

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

COTTON BAYOU MARINA, INC.)	
d/b/a/ TACKY JACK’S)	
RESTAURANT, et al.)	
)	
Plaintiff,)	
)	
vs.)	CIVIL CASE NO. 1:10-cv-00243-C
)	
BP, plc; et al.,)	
)	
Defendants.)	
)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT HALIBURTON
AND BP DEFENDANTS’ MOTION FOR STAY OF PROCEEDINGS**

Plaintiff, Cotton Bayou Marina, Inc., d/b/a Tacky Jack’s Restaurant, individually and on behalf of themselves and all others similarly situated (“Plaintiff”), by and through undersigned counsel, hereby submits this Memorandum in Opposition to Defendant Halliburton Energy Services, Inc., and BP Defendant’s (Collectively “Defendants”) Motion for Stay of Proceedings Pending Transfer by The Judicial Panel on Multidistrict Litigation.¹ For the following reasons, the Defendants’ motion for stay is due to be denied.

ARGUMENT

The Court’s inherent power to stay proceedings is discretionary and is derivative of the Court’s power to manage cases to ensure just, efficient adjudication. *Landis v. North America Co.*, 299 U.S. 248, 254 (1936); *Gold v. Johns Manville Sales Corp.*, 723 F.2d 1068 (3rd Cir. 1983). However, the Judicial Panel on Multidistrict Litigation rules clearly provide that a district

¹ Defendant Halliburton filed its Motion for Stay on 5/17/10 (Doc. 7). The BP Defendants filed their Joinder in Motion for Stay on 5/18/10 (Doc 13), joining, adopting and incorporating by reference the arguments submitted to the Court by Defendant Halliburton. Therefore, Plaintiff submits this opposition memorandum in response to both filings.

court continues jurisdiction despite the pendency of an motion to consolidate pursuant to 28 U.S.C. § 1407.

The pendency of a motion . . . before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

J.P.M.L.R.P 1.5. Indeed, JPML Rule 1.5 has been construed as “discouraging district courts from staying pending motions.” *Johnson, et al. v. Micron Technology, Inc., et al.*, 354 F. Supp. 2d 736, 739 (E.D. Michigan 2005).

This point is buttressed by the *Manual for Complex Litigation*, which provides:

The transferor court should not automatically stay discovery . . . Nor should the court automatically postpone rulings on pending motions, or generally suspend further proceedings.

Manual for Complex Litigation, Fourth, § 20.131 (2004).

Importantly, the Panel has said:

The Panel’s experience indicates that the use of stay orders by the district courts, particularly in the area of discovery, is usually undesirable. Any discovery obtained prior to the Panel decision will benefit the parties to the action if transfer is denied and will presumably be made available to all other parties if transfer is ordered.

In re Penn Central Secs. Litig., 333 F. Supp. 382, 384 (J.P.M.L. 1971); *see also The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589 (1998) (“[D]istrict courts will commonly refuse to grant a motion to stay discovery pending the outcome of a Panel transfer motion.”).

“When considering a motion to stay, the district court should consider three factors: (1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative

litigation if the cases are in fact consolidated.” *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997). “[A] district judge should not automatically stay discovery, postpone rulings on pending motions, or generally suspend further rulings upon a parties’ motion to the MDL Panel for transfer and consolidation.” *Rivers*, 980 F. Supp. at 1360 (citing Manual for Complex Litigation, Third, at 252 (1995)).

A large portion of the Defendants’ motion is dedicated to referencing cases where other courts have granted motions for stay in the context of existing MDLs. (Halliburton’s Motion at 4.) This case is distinguishable, as there has been no action by the Judicial Panel on Multidistrict Litigation to consolidate this and other similar cases. See *Callahan v. Vertrue Incorporated*, 2009 U.S. Dist. LEXIS 24674 (March 18, 2009) (stay denied pending MDL consolidation); see also, *Garcia v. Tyson Foods, Inc.*, 2008 U.S. Dist. LEXIS 67304 (Sept. 3, 2008); see also, *Gallardo v. Aurora Dairy Corporation*, 2008 U.S. Dist. LEXIS 7730 (Jan. 23, 2008). In addition, the oil that continues to pour into the Gulf of Mexico may ultimately be the largest, man-made environmental catastrophe in the history of the United States, and perhaps the planet. The cases that the Defendants cite, by contrast, involved matters such as the fraudulent marketing and underwriting of auction-rate bonds, products liability, and discrimination. Accordingly, the cases that Defendants cite are not comparable to this case and do not support the conclusion that this case should be stayed.

On May 25, 2010, in a similar case involving these Defendants, the Honorable William H. Steele of this District denied the BP Defendants’ Motion for Stay in Cause No. 1:10-cv-00215 (Doc. 33). In the Order, Judge Steele stated as follows:

In this case, the Court finds that the Motion is premature.....Regardless of whether and where the MDL Panel ultimately transfers this action for consolidated and coordinated pretrial proceedings, defendants will need to file

answers or responsive pleadings.....Entering a stay at this juncture and under these circumstances would not rescue defendants from material hardship or the risk of inconsistent adjudications; after all, they must answer the Complaint anyway, and the likelihood of adjudication of any merits issues prior to late July (when the MDL Panel will hear the motions to transfer) appears quite slim, simply because of the nascent status of this litigation. By all appearances, the only tangible effect of entering a stay at this time would be to allow defendants a three-month reprieve after service of process before being required to answer the allegations brought by plaintiff in the Complaint. Such a protracted delay appears both unnecessary and unwarranted.

Id at 2-3

Furthermore, there have been at least 10 other similar related oil spill cases in this District where Defendants' Motions for Stay have been denied.² Accordingly, Defendants' Motion for Stay in this case is unwarranted.

I. The Defendants Would Not Suffer Hardship or Inequity if the Motion for Stay is Denied

The Defendants fail to present any evidence or argument regarding the hardship they will face if this Court denies their motions for stay. Before a stay may be issued, "the party requesting the stay must demonstrate 'a clear case of hardship or inequity,' if there is 'even a fair possibility' that the stay would work damage on another party." *Landis*, 299 U.S. at 255. Here, the Defendants generally point to the benefits of MDL consolidation - avoiding litigating multiple lawsuits simultaneously and avoiding being subjected to "multiple pleading and discovery requirements, and potentially conflicting or inconsistent rulings on pretrial matters - to support their motions for stay. Such conclusory statements are insufficient to support a motion for stay. *See Callahan*, 2009 U.S. Dist. LEXIS 24674 ("their conclusory assertion that a stay will serve judicial economy is speculative at best.") Regardless of whether, where or when the

² Including, Cause No.'s 1:10-cv-00195-WS-B(Doc 41); 1:10 -cv-00223-KD-C(Doc. 40); 1:10-cv-00202-KD-B (Doc. 39); 1:10-cv-00201-KD-C (Doc. 40); 1:10-cv-00206-KD-N (Doc. 36); 1:10-cv-00252-KD-M (Doc. 8) and 1:10-cv-00235-KD-B (Doc. 24)

oil spill cases are coordinated or consolidated, at this early point, the Defendants will need to undertake many of the same actions, such as preserving discovery, with respect to all cases pending against them. Further, the Defendants' speculation about inconsistent pretrial rulings is overshadowed by the magnitude and nature of this ongoing catastrophe and the prejudice, discussed above, that would result to Plaintiff should its case suddenly be frozen for the next several months.

Importantly, in this case, the benefits of a consolidated proceeding are not currently available to Defendants. And even if an MDL court is ultimately created and similar cases are consolidated and transferred to the MDL for pretrial proceedings, there is nothing to prevent similar lawsuits from being brought in state courts and, where diversity jurisdiction does not exist, simultaneous actions proceeding against Defendants. In short, the Defendants did not, and cannot, make the requisite showing of undue hardship necessary to support the stay requested.

II. Granting Defendants' Motion Would Cause Needless Delay and Not Promote Judicial Economy

The Defendants have requested that this Court relinquish its jurisdiction over this case in favor of allowing the case to remain stagnant for an unknown period of time. Again, a conditional transfer order has not been issued in this case; there is no existing MDL; and there is no guarantee that an MDL will be formed in the future. The goal of consolidation under 28 U.S.C. § 1407 (a) is to promote the just and efficient resolution of a case. It remains to be seen how judicial economy will be served by stopping all proceedings without an MDL having been created. Rather, if an MDL is established in the future, all of the decisions which have been made by this Court and all of the information and documents obtained through discovery obtained in this Court would inure to the benefit of the MDL court.

III. Plaintiff Would Suffer Substantial Hardship if Defendants' Motion For Stay is Granted

Defendants' requested stay is in reality a delay of numerous, unknown months before any coordinated proceedings in a future MDL court would begin. Because this underlying basis of this litigation is ongoing, the immediate months ahead may prove pivotal to the outcome of this case. In the meantime, oil continues to flood the Gulf at an alarming rate, and Plaintiff may need to take actions – such as emergency, real-time discovery related to the potential cause(s) of this disaster and Defendants' efforts to mitigate the mounting damages – for which Plaintiff may need to seek court intervention. Issues like document retention and the implementation of policies to ensure evidence is not destroyed in the normal course of business due to document retention and destruction policies must be addressed immediately to avoid undue, substantial hardship to Plaintiff and those similarly situated.

CONCLUSION

Plaintiff respectfully requests that this Court issue an Order denying Defendants' motion for stay. The stay would prejudice Plaintiff and hinder judicial economy without offering any benefit to the Defendants, other than the general benefits of MDL coordination referenced by Defendants. Because Plaintiff would be prejudiced by the stay, Defendants are required to make a clear showing that they will suffer hardship or inequity if the stay is denied. The Defendants have failed to make a clear showing of hardship or inequity.

Respectfully submitted by,

s/John E. Tomlinson

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Dated: June 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2010, a copy of the foregoing pleading was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record registered to receive electronic service by operation of the Court's electronic filing system. I also certify that I have mailed this filing by United States Postal Service to all counsel of record who are not registered to receive electronic service by operation of the Court's electronic filing system.

s/John E. Tomlinson _____
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