

**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.,)	
)	
Plaintiffs,)	
)	
vs.)	Civil Action No. 1:10-cv-00243-WS-C
)	
BP, plc, et al.)	
)	
Defendants.)	
)	

PLAINTIFF’S MEMORANDUM IN OPPOSITION TO HALLIBURTON ENERGY SERVICES, INC.’S RENEWED MOTION TO STAY PROCEEDINGS

Plaintiff, Cotton Bayou Marina, Inc. (hereinafter “Plaintiff”), by and through undersigned counsel, hereby submit this Memorandum in Opposition to Defendant Halliburton Energy Services, Inc.’s (hereinafter “HESI”) Renewed Motion to Stay Proceedings Pending Transfer by the Judicial Panel on Multidistrict Litigation. In further support, the Plaintiff states the following:

I. BACKGROUND

On May 7, 2010, Plaintiff filed its Complaint [Doc. 1] in this matter. On May 17, 2010, HESI filed its Motion to Stay Proceedings Pending Transfer by the Judicial Panel on Multidistrict Litigation. [Doc. 7]. Thereafter, on June 2, 2010, this Court denied HESI’s Motion to Stay. [Doc. 38]. In its Order, this Court noted the Motion to Stay was premature and that the “motion to stay proceedings is denied without prejudice to the defendants’ ability to re-file same after responsive pleadings have been filed”. [Doc. 38].

On July 6, 2010, HESI filed a Motion to Dismiss Plaintiff’s Complaint. [Doc. 52]. **Minutes after** filing its Motion to Dismiss, Defendant HESI filed a Renewed Motion to Stay on July 6, 2010, giving “additional reasons” in support. [Doc. 54].

II. ARGUMENT

A. HESI's Motion is still premature

Defendant HESI's Renewed Motion to Dismiss is still premature. This matter has not yet been transferred to MDL No. 2179, nor has HESI filed an answer or other responsive pleading herein. HESI has filed a Motion to Dismiss as opposed to a "responsive pleading". Until such a time as HESI files a responsive pleading as required by the Court's June 2, 2010 Order, the filing of the renewed motion to stay remains premature. [Doc. 54]. A motion to dismiss is NOT a "responsive pleading" according to the Federal Rules of Civil Procedure. *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562, 2569, 162 L.Ed.2d 582 (2005); See, e.g., *Thompson v. Carter*, 284 F.3d 411, 415 n. 2 (2d Cir.2002) (motion to dismiss is not a responsive pleading...). For Rule 15 purposes, a **motion to dismiss** is also not considered a **responsive pleading**." *Coventry First, LLC v. McCarty*, 605 F.3d 865, 869 (11th 2010) (citing *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1291 (11th 2007)). Furthermore, Motions are not "pleadings", as Rule 7(a) - (b) makes clear. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 788 (9th Cir.2000); *Maldonado v. Dominguez*, 137 F.3d 1, 11 n. 8 (1st Cir.1988); *Gupta v. Northrop Grumman Corp.*, 462 F.Supp.2d 56, 61 (D.D.C. 2006).

The posture of this case has not changed since this Court's June 2nd Order stating HESI's Motion to Stay was premature [Doc 38]. As such, HESI's renewed premature Motion should be denied.

B. Case Precedent Supports A Denial of HESI's Motion to Stay Proceedings

HESI's renewed Motion to Stay fails in light of well-defined case precedent. 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 court continues jurisdiction despite the pendency of a 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)).

C. HESI’s Reliance on Case Precedent Cited by the BP Defendants is Misguided

A large portion of HESI’s original Motion to Stay is dedicated to referencing cases where this and other courts have granted motions for stay in the context of existing MDLs. [Doc. 7]. This case is distinguishable, as the Judicial Panel on Multidistrict Litigation has not yet consolidated 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). Furthermore, none of the cases that the BP Defendants cited in support of a stay involved the kind of ongoing, man-made disaster that is involved here. The oil spill in the Gulf of Mexico giving rise to this action is arguably the largest, man-made environmental catastrophe in the history of the United States, and perhaps the planet. The cases that the BP Defendants cite, by contrast, involved matters such as the sale of life insurance policies,¹ the fraudulent marketing and underwriting of “auction-rate” bonds,² a product liability dispute,³ antitrust violations,⁴ and discrimination.⁵

¹ See *Tench v. Jackson Nat’l Life Ins. Co.*, No. 99-5182, 1999 WL 1044923, at *1 (N.D. Ill. Nov. 12, 1999); *Good v. Prudential Ins. Co.*, 5 F. Supp. 2d 804, 806 (N.D. Cal. 1998).

² *Louisiana Stadium & Exposition Dist. v. Fin. Guaranty Ins. Co.*, No. 09-235, 2009 WL 926982, at *1 (E.D. La. April 2, 2009).

Moreover, the BP Defendants' brief incorrectly suggests that *Tench* involved the same "circumstances present here." (Doc 9 at 4). *Tench* involved the deceptive marketing of life insurance policies, and was thus in no way comparable to the facts of this case. *see* 1999 WL 1044923, at *1. In addition, in *Tench*, similar cases had previously been centralized before a different judge who had been handling them for more than three years, and the Panel was scheduled to hear argument on transfer within a week, such that a stay did not cause any delay of the plaintiff's case. *Id.* at *1-2. In contrast, a stay in this case would cause an unreasonable halt in progress and would delay a significant amount of time considering the fact that the damages here are continuing to unfold at a dramatic rate.

Good, much like *Tench*, also involved misrepresentations in the sale of life insurance, an MDL action had already been centralized, and the plaintiff's case had been related for transfer to the court handling that ongoing action. 5 F. Supp. 2d at 806. Moreover, the district court considered and denied a motion to remand *before* granting a stay, thereby rendering moot the plaintiff's primary argument in opposition to a stay, and also expressed confidence that the stay would be brief. *Id.* at 809.

In *Louisiana Stadium*, involving an "auction-rate" bond dispute, the court determined that a stay would not result in any prejudice, because submissions to the Panel were due later the same month, and a ruling was expected "shortly thereafter." 2009 WL 926982, at *1. The court also anticipated that the case would be transferred and expressed concern that the court's spending time familiarizing itself with complex financial transactions that it would ultimately not

³ *Kennedy v. Novartis Pharms. Corp.*, No. 02-2331, 2002 WL 31051601, at *1 (E.D. La. Sept. 12, 2002).

⁴ *Falgoust*, 2000 WL 462919, at *1; *Aikins v. Microsoft Corp.*, No. 00-0242, 2000 WL 310391, at *1 (E.D. La. Mar. 24, 2000).

⁵ *Rivers v. The Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997).

rule upon would waste judicial resources. *Id.*

Kennedy was a product liability case involving phenylpropanolamine, a substance found in various over-the-counter nasal decongestant products. 2002 WL 31051601, at *1. Like *Trench* and *Good*, an MDL had already been established, the case was subject to a conditional transfer order, and a decision on transfer was anticipated shortly (within as little as three, but no more than four, weeks). *Id.*

In *Falgoust*, an antitrust case against Microsoft Corporation, the plaintiffs had failed to show any significant prejudice. 2000 WL 462919, at *2. By contrast, Plaintiffs in this case would suffer substantial prejudice if their case were to come to a halt, stripping them of the ability to make any progress during this critical time, as events relevant to their case continue to take place.

For its part, *Aikins*, involved the same controversy as *Falgoust*, and it was decided on a similar, distinguishable basis. *See* 2000 WL 310391, at *1.

Finally, in *Rivers*, the *plaintiffs* moved for the stay, and the defendants – in stark contrast with Plaintiffs here – made no argument that a stay would cause them any prejudice. 980 F. Supp. 1360.

Accordingly, none of the cases the BP Defendants cited cases are comparable to this case and none support the conclusion that this case should be stayed.

D. HESI Has Not Submitted Evidence Supporting Its Motion

If this Court were to consider HESI's renewed motion to stay, HESI has still not met the requisite showing regarding the necessity of a stay in this case. 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.

In determining whether a stay is proper, a 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)).

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

Importantly, in this case, the benefits of a consolidated proceeding are not currently available to HESI. 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 HESI. In short, HESI did not, and cannot, make the requisite showing of undue hardship necessary to support the stay requested.

Contrary to its assertions, HESI fails to present any evidence or argument regarding the hardship it will face if this Court denies its motion to stay. Although HESI, and the original Motion filed by the BP Defendants, argue that potential inconsistent rulings on merits based issues raised may occur in Motion practice before this Court, including HESI's current Motion to Dismiss, they have yet to point out a single occurrence as to contradictory or inconsistent rulings on these issues. HESI's conclusory statements with regard to avoiding potentially conflicting or inconsistent rulings are still insufficient to support a motion to stay. Ironically, HESI has already filed numerous motions to dismiss raising the same legal issues in other cases pending in this judicial district. Regardless of whether the MDL Panel ultimately transfers this action for consolidated and coordinated proceedings, these issues on motions to dismiss will need to be briefed. Given these facts, HESI's speculation about inconsistent pretrial rulings on its Motions to Dismiss in this district, and others, is clearly unsupported and overshadowed by the magnitude and nature of this ongoing catastrophe and the prejudice that would result to Plaintiffs. HESI still cannot make the requisite showing of undue hardship necessary to support the stay requested.

In addition, Defendant's argument with regard to the lack of prejudice to Plaintiff and the availability/preservation of evidence through other federal district and state court orders is presumptuous at best. Neither the Court nor the Plaintiff in this case is bound by any limitations or restrictions set forth in those orders. 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, 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.

The Plaintiff should have the opportunity to conduct their own discovery, and to make their own arguments to THIS Court, through counsel of their own choosing, regarding what evidence should be preserved and produced in order to prove their case. Consequently, these events should have no bearing on the Court's decision in this case and Defendant's Motion should be denied.

III. CONCLUSION

For the reasons stated above Plaintiff respectfully requests that this Court issue an Order denying Defendant HESI's Renewed Motion to Stay. Moreover, Defendant's Motion is still premature and the stay would prejudice Plaintiff and hinder judicial economy without offering any benefit to Defendant HESI, other than the general benefits of MDL coordination. Because Plaintiff would be prejudiced by the stay, Defendant HESI is required to make a clear showing that they will suffer hardship or inequity if the stay is denied. Defendant HESI has failed to make a clear showing of hardship or inequity. Therefore, Defendant HESI's Motion should be DENIED.

Respectfully submitted by,

s/Richard D. Stratton

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Dated: August 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 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/Richard D. Stratton

OF COUNSEL