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

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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NATURE AND STAGE OF PROCEEDINGS

Plaintiff Robotti & Company, LLC ("Plaintiff" or "Robotti") has brought a purported class action against Gulfport Energy Corporation ("Gulfport" or the "Company") and three former and two current directors challenging anti-dilution adjustments to certain Gulfport warrants and options made in connection with a Gulfport rights offering (the "Rights Offering") that occurred more than three and a half years ago. This oddball suit is purportedly brought on behalf of holders of Gulfport shares as of August 20, 2004, the date the Rights Offering concluded. Of course, since Gulfport is a public company which has now been listed on NASDAQ for several years, most of the people Robotti purports to represent are probably no longer Gulfport stockholders.

Robotti's sole "claim" is that the anti-dilution adjustments to the warrants and options caused "dilution" to the outstanding shares of Gulfport. Though this is a classic derivative claim, Robotti has made no demand on the Gulfport Board, nor has it alleged why demand would be futile. Robotti's original complaint filed on July 27, 2007, contained no allegations seeking to establish demand futility. Robotti claims that demand is excused because a single sentence in its Amended Verified Class Action Complaint (the "Amended Complaint" or "Am. Compl."), filed January 15, 2008, makes the conclusory assertion that a majority of Gulfport's directors are not "identified" as "independent" and had an interest because they held an unspecified number of options.[1] However, this allegation is factually untrue and legally insufficient.

In fact, a majority of the directors on the Gulfport Board at the time Robotti filed its Amended Complaint were not even Gulfport directors at the time of the Rights Offering. Moreover, Plaintiff has failed to demonstrate any material financial interest on the part of the Gulfport directors. Four of the five directors at the time of the Rights Offering held only 20,000

[1] Am. Compl. ¶8.

options. Accordingly, the purported benefit they might have received from the alleged dilution was *de minimus*. Beyond that, the anti-dilution adjustment simply gave the directors the right after the Rights Offering to purchase the same equity interest for the same amount of money as before the Rights Offering. Thus, there was no "dilution." Plaintiff also has not alleged that any of the directors at the time of the Rights Offering or any of Gulfport's current directors are affiliated with Gulfport's controlling stockholder, who held most of the warrants at the time of the Rights Offering.[2]

Plaintiff's failure to allege facts showing that a majority of the Board was materially interested or not independent, both at the time of the Rights Offering and at the time of the Amended Complaint, means that Robotti's complaint must be dismissed both for failure to comply with the demand requirement of Court of Chancery Rule 23.1 and for failure to state a claim under Court of Chancery Rule 12(b)(6). As discussed below, the Amended Complaint also fails to state a claim because documents integral to and referenced in that complaint establish that plaintiff's allegations have no factual basis. Moreover, plaintiff's inexcusable delay in bringing its "claim," both before and after the Rights Offering, requires dismissal based on laches and the statute of limitations.

This is Defendants' Opening Brief in support of their motion to dismiss.

[2] The warrants were exercised (and Gulfport received the warrant price) years ago. Plaintiff makes no allegation that any of the options (and particularly those held by directors serving at the time of the Rights Offering) were ever exercised.

STATEMENT OF FACTS

A. The Record on Defendants' Motion to Dismiss

The circumstances of this case require that in deciding Defendants' Motion to Dismiss, the Court consider documents beyond the allegations of the Complaint. First, Robotti has previously brought an action pursuant to 8 *Del. C.* § 220, and the Court issued an Opinion and Order after trial in that case.[3] Because Robotti was the plaintiff in that highly contested summary proceeding and had a full and fair opportunity to litigate, factual and legal determinations adverse to Robotti in that action are entitled to collateral estoppel effect in this case.[4] Moreover, the Amended Complaint ¶16 specifically references the opinion in the 220 action.

Second, the Court must consider documents that are integral to Plaintiff's claim or are incorporated by reference into the Amended Complaint.[5] Such documents include documents expressly relied upon in the Amended Complaint such as: Gulfport's July 22, 2004 Prospectus (Am. Compl. ¶13), Gulfport's 2005 (10-K Am. Compl. ¶18), Gulfport's 10-Q for the quarter ending September 30, 2004, and the Backstop Agreement (Am. Compl. ¶24). The Amended Complaint also repeatedly refers to the documents produced by Gulfport pursuant to the Court's Order in the § 220 action (the "§ 220 Documents") and Plaintiff's claim is largely based on what these documents purportedly do or do not say[6]. Am. Compl. ¶¶24-28, 30-32. Accordingly, the §

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[3] *Robotti & Co., LLC v. Gulfport Energy Corp.*, 2007 WL 2019796 (Del. Ch.).

[4] *Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *8 (Del. Ch.); *J.W. Acquisitions, LLC v. Shulman*, 2006 WL 3087797, at *6-7 (Del. Ch.). In contrast, the Individual Defendants accused of wrongdoing in this action were not parties to the § 220 case.

[5] *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 422 & n.3 (Del. Ch. 2007); *Vanderbilt Income and Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, 925 & n.5 (Del. Ch. 1999).

[6] Significantly, the allegations of the Amended Complaint repeatedly assume (erroneously) that because director consents, Board minutes and other documents do not reflect discussion of particular topics that means that these subjects were not discussed.

220 Documents are integral to Plaintiff's claim and are properly considered on Defendants' Motion to Dismiss. Similarly, the Amended Complaint repeatedly claims that "the records of the Company" do not reflect various matters. Am. Compl. ¶¶24, 30b, 30c, 30f, 30g. Accordingly, the public records of Gulfport are appropriately considered on the Motion to Dismiss. Also integral to Plaintiff's claim are the terms of the Rights Offering, as reflected in the Prospectus (Am. Compl. ¶¶13-14, 17, 20-21) and the anti-dilution provisions of the warrants and options (Am. Compl. ¶¶21-23, 26-27, 29, 30d, 31, 33-34, 40).

Third, Plaintiff's claim includes representations concerning the contents of the Prospectus and the § 220 Documents, and the Company's records, so these documents are properly considered to show what the documents actually said.[7]

Fourth, matters of public record, such as the trading prices of Gulfport's stock (Compl. ¶¶14, 17-18, 23, 31, 34, 37), can properly be referenced on Defendants' Motion to Dismiss.[8] Similarly, the membership of Gulfport's board is a matter of public record.[9]

As the discussion below indicate, consideration of documents beyond the four corners of the Amended Complaint is necessary to prevent Plaintiff from inflicting the substantial burdens of discovery on Defendants by filing a misleading complaint that misstates the facts and omits crucial information.[10]

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[7] *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995); *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1072 & n.53 (Del. Ch. 2001); *Trenwick America Litig. Trust v. Ernst & Young L.L.P.*, 906 A.2d 168, 188 & nn.55-56 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007) (complaint referred to corporation's books and public records).

[8] *Trenwick*, 906 A.2d at 188 & nn.55-56; *Teachers' Ret. Sys. of Louisiana v. Aidinoff*, 900 A.2d 654, 664 (Del. Ch. 2006); *In re Wheelabrator Techs. Inc. S'holder Litig.*, 1992 WL 212595, at * 12 (Del. Ch.); *Shellburne Civic Ass'n, Inc. v. Brandywine School Dist.*, 2006 WL 2588959, at *1 & n.3 (Del. Ch.).

[9] *Jacobs v. Yang*, 2004 WL 1728521, at *4 & nn. 17, 19 (Del. Ch.).

[10] *Midland Food*, 792 A.2d at 925 & n.5. *See also Beck v. Atlantic Coast PLC*, 868 A.2d 840, 854 (Del. Ch. 2005) (violation of Court of Chancery Rule 11 for complaint to misrepresent material factual circumstances); *Rice v. Herrigan-Ferro*, 2004 WL 1587563, at *1 (Del. Ch.) (complaint falsely alleged statements of fact).

B. Parties

Plaintiff alleges it is a stockholder of Gulfport and has been such since at least 2004. Am. Compl. ¶1. At the time of the Rights Offering, Robotti held approximately 90,000 Gulfport shares. Am. Compl. ¶14; *Robotti,* 2007 WL 2019796, at *1. Robotti exercised its full subscription and oversubscription rights and purchased in the market and exercised additional rights. Am. Compl. ¶21; *Robotti,* 2007 WL 2019796, at *1. Thus, the Rights Offering did not dilute Robotti. *Robotti,* 2007 WL 2019796 at *3.

Defendant Gulfport is a Delaware corporation and an independent oil and gas production company with properties located along the Louisiana Gulf Coast. Am. Compl. ¶2. In 2004, Gulfport was in the business of oil and gas exploration and production. *Id.* ¶18.

The individuals named as defendants (Mike Liddell, Robert E. Brooks, David L. Houston, Mickey Liddell and Dan Noles) served as Gulfport directors in 2004 at the time of the Rights Offering. *Id.* ¶¶3-7. Although Plaintiff has misrepresented to the Court that "the Board is unchanged since the Offering,"[11] the Amended Complaint ¶¶6-7 acknowledges that Mickey Liddell and Dan Noles left the Gulfport Board in April 2007, more than eight months before the filing of the Amended Complaint. Had Plaintiff performed the due diligence Court of Chancery Rule 11 requires, it would know that its representation in the Amended Complaint that Robert E. Brooks is still a Gulfport director is false. Mr. Brooks resigned from the Board on October 29, 2007, and the Board appointed Donald Dillingham as an independent director on November 9, 2007. DX 17.

Paragraph 8 of the Amended Complaint alleges that each Individual Defendant was "conflicted on this transaction" because he was "either an option-holder and/or a warrant-holder." At the time of the Rights Offering, Gulfport had 2.4 million warrants and 627,000

[11] Plaintiff's Memorandum in Opposition to Defendants' Motion to Stay Discovery, p. 5 & n.5.

options outstanding. Am. Compl. ¶21; *Robotti*, 2007 WL 2019796, at *1. The exercise price for the warrants was $4.00 per share, and the exercise price for the options was $2.00 per share. Am. Compl. ¶21. Plaintiff admits that the options were held by Gulfport directors and officers, not by the controlling stockholder. *Id.* The warrants were mainly owned by an affiliate of Gulfport's controlling stockholder, not by the directors and officers. *Id.* The Prospectus (pp. 48-49),[12] which is repeatedly referenced in the Amended Complaint (¶¶13, 23, 30, 32), confirms that the Individual Defendants did not hold any warrants. Indeed, the Amended Complaint (¶21) acknowledges that "[t]he options were management-owned and board-owned while Gulfport's controlling shareholder Davidson beneficially owned the majority of the warrants." In the § 220 action, the Court of Chancery found that:

> The options were management-owned and an affiliate of Gulfport's controlling shareholder owned the majority of the warrants.[13]

Thus, the Amended Complaint does not and could not allege that the Gulfport directors had any material interest with respect to the warrants.[14]

The conclusory assertion in ¶8 of the Amended Complaint that the Individual Defendants were option-holders contains no facts showing that their interest in the Gulfport options gave them any material financial interest in the Rights Offering. In fact, the Prospectus (p. 46) indicates that only Mike Liddell, the Company's Chairman and CEO, held a significant number

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[12] DX 9.

[13] *Robotti*, 2007 WL 2019796, at *1. The Amended Complaint alleges that at the time of the Rights Offering Gulfport's controlling stockholder was Charles Davidson "who through various entities including CD Holdings and Wexford Management, LLC was reported to have beneficial ownership of approximately 2/3 of the Company stock." Am. Compl. ¶15. However, neither Mr. Davidson nor Wexford Management, LLC is named as a defendant in the action, and Plaintiff dismissed the CD Holdings entity it had named in the Amended Complaint.

[14] Similarly, the Amended Complaint alleges no facts showing that any of the directors had a material interest in or was not independent concerning the Backstop Agreement.

of options.[15] The four other directors each held only 20,000 options, which were insufficient to give them a material interest in how the options were treated in the Rights Offering.

The Amended Complaint (¶21) alleges that "the strike price on the options was $2.00." As the Amended Complaint acknowledges, the subscription price in the Rights Offering was $1.20 per share. (Am. Compl. ¶14, 23-24, 26, 28, 40). Because the exercise price of the rights was below the exercise prices of the warrants and the options, the anti-dilution provisions protecting the holders of the warrants and the options were triggered by the Rights Offering. Am. Compl. ¶21; *Robotti*, 2007 WL 2019796, at *1. The Prospectus (DX at p. 22) disclosed the anti-dilution adjustment to the options and indicated that (i) prior to the Rights Offering, there were 627,337 options outstanding with an exercise price of $2.00 per share, (ii) the aggregate exercise price for the options (i.e. $1,254,674) would not be changed by the Rights Offering, and (iii) after giving effect to the Rights Offering, there would be 1,254,612 options with an exercise price of $1.01 per share. Thus, the anti-dilution adjustment to the options merely preserved the rights of the option holders to purchase the same percentage interest in the Company for the same amount of money.[16] As the Amended Complaint (¶21) admits, the anti-dilution provisions merely enabled the warrant holders and option holders to purchase additional shares "to maintain their position after the offering." *Id.* Therefore, the adjustment did not "dilute" existing Gulfport stockholders. Of course, the anti-dilution adjustments did not automatically give the option holders and warrant holders' additional shares--they still had to pay the adjusted exercise price

[15] Paragraph 15 of the Amended Complaint also alleges that at the time of the Rights Offering "Michael Liddell" was "reported as beneficial (sic) was (sic) approximately 11% of the Company stock." However, what was reported was that "Mike Liddell" held 712,146 shares of Gulfport's outstanding common stock and held options to purchase 457,270 shares.

[16] As the Prospectus (p. 4) indicated, before the Rights Offering, Gulfport had 10,146,566 shares of common stock outstanding (DX 9) and after the Rights Offering, it would have 20,146,566 shares outstanding. Thus, while as a result of the Rights Offering the number of options roughly doubled, so did the number of outstanding shares. Consequently the options conferred the right to purchase the same percentage of Gulfport's equity for the same amount of money both before and after the Rights Offering.

for the warrants and options in order to receive any shares. Significantly, the Amended Complaint contains no allegation that any of the 627,000 options were actually exercised.

C. The Rights Offering

1. The Rights

The Rights Offering was made pursuant to a July 22, 2004 Prospectus. Am. Compl. ¶13; *Robotti*, 2007 WL 2019796, at *1.[17] In the Rights Offering, all Gulfport stockholders received one transferable subscription right to buy a share of Gulfport common stock for $1.20 per share for every 1.0146 shares of Gulfport common stock owned. Am. Compl.¶14; *Robotti*, 2007 WL 2019796, at *1. To the extent the offer was undersubscribed, shareholders exercising their rights had oversubscription rights to purchase any remaining shares. *Id.*

2. Use of Proceeds

As Plaintiff acknowledges, the Prospectus disclosed that the purpose of the Rights Offering was to fund part of Gulfport's proposed seismic and drilling programs. Am. Compl. ¶20; *Robotti*, 2007 WL 2019796, at *1. At the time of the Rights Offering, Gulfport had only $580,000 in cash. *Robotti*, 2007 WL 2019796, at *1. However, Gulfport was seeking to pursue a significant expansion of its drilling portfolio. Am. Compl. ¶20. Gulfport's 10-Q for the quarter ending September 30, 2004, reported that CD Holdings had applied a $500,000 balance Gulfport owed under an existing credit facility toward the exercise of subscription rights in the Rights Offering. *Id.* The 10-Q also disclosed that $11.1 million of the net proceeds from the Rights Offering had been used to fund ongoing operations in Gulfport's WCCB and East

[17] The Amended Complaint asserts that "the Company first announced a rights offering" in the Prospectus and that the Prospectus was "filed with the Securities and Exchange Commission and first available to stockholders on July 27, 2004." Am. Compl. ¶13. However, documents Plaintiff has filed with the Court show that Registration Statements for the Rights Offering, including preliminary prospectuses, were filed with the SEC on May 12, 2004, June 21, 2004 and July 22, 2004. Plaintiff's Memorandum In Opposition to Defendants' Motion to Stay Discovery, Ex. B, p. 2.

Hackberry Oil Fields. *Id.* An additional $2.2 million from the proceeds of the Rights Offering was to be applied to an outstanding balance with the Bank of Oklahoma. *Id.*

3. The Gulfport Board's Consideration of the Rights Offering

The Complaint repeatedly asserts that there was no report on, no discussion and no Board action on various matters because the records of the Company do not show such reports discussion or action. Am. Compl. ¶¶24-28, 30a-g, 31. First, contrary to plaintiff's misrepresentation, the § 220 Documents and other Gulfport records that are publicly available do show that reports were given, discussion occurred and decisions were made. Second, the absence of specific mention in director consents summarizing the details of reports and discussions does not mean that such discussions and consideration never happened. Indeed, the § 220 Documents show there were such reports and discussions. Delaware law permits the use of unanimous director consents to approve actions and contains no requirement that such consents must reflect the details of reports to the board or discussions by the board that led the board to take the action by consent. 8 *Del. C.* § 141(f).

Contrary to the unsupported allegations of the Amended Complaint that the documents produced by the Company in the § 220 action do not show consideration by the Board concerning the selection of the subscription price, alternatives to the Rights Offering and other matters, the documents themselves, which are repeatedly referred to in the Amended Complaint, show there was such discussion. The minutes of Gulfport's November 14, 2003 Board of Directors meeting[18] show that in connection with the Operations Report the Board discussed

[18] Gulfport's minutes are in an agenda format without a detailed summary of the reports given and discussions held. Of course, there is no requirement under Delaware law that minutes be kept in a particular format. Board actions are generally reflected in accompanying unanimous director consents, a procedure specifically authorized by 8 *Del. C.* § 141(f).

"Capital Constraints" and a "Possible Offering."[19] The April 14, 2004 minutes show discussion of "CAPITAL REQUIREMENTS" for "10 wells to drill," "Workovers" and "Seismic Hackberry."[20] The minutes also reflect that there was discussion of numerous topics related to the "RIGHTS OFFERING," including:

> A. Discussion of terms.
> B. Discussion of backstop and commitment obligations.
> C. Fairness.
> 1. Registered rights, freely tradeable.
> 2. Discussion of advisability of fairness opinion. Discussion included the cost of such opinion. Board determined that since the rights will be registered with the SEC and freely tradeable that the offering price is fair.
> D. Increase in authorized shares.[21]

The minutes also reflect that the Board passed resolutions approving the Rights Offering and the increase in authorized shares.[22] There is a unanimous director consent dated April 14, 2004 reflecting the Board's approval for the increase in authorized shares, the filing of an Information Statement related to the increase in authorized shares, and the authorization of the Rights Offering, Backstop Agreement and draft Registration Statement for the Rights Offering.[23]

Gulfport also produced the April 14, 2004 letter agreement that constituted the Backstop Agreement.[24] That agreement provided:

> CD Holdings agrees to backstop a Rights Offering under the following conditions: (i) the offering yields gross proceeds of $12.0 million; (ii) the rights are offered at $1.20 a share; (iii) the rights are registered with the Securities and Exchange Commission; and (iv) no offer on West Cote Blanche Bay is

[19] DX 18 at GULFPORT 037.
[20] DX 18 at GULFPORT 034.
[21] *Id.*
[22] *Id.*
[23] DX 18 at GULFPORT 016-027. Gulfport also produced the April 15, 2004 Written Consent of Stockholders to the certificate amendment increasing Gulfport's authorized shares. DX 18 at GULFPORT 031-033.
[24] DX 18 at GULFPORT 035.

> accepted prior to funding of the Rights Offering, and approved by majority of Gulfport shareholders; (v) a 2% commitment fee.

The handwritten changes to the Backstop Agreement indicate that it was the subject of the negotiation.[25]

On May 17, 2004, the Gulfport Board met and, according to minutes, received an "OPERATIONS REPORT" that included a drilling report and a report on the seismic shoot at Hackberry.[26] The Board also received a further report on the Rights Offering.[27]

Further consideration of the Rights Offering by the Gulfport directors is reflected in minutes dated July 12, 2004 which indicate that at a meeting on that date, after a discussion of operations, including a drilling report and report on the seismic shoot at Hackberry, there was an "Update on Rights Offering."[28] In an accompanying consent dated July 12, 2004, the Board resolved that it was fair and in the best interests of the Company and its stockholders for the Company to issue 10 million shares upon the exercise of the Rights at a subscription price equal to $1.20 per share.[29] In resolutions that were approved at the July 12, 2004 meeting, the Board confirmed that the pricing of the Rights at a subscription price of a $1.20 per share was fair and in the best interests of the Company and its stockholders.[30] The resolutions also set the record date for the Rights Offering as July 16, 2004.[31]

According to minutes dated August 16, 2004, at a Board meeting on that date, the Gulfport Board received an "OPERATIONS REPORT" that included a drilling update, a

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[25] *Id.*
[26] DX 18 at GULFPORT 012.
[27] *Id.*
[28] DX 18 at GULFPORT 002. Thus, the Amended Complaint's assertion (¶¶26, 30b) that the Board did not review the status of the drilling program is false. *See also* DX 18 at GULFPORT 034; DX 18 at GULFPORT 012; DX 18 at GULFPORT 001.
[29] DX 18 at GULFPORT 003-009.
[30] DX 18 at GULFPORT 010-011.
[31] *Id.*

Hackberry Seismic update, a production update and a pricing update.[32] The directors also received a "FINANCIAL REPORT" which included an update on the Rights Offering and a discussion of the Company's financials.[33]

The documents Gulfport produced in the § 220 action show that the Rights Offering was discussed during at least five separate Board meetings from November 2003 to August 2004. The documents show there was discussion of the Company's capital needs and alternatives to the Rights Offering, including a possible sale of the West Cote field. Moreover, the documents Gulfport provided referenced numerous public filings, including information statements and registration statements, that provide additional information regarding the Rights Offering and related matters, such as the Backstop Agreement and credit facility.

4. The Subscription Price of the Rights

The Prospectus described the factors the Gulfport board considered in setting the subscription price at $1.20 per share, including the market price of Gulfport's stock, the availability of financing alternatives and the ability to get CD Holding the backstop the offering at that price.[34] The Board also considered that the rights were registered with the SEC and freely tradeable.[35] The Prospectus specifically disclaimed that the offering price represented the actual value of Gulfport or its stock.[36] The Board discussed the terms of the Rights Offering, including the subscription price, at multiple Board meetings.[37] The Board reconfirmed on July 12, 2004 that the $1.20 per-share subscription price was fair.[38]

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[32] DX 18 at GULFPORT 001.
[33] *Id.*
[34] Am. Compl. ¶23.
[35] DX 18 at GULFPORT 034.
[36] DX 9 at p. 8.
[37] DX 18 at GULFPORT 034; GULFPORT 016-027 at 018; GULFPORT 035; GULFPORT 003-009 at 003; GULFPORT 010-011 at 010.
[38] DX 18 at GULFPORT 003-009, 010-011.

Robotti concedes that rights offerings are generally done at below-market prices.[39] Robotti's assertion that a 60% discount to the market was "unusual" is not supported by any facts.[40] Furthermore, Robotti does not allege what a "more usual discount" would be.

Robotti's argument that "[m]anagement and the controlling stockholder were the principal beneficiaries of the decision to price the rights offering well below the book value and market trading value of the Company" is belied by Robotti's own conduct.[41] Robotti exercised its subscription rights, oversubscription rights and rights purchased in the market, thereby benefitting from the discount to market price it complains about.[42] If defendants had intended to confer a benefit only on management and the controlling shareholder, it would not have engaged in a Rights Offering whereby all Gulfport shareholders, including Robotti, were invited to buy shares at the $1.20 price through subscription rights, oversubscription rights and the ability to purchase rights and shares in the open market.

5. The Need for Capital and Financing Alternatives

The Amended Complaint asserts that Gulfport's records are totally devoid of anything showing Board exploration or consideration of financing alternatives. Am. Compl. ¶¶24, 26-28, 30c. It also suggests that the records do not show that in 2004 Gulfport needed any capital for financing its drilling program. *Id.* ¶¶26-28, 30a, 35, 38. Once again, the minutes and other documents are to the contrary. The Board discussed capital constraints at its November 14, 2003 meeting.[43] At its April 14, 2004 meeting, the Board discussed the capital requirements for new wells, workovers and seismic studies.[44] The April 14, 2004 Board consent indicates that the

[39] *Robotti*, 2007 WL 2019796, at *1 & n.3, *2.
[40] Am. Compl. ¶34.
[41] *Id*.
[42] *Robotti*, 2007 WL 2019796, at *1.
[43] DX 18 at GULFPORT 037.
[44] DX 18 at GULFPORT 034.

Rights Offering is needed to finance capital expenditures.[45] Gulfport's documents and SEC filings also show consideration of financing alternatives, including in particular a sale of the West Cote Blanche Bay field.[46] Gulfport also extended the maturity date of its existing $2.3 million line of credit with Bank of Oklahoma to July 1, 2004 and planned to either extend the maturity date further or repay the $2.2 million outstanding balance from the proceeds of the Rights Offering.[47] Plaintiff concedes, that prior to the Rights Offering, Gulfport had only $580,000 in cash and cash equivalents.[48]

Robotti makes conclusory assertions that "by the time the rights offering closed, the Company's drilling program, which the proceeds of the Rights Offering were purportedly needed to finance, were well on their way if not virtually completed" and "[t]he results of that drilling program were so successful that rather than drill 12 wells, the Company decided to drill just eight."[49] These broad statements are unsupported by specific facts, which is not surprising because the statements are factually incorrect. The twelve well drilling program for 2004 was not even initiated until July, 2004.[50] As the Court found in the §220 action, Robotti's contentions are based on a misinterpretation of a press release stating that eight new wells were drilled and completed and four existing wells were recompleted in the third quarter, which ended September 30, 2004.[51] Gulfport's 10-Q for the quarter ended September 30, 2004 (filed November 12, 2004) stated that Gulfport commenced an eight well drilling program in July, 2004, also recompleted four existing wells, was permitting six additional wells, began a five well workover

[45] DX 18 at GULFPORT 016-027 at 018.
[46] DX 18 at GULFPORT 035; DX 4, p. RC 519; DX 8, pp. RC613-614; DX 9, p. 30.
[47] DX 4, p. RC 518; DX 9, p. 30.
[48] Am. Compl. ¶20; *Robotti*, 2007 WL 1029796, at *1.
[49] Am. Compl. ¶35.
[50] DX 7 at 16.
[51] *Robotti*, 2007 WL 2019796 at *3 & n.24.

and eight well recompletion program in November, 2004 and was planning to workover and recomplete six to ten wells in the first quarter of 2005.[52] Thus, at the time the Rights Offering was completed in August 2004, the drilling program was not "virtually completed." As the Prospectus for the Rights Offering explained, Gulfport had already used borrowings under the $3 million revolving credit facility with CD Holding to fund a portion of the drilling program.[53] Those borrowings would either be used by CD Holding to exercise rights (which would reduce the cash received in the Rights Offering) or part of the proceeds would be used to repay the borrowings.[54] Gulfport's 10-Q for the quarter ended September 30, 2004 reported that CD Holding had applied toward the exercise of rights the $500,000 Gulfport had borrowed under the credit facility to fund a part of the drilling program.[55] It further disclosed that the $11.1 million of net proceeds from the Rights Offering "were and will be used to fund the Company's seismic and drilling programs at WCCB and East Hackberry Field and to repay in full the outstanding principal balance of approximately $2,200,000 on the Company's line of credit with the Bank of Oklahoma."[56]

6. The Market Price of Gulfport's Stock

The Amended Complaint repeatedly refers to the market price of Gulfport shares being $3.10 on the bulletin board and misleadingly implies that $3.10 per share was the trading price at the time of the Rights Offering. Am. Compl. ¶¶14, 17, 23, 37. Robotti's allegations regarding the $3.10 trading price are particularly misleading, given that the $3.10 price actually represented

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[52] DX 11, p. 16.
[53] DX 9, p. 11.
[54] DX 9, pp. 3-4, 11. Contrary to the Amended Complaint ¶30e, the § 220 Documents show the Board considered and approved the terms of the facility after reviewing a draft thereof. DX 18 at GULFPORT 016-027 at GULFPORT 021.
[55] DX 11, p. 22.
[56] *Id.* at 23. As the Prospectus disclosed (DX 9, p. 11), $4.5 million of the Rights Offering proceeds was budgeted for the seismic survey. *See also* DX 11, p. 17.

only one 500 share trade on April 12, 2004.[57] The Prospectus (DX 9 at p. 3) states that on April 13, 2004, the last trading day before the Board decided to proceed with the Rights Offering, the closing bid for Gulfport stock on the OTC Bulletin Board was $3.10. It further states that on July 21, 2004, the closing price was $2.19 per share.[58] The trading price of Gulfport stock on the bulletin board during 2004 is a matter of public record. Those public trading prices reflect that during 2004 prior to the Rights Offering Gulfport's stock frequently traded well below $3.10. Thus, one of the central premises underlying Plaintiff's "claim" (*i.e.* that the $1.20 Rights Offering price was way below the market price of Gulfport's stock) is faulty. Thus, Plaintiff's reliance on a "prevailing market price of the stock [of] $3.10 per share" is misleading and indicative of the lack of any valid claim.

Plaintiff acknowledges that the bulletin board market for Gulfport stock was "thinly traded," "illiquid," and "inefficient." Am. Compl. ¶¶14, 17. Prior to the Rights Offering, trading was sporadic and frequently involved only a few shares; on some days, the stock did not trade at all.[59] The additional shares that became part of the public float as a result of the Rights Offering improved the liquidity and trading volume in the market.[60] After the Rights Offering, it was rare for no shares to trade, and there was trading volume above 10,000 shares on most days.[61] Moreover, the trading price of Gulfport's stock after the Rights Offering was actually higher than prior to the offering.[62]

7. The Backstop Agreement

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[57] DX 19, p. 12. A 24,000 share trade on March 26, 2004 occurred at $2.83, and the day before 5,300 shares traded at $2.80.
[58] DX 9.
[59] DX 19, pp. 10-13.
[60] *Id.*, pp. 9-10.
[61] *Id.*
[62] *Id.*

Robotti claims the Backstop Agreement was unnecessary.[63] However, it concedes it is not unusual to have a Backstop Agreement for a rights offering.[64] Plaintiff alleges that the minutes of Board meetings and other records of the Company concerning the Board approval of the Rights Offering "are totally devoid of anything which would show the board had any level of participation [in] obtaining or considering the backstop agreement." Am. Compl. ¶24. In fact, the April 14, 2004 minutes show a specific "discussion of backstop and commitment obligations."[65] The April 14, 2004 Consent discusses and approves the Backstop Agreement and commitment fee, noting that the Board review a draft of the agreement.[66] The handwritten changes to the Backstop Agreement itself show that there was consideration of its terms.[67] Most importantly, Plaintiff concedes that no shares were ever purchased pursuant to the Backstop Agreement.[68]

D. Robotti Has Failed to Allege Substantial Dilution

Robotti's investment in Gulfport was approximately 90,000 shares prior to the Rights Offering.[69] Robotti acquired a substantial number of additional shares through (i) exercise of subscription rights, (ii) exercise of oversubscription rights and (iii) rights and shares purchased in the open market.[70] Thus, Robotti owned substantially more shares after the Rights Offering. Since slightly less than one right was issued per outstanding share in the Rights Offering, Robotti suffered no dilution. The number of Gulfport shares outstanding after the Rights Offering was

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[63] Am. Compl. ¶37.
[64] *Id.* The Backstop Agreement was publicly available in the May 11, 2004 preliminary registration statement that Robotti reviewed and underlined. *See* DX 4 at RC 560. The Prospectus (DX 9 at pp. 1-2, 16) also described the Backstop Agreement.
[65] DX 18 at GULFPORT 034.
[66] DX 18 at GULFPORT 016-027 at 018-019, 022.
[67] DX 18 at GULFPORT 035.
[68] Am. Compl. ¶37.
[69] Am. Compl. ¶14.
[70] *Id.* ¶21.

slightly less than twice the outstanding shares before the Rights Offering, while Robotti's shareholdings were far more than twice its pre-offering holdings because Robotti essentially doubled its shareholdings by exercising its subscription rights, then further increased its holding through its exercise of oversubscription rights and rights purchased in the market. Therefore, Robotti owned a greater portion of Gulfport's outstanding shares after the Rights Offering than before. Following the Rights Offering, Gulfport was quite successful and the market price of its stock climbed into double digits.[71] Thus, Robotti profited greatly from the Rights Offering it now attacks.

[71] DX 19 at pp. 1-10.

ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE AMENDED COMPLAINT FAILS TO COMPLY WITH RULE 23.1

On a motion to dismiss under Court of Chancery Rule 23.1, plaintiffs are entitled to all reasonable factual inferences that logically flow from the facts alleged in the complaint.[72] However, conclusory allegations of law or fact are not considered as expressly pleaded facts or factual inferences.[73] The Court "'need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences.'"[74]

A. Plaintiff Failed to Make the Required Demand and Failed to Demonstrate Demand is Excused

Court of Chancery Rule 23.1 preserves the board's authority over ordinary business decisions by requiring that before asserting derivative claims, a stockholder either demand that the corporate board initiate the litigation itself, or, in the alternative, demonstrate in the complaint why such demand would have been futile.[75] A plaintiff who asserts demand futility must "comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by Court of Chancery Rule 8(a)."[76] Vague or conclusory allegations are not sufficient.[77] Merely raising an inference that a board would refuse demand or even alleging the board would refuse demand is not sufficient.[78] To establish demand futility under *Aronson*,[79] Plaintiff's complaint must raise a reasonable doubt about the directors'

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[72] *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000).
[73] *White v. Panic*, 783 A.2d 543, 549 (Del. 2001) (quoting *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000)).
[74] *Id*. (quoting *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988)).
[75] *In re infoUSA, Inc. S'holders Litig.*, 2007 WL 2419611, at *12 (Del. Ch.).
[76] *infoUSA*, 2007 WL 2419611, at *12 (quoting *Zimmerman v. Braddock*, 2002 WL 31926608, at *7 (Del. Ch.)).
[77] *Brehm*, 746 A.2d at 254.
[78] *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 553205, at *5 (Del. Ch.).
[79] *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

disinterest and independence.[80] For example, a plaintiff must allege a specific director is interested by stating facts showing that the director personally benefited from the challenged transaction, or show that a particular director is dominated by or is beholden to an interested director.[81] This requires a detailed, fact-intensive, director-by-director analysis.

1. Plaintiff Did Not Make a Demand or Allege Futility in Either Complaint

Plaintiff's complaint does not allege it made a pre-suit demand when it filed its first complaint on July 27, 2007 or when it filed its Amended Complaint on January 15, 2008. Nor does either complaint allege that demand is excused. Rather, Plaintiff purports to bring its dilution claims as individual and class claims. However, under Delaware law, Plaintiff's claim that stockholders were diluted by options and warrants is a derivative claim.

2. Plaintiff's Dilution Claims are Derivative

Plaintiff acknowledges as it must,[82] and the Court recognizes in its opinion,[83] that Robotti was not diluted by the Rights Offering. Instead, the alleged dilution supposedly occurred when the anti-dilution provisions protecting the holders of the warrants and options were triggered by the Rights Offering. This Court has recognized since *Elster v. American Airlines*,[84] that:

> [a]ny injury which plaintiff may receive by reason of the dilution of his stock would be equally applicable to all the stockholders of defendant, since plaintiff holds such a small amount of stock in proportion to the amount of stock outstanding that the control or management of defendant would not be affected by the granting of these options, and, further, since there is no averment that the pre-

[80] *infoUSA*, 2007 WL 2419611, at *13.
[81] *Orman v. Cullman*, 794 A.2d 5, 25, n.50 (Del. Ch. 2002); *infoUSA*, 2007 WL 2419611, at *13; *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004) (quoting *Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996)).
[82] Compl. ¶21 (acknowledging that Robotti exercised its full subscription rights and purchased additional rights in the open market).
[83] *Robotti*, 2007 WL 2019796, at *1.
[84] *Elster v. American Airlines*, 100 A.2d 219, 222 (Del. Ch. 1953)(seeking to enjoin the grant and exercise of stock options because they would result in a dilution of her stock personally).

> emptive rights of plaintiff as a stockholder are affected by their issuance.

The Delaware Supreme Court in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*,[85] stated that the analysis to determine a derivative, as opposed to a direct, claim should focus on "the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation." After *Tooley*, the Delaware courts have continued to hold that dilution claims are derivative.[86] Dilution claims are derivative because the alleged injury resulting from the dilution claim "is to the corporation because 'it falls upon all shareholders equally and falls only upon the individual shareholder in relation to his proportionate share of stock as a result of the direct injury being done to the corporation."[87] In particular, claims of dilution premised on the issuance of additional equity or options reducing the value of the complaining stockholder's shares continue to be derivative claims.[88] Robotti's Amended Complaint attempts to state a general dilution claim, which under Delaware law has been considered a derivative claim for more than fifty-five years. Robotti did not make a demand on the board and made no allegations in either of its complaints that demand was excused. Therefore, Robotti's claim should be dismissed.

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[85] *Tooley v. Donaldson, Lufkin & Jenrette, Inc*., 845 A.2d 1031, 1039 (Del. 2004).

[86] *See, e.g., Conrad v. Blank*, 940 A.2d 28, 34 (Del. Ch. 2007)(stockholder derivative action where complaint challenged amendment to exercise price of option grants); *FS Parallel Fund v. Ergen*, 879 A.2d 602 (Del. 2005), *aff'g* C.A. No. 19853 (Del. Ch. July 28, 2003); *Feldman v. Cutaia*, 2007 WL 2215956, at *7 & n.36 (Del. Ch.); *Oliver v. Boston Univ.*, 2006 WL 1064169, at *17 (Del. Ch.); *Gatz v. Ponsoldt*, 2004 WL 3029868, at *7 (Del. Ch.)("Mere claims of dilution, without more cannot convert a claim, traditionally understood as derivative, into a direct one.").

[87] *Feldman*, 2007 WL 2215956, at *7 (quoting *In re Berkshire Realty Co., Inc.*, 2002 WL 31888345, at *4 (Del. Ch.).

[88] *Feldman*, 2007 WL 2215956, at *7-10.

3. Plaintiff Has Not Alleged the Current Board is Interested or Not Independent

In the context of a motion to dismiss under Rule 23.1, the Court considers the board in place at the time the plaintiff brings the complaint.[89] The Amended Complaint does not even identify Gulfport's current directors, much less allege particularized facts showing interest or lack of independence. In its memorandum opposing a stay of discovery (p. 5 n.5), Plaintiff asserted that demand is excused based on the inaccurate and conclusory assertion of the Amended Complaint that "[a]t the time of the wrongs alleged herein, the Company did not have (and today does not have) a majority of Directors identified as 'independent.'" Am. Compl. ¶8. The membership of the Gulfport board at the time of Plaintiff's original complaint and Amended Complaint is a matter of public record. At the time Robotti filed its original complaint, two of the five members of the Company's board were not on the board in 2004 at the time of the Rights Offering and two others did not have a material financial interest because they only held 20,000 Company options at the time of the Rights Offering.[90] By the time Robotti filed its Amended Complaint on January 15, 2008, a majority of the board had changed since the Rights Offering. A new board member had replaced defendant Brooks, who was on the board at the time of the Rights Offering, but resigned in October 2007.

Demand is to be considered at the time Robotti filed its Amended Complaint. Plaintiff has not alleged and cannot allege that a majority of the directors in office at the time the Amended Complaint was filed were interested or incapable of exercising independent judgment with respect to Robotti's claims. Therefore, Plaintiff was not excused from making a demand

[89] *In re Tyson Foods, Inc.*, 919 A.2d 563, 582 (Del. Ch. 2007); *see also Braddock v. Zimmerman*, 906 A.2d 776, 784-86 (Del. 2006) (discussing when plaintiff must make demand upon new board when amended derivative complaint is filed).

[90] Indeed, even Mike Liddell, who held 456,270 options, did not have a material interest because the anti-dilution adjustment as a result of the Rights Offering only allowed him to buy the same percentage of Gulfport's equity for the same amount as prior to the Rights Offering.

under Rule 23.1 when it amended its complaint because it has not alleged facts showing a majority of the Board at that time was interested or lacked independence. The Delaware Supreme Court, in *Braddock v. Zimmerman* held that "[t]hree circumstances must exist to excuse a plaintiff from making demand under Rule 23.1 when a complaint is amended after a new board of directors is in place . . . ."[91] The Court requires demand to be made on the new board, unless:

> First, the original complaint was well pleaded as a derivative action; second, the original complaint satisfied the legal test for demand excusal; and third, the act or transaction complained of in the amendment is essentially the same as the act or transaction challenged in the original complaint.[92]

Robotti does not satisfy this test. First, Robotti did not plead its dilution claim as a derivative claim in the original complaint. Second, the original complaint did not satisfy the legal test for demand excusal. Indeed, the original complaint did not even assert that demand was excused. The original complaint certainly did not contain the director-by-director analysis required to show demand was excused. Because Robotti failed to make a demand on the board in place at the time of its Amended Complaint, it cannot satisfy the demand requirement of Rule 23.1.

4. The Amended Complaint Fails to Contain a Detailed Director-by-Director Analysis Demonstrating that the Directors at the Time of the Original Complaint Were Not Disinterested or Independent

The Amended Complaint does not contain any director-by-director analysis demonstrating that a majority of the Gulfport directors at the time of either complaint were not disinterested and independent. Even if the demand requirement was to be applied based on the directors in office during 2004, Plaintiff only alleges weakly that, "[e]ach Individual Defendant was either an option-holder and/or a warrant-holder, (sic) therefore (sic) conflicted on this

[91] *Braddock*, 906 A.2d at 786.
[92] *Id*.

transaction."[93] Plaintiff's general allegations as to the board as a whole are insufficient to excuse demand. Vague or conclusory allegations do not overcome the presumption of a director's capacity to consider a demand.[94]

The individual members of the Board at the time of the Rights Offering did not have a material financial interest conflicting with that of the corporation's stockholders. Plaintiff does not allege, let alone with particularity, that any benefit received from the Rights Offering was material or substantial to any of the individual director defendants. As this Court recognizes,

> it is not enough to establish the interest of a director by alleging that he received any benefit not equally shared by the stockholders. Such benefit must be alleged to be *material* to that director. Materiality means that the alleged benefit was significant enough "*in the context of the directors' economic circumstances*, as to have made it improbable that the director could perform [his] . . . duties . . . ."[95]

All the shareholders had equal opportunity to participate in the Rights Offering. None of the directors held warrants. Four of the five directors held a nominal number of options. As shown above, the anti-dilution adjustment to the options only put the directors in the same position after the Rights Offering as before it. In short, none of the directors at the time of the Rights Offering got any material financial benefit from the transaction.

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[93] As pointed out above and as Plaintiff acknowledges (Am. Compl. ¶21), the directors did not own any warrants. Am. Compl. ¶8.

[94] *Zimmerman v. Braddock*, 2002 WL 31926608, at *7 (Del. Ch.). *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167-68 (Del. 1995); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 366 (Del. 1993) ("Cede II").

[95] *President & Fellows of Harvard College v. Glancy*, 2003 WL 21026784, at *21 (Del. Ch.) (quoting *Orman v. Cullman*, 792 A.2d 5, 23 (Del. Ch. 2002) (emphasis in original)).

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM

The Amended Complaint should also be dismissed pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In considering a motion to dismiss under Rule 12(b)(6), the well-pleaded allegations of the complaint are presumed to be true.[96] The Court need not, however, "blindly accept as true all allegations."[97] In the derivative action context, Plaintiff is required to plead facts that state a claim, rather than mere conclusions.[98]

A. The Amended Complaint Fails to Overcome the Presumption of the Business Judgment Rule

The business judgment rule is an evidentiary "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[99] Given this powerful presumption, "the judgment of a properly functioning board will not be second-guessed and '[a]bsent an abuse of discretion, that judgment will be respected by the courts.'"[100] "Because a board is presumed to have acted properly, '[t]he burden is on the party challenging the decision to establish facts rebutting the presumption.'"[101]

To establish that a board of directors was interested or lacked independence in making a challenged decision, "a plaintiff must allege facts as to the interest and lack of independence of the individual members of the board. . . . a plaintiff must normally plead facts demonstrating

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[96] *See Grobow*, 539 A.2d at 187 n.6.
[97] *Id.* at 187.
[98] *In re Tyson Foods Inc. Consol. S'holders Litig.*, 919 A.2d 563, 582 n.36 (Del. Ch. 2007).
[99] *Aronson*, 473 A.2d at 812 (citations omitted).
[100] *Orman*, 794 A.2d at 20 (quoting *Aronson*, 473 A.2d at 812).
[101] *Id.* (quoting *Aronson*, 473 A.2d at 812).

'that a majority of the director defendants have a financial interest in the transaction or were dominated or controlled by a materially interested director."[102]

As discussed above, the Amended Complaint fails to allege any facts establishing that a majority of the Gulfport Board was materially interested in or not independent with respect to the Rights Offering. The essence of Plaintiff's claim is that Plaintiff and the members of the purported class of (largely former) Gulfport stockholders had their shares devalued "at the expense of the controlling stockholder and management." Am. Compl. ¶41. However, as the Amended Complaint acknowledges (¶¶3-7), only one of the five director-defendants was a member of management. The Amended Complaint does not allege any facts showing that any of the directors had any affiliation with the controlling stockholder. In short, the Amended Complaint fails to allege facts showing that a majority of the Board had any self-interest in the transactions Plaintiff attacks or was not independent of the controlling stockholder.

B. Because of Erroneous Factual Premises, the Amended Complaint Fails to State a Claim

As discussed above, critical factual premises of the Amended Complaint are simply incorrect. Because the factual foundation for Plaintiff's claim is faulty, the claim itself cannot be sustained. Moreover, Plaintiff's dilution claim is factually unsupported, and many of Plaintiff's allegations are nonsense. For example, Plaintiff alleges that the Board should have selected a subscription price that did not trigger the anti-dilution rights of the warrants. Am. Compl. ¶¶26-27, 29, 30c-d, 31, 34, 40. However, as the Amended Complaint (¶21) acknowledges, the strike price of the warrants was $4.00 per share. *Id.* ¶21. Plaintiff acknowledges that rights offerings must be priced at a discount to market price. *Id.* ¶34. Thus, even crediting Plaintiff's contention regarding the market price of Gulfport stock being $3.10 per share, there was no way Gulfport

[102] *Orman*, 794 A.2d at 22 (quoting *Crescent/Mach I Partners, L.P. v. Turner*, 2000 WL 1481002 (Del. Ch.)).

could have priced the Rights Offering at a level above the $4.00 per-share exercise price of the warrants. Given that the market price of Gulfport's stock was substantially less than the exercise price of the warrants, Gulfport could not have done any Rights Offering, even at the market price, without triggering the anti-dilution provisions of the warrants.

Significantly, while Plaintiff refers repeatedly to the anti-dilution provisions of the options and warrants, the Amended Complaint never alleges there was anything improper about such provisions. Anti-dilution provisions are customary features of a wide variety of corporate securities.[103] Plaintiff makes no claim that the anti-dilution adjustments were not correctly made, nor does Plaintiff deny that the anti-dilution provisions of the options and warrants had been known for several years.

The Prospectus contains the following description of the effects of the Rights Offering on stock options:

> As of June 1, 2004, there were outstanding options to purchase 627,337 shares of our common stock at an exercise price of $2.00 per share. The agreements covering these options have anti-dilution provisions that will be triggered by this rights offering. The number of shares of common stock for which options may be exercised will be increased and the exercise price per share will be decreased based upon the subscription price per share of the rights issued in this rights offering, the number of shares issuable in this Rights Offering and the current market price of our common stock. The aggregate exercise price applicable to the options will remain unchanged. After giving effect to this offering, there will be outstanding options to purchase 1,245,612 shares of our common stock at an exercise price of $1.01 per share.[104]

Thus, the Prospectus confirms that after the Rights Offering, option holders simply retained their same right to purchase about 6% of Gulfport's outstanding stock for about $1.2 million.

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[103] *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1352 (Del. 1985); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 165 & n.79 (Del. Ch. 2005).

[104] DX 9 at p. 22. The Prospectus also described the effect of the Rights Offering on the anti-dilution provisions of the warrants. *Id.*

Plaintiff's dilution claim also ignores such obvious facts as that the options were already in the money based on Gulfport's stock price compared to the $2.00 per share option exercise price.

C. The Amended Complaint Fails to State a Disclosure Claim

The supposedly misleading statements or omissions in the Prospectus Plaintiff lists in ¶30 of the Amended Complaint largely track Plaintiff's erroneous factual assertions. Thus, the factual assertions upon which Plaintiff's disclosure claims are based are simply untrue.

Plaintiff asserts that the statement in the Prospectus that the purpose of the offering is to provide a portion of Gulfport's capital requirements is misleading because the § 220 Documents do not reveal that the Board considered the Company's capital expenditure requirements. Am. Compl. ¶30a. In fact, the § 220 Documents show that the Board considered Gulfport's capital constraints and needs and determined that the Rights Offering was an appropriate method for funding Gulfport's capital requirements.[105] Paragraph 30a of the Amended Complaint also contains another false accusation:

> From the Section 220 Action, it is clear that the Board did not even have before it either the Rights Offering or the Prospectus relating to it.

In fact, the § 220 Documents show that the Board reviewed and authorized the filing of drafts of the Prospectus (*i.e.* the Registration Statement) which contained the Rights Offering, and approved the offering and the Prospectus.[106]

Plaintiff claims in ¶30b of the Amended Complaint that the statement in the Prospectus that the net proceeds of the Rights Offering will be used to fund a portion of Gulfport's proposed seismic and drilling programs is misleading because the "records of the corporation" contain

[105] DX 18 at GULFPORT 037; DX 18 at GULFPORT 034.

[106] DX 18 GULFPORT 016-027 at GULFPORT 018-020; DX 18 at GULFPORT 003-009; DX 18 at GULFPORT 003-004; DX 18 at GULFPORT 010-011 at GULFPORT 010. Indeed, it is Plaintiff that has made allegations in the Amended Complaint that are directly contrary to the record in the § 220 Action, including Plaintiff's sworn testimony.

"absolutely no evidence" that the Board received any analysis of the proposed seismic and drilling programs and the funding needs therefore and that there is no Board resolution stating that the seismic and drilling programs are the principal purpose for the funding obtained in the Rights Offering. To the contrary, the § 220 Documents show that the Board received regular reports on the seismic and drilling programs.[107] Indeed, the various Registration Statements and Gulfport's other SEC filings, which the Board authorized, recognize that the primary capital need of the Company is for funding of its drilling and seismic operations.

Plaintiff's disclosure allegations in ¶30c consists simply of a counterfactual laundry list that is contradicted by the "actual records of the company" which the Amended Complaint references. Plaintiff's contention that the statement in the Prospectus concerning the determination of the subscription price for the Rights Offering is misleading because the "records of the company" demonstrate that there is "absolutely no validity" to the description of the factors used to set the subscription price is simply an argumentative mischaracterization of the facts.[108] The Board initially considered the subscription price at its April 14, 2004 meeting, then specifically reconsidered the pricing of the subscription rights on July 12, 2004 and determined that the Rights Offering at a $1.20 per-share subscription price was fair to, and in the best interest of, the Company and its stockholders.[109] Thus, Plaintiff's pejorative description of the Board doing nothing but to "rubber stamp management and the controlling stockholder's predetermined Subscription Price" does not state a disclosure claim. First, Defendants were not

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[107] DX 18 at GULFPORT 034; DX 18 at GULFPORT 012; DX 18 at GULFPORT 002; DX 18 at GULFPORT 001. Under 8 *Del. C.* § 141(e), a report or analysis can be oral and does not have to be in writing. *Cinerama, Inc. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995); *Smith v. Van Gorkom*, 488 A.2d 858, 874-75 (Del. 1985).

[108] Plaintiff's disclosure allegations overlook a critical point: the records of the Company show that the Board approved the various registration statements containing the preliminary prospectuses and the final prospectus. This reinforces that the Board had affirmatively made the determinations and granted the approvals reflected in the Prospectus.

[109] *See* DX 18.

required to disclose Plaintiff's subjective characterization or confess wrongdoing. Second, Plaintiff's mischaracterization is simply false.[110] In determining the subscription price, the Board, in fact, considered the various factors cited in the Prospectus that the Board reviewed approved.

The assertion in ¶30d of the Amended Complaint that there was no discussion or consideration of the dilution which would result from the Rights Offering subscription price triggering the anti-dilution requirements of the options and warrants is also untrue. The Board approved the preliminary and final prospectuses which specifically describe the impact of the operation of the anti-dilution provisions of the options and warrants.[111]

The Board specifically did consider and approve the $3 million revolving credit facility entered into on April 30, 2004.[112] Therefore, the allegations of ¶30e and ¶30f are false. Similarly, the "records of the company," including the prospectuses approved by the Board, show that the Board did determine that it was in the Company's best interest to undertake the Rights Offering if a sale of the West Cote Blanche Bay field was not consummated. Therefore, the allegations of ¶30g of the Amended Complaint are false.

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[110] Plaintiff also makes the absurd assertion that there is no evidence that the Board had before it "any analysis of the current market price of the stock." Gulfport's market price was published every day. As discussed above, the Board did, contrary to Plaintiff's baseless allegations, consider financing alternatives, and the preliminary and final prospectuses discuss the level and volatility of commodity prices.

[111] As discussed earlier, it is questionable whether there was any "dilution" since the operation of the anti-dilution provisions simply permitted the option holders to purchase the same percentage interests in the Company for the same amount of money.

[112] DX 18 at GULFPORT 021.

III. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFF'S CLAIMS ARE TIME BARRED.

A. Breach of Fiduciary Claims Arising Out of the July 2004 Rights Offering are Barred by Laches

Laches is an equitable defense based on the principle that a person with knowledge of a transaction "should not be permitted to sit in silence while positions are fundamentally changed by potential adversaries and the rights of third parties accrue."[113]

1. Plaintiff Unreasonably Delayed Filing Its Claim

Laches exists where a plaintiff delays unnecessarily in asserting its claim and the defendants are prejudiced.[114] In the laches analysis, a plaintiff "is chargeable with such knowledge of a claim as he or she might have obtained upon inquiry. . . ."[115] Despite Plaintiff's assertions otherwise, Plaintiff was or should have been aware of the alleged wrongs long before the July 22, 2004 Prospectus. In the § 220 action, Robotti produced numerous Gulfport SEC filings with notes and markings indicating Robotti had reviewed the pertinent parts of the filings and was aware of the matters it now complains about, including the Rights Offering, the Backstop Agreement, the CD Holding Line of Credit and the anti-dilution adjustments in Gulfport's warrants and options.[116] Robotti was on notice of Gulfport's Rights Offering as early as April 2004 when Gulfport filed its 10KSB disclosing that the board planned

> a registered rights offering in the amount of $12.0 million dollars for a commitment fee of 2%. The Rights Offering will be backstopped by the Company's principal shareholder. As a result, the company is guaranteed proceeds of $12.0 million if the Offering is commenced. Therefore, the Company shall have required liquidity either through the sale of the property or the

[113] *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000) (quoting *Elster v. American Airlines*, 128 A.2d 801, 805 (Del. Ch. 1985)).
[114] *Fike*, 752 A.2d at 114.
[115] *Id*.
[116] DX 5; DX 4; DX 8.

> proceeds from the Rights Offering. Shareholders choosing not to participate will suffer substantial dilution.[117]

DX 3 at 19. Gulfport's subsequent filings in May, June and July 2004 further disclosed the details of the Rights Offering and related matters that form the basis of Robotti's complaint.[118] On July 22, 2004, Gulfport filed its SB-2/A.[119] DX 8. The Prospectus dated July 22, 2004 repeated the earlier descriptions of the Rights Offering. *Robotti*, 2007 WL 2019796, at *1. Only after the Rights Offering was about to close and Robotti had exercised rights and oversubscription rights and purchased in the market and exercised additional rights did Robotti on August 14, 2004 make the first of several defective demands under 8 *Del. C.* § 220. [120] Through Gulfport's repeated public disclosures about the Rights Offering, Robotti knew or should have known about the alleged harm more than three years before it filed this action. The statute of limitations began to run at the time the cause of action accrued, even if Robotti was unaware of the cause of action or the harm.[121] In *Tyson*, the Court (1) dismissed plaintiffs' claims relating to all transaction revealed in the corporation's proxies more than three years before plaintiffs filed their complaint and (2) held shareholders should have been able to discover their harms at the time the transactions were revealed in the company's public filings.[122] Accordingly, the Court should dismiss Robotti's claims because the transactions it complained of were disclosed in Gulfport's public filings more than three years before Robotti filed its complaint.

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[117] DX 3 at 19.
[118] *See, e.g.* , DX 4 at 1; DX 20 at 12-13, 17-18, 20-22; DX 5; DX 6.
[119] DX 8.
[120] As is a matter of public record, the initial demand failed to attach the required proof of beneficial ownership.
[121] *In re Tyson Foods, Inc.*, 919 A.2d 563, 583 (Del. Ch. 2007)(citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch.)).
[122] *Id*.

Robotti's abysmal delay of over three years in filing suit with respect to the Rights Offering is unreasonable. If Robotti objected to these actions, it had a duty to Gulfport and Gulfport's other stockholders to act promptly and decisively in its challenge.[123] Instead, Robotti waited more than three years and three months from the announcement of the board's approval of the registered rights offering to file a derivative claim. Three botched demands and a fourth demand lackadaisically moved through the Court of Chancery by plaintiff do not satisfy the "degree of diligence which the situation . . . in fairness and justice required."[124]

2. Defendants are Prejudiced by Plaintiff's Unreasonable Delay

Plaintiff's failure to aggressively pursue this action in a timely fashion has severely prejudiced defendants Gulfport and Gulfport's other shareholders who exercised their validly issued full subscription rights, and purchased additional subscription rights under the Rights Offering. Plaintiff is not permitted to sit in silence when prompt and vigorous action is required.[125] Here, based on the validity of the Rights Offering, Robotti and others purchased all 10 million shares of common stock in the Rights Offering, which expired on August 20, 2004.[126] The net cash proceeds from the Rights Offering were used to fund a portion of Gulfport's seismic and drilling programs at ECBB and East Hackberry Field and to repay in full the

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[123] *Federal United Corp. v. Havender*, 11 A.2d 331, 343 (Del. 1940) (laches barred action seeking to void merger filed seven months after merger); *Shanik v. White Sewing Machine Corp.*, 19 A.2d 831 (Del. 1941) (dismissing action to rescind amendment to certificate of incorporation based on laches where action was filed five and a half months after certificate of amendment was filed).

[124] *Scotton v. Wright*, 117 A. 131, 136 (Del. Ch. 1922), *aff'd*, 121 A. 69 (Del. 1923).

[125] *Havender*, 11 A.2d at 343; *Shanik*, 19 A.2d at 837-38 (laches appropriate bar to plaintiff's claim where corporation proposed change to its capital structure, circulated materials about the proposed change, the new stock was traded on a national stock exchange and several shares of the old stock were exchanged for the new stock before plaintiff filed his complaint); *Hutchinson v. Fish Eng'g Corp.*, 203 A.2d 53, 63 (Del. Ch. 1964) ("One of the firmest equitable principals is that one may not slumber on his rights to the detriment of another and later attempt to assert them.").

[126] DX 13 at RC 742.

outstanding principal balance on the company's line of credit with the Bank of Oklahoma.[127] Plaintiff was aware of these events and voiced no objection. As a result, plaintiff's dilatory effort to bring a breach of fiduciary duty action at this stage is prejudicial not only to defendants, but also to persons and entities not parties in this suit, including Gulfport's current stockholders.[128]

Robotti and others took advantage of the Rights Offering, and received substantial benefits from it. *Robotti*, 2007 WL 2019796, at *1 (Del. Ch.) ("Robotti exercised its full subscription rights and additional subscription rights under the offering."); It is fundamentally unfair and prejudicial to allow plaintiff, more than three years after the fact, to allege defendants breached their fiduciary duty after seizing upon the benefits he could obtain by participating in the Rights Offering.

3. Plaintiff's § 220 Demand Did Not Toll the Statute of Limitations

Plaintiff's § 220 demand did not toll the statute of limitations because Plaintiff knew all of the facts necessary to bring his claim within the three-year statute of limitations period often applied by analogy to determining whether laches bars a breach of fiduciary duty claim. Indeed, Robotti filed its initial complaint before it received any documents in the § 220 Action. Robotti knew of its potential claim well within the three year statute of limitations for a breach of fiduciary duty.[129] Similar to *Orloff*, where the Court found plaintiffs' claims relating to a matter that was public record and highly material to plaintiffs was barred by laches, this Court should find Robotti knew about or had sufficient information to pursue its claim within the appropriate time frame. Moreover, plaintiff does not allege that it was mislead, or unable, through exercising

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[127] *Id.*

[128] *See Flerlage v. KDI Corp.*, 1986 WL 523, at *1 (Del. Ch.) (when certificate amendment challenged, disadvantage to stockholders who traded in stock while no challenge existed presumed).

[129] *Orloff v. Shulman*, 2005 WL 3272355, at *10 (Del. Ch.).

normal diligence, to extract sufficient information to bring a complaint at an earlier date.[130] Like the plaintiff in *Orloff*, it is implausible that Robotti did not know or have sufficient information to press its claim with the three-year statute of limitations.

Even if Robotti's § 220 Action may have, under other circumstances tolled the statute of limitations, tolling is not warranted here. Robotti was dilatory in pursuing its § 220 rights, including delaying for months before making a demand when the Rights Offering was closing, then requiring four attempts before it complied with 8 *Del. C.* § 220.[131] Even when Robotti finally complied with § 220 on November 17, 2005, it did not vigorously pursue its rights. Plaintiff asked for and received repeated extensions, including one for the trial date and its post-trial reply brief. Plaintiff's post-trial reply brief was not filed until December 2006, almost four (4) months after its opening brief and five (5) months after the trial. When Plaintiff received documents from the § 220 action, it then waited 19 weeks before filing the Amended Complaint. Plaintiff's delay in the § 220 action should not be rewarded by allowing this to proceed. Thus, plaintiff's claim should be barred under the doctrine of laches.

[130] *Orloff*, 2005 WL 3272355, at *10.

[131] Even after Robotti's first failed § 220 demand on August 16, 2004, it delayed until May 23, 2005 to file its next demand and nearly three months more to file its third failed demand on August 12, 2005 (almost a year since it first attempted to make a demand), and an additional three months until making its November 17, 2005 demand.

CONCLUSION

For the foregoing reasons set forth herein, Defendants' Motion to Dismiss should be granted.

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CERTIFICATE OF SERVICE

I, Michael Hanrahan, do hereby certify that on this 29th day of April 2008, I caused a copy of the foregoing **Defendants' Opening Brief In Support of Their Motion to Dismiss** to be served via LexisNexis File and Serve on the following counsel of record:

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