COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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November 30, 1999

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Re: *Electra Investment Trust PLC v. Crews, et al.*
Civil Action No. 17186

Dear Counsel:

I have considered the letters supporting your opposing motions to compel and stay discovery in the above-captioned matter. Because defendants have not offered a credible reason for this Court to delay discovery, plaintiff's motion to compel is granted and defendants' motion to stay is denied.

Plaintiff, the Electra investment entities (collectively "Electra"), holds significant minority interests in nominal defendant The Benjamin Company ("TBC"). On May 26, 1999, Electra filed a derivative suit alleging claims of fraudulent conveyance and breach of fiduciary duty (the "1999 Suit") arising

out of the allocation of settlement proceeds defendants are to receive in connection with a litigation against the Airport Board of the Dallas/Ft. Worth Airport (the "Texas Litigation"). The gist of Electra's complaint is that Robert B. Crews, Jr. ("Crews"), director and majority shareholder of TBC, and the four directors of TBC aligned with him, have illegally siphoned the settlement "value" of the Texas Litigation from the company till to their own pockets. The individual defendants have done so, plaintiff alleges, in order to improperly fund the cost of defending a 1997 lawsuit commenced by Electra against them (the "1997 Suit"). The 1997 Suit is currently pending before this Court.

On June 17, 1999, TBC and the individual defendants respectively filed separate, one-page motions to dismiss pursuant to Court of Chancery Rule 23.1. Defendants have yet to file an opening brief in support of their dispositive motions. On July 30, Electra served its first document request. Pursuant to Court of Chancery Rule 34(b), defendants' response, unless otherwise provided by order of the Court, was due no later than August 30, 1999.

When the individual defendants' counsel received the July 30 document request, he observed that the caption on the notice of service was the caption for the 1997 Suit rather than the 1999 Suit (the requests

themselves correctly carried the caption of the 1999 Suit). Shortly thereafter, he phoned Electra's counsel and informed him of the error. Defendants' counsel also stated his view that discovery should be stayed pending the resolution of his case dispositive motion and that he would make this argument once properly served with corrected requests. According to defendants' counsel, Electra's counsel responded that "he would look into the matter."[1]

When defendants failed to respond to Electra's discovery request within the time allotted in Rule 34(b), Electra sent a letter dated October 5, 1999 to defendants' counsel stating that because defendants' responses were long past due, all objections to the discovery request had been waived.[2]

By letters dated October 6 and 7, 1999, defendants stated that because of the error in the notice of motion's caption, Electra had not served a proper document request and that defendants' counsel felt that the parties had struck an oral agreement that Rule 34(b)'s tolling period would not commence until Electra made a formal, written correction to the notice of motion's caption. Electra's counsel disputes the communication, let alone the existence, of any such agreement.

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[1] Defs' Ans. Br. at ¶ 5.
[2] Citations omitted.

The long and short of the debate outlined immediately above is that defendants' counsel at all times (by his own admission) knew exactly to which matter Electra's discovery request referred and that there was never a moment of ambiguity. The position that Rule 34(b)'s tolling period should not commence until a formal correction was made by Electra's counsel is hyper-technical, wasteful and borders on frivolous. The Court wholly rejects it.

Defendants predicate their motion to stay discovery on two grounds: (1) a stay is appropriate when a case dispositive motion has been filed with the Court; and (2) a thinly-supported argument that Electra is using the 1999 Suit to overwhelm the strained resources of the individual defendants and frustrate their efforts to take discovery in the 1997 Suit.

While defendants cite cases where the Court has granted a motion to stay discovery when the moving party's case dispositive motion was also pending, Electra correctly points out that "there is no hard and fast rule that affords to defendants a right to a stay simply because a case dispositive motion has been filed."[3] Indeed, the Court has held that "the customary

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[3] *Kahn v. Tremont*, Del. Ch., C.A. No. 12339, Allen, C. (Aug. 21, 1992), Mem. Op. at 4.

procedure is to permit discovery to proceed despite the pendency of a possibly dispositive motion."[4]

On some occasions, the Court of Chancery has employed a loose three-part test when considering motions to stay discovery.[5] While not denying the wisdom of these factors, they are by no means exclusive or exhaustive. A stay of discovery, in my view, is inappropriate when the moving party has demonstrated no sense of urgency or even the slightest willingness to set the dispositive motion's briefing schedule in a timely manner. Here, defendants have yet to file opening briefs in support of their motions.[6] When pressed for a date, they offered January 25, 2000. This date is more than three months after their belated motion to stay, nearly five months after their responses to the discovery requests were due, and more than seven months after they filed their one-page motions to dismiss.

Defendants also argue that the 1999 Suit is designed primarily to tax the allegedly limited resources they have available for purposes of defending

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[4] *Darnielle v. Santa Fe Industries, Inc.*, Del. Ch., C.A. No. 5787, Marvel, C. (Sept. 14, 1979), Letter Op. at 5.

[5] *See, e.g., In re McCrory Parent Corp.*, Del. Ch., C.A. No. 12006, Allen, C. (July 3, 1991).

[6] *Cf. Ohstrom v. Harris Trust Co.*, Del. Ch., C.A. No. 15709, Chandler, C. (Oct. 17, 1997) (granting motion to stay when dispositive motion had been briefed and argued and was merely awaiting the Court's decision).

the 1997 Suit. Defendants' motion, however, does not explicate this theory with a great deal of particularity. Electra filed their 1999 Suit days after TBC's board, over the objections of the Electra representatives, allocated the Texas Litigation's settlement "value" primarily to the individual defendants herein (as opposed to TBC). Electra's discovery requests in this matter appear to be narrowly targeted toward information generally regarding the settlement negotiations among the parties to the Texas Litigation, valuation and allocation of the settlement proceeds, legal fees incurred in pursuit thereof, and valuation of Crews' individual claims. These requests do not strike me as extraordinarily burdensome nor, in my view, could they be characterized as unduly broad.[7] For this reason as well, I believe a stay is inappropriate.

Electra's complaint raises colorable claims. Because defendants have failed to demonstrate that they are willing to vigorously move ahead with their dispositive motion and because they have failed to demonstrate with particularity that Electra's 1999 Suit is brought in bad faith, I deny their motion to stay and grant plaintiff's motion to compel.

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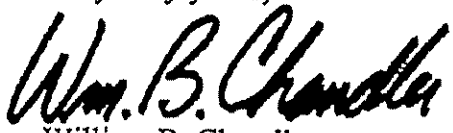
[7] *Id.* (granting motion to stay when discovery process of plaintiff's underlying claim involved highly burdensome and labor-intensive reconstruction of stock ownership records (including all dividends, splits, etc.) over an approximately thirty-year period).

Although Electra also argues that defendants have waived their right to object to discovery requests, I do not so presently hold. Rather, I order defendants to comply with Electra's discovery request on or before December 15, 1999. Any disputes regarding the requested documents shall be promptly brought to the attention of the special discovery master appointed for the 1997 Suit.

IT IS SO ORDERED.

Very truly yours,



William B. Chandler

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