IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SPYRIDON C. CONTOGOURIS and STEPHEN A. BALDWIN	:	CIVIL ACTION
	:	NO. 10-4609
VERSUS	:	
	:	SECTION "F"(1)
WESTPAC RESOURCES, LLC, PATRICK N. SMITH, KEVIN M. COSTNER and RABOBANK, N.A.	:	JUDGE FELDMAN
	:	MAG. JUDGE SHUSHAN

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL AGAINST ALL DEFENDANTS, AND NON-PARTIES JOHN HOUGHTALING, GAUTHIER HOUGHTALING AND WILLIAMS AND CHARLES JOUANDOT

MAY IT PLEASE THE COURT:

BACKGROUND

This is an action for fraud brought by Spyridon M. Contogouris and Stephen A. Baldwin in connection with the acquisition of their interests in a Louisiana limited liability company, Ocean Therapy Solutions, LLC ("OTS") by the defendants. Plaintiffs were both original members of OTS, which was formed in the wake of the April 17, 2010 Deepwater Horizon Oil spill to market an oily water separation device manufactured by C.I.N.C. Industries, Inc. a/k/a Costner in Nevada Corporation ("CINC"). The financial backing for the development of this centrifuge technology was provided by defendant Costner in the 1990s, but he subsequently sold his interest in CINC and the patents on the centrifuge units to other parties.

The essential facts of the action are not in dispute. OTS was formed on May 13, 2010, and the original members were Spyridon Contogouris (28%), John Houghtaling, a Metairie

lawyer (21.5%), Westpac Resources, LLC, a Delaware limited company 80% owned by defendants Costner and Smith, L&L Properties, LLC, a Louisiana limited company owned by New Orleans businessman Frank Levy (15.5%)[1], Stephen Baldwin, an actor domiciled in New York (10%) and Francisco Valobra, a local businessman (5%). In late May and early June, 2010, defendants issued several cash calls to plaintiffs, requiring them to put up 38% of $3 million to fund the operations of OTS or face dilution of their shares. Since plaintiffs could not discern any reason for the magnitude of the cash call, and it pressured into selling their interest in OTS to one or more of the other members.[2] On June 11, 2010, plaintiffs signed an agreement to sell their interest in OTS to Patrick N. Smith or his designee for a total of $1.9 million. The agreement called for the purchaser to make a 10% deposit against the purchase price on that date, with the balance due on June 18, 2010. The actual membership interests would not transfer until the entire price was paid. The negotiations for the purchase of plaintiffs' membership interest took place between plaintiff Contogouris, defendant Smith and an attorney who represented all of the defendants, Daniel Grigsby of Los Angeles, California.

Perhaps not coincidentally, on June 14, 2010, BP informed OTS that it would sign a contract calling for the lease of 32 V20 separator units. A contract was in fact signed on June 15, 2010 calling for a 90 day lease of 32 separator units. The contract also called for BP to make

[1] Mr. Levy and his company withdrew from OTS on June 4, 2010 and ceded their shares to John Houghtaling.

[2] For the Court's reference, on June 8, 2010, BP agreed to issue a letter of intent to OTS for the lease of 32 units under a contract having an approximate value of $45 million. Although plaintiff Contogouris was informed that there was a letter of intent, its contents were not shared with him.

an advance deposit of $18,201,000 to OTS to capitalize the company.[3] The existence of this agreement to make a deposit of $18,201,000 was concealed from plaintiffs until well over a month after the sale of their interests.[4] These facts were disclosed to Contogouris in July, 2010 by John Houghtaling in an effort to induce Contogouris to loan Houghtaling $1 million to purchase a home located at 4717 St. Charles Avenue. This suit, seeking damages equal to what plaintiffs would have earned from OTS had they not been deceived, ensued.[5]

LEGAL STANDARDS FOR DISCOVERY

Under Rule 26(b)(1), parties may obtain discovery "regarding any non-privileged matter that is relevant to any party's claim or defense." For good cause, "the court may order discovery of any matter relevant to the subject matter of the litigation." The scope of discovery is broad and encompasses any matter that bears on, or reasonably could lead to other materials that might bear on any issue that is or might be in the case. *Oregon Precision Industries, Inc. v. International Omni-Pac Corp.,* 160 F.R.D. 592 (D.Ore. 1995). The purpose of Rules 26-37 is to provide each party with the fullest pre-trial knowledge and to clarify and narrow the issues to be tried. *Nutt v. Black Hill Stage Lines, Inc.,* 452 F.2d 480 (8th Cir. 1971). As stated by the Supreme Court in *Hickman v. Taylor,* 329 U.S. 495 (1947):

[3] Defendants were aware that BP had indicated a willingness to provide funds to capitalize OTS at least by May 27, 2010, the date defendant Smith drafted a letter to a senior VP executive mentioning that these discussions had taken place.

[4] It is clear from documents produced that defendants and their attorney, Grigsby, knew of the $18,201,000 deposit prior to plaintiffs' agreement to sell their interest. The first iteration of the BP – OTS contract was prepared by Daniel Grigsby on June 10, 2010, and called for this deposit. Despite representing OTS in connection with the drafting of this agreement, Grigsby did not disclose the advance deposit, which would obviate the need for a cash call, to Contogouris during the June 10 and June 11, 2010 negotiations with Contogouris to acquire his interest.

[5] Alternatively, plaintiffs seek recission of the sale.

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can be shown 508*508 that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 (b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

The courts therefore liberally grant pretrial discovery.

DISCOVERY PROPOUNDED AND OBJECTIONS LODGED

The subject of this motion is the following discovery propounded and the responses received:

PATRICK N. SMITH:

Interrogatories Propounded on July 18, 2011 (Exhibit 1)

Request for Production Propounded on July 18, 2011 (Exhibit 2)

Answers to Interrogatories by Patrick N. Smith on September 1, 2011 (Exhibit 3)

Responses to Request for Production by Patrick N. Smith on September 1, 2011 (Exhibit 4)

KEVIN M. COSTNER:

Interrogatories Propounded on July 18, 2011 (Exhibit 5)

Request for Production Propounded on July 18, 2011 (Exhibit 6)

Answers to Interrogatories by Kevin Costner (Exhibit 7)

Responses to Request for Production by Kevin Costner (Exhibit 8)

WESTPAC RESOURCES, LLC

Interrogatories to Westpac Resources July 18, 2011 (Exhibit 9)

Request for Production to Westpac Resources July 18, 2011 (Exhibit 10)

Answers to Interrogatories by Westpac Resources September 1, 2011 (Exhibit 11)

Response to Request for Production by Westpac Resources September 1, 2011 (Exhibit 12)

JOHN HOUGHTALING

Subpoena to John Houghtaling (Exhibit 13)

Response to Subpoena and Objections by John Houghtaling (Exhibit 14)

CHARLES JOUANDOT

Subpoena to Charles Jouandot (Exhibit 15)

Response to Subpoena and Objections by Charles Jouandot (Exhibit 16)

GAUTHIER, HOUGHTALING & WILLIAMS

Subpoena to Gauthier Williams (Exhibit 17)

Response to Subpoena and Objections by Gauthier Houghtaling (Exhibit 18)

A discovery conference was held between counsel for all parties and non-parties who are the subject of this motion on October 10, 2011. At the conference, the non-movants refused to withdraw their objections to the production of post-June 18 materials and to the production of financial records. However, the non-movants indicated that they would discuss with their clients the possibility of producing records regarding distributions to members. This issue was not resolved during the conference, and the parties agreed that plaintiffs would submit this motion and if an agreement could be worked out, to notify the Court.

ARGUMENT

There are two specific objections addressed by this motion lodged by defendants and the non-parties who are the subject of this motion. The first is the refusal of each one of them to produce any requested records or information that post-dates June 18, 2010, the date plaintiffs transferred their interest. The second is the refusal of defendants to produce any financial information including OTS' financial records and banking records. In addition, there are some specific discovery requests that have been objected to for which plaintiffs now seek a response.

(1) General Temporal Objection of all Defendants and non-parties:

Each of the defendants, either in their general objections, or responses to specific discovery requests, has refused to provide any documents or information that post-dates June 18, 2011, the effective date of the transfer of plaintiff's interest in OTS. Plaintiffs cannot present their case without this information, and the objection is an artificial one. Plaintiffs allege as damages all monies to which they would have been entitled had they remained as members of OTS. The only financial information provided by defendants are bank statements and ledgers from OTS' bank accounts during June, 2010. All information following June 18, 2010 has been redacted. These statements are redacted to show only two transactions -- a wire from BP into the Rabobank account dated June 16 and a $1,250,000 wire out to a payee whose name has been redacted (but which other documents show was Westpac Development, a limited company owned by defendant Smith) on June 18, 2010. Plaintiffs have no way of telling how profitable OTS was, the amounts of money it earned, or anything else related to the actual value of their interest without this information. Plaintiffs are simply incapable of determining what they are due without this post-June 18 information.

Moreover, plaintiffs have alleged that all defendants were the recipients of their interest in OTS. Without post-June 18 information, plaintiffs cannot tell who was the "designee" who ultimately acquired their interests. We do know from documents produced that on June 14, three days after the transfer, the ownership of OTS was reconstituted as follows: 50% Westpac, 17% Smith, 4% Valobra, and 29% Houghtaling. However, the ultimate disposition of the shares is not available without additional information.[6]

There is no legal basis for the temporal objection lodged by defendants. What occurred after June 18 may lead to the discovery of relevant information. Plaintiffs therefore request that they be provided with responsive documents post June 18, 2010, including the internal financial statements of OTS showing profit, loss and distributions. Plaintiffs will agree to some reasonable temporal restriction and will also agree to a reasonable confidentiality agreement. The documents produced to date indicate that the last date of payment by BP was made on approximately January 20, 2011. Plaintiffs would suggest that a reasonable cut-off date for information would be sixty days after that date, or on March 20, 2011.

(2) Banking and Financial Information:

Each defendant and the non-parties against whom this motion to compel is brought has refused to produce any banking or financial information regarding accounts held by OTS or Westpac Development or Westpac Resources that post-dates June 18, 2010. The true story of

[6] There were documents produced to suggest that a wealthy Dallas businessman, Ted Skokos, wired $3 million to Westpac Development on June 10, 2011, and another document suggesting that Skokos was to ultimately acquire Smith's 17% reconstituted interest. Without this post-June 18 information, plaintiffs do not know if Skokos was the actual acquirer of their interest of a part thereof. Moreover, plaintiffs have alleged in the complaint that the funds received from BP were used to purchase their interest. Without complete financial information, there is no way to determine if the Skokos funds or the BP funds were used to buy them out.

this case lies in "follow the money". The banking records of these three entities through March 22, 2011 is vital to plaintiffs' ability to prepare the case for trial. That is particularly true in this case, as there is an allegation that defendants opened an unauthorized account at Rabobank in California, an allegation supported by a July 22, 2010 letter sent by John Houghtaling, the CEO of OTS, to Rabobank stating that the account opened there, into which BP monies were deposited, was unauthorized. Additionally, there is evidence of multiple bank accounts having been opened for OTS that has been produced by BP or Houghtaling, including accounts at Rabobank in Santa Barbara, FNBC in Metarie, and yet a third account at a bank in Beverly Hills, California. The documents produced from a non-party, CINC, as well as from Westpac itself, suggest that various debts of OTS were paid from the account of Westpac Development, and monies paid to Westpac Development, making production of these records also necessary. Plaintiffs therefore request that the court order production of these materials from defendants and the non-parties against whom this motion is brought. Plaintiffs recognize that financial information is personal and proprietary, and agree that these records will be strictly confidential and only used for the purposes of this litigation.

(3) Specific Discovery Requests:

Plaintiffs ask that the Court direct defendants and the non-parties against whom this motion is brought respond or more fully respond to the following specific discovery requests:

(i) Joint Defense Agreements

Request for Production No. 6 directed to Mr. Costner asked for copies of Joint Defense or Common Interest agreements between the defendants. The request was objected to on grounds that it was overbroad and on grounds a boilerplate indemnity agreement was

produced in the Operating Agreement of OTS. However, other defendants revealed that a joint defense agreement does in fact exist. (Smith, response to Request No. 6, Westpac, response to Request No. 6) These apparently consist of a written agreement between Smith and Westpac, and a trilateral oral agreement between the three defendants. Those defendants objected on grounds that such agreements are not discoverable pursuant to *Ford Motor Company v. Edgewood Properties,* 257 F.R.D. 418 (D.N.J. 2009). However, *Ford Motor* does not so hold. It requires an *in camera* production of the agreement. If the Court determines it contains only boilerplate joint defense language, it is not subject to production. However, if it contains substantive information, it will be produced. Plaintiffs therefore ask that the joint defense agreements be produced by defendants for an *in camera* inspection by the Court. Defendants indicated that they would submit these to the court for an *in camera* review at the October 10, 2011 discovery conference.

(ii) Financial Records

All defendants objected to Request No. 7 related to production of financial records, including checks, dividends, distributions, membership interests, contracts, forms 1099, forms W-2, forms K-1, wire transfers, deposit slips, invoices, balance sheets or other financial records evidencing transactions between you and Ocean Therapy Solutions, John Houghtaling, Spyridon Contogouris, Stephen Baldwin, Patrick Smith, Westpac Resources and/or Rabobank, N.A. during the period April 17, 2010 to the present. In addition to their temporal objections, defendants also objected on other grounds. Costner objected on grounds of relevance and would not produce the records absent a protective order that restricts use and dissemination of the

information. Smith and Westpac objected on grounds that the request was overly broad and burdensome.

These records are highly relevant to determine how much these individuals profited from the acquisition of plaintiffs' membership interests in OTS, and therefore necessary to calculate plaintiffs' damages. The request is not overly burdensome as it solely relates to financial dealings between certain entities over a specific and fairly narrow time frame. As to the confidentiality of the records, plaintiffs agree that the documents should be ordered kept confidential and only used for purposes of this litigation.

(iii) Text messages:

In Request for Production No. 1 directed to all defendants, and to the non parties in Item 1 of the subpoenas directed to them, each was requested to produce text messages referencing communications with various individuals. No one produced any text messages in response to discovery, although plaintiffs are aware that numerous text messages were exchanged and have or will produce those in their possession. Plaintiffs ask that the Court order the production of all text messages in the possession of these parties and individuals, or direct that they be retrieved from their cell phones and produced. Alternatively, if the cell phones from which they were made is produced, plaintiffs will retrieve the text messages themselves and allow defendants to observe that process.

During the October 10, 2011 discovery conference, the non-movants indicated they had been unable to retrieve text messages because they could not find someone who had the technology to retrieve those. Plaintiffs indicated that they have the means to retrieve these messages if the phone from which they were made is produced. Plaintiffs further agreed to

provide the name of the service provider who can perform the actual retrieval. However, no actual agreement was made regarding the production of these text messages.

(iv) Current location of separator units:

Westpac and Smith were asked at RFP 13 to produce records showing the current whereabouts of the separator units leased to BP. The request was objected to on grounds of relevance. Although at trial this objection may be well-founded, at this stage, it is not. Plaintiffs believe those units are now in the possession of a company controlled by Mr. Costner, Blue Planet Water Solutions. Whether they are in Blue Planet's possession and how they came to be there may be relevant to plaintiffs' damages, or may lead to other relevant information. If plaintiffs are to be put in the same position that they were in prior to the alleged fraud, they necessarily need to know the disposition of these separator units. Plaintiffs ask that the Court order production of this information.

(v) Bates and Maxwell records:

RFP Nos. 28 and 29 directed to Westpac requested ledgers prepared by Bryan Bates and Justin Maxwell, both of whom worked for WestPac Resources and were members of the company, as well as communications between those two individuals and the CFO of OTS, Chuck Jouandot. These were objected to on grounds of relevance. The reason for the request was the allegation in the complaint that plaintiff Contogouris was shown such a ledger that was prepared by Bates and/or Maxwell showing millions of dollars of payments to defendants. Those records are highly relevant to plaintiffs damages, and therefore it is requested that their production be ordered.

(vi) Valobra records:

RFP No. 33 and No. 38 directed to Westpac requested records and communications between Westpac or its personnel and Francisco Valobra, a minority owner of OTS. These were objected to as overbroad substantively and temporally. Plaintiffs will limit their request to those documents specifically related to the activities of OTS and for the time period April 17, 2010 to March 22, 2011, and asks that the Court order their production.

(vii) Divorce records:

Patrick Smith was asked at RFP 22 and 23 to produce the record of his divorce proceeding and any documents showing that an imminent settlement of that proceeding would take place during the week of June 11-18, 2010. The basis for this request was Smith's statement to Contogouris, as alleged in the Complaint, that he could only make a 10% down payment on the acquisition of their interest on June 11 because he was waiting for his divorce to finalize the following week. Plaintiffs asked for these records to test the credibility of Mr. Smith. The objection to the request that it was designed to harass or embarrass Smith is incorrect. Plaintiffs ask that the Court order the production of the records.

For the foregoing reasons, plaintiffs request that their Motion to Compel be granted.

Respectfully submitted this 10th day of October, 2011.

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C E R T I F I C A T E O F S E R V I C E

I hereby certify that a copy of the foregoing has been served on all counsel of record by depositing same in the United States mail, postage pre-paid and properly addressed, or by filing same using the Court's electronic filing system, or by other means, such as facsimile or electronic mail, on this 10th day of October, 2011.

s/John F. Emmett