason as well, the Complaint fails to state a claim and should be dismissed pursuant to Court of Chancery Rule 12(b)(6).

B. Plaintiffs' Claims Are Moot.

Plaintiffs brought this Action seeking to enjoin Cheniere's June 12, 2014 stockholder meeting, enjoin the vote on Proposals 3 and 4 at that meeting, and alleging that the stock issued under Amendment No. 1 was invalid. Since the Action was filed, Cheniere has postponed the June 12, 2014 stockholder meeting, will not be including Proposals 3 and 4 in the proxy materials for the annual stockholder meeting, and brought an action asking this Court to declare valid the issuance, whether occurring in the past or future, of shares issued under Amendment No. 1.

Such action renders the majority of Plaintiffs' claims moot. *See Gen. Motors. Corp. v. New Castle Cnty.*, 701 A.2d 819, 823 (Del. 1997) ("According to the mootness doctrine, although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist."); *Multi-Fineline Electronix, Inc. v. WBL Corp., Ltd.*, C.A. No. 2482, 2007 WL 431050, at *8 (Del. Ch. Feb. 2, 2007) (noting "a court generally will not grant relief if the substance of the dispute disappears due to the occurrence of certain events following the filing of an action," and finding "[t]he alleged controversy surrounding WBL's voting of its M-Flex shares…is now clearly moot").

For these reasons, the Complaint fails to state a justiciable claim, and should be dismissed pursuant to Court of Chancery Rule 12(b)(6).

C. Plaintiffs' Belated Challenge To the Treatment Of Abstentions Is Barred By Laches And/Or Acquiescence.

"The defense of laches normally requires a showing by a defendant that (a) plaintiff knew (or should have known) of its rights or claim; (b) plaintiff failed to assert its rights or claim; and (c) defendant has materially changed its position or otherwise materially relied on plaintiff's failure to assert." *Klaassen v. Allegro Dev. Corp.*, C.A. No. 8626-VCL, 2013 WL 5739680, at *20 (Del. Ch. Oct. 11, 2013) *judgment entered*, C.A. No. 8626-VCL, 2013 WL 5726452 (Del. Ch. Oct. 18, 2013) and *aff'd*, No. 583, 2013, 2014 WL 996375 (Del. Mar. 14, 2014) and *aff'd*, 82 A.3d 730 (Del. 2013). Acquiescence "applies when a plaintiff 'has full knowledge of his rights and the material facts and (1) remains inactive for a considerable time; *or* (2) freely does what amounts to recognition of the complained of act; *or* (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." (*Id.* (citation omitted; emphasis in original).) Where the facts pleaded in the complaint establish that the claim is time barred, laches may be applied at the pleading stage. *See Buerger v. Apfel*, C.A. No. 6539-VCL, 2012 Del. Ch. LEXIS 55, at *4 (Del. Ch. Mar. 15, 2012); *In re Sirius XM S'holder Litig.*, C.A. No. 7800-CS, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013). Both laches and acquiescence are made

out on the face of the Complaint and no further facts are necessary for their application.

The December 31, 2012 Proxy Statement was publicly filed with the SEC on December 31, 2012 and specifically recited that "Abstentions and broker non-votes represented by submitted proxies will not be taken into account in determining the outcome of Proposal 2." (December 31, 2012 Proxy Statement at 5.) Plaintiffs did not move to enjoin the Special Meeting scheduled for February 1, 2013 or otherwise object. A Special Meeting occurred on February 1, 2013, and on February 5, 2013, Cheniere publicly filed a Form 8-K with the SEC disclosing the number of votes for and against the proposal, as well as the number of abstentions. (February 5, 2013 8-K at 3.) The Form 8-K also stated that "[t]he stockholders voted in favor of Amendment No. 1 to the 2011 Plan." (*Id.*) Thus, by no later than February 5, 2013, Cheniere stockholders were fully aware of the fact that abstentions had not been counted in determining the outcome of the stockholder vote on Amendment No. 1 *and* that the result would have been different had abstentions been counted as "no" votes, as Plaintiffs now contend. Yet, Plaintiffs took no action.[5]

[5] In view of the public disclosures, Plaintiffs can offer no explanation for their lengthy delay in bringing this action. "In the instant case, the public documents provide the basis for *all* of plaintiffs' claims." *In re Dean Witter P'ship Litig.*, *(cont'd)*

Instead, Plaintiffs sat idly by as Cheniere began to award shares in reliance on Amendment No. 1.[6] In doing so, Cheniere relied on the validity of Amendment No. 1 and the availability of the 25 million additional shares authorized by Amendment No. 1. And, the recipients of shares that were awarded pursuant to Amendment No. 1 relied on the validity of the shares they received (which formed part of the compensation they were paid for their work). *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 11.06, at 11-61 (2010) (noting that "where the rights and interests of third parties come into existence during the time of the plaintiff's delay, the requirement of prejudice will be satisfied"); *see also* Edward P. Welch *et al.*, *Mergers & Acquisitions Deal Litigation Under Delaware Corporation Law* § 3.04 (2014) (collecting cases). More than 17 million shares were awarded, all premised on the validity of Amendment No. 1. Notably, the

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C.A. No. 14816, 1998 WL 442456, at *8 n.60 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999) (TABLE) (emphasis in original).

[6] Plaintiffs were aware that the Company would begin awarding shares immediately after approval of Amendment No. 1. The December 31, 2012 Proxy Statement specifically informed stockholders: "On December 21, 2012, the Compensation Committee approved an aggregate of 17.4 million shares of restricted stock under the 2011 Plan to all employees and 600,000 shares of restricted stock to a consultant of the Company as part of their Long-Term Commercial Bonus Awards for Trains 3 and 4 of the liquefaction project, to be issued upon stockholder approval of Amendment No. 1 to the 2011 Plan." (December 31, 2012 Proxy Statement at 18.)

price of Cheniere's common stock has tripled since the Company's February 5, 2013 public disclosure of the fact that the stockholders voted in favor of Amendment No. 1.

It would be difficult to conceive of a set of facts more appropriate for the application of the doctrine of laches or acquiescence. If Plaintiffs' hypothesis that abstentions should have been counted as "no" votes is correct (and it is not), had Plaintiffs acted diligently, Cheniere would have been able to take corrective action before shares were awarded pursuant to Amendment No. 1 and any issues could have been resolved before Cheniere, its employees and even Cheniere's stockholders (who have benefited from substantial increases in stockholder value as a result of the efforts of management and employees incentivized by the stock awards) all relied on the validity of Amendment No. 1. Application of laches and acquiescence is therefore appropriate. *See Klaassen*, 2013 WL 5739680, at *20 ("[Defendant] has been prejudiced by [plaintiff's] months of unreasonable delay, and the doctrine of laches bars his claims."); *Stengel v. Rotman*, C.A. No. 18109, 2001 WL 221512 (Del. Ch. Feb. 26, 2001) ("[Plaintiff's] delay prejudiced the defendants and [defendant's] other stockholders. Had [Plaintiff] raised a timely objection, the defendants had several options."), *aff'd mem. sub nom. Stengel v. Sales Online Direct, Inc.*, 783 A.2d 124 (Del. 2001); *Vol-Tech Educ. Ass'n v. Delcastle Teachers Ass'n*, C.A. No. 4974, 1976 Del. Ch. LEXIS 143, at *7 (Del.

Ch. May 12, 1976) (laches barred claim regarding election ballot); *Bay Newfoundland Co. v. Wilson & Co.*, 37 A.2d 59 (Del. 1944) ("The complainant was under a duty to the corporation and the stockholders to make known its dissent at a time when its objection might have had effect. Having elected the course of silence and inaction when it was its duty to speak or to act, equity will now withhold its aid." (citation omitted)); *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 171 (D.C. Cir. 2003) (applying Delaware law: "If Kaidanow and Arcoro had raised their objection to the issuance based on improper board authorization earlier, Omni could immediately, and at a comparatively insignificant cost, have remedied the alleged defect by simply voting on and approving a resolution which was indisputably compliant with the requirements of the statute. However, the delay has permitted the matter to 'become entangled and the rights and business concerns of others to intervene.'") (citation omitted).[7]

[7] Prior to the effectiveness of 8 *Del. C.* § 205, a void (as opposed to voidable) issuance of stock generally could not be cured by the application of equity or equitable defenses. *See STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991); *Blades v. Wisehart*, C.A. No. 5317-VCS, 2010 WL 4638603, at *10 (Del. Ch. Nov. 17, 2010). The Legislature, however, expressly overruled these cases in passing 8 *Del. C.* §§ 204, 205. *See Boris v. Schaheen*. C.A. No. 8160-VCN, 2013 WL 6331287, at n.168 (Del. Ch. Dec. 2, 2013); *see also* Legislative Synopsis, House Bill # 127 ("§ 204 is intended to overturn the holdings in case law, such as STAAR Surgical Co. v. Waggoner, 588 A.2d 1130 (Del. 1991) and Blades v. Wisehart, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010), that corporate acts or transactions and stock found to be "void" due to a failure to comply with the applicable provisions of the General Corporation *(cont'd)*

III. THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 23.1 BECAUSE DEMAND WOULD NOT HAVE BEEN FUTILE.

Before being permitted to usurp a board's inherent authority to determine whether to pursue litigation, a stockholder must "either (1) make a pre-suit demand by presenting the allegations to the corporation's directors, requesting that they bring suit, and showing that they wrongfully refused to do so, or (2) plead facts showing that demand upon the board would have been futile." *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009). Plaintiffs failed to do either here.

Plaintiffs elected not to make a demand on the Cheniere board. Instead, they filed their nearly identical complaints alleging that demand would have been futile. However, the events that unfolded after Plaintiffs filed this litigation demonstrate the exact opposite. Almost immediately after this case was filed, Cheniere postponed its June 12, 2014 stockholder meeting, and brought the Section 205 Action asking this Court to declare valid the issuance, whether occurring in the past or future, of shares issued under Amendment No. 1. Thus, it

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Law or the corporation's organizational documents may not be ratified or otherwise validated on equitable grounds"), available at http://legis.delaware.gov/LIS/lis147.nsf/2bede841c6272c888025698400433a04/5a64a8392ac7904285257b5f0056eef6?OpenDocument> In view of the new authority granted pursuant to Section 205, regardless of whether an issuance was "void," or "voidable," the Court may apply equitable doctrines, including laches and acquiescence.

is clear that demand would *not* have been futile, because if Plaintiffs had bothered to make a demand, Defendants would have taken action in response to it – exactly the action that Plaintiffs claim the Cheniere board would not have.[8]

For these reasons, the Complaint should be dismissed for failure to comply with Court of Chancery Rule 23.1.[9]

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[8] In *Avacus Partners, L.P. v. Brian*, C.A. No. 11001, 1990 WL 161909 (Del. Ch. Oct. 24, 1990), a company argued that the fact that it had responded to a demand by another dissatisfied stockholder by forming a special committee to evaluate the stockholder's demand, which committee then recommended the corporation take no action, conclusively demonstrated that demand by another stockholder would not have been futile. The court found that this argument "has some intuitive appeal." *Id.* at *9. Here the appeal of this argument is even more compelling – unlike *Avacus*, Cheniere did not form a special committee which then recommended that the action sought by stockholders making demand not be taken. Here, the Company has *affirmatively taken action and brought suit* regarding the issues raised in the Complaint – exactly what Plaintiffs assert (without foundation) would not have happened if a demand had been made.

[9] Moreover, the existence of this motion to dismiss pursuant to Rules 12(b)(6) and Rules 23.1 warrants a stay of discovery, which further supports that the Section 205 Action should proceed ahead of this Action. *Skubik v. New Castle Cnty.*, C.A. No. 16091, 1998 WL 118199, at *2 (Del. Ch. Mar. 5, 1998) (granting stay of discovery pending resolution of defendant's motion to dismiss); *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993) (derivative plaintiffs "are not entitled to discovery to assist their compliance with Rule 23.1"); *Scattered Corp. v. Chicago Stock Exch., Inc*., 701 A.2d 70, 77 (Del. 1997) ("The law in Delaware is settled that plaintiffs in a derivative suit are not entitled to discovery to assist their compliance with the particularized pleading requirement of Rule 23.1.").

CONCLUSION

For these reasons, Defendants respectfully request that the Court stay this Action in deference to the Section 205 Action, or to dismiss the Complaint with prejudice pursuant to Court of Chancery Rules 12(b)(6) and 23.1.

/s/ Edward P. Welch
Edward P. Welch (ID No. 671)
Edward B. Micheletti (ID No. 3794)
Sarah R. Martin (ID No. 5230)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000 (Telephone No.)
(302) 651-3001 (Facsimile No.)

Attorneys for Defendant
Cheniere Energy, Inc.

Of Counsel:

Susan L. Saltzstein
Joseph N. Sacca
Jeffrey S. Geier
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000 (Telephone No.)

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