UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OCEANIC EXPLORATION COMPANY et al., Plaintiffs, v. CONOCOPHILLIPS, INC. et al., Defendants.	Civil Action No. 4:07-cv-00815

OPPOSITION OF PLAINTIFFS OCEANIC EXPLORATION COMPANY AND PETROTIMOR COMPANHIA DE PETROLEOS, S.A.R.L. TO CONOCOPHILLIPS' MOTION FOR STAY

Preliminary Statement

Defendants' previous motions to stay sought stays of discovery during the motions to dismiss, during the defense efforts to reconsider and/or appeal the adverse results of those motions to dismiss, and during the defense efforts to change venue. This latest Motion for Stay asks this Court to stay discovery while Defendants attempt to re-litigate Judge Sullivan's motion to dismiss rulings, and attempt to obtain a backdoor summary judgment without discovery.

This Court should therefore see the subject Motion for Stay for what it is: only the latest effort to delay discovery in a three-year old case that is long overdue for that discovery. That tactic began in Judge Sullivan's court. It continues in this Court with this latest Motion for Stay, with Defendants' refusal to make even an overdue response to the Plaintiffs' document requests, and with Defendants' refusal to exchange the initial disclosures and principal documents required by this Court's two March 16, 2007 orders and this Court's Personal Procedures.

This Court's two March 16, 2007 orders implicitly denied the defense Motion for Stay. By this response, the Plaintiffs ask this Court to make that denial so explicitly and so clearly that even Defendants will understand it, and require Defendants to do what the Plaintiffs have tried to do from the inception of this case: conduct the necessary discovery, and move this case to a full, final and fair resolution.

Statement of Facts

On October 13, 2004, the Honorable Emmet B. Sullivan, of the District of Columbia District Court, instructed the parties to defer discovery until after he ruled on the then-pending dispositive motions, which included ConocoPhillips and ConocoPhillips Company's (collectively "ConocoPhillips") Motions to Dismiss.[1] On September 21, 2006, Judge Sullivan granted in part and denied in part that motion.[2]

On September 21, 2006, Judge Sullivan set an Initial Scheduling Conference for November 3, 2006.[3] Consistent with Rule 26, on October 13, 2006, the parties engaged in a Rule 26(f) conference, and discovery commenced. *See Fed. R. Civ. P.* 26(d).[4] On October 26, 2006, Petrotimor and Oceanic (collectively "Oceanic") served its First Set of Requests for Production of Documents on each of the two ConocoPhillips Defendants.[5] Eight days later, Judge Sullivan stayed

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[1] S.D. Tex. Docket No. 68.

[2] S.D. Tex. Docket Nos. 91-92.

[3] S.D. Tex. Docket No. 91.

[4] *See* Affidavit of Jon D. Corey dated April 3, 2007 ("Corey Affidavit"), ¶ 2. In the Conference Report and Discovery Plan, the parties agreed to dispense with the initial disclosures provided for by Rule 26(a)(1). S.D. Tex. Docket No. 103.

[5] Both Notices of Service of the Document Requests and the Document Requests were filed with the Court. *See* S.D. Tex. Docket Nos. 104, 105, 119; Addendum to ConocoPhillips' Motion for Stay. ConocoPhillips asserts that Oceanic "prematurely" served discovery requests upon ConocoPhillips "in the face of Judge Sullivan's contrary stay order . . . ." Defendants' Memorandum at 4. To the contrary, during the parties' telephonic meet and confer on October 13, 2006, and the Joint Conference Report subsequently filed on October 25, 2006, Oceanic made clear to ConocoPhillips that Oceanic believed discovery in this case should proceed. (footnote continued)

discovery pending resolution of ConocoPhillips' Motion for Reconsideration and request for an interlocutory appeal.[6] At the November 3, 2006 Scheduling Conference, Judge Sullivan stated: "And while I'm focused on it I'll just stay discovery for a brief period of time."[7] Judge Sullivan further stated: "And that's why I'm going to stay discovery briefly. I don't want to do it for any extended period of time . . . ."[8]

On November 17, 2006, Judge Sullivan denied the Motion for Reconsideration, but *sua sponte* stayed discovery "pending resolution of ConocoPhillips' Motion to Transfer Venue."[9]

On February 5, 2007, Judge Sullivan resolved that motion by granting ConocoPhillips' Motion and transferring the case to this Court. By the terms of Judge Sullivan's November 17, 2006 Order, the discovery stay lifted on that date.[10] From then, ConocoPhillips had 22 days to respond or object to Oceanic's requests for production, until February 27, 2007. *See Fed. R. Civ. P.* 34(b). ConocoPhillips neither responded nor objected to the documents requests by that date. On March 14, 2007, however, ConocoPhillips filed the Motion for Stay that is the subject of this response.[11]

On March 16, 2007, the Court issued two orders compelling the Parties to:

- "disclose their principal facts and documents";

Oceanic served its document requests upon ConocoPhillips on October 26, 2006, which was after the District Court issued its opinion on defendants' Motions to Dismiss but before the District Court stayed discovery at the November 3, 2006 status conference. During that interim time period, there was no discovery stay in effect. Therefore, Oceanic's Requests were not only not prematurely served, they were correctly and publicly served.

[6] S.D. Tex. Docket Entry dated 11/03/2006.

[7] 11/03/2006 Hearing Tr. at 4:11-12 (Corey Affidavit, Exh. A, ¶ 4).

[8] 11/03/2006 Hearing Tr. at 8:17-22; 9:4-5 (Corey Affidavit, Exh. A, ¶ 4).

[9] S.D. Tex. Docket No. 109.

[10] S.D. Tex. Docket Nos. 112-113.

[11] S.D. Tex. Docket Nos. 118-119.

- not delay initial disclosures; and
- exchange, review and discuss documents with opposing counsel.[12]

In other words, to proceed with discovery. Consistent with those Orders, on Thursday, March 29, 2007, Oceanic served its initial disclosures and produced over 19,000 pages of documents.[13] On Friday, March 30, 2007, Oceanic received from ConocoPhillips no initial disclosures and less than 900 pages of documents, 600 of which had already been filed and served in this action.[14]

Argument

I. DISCOVERY SHOULD PROCEED BECAUSE CONOCOPHILLIPS' MOTION FOR JUDGMENT ON THE PLEADINGS IS A PRE-DISCOVERY MOTION FOR SUMMARY JUDGMENT.

Although ConocoPhillips styled its Motion for Judgment on the Pleadings as a motion that tests the sufficiency of the Second Amended Complaint, ConocoPhillips submitted a 327 page affidavit with exhibits it asks the Court to "notice."

Benchmark Electronics, Inc. v. J.M. Huber Corp., 343 F.3d 719 (5th Cir. 2003), is controlling. There, defendant filed evidence in support of its Rule 12(c) motion for judgment on the pleadings. *See id.* at 725. Plaintiff sought relief from a discovery stay to conduct discovery before opposing defendant's Rule 12(c) motion. *See id.* The defendant in *Benchmark*, like ConocoPhillips here, argued that discovery was premature because of the pendency of defendant's motion for judgment on the pleadings, *id.* at 725-726, and the district court sided with the defendant and treated defendant's motion for judgment on the pleadings as a motion for summary judgment without providing plaintiff an opportunity to conduct discovery, and granted the motion. *See id.* at 725. The

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[12] S.D. Tex. Docket Nos. 121-122.

[13] Corey Affidavit, ¶ 3.

[14] *Id.*

Fifth Circuit reversed, holding that the district court plainly erred in refusing discovery on a motion for judgment on the pleadings that clearly was a motion for summary judgment. *Id.* at 726.

Here, as in *Benchmark*, ConocoPhillips' sole justification for the stay is that discovery is premature because its dispositive motion is pending before the District Court. *See generally* Defendants' Memorandum of Law in Support of Motion for Stay ("Defendants' Memorandum"); *Benchmark*, 343 F.3d at 725-726. The Fifth Circuit in *Benchmark* rejected the same argument that ConocoPhillips is making here. *See id.* If Oceanic is deprived of its opportunity to conduct discovery in this "highly fact intensive case," then, like the plaintiff in *Benchmark*, Oceanic will be "deprived of a full and fair opportunity to defend against summary judgment on its claims." *Id.* at 726; *see also Clark v. Tarrant County*, 798 F.2d 736, 746 (5th Cir. 1986) (recognizing that the district court cannot assume that a party will put forth all of its evidence if the party does not know that the court is going to treat a motion that tests the sufficiency of the pleadings as a summary judgment motion). Under the holding of *Benchmark*, ConocoPhillips' Motion for Stay should be denied.

II. CONOCOPHILLIPS' AUTHORITIES IN SUPPORT OF ITS MOTION FOR STAY ARE INAPPOSITE.

ConocoPhillips cites *Corwin v. Marney, Orton Investment*, 843 F.2d 194 (5th Cir. 1988), to support the proposition that the Court has the power to stay discovery. *See* Defendants' Memorandum at 3. The question is not whether the Court has the authority to stay discovery. Clearly it does. Rather, the question is whether the Court *should* stay discovery when ConocoPhillips has filed a pre-discovery Motion for Summary Judgment. The *Corwin* case offers no guidance on this question. In *Corwin*, before the district court granted defendant's motion for summary judgment, the parties had agreed that further discovery was "unnecessary" because the

court had before it all facts necessary for a complete adjudication. 843 F.2d at 200. The Fifth Circuit therefore held that the district court did not abuse its discretion in limiting discovery—in light of the parties' agreement. *See id.* Oceanic and ConocoPhillips have reached no such agreement.

ConocoPhillips also cites *Landry v. Air Line Pilots Ass'n*, 901 F.2d 404 (5th Cir. 1990), in support of its Motion. *See* Memorandum at 3-4. *Landry* is inapplicable here. In *Landry*, the Fifth Circuit held that the defendants had satisfied their burden under Rule 26(c) of demonstrating good cause to stay further discovery, in part because the defendants had demonstrated that the depositions sought by the plaintiffs were not needed for the court to rule on plaintiffs' motion for summary judgment. *See id.* at 435-436. Having made a *prima facie* showing that a protective order was warranted, the burden shifted to the plaintiffs to show a need for the requested discovery. *See id.* at 436. The *Landry* plaintiffs failed to shoulder their burden in this regard. *See id.* This is not the case here. (*See* Section III below). Not only are ConocoPhillips' wholly conclusory assertions of "massive" expense insufficient to satisfy ConocoPhillips' burden under Rule 26(c), but Oceanic has demonstrated ample need for the long-denied discovery it now seeks.

III. CONOCOPHILLIPS HAS NOT MET AND CANNOT MEET ITS BURDEN UNDER FEDERAL RULE OF CIVIL PROCEDURE 26(c).

As ConocoPhillips has moved for a Protective Order pursuant to Federal Rule of Civil Procedure 26(c), it therefore must show "the necessity of its issuance, which contemplates a *particular and specific demonstration of fact* as distinguished from stereotyped and conclusory statements." *In re Terra International, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (*quoting United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)) (emphasis added); *Ferko v. National*

Ass'n for Stock Car Auto Racing, Inc., 218 F.R.D. 125, 133 (E.D. Tex. 2003) (same). ConocoPhillips fails to shoulder that burden.

ConocoPhillips' assertions regarding the purported "massive" expense that the requisite discovery will entail are exactly the type of conclusory statements that the Fifth Circuit has found insufficient under Rule 26(c). *See, e.g., In re Continental Airlines Corp.*, 43 B.R. 130, 134 (5th Cir. 1984) ("[M]ere allegations and arguments of conjectural harm" were insufficient to meet movant's burden of demonstrating "particular concrete . . . showing of fact . . . ."); *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88, 91 (N.D. Tex. 1994) (recognizing that "conclusory assertions of injury are insufficient . . ." to demonstrate good cause under Rule 26(c)). Accordingly, ConocoPhillips' unsupported assertions of "burden" and "expense" are inadequate to make out the particularized showing of hardship if discovery proceeds. *See id; see also Landis v. North American Co.*, 299 U.S. 248, 255 (1936) (recognizing that the "suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.").

ConocoPhillips also seeks to stay depositions. To do so, ConocoPhillips must demonstrate "extraordinary circumstances" compelling the need for such an order. *See Bucher,* 160 F.R.D. at 91 (*citing Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)) ("protective orders prohibiting depositions are rarely granted."). ConocoPhillips cites no fact or circumstance that rationally could be characterized as so "extraordinary" as to warrant a protective order prohibiting depositions from proceeding.

ConocoPhillips also attempts to ease the burden it must shoulder by attempting to factor third party discovery into its argument, asserting that Oceanic's requested document discovery and depositions "is before considering all the third-party discovery that Oceanic's allegations call

into play . . . ." Defendants' Memorandum at 5. ConocoPhillips cites no authority—and Oceanic can locate none—for the proposition that expenses incurred by a third party in responding to discovery requests may be imputed to ConocoPhillips for purposes of satisfying its burden under Rule 26(c).

IV. EVEN IF CONOCOPHILLIPS HAD SATISFIED ITS BURDEN OF DEMONSTRATING GOOD CAUSE UNDER RULE 26(c)—AND IT HAS NOT—THEN OCEANIC HAS DEMONSTRATED THE NEED TO CONDUCT DISCOVERY.

If the Court treats ConocoPhillips' Motion for Judgment on the Pleadings solely as testing the sufficiency of the Second Amended Complaint, then for the reasons set forth in Oceanic's Motion to Strike, ConocoPhillips' Motion should be denied. If, however, the Court treats ConocoPhillips' Motion for Judgment on the Pleadings as a pre-discovery Motion for Summary Judgment, and holds that ConocoPhillips has satisfied its burden under Rule 26(c), then Oceanic must demonstrate to the Court the facts that Oceanic hopes to adduce, genuine issues of material fact it hopes to create, or some showing it hopes to rebut through discovery. *See Landry v. Air Line Pilots Ass'n,* 901 F.2d 404, 436 (5th Cir. 1990). As explained below, Oceanic has satisfied its burden.

Oceanic has had *no opportunity* to take discovery on any issue in this case, much less an opportunity to take discovery on the key, disputed, factual issues of causation and damages that are central to ConocoPhillips' Motion for Judgment on the Pleadings. These issues include:

- The assertion that Oceanic would not have qualified to bid for such rights, had ConocoPhillips' bribery not prevented open bidding.
- The assertion that notwithstanding the pattern of bribery, Oceanic would not have won any bid for such rights.

Oceanic's First Set of Requests for Production of Documents ("Requests") seek documents that address these factually complicated issues of causation and resulting damages.

Oceanic's Requests are directed at obtaining documents related to money paid by ConocoPhillips to persons in Indonesia (Request Nos. 7); money paid to Alkatiri or other East Timorese officials (Request Nos. 9-19); bribes paid by ConocoPhillips to the Designated Authority or Joint Authority (Request Nos. 20-23); ConocoPhillips' exploration activities in the Timor Sea (Request Nos. 25-26); documents relating to the travel of certain ConocoPhillips' executives who were involved in the bribery scheme (Request Nos. 75-78); ConocoPhillips' tax returns and related audits during the pertinent time period (Request Nos. 54-60); documents relating to ConocoPhillips' decision to bid for Block 91-13 (Request Nos. 73-74); documents relating to the allegations of bribery and corruption in the Second Amended Complaint (Request Nos. 80-81); and documents that reflect the deposit of money or wire transfers in the Designated Authority's or Joint Authority's Chase Manhattan Bank Accounts (Request Nos. 89-90).

The documents responsive to these and other of Oceanic's document requests bear directly on whether ConocoPhillips' alleged acts of bribery resulted in the reinstatement of ConocoPhillips' production-sharing contracts in the Timor Gap, thereby resulting in the loss of Oceanic's opportunity to bid for exploration and production rights in the Timor Gap. This document discovery also bears on whether Oceanic would have been the successful bidder for those rights, had Oceanic not been deprived of the opportunity to meaningfully compete for the rights to explore for and produce oil and natural gas in the Timor Gap.

Conclusion

For the foregoing reasons, Oceanic respectfully requests that the Court deny ConocoPhillips' Motion for Stay in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served upon the following list via electronic court filing or deposited in the United States Mail, first class delivery, on this the 3rd day of April, 2007

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