IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
5:11-CV-00463-D

BRAD HABERLAND, derivatively on behalf of DEX ONE CORPORATION,	)	
Plaintiff,	)	
v.	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STAY DISCOVERY (Fed. R. Civ. P. 26(c))**
JONATHAN B. BULKELEY, EUGENE I. DAVIS, RICHARD L. KUERSTEINER, W. KIRK LIDDELL, MARK A. MCEACHEN, ALFRED T. MOCKETT, ALAN F. SCHULTZ, STEVEN M. BLONDY, GEORGE F. BEDNARZ, MARK W. HIANIK, SEAN W. GREENE, and DAVID C. SWANSON,	)	
Defendants,	)	
and	)	
DEX ONE CORPORATION,	)	
Nominal Defendant.	)	

Defendants Jonathan B. Bulkeley, Eugene I. Davis, Richard L. Kuersteiner, W. Kirk Liddell, Mark A. McEachen, Alfred T. Mockett, Alan F. Schultz, Steven M. Blondy, George F. Bednarz, Mark W. Hianik, Sean W. Greene, and David C. Swanson (the "Individual Defendants") and Nominal Defendant Dex One Corporation ("Dex One" or "the Company") (collectively, "Defendants") move the Court to enter a protective order staying the Rule 26(f) discovery conference, the entry of a scheduling order, and the commencement of initial disclosures and other discovery until this Court has decided Defendants' Motion to Dismiss, which is filed contemporaneously herewith.

NATURE OF THE CASE

In this shareholder derivative action Plaintiff seeks to assert claims on the Company's behalf against its current directors and current and former executive officers, though Plaintiff commenced this action without making any pre-suit demand on the Company's Board of Directors. Plaintiff's claims are based on the so-called "say on pay" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (the "Dodd-Frank Act"). Enacted in 2010, the Dodd-Frank Act requires publicly traded companies to hold a non-binding shareholder vote concerning their executive compensation at least once every three years. U.S.C. § 78n-1(a). The statute expressly states that such votes "shall not be binding" and "may not be construed" to change or add to the fiduciary duties of a company's board of directors. 15 U.S.C. § 78n-1(c). Notwithstanding this unambiguous statutory language, Plaintiff asserts breach of fiduciary duty and unjust enrichment claims against the Company's directors and executives based on a negative "say on pay" vote.

As set forth in Defendants' contemporaneously filed Motion to Dismiss and Memorandum in Support, Plaintiff's claims should be dismissed in their entirety as a matter of law for at least two independent reasons. First, Plaintiff is barred from asserting shareholder derivative claims on behalf of the Company because he has not made the required pre-suit demand or adequately alleged that such demand was futile. Second, even if Plaintiff had adequately alleged demand futility, his conclusory allegations in no way rebut the presumptions of the business judgment rule, and therefore fail to state claims for breach of fiduciary duty and unjust enrichment. In addition, Defendants assert, as a separate basis for dismissal of Plaintiff's claims, in whole or in part, that Plaintiff, who acquired Dex One stock after the Company emerged from bankruptcy, cannot, as a matter of law, challenge decisions that (i) pre-dated his

stock ownership and (ii) were reviewed, approved, and confirmed by the United States Bankruptcy Court for the District of Delaware. Because this Motion to Dismiss is likely to dispose of Plaintiff's claims in their entirety, good cause exists to stay discovery pending disposition of the Motion to Dismiss.

STATEMENT OF RELEVANT FACTS

Plaintiff Brad Haberland commenced this shareholder derivative action on September 1, 2011, asserting claims for breach of fiduciary duty and unjust enrichment that challenge the business judgment of the Company's Board with regard to 2010 executive compensation. (*See generally* Compl. (Docket No. 1).) Defendants have filed a Motion to Dismiss seeking dismissal of all claims asserted by Plaintiff in this action. For a more complete recitation of the facts alleged by Plaintiff and the bases for Defendants' Motion to Dismiss, Defendants refer to and incorporate by reference the Statement of Relevant Facts in their contemporaneously filed Memorandum of Law in Support of Motion to Dismiss.

ARGUMENT

In a shareholder derivative action, the plaintiff bears the burden of pleading particularized facts that establish demand futility without the benefit of discovery. Likewise, in a civil action, the plaintiff bears the initial burden of pleading factual allegations that state claims upon which relief could be granted. Here, as set forth in the Motion to Dismiss, Plaintiff has utterly failed to meet these burdens, and Defendants should not be put to the substantial burden and expense of discovery relating to Plaintiff's claims unless and until those claims survive this threshold legal scrutiny.

I. THE PENDING MOTION TO DISMISS SHOULD DISPOSE OF THE ENTIRE COMPLAINT.

Ordinarily, discovery may commence after the parties have conferred as required by Rule 26(f). FED. R. CIV. P. 26(d). Courts, however, have the authority to alter the timing and sequence of discovery. *Id.* In particular, courts have discretion under Rule 26(c) to stay discovery for "good cause." FED. R. CIV. P. 26(c); *Tilley v. United States*, 270 F. Supp. 2d 731, 734 (M.D.N.C. 2003) (granting a motion for a protective order to stay discovery), *aff'd*, 85 F. App'x 333 (4th Cir. Jan. 15, 2004), *cert. denied*, 543 U.S. 819 (2004). Good cause to stay discovery exists when resolution of a pending motion may dispose of the entire action and discovery is not necessary to rule on that motion. *See Tilley*, 270 F. Supp. 2d at 734. Accordingly, "[f]ederal district courts often stay discovery pending the outcome of dispositive motions that will terminate the case." *Cleveland Constr., Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407-RJC-DCK, 2009 WL 903564, at *2-3 (W.D.N.C. Mar. 31, 2009) (attached as **Ex. 1**) (granting motion to stay discovery because pending motion to dismiss had potential to dispose of case without the need for discovery).

In considering whether to grant a stay, the "[f]actors favoring issuance of a stay include the potential for the dispositive motion to terminate all the claims in the case or all the claims against particular defendants, strong support for the dispositive motion on the merits, and irrelevancy of the discovery at issue to the dispositive motion." *Yongo v. Nationwide Affinity Ins. Co. of Am.*, No. 5:07-CV-94-D, 2008 WL 516744, at *2-3, *8 (E.D.N.C. Feb. 25, 2008) (attached as **Ex. 2**) (applying these factors and granting motions to stay discovery pending resolution of potentially dispositive motions).

Defendants' Motion to Dismiss provides multiple reasons for dismissing Plaintiff's claims in their entirety. As an initial matter, the Motion identifies Plaintiff's failure to make a

pre-suit demand and accompanying failure to plead particularized facts establishing that demand would have been futile. Under Delaware law, this failure to plead demand futility with particularity bars Plaintiff from asserting shareholder derivative claims on the Company's behalf. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048-49, 1057 (Del. 2004); *White v. Panic*, 783 A.2d 543, 550-51, 557 (Del. 2001). Accordingly, several courts have found that a pending motion to dismiss for failure to establish demand futility provides good cause for staying discovery. *E.g. McCabe v. Foley*, 233 F.R.D. 683, 685-87 (M.D. Fla. 2006) (granting motion to stay discovery based on pending motion to dismiss shareholder derivative claims for failure to show demand futility under Rule 23.1 and Delaware law); *In re First Bancorp Derivative Litig.*, 407 F. Supp. 2d 585, 586-87 (S.D.N.Y. 2006) (granting a motion to stay discovery so that court could "hear and decide a motion to dismiss under Rule 23.1"). This comports with the threshold nature of the demand requirement. *See In re Openwave Sys. Inc. S'holder Derivative Litig.*, 503 F. Supp. 2d 1341, 1353 (N.D. Cal. 2007) (granting motion to stay discovery in shareholder derivative action because "Rule 23.1 reflects a Congressional intent that derivative actions pass certain hurdles before being allowed to proceed with the normal course of litigation, including discovery").

In addition, the Motion to Dismiss asserts that Plaintiff's factual allegations fail to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff's conclusory allegations do not rebut the presumptions of the business judgment rule, and the Complaint consequently fails to state claims for breach of fiduciary duty and unjust enrichment. This argument provides an independent basis for dismissing Plaintiff's claims in their entirety.

II. NO DISCOVERY IS NECESSARY BECAUSE DEFENDANTS' MOTION TO DISMISS CHALLENGES ONLY THE SUFFICIENCY OF THE COMPLAINT.

Under Delaware law, the question of demand futility turns solely on the allegations of the Complaint. *Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990); *Aronson v. Lewis*, 473 A.2d 805, 808 (Del. 1984). Moreover, Plaintiffs are not permitted discovery to prove that demand is futile. *Rales v. Blasband*, 634 A.2d 927, 934 & n.10 (Del. 1993); *Levine v. Smith*, 591 A.2d 194, 207 (Del. 1991), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253-54 (Del. 2000); *see also Ryskamp v. Looney*, No. 10-cv-00842-CMA-KLM, 2010 WL 4256205, at *3-4 (D. Colo. Oct. 21, 2010) (attached as **Ex. 3**)("[d]erivative plaintiffs are not entitled to discovery to assist their compliance with Fed. R. Civ. P. 23.1, which governs derivative actions"); *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, 493 F.3d 393, 400 (3d Cir. 2007) ("If derivative plaintiffs are allowed to obtain discovery after making conclusory allegations in their complaints to strengthen those very complaints, then shareholder plaintiffs will have incentive to make baseless allegations and then engage in discovery fishing expeditions.").

Likewise, discovery is irrelevant to determining the adequacy of Plaintiff's factual allegations under Rule 12(b)(6), an inquiry which also focuses exclusively on the factual allegations of the Complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). A motion to dismiss "challenges the legal sufficiency of a complaint" and turns on "whether, on its face, it [the complaint] states a plausible claim for relief." *Francis v. Giacomelli*, 588 F.3d 186, 192-93 (4th Cir. 2009). Consequently, a plaintiff is not entitled to discovery unless the complaint includes sufficient well-pleaded factual allegations to survive a motion to dismiss. *See Iqbal*, 129 S. Ct. at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled

to discovery, cabined or otherwise.") Accordingly, no discovery is necessary to decide the Motion to Dismiss.

Granting this Motion to Stay will not prejudice Plaintiff or disrupt the Court's schedule. No discovery has been served, and no discovery or trial deadlines have been established. On the other hand, if discovery commences before the Motion to Dismiss is decided, the parties will be forced to incur expense prematurely and perhaps unnecessarily. Indeed, even if discovery were permitted, it would not be relevant to the Motion to Dismiss, which concerns only the threshold sufficiency of the factual allegations in the Complaint. Consequently, Defendants' request for a stay is reasonable and appropriate under the circumstances, and granting that request will not cause any prejudice to Plaintiff.

CONCLUSION

Good cause exists to stay discovery in this case because Defendants' pending Motion to Dismiss should dispose of the entire action. The Motion posits two independent grounds for dismissal, either of which, if accepted, would require dismissing this entire action. Since these arguments challenge only the sufficiency of the Complaint, no discovery is needed to decide the Motion to Dismiss, and thus Plaintiff will not be prejudiced by a stay. Additionally, because no trial or discovery dates have been set, the requested stay will not disrupt the Court's schedule. Accordingly, good cause exists to stay discovery pending the Court's disposition of Defendants' Motion to Dismiss.

Respectfully submitted this the 31st day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 31st day of October, 2011, I electronically filed the foregoing Memorandum of Law in Support of Defendants' Motion to Stay Discovery with the Clerk of the Court using the CM/ECF system, which will send notification to Plaintiff's counsel of record as follows:

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