FILED: NEW YORK COUNTY CLERK 04/12/2011 INDEX NO. 650180/2010
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Lowe Justice PART 56

Energy EIA C

-v-

Maxim

INDEX NO. 650180/2010
MOTION DATE 3/15/2011
MOTION SEQ. NO. 008

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/11/2011

RICHARD B. LOWE III, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☑ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 56

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ENERGY EIAC CAPITAL LTD and
SANIBEL INTERTRADE CORP.,
as Assignees of ENERGY INFRASTRUCTURE
ACQUISITION CORP.,

Plaintiffs, Index No. 650180/2010

-against- **DECISION AND ORDER**

MAXIM GROUP LLC,

Defendant.

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RICHARD B. LOWE, III, J:

Plaintiffs Energy EIAC Capital LTD and Sanibel Intertrade Corp. ("Plaintiffs") move, pursuant to CPLR §5015(a)(1), to vacate the issuance of letters rogatory, granted November 15, 2010.

BACKGROUND

Energy Infrastructure Acquisition Corp. ("EIAC") is "special purpose acquisition company or "SPAC". A SPAC is a publicly traded company that raises capital through an initial public offering ("IPO"), which capital is then used to acquire assets of another company (a "target") within a fixed period of time. If the SPAC does not acquire a target within the time period set forth in the terms of the IPO, the SPAC is liquidated and the capital raised in the IPO is returned to investors. EIAC's IPO was completed on July 21, 2006, with Maxim Group LLC ("Defendant") serving as the underwriter. Defendant also acted as EIAC's advisor in acquiring a

target (Complaint ¶ 10-17).

In or about June 2007, EIAC entered negotiations to acquire the assets of target company Vanship Holdings Ltd. ("Vanship"). In December 2007, EIAC and Vanship entered into a share purchase agreement ("SPA") whereby EIAC, through an affiliate, would purchase assets from Vanship valued at roughly $643 million by no later than July 21, 2008 (Complaint ¶26-35). The complaint alleges that in early 2008, "it became apparent that the transaction could not be completed as set forth in the SPA, and the transaction ultimately fell apart completely due to [Defendant's] knowing, reckless or grossly negligent errors in structuring the transaction." (Complaint ¶37). The complaint also alleges that Defendant improperly disclosed to Vanship the confidential negotiation strategy of EIAC, causing EIAC to lose tens of million of dollars in concessions (Complaint ¶58). In December 2009, EIAC assigned to Plaintiffs all rights to EIAC's claims against Defendant arising from Defendant's role in EIAC's IPO and the proposed business combination with Vanship (Complaint ¶62). On March 17, 2010, Plaintiffs sued Defendant for breach of contract, gross negligence, breach of fiduciary duty, and attorneys' fees.

On October 18, 2010, Defendant moved for issuance of letters rogatory, seeking to depose six current and former directors of EIAC and three current employees of Vanship and its affiliate, Univan Ship Management ("Univan"). On November 8, 2010, the Court granted Defendant's motion without opposition. Plaintiffs allege their failure to file opposition papers was caused by a miscommunication with the Court and move to vacate the issuance of letters rogatory.

STANDARD OF REVIEW

CPLR §5015(a)(1) permits a court which rendered a judgment or order to relieve a party from it upon such terms as may be just...upon the ground of...excusable default. To prevail under §5015(a)(1), the movant must show both that his or her default is excusable and that the action is meritorious."(*Scopino v St. Joseph's Hosp*, 142 AD2d 569, 570 [2d Dept 1988]).

DISCUSSION

The Court first notes that Plaintiffs' reason for not filing opposition papers–an alleged miscommunication with the Court–is suspect and of little merit. Nevertheless it is the longstanding preference in New York that cases be decided on their merits (*Rivera v City of New York*, 292 AD2d 246 [1st Dept 2002] [noting the "strong public policy of allowing cases to be decided on their merits"]; *Dinnocenzo v Jordache Enterprises, Inc.*, 228 AD2d 306 [1st Dept 1996] [making exceptions to procedural requirements because of the "overriding policy of allowing cases to be decided on their merits."] Thus, the Court will entertain Plaintiffs' substantive arguments in opposing the issuance of the letters rogatory.

Plaintiffs first argue that the motion for letters rogatory is improper because it was filed after the scheduling deadline for fact depositions as set forth in the preliminary conference order. Plaintiffs' argument is unavailing. The preliminary conference order specifically sets letters rogatory apart from regular fact depositions, and directs the parties to confer in good faith regarding their issuance (See Aff. of Martin D. Edel, Ex. F). Moving for the issuance of letters rogatory three days after fact depositions were to be scheduled was thus not improper.

Plaintiffs further argue that Defendant has failed to meet its burden justifying international depositions. International depositions require a higher showing of relevance than

domestic depositions (*Richbell Information Services, Inc. v. Jupiter Partners L.P.*, 32 AD3d 150, 156 [1st Dept 2006] ["[A] number of courts...have said that a more stringent test should apply in international discovery than in purely domestic discovery."]; Restatement [Third] of Foreign Relations Law § 442, Comment a [before issuing an order for production of information located abroad, the court should scrutinize a discovery request more closely than it would a request for information located in the U.S.].

Defendant's request for international depositions is broad, seeking to depose nine people in six different countries across the world. Six of the persons Defendant seeks to depose are current or former directors of EIAC and three are current employees of Vanship and its affiliate, Univan. While it is evident that these personnel possess information material and necessary to this case, the Court is not satisfied that nine separate depositions are necessary to obtain this information.

Indeed, it is apparent that each of the EIAC personnel was serving in a nearly identical capacity[1] at the time of the transaction at issue; similarly, Defendant has shown no distinction between the responsibilities of the three Vanship/Univan personnel during the time of the transaction at issue. In short, Defendant has failed to show how each of the nine persons it seeks to depose will uniquely provide material and necessary information. Permitting all nine depositions thus risks unnecessary repetitive testimony being taken (*See Richbell*, 32 AD3d at 157 [holding that the availability of an alternative source to obtain the desired information is an important consideration when determining the scope of international discovery). The risk is

[1]Each of the EIAC personnel was a director during the time of the transaction at issue, though some held additional responsibilities.

especially significant because of the burden and expense associated with international depositions. Therefore, the Court will only permit letters rogatory to be issued for two persons from EIAC (*i.e.* those listed on "Schedule A"; Schechtman Aff. Ex. 3, p. 3) and one person from Vanship (*i.e.* those listed on "Schedule B"; *id.* at 4). Within this constraint, Defendant may choose the persons for which letters rogatory will be issued.

Plaintiffs lastly argue that the issuance of letters rogatory lifts the current stay on discovery for Defendant to the prejudice of Plaintiffs. This argument is without merit. The issuance of letters rogatory only allows Defendant to begin the lengthy procedures required for international depositions. It does not allow Defendant to schedule or take any depositions.

Therefore, based on the foregoing, it is hereby

ORDERED that Plaintiffs' motion to vacate is granted in part whereby letters rogatory will be issued for two persons from EIAC and one person from Vanship. Submit order within 20 days of entry.

Date: April 11, 2011

RICHARD B. LOWE III

J.S.C.