UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

RESOLUTE FOREST PRODUCTS, INC., *et al*.	)	
	)	
Plaintiffs,	)	CIVIL ACTION FILE
	)	NO. 1:16-cv-00071-JRH-BKE
v.	)	
	)	
GREENPEACE INTERNATIONAL (aka "GREENPEACE STICHTING COUNCIL") *et al*.	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO LIFT STAY OF DISCOVERY

Plaintiffs Resolute Forest Products, Inc., Resolute FP US, Inc., Resolute FP Augusta, LLC, Fibrek General Partnership, Fibrek US, Inc., Fibrek International Inc., and Resolute FP Canada, Inc. (the "plaintiffs" or "Resolute") hereby submit this Motion to lift the discovery stay entered by this Court, on September 22, 2016, pending resolution of the motions by Greenpeace International (aka Greenpeace Stichting Council) ("GPI"), Greenpeace, Inc., Greenpeace Fund, Inc., ForestEthics, Daniel Brindis, Amy Moas, Matthew Daggett, Rolf Skar and Todd Paglia (collectively, "defendants") to dismiss, strike, or transfer venue filed on September 8, 2016. (Doc. 66.)

INTRODUCTION

The Federal Rules of Civil Procedure, Local Rule 26, and this Court's Amended Rule 26 Order create a presumption in favor of proceeding with discovery even when a motion to dismiss is pending. Notwithstanding this clear presumption, in an effort to avoid discovery into their self-proclaimed "radical" campaign to falsely designate Resolute as the Canadian Boreal "Forest

Destroyer," defendants moved for an order staying discovery pending resolution of yet-to-be-filed motions to dismiss. (Doc. 35.) This Court issued a temporary stay of discovery pending review of defendants' motions. (Doc. 40.) On September 8, 2016, defendants collectively filed six motions to dismiss, which euphemistically recast the Complaint's detailed allegations of intentional misrepresentations, fraud, tortious interference, and other illegal conduct as speech protected by the First Amendment and Georgia's anti-SLAPP law, and lodged other "straw man" challenges to the sufficiency of plaintiffs' legal claims. Based on a "preliminary peek" at defendants' motion papers, on September 22, 2016, this Court granted defendants' motion to stay discovery pending the outcome of their motions to dismiss, strike, and transfer venue. (Doc. 66.)

Now, with plaintiffs' Response to defendants' Motions before the Court, supported by the declarations of two renowned scientists attesting that defendants' false and misleading allegations about Resolute reflect a "fundamental disregard for scientific reality," premised on "distorted results" from studies that are "largely irrelevant to the issue at hand," it is clear that there is no basis to dismiss plaintiffs' claims as a matter of law. Under clear legal precedent, neither the First Amendment nor Georgia's anti-SLAPP statute provide a defense to plaintiffs' claims arising from defendants' criminal, illegal and fraudulent conduct. And, while no *prima facie* showing of falsity beyond the detailed allegations set forth in the Complaint is required at this juncture, the objective scientific evidence cited by Professor Peter Reich, Ph.D., and Professor Frederick Cubbage, P.h.D., demonstrates that defendants' ubiquitous misrepresentations about Resolute constitute calculated falsehoods. Under these circumstances, defendants cannot legitimately claim that their conduct amounts to mere "advocacy." Accordingly, this Court should lift the discovery stay and direct the parties to proceed with discovery in accordance with the presumption set forth in the federal and local rules.

ARGUMENT

I. Plaintiffs' Response To Defendants' Motions Demonstrates There Is No Basis To Dismiss Any Of Plaintiffs' Claims As A Matter Of Law.

On October 5, 2016, this Court reiterated that given the strong presumption that discovery should proceed in accordance with the federal and local rules, discovery should only be stayed pending a motion to dismiss where plaintiffs' claims are "*so weak*" so as to render discovery a mere futile exercise. *See Davison v. Nicolou*, 2016 WL 5867052, at *4 (S.D. Ga. Oct. 5, 2016) (emphasis added); *see also S. Motors Chevrolet, Inc. v. General Motors, LLC*, 2014 WL 5644089, at *1, *3 (S.D. Ga. Nov. 4, 2014) (Smith, M.J.) (denying discovery stay, where motion to dismiss was no "*no slam-dunk*" nor "*clearly meritorious and truly case dispositive*" so as to "warrant[ ] the requested discovery stay") (emphasis added) (internal citation omitted); *Koock v. Sugar & Felsenthal, LLP*, 2009 WL 2579307, at *2 (M.D. Fla. Aug. 19, 2009) ("A preliminary review of the case reveals that [defendant's] motion to dismiss is not *so clear on its face* that there is an immediate and clear possibility that it will be granted.") (emphasis added); *Ray v. Spirit Airlines, Inc.*, 2012 WL 5471793, at *2 (S.D. Fla. Nov. 9, 2012) (denying defendant's motion to stay where "the Court cannot say that this case is *surely* destined for dismissal") (emphasis added).

Plaintiffs have now submitted their Response to defendants' motions to strike, dismiss, and transfer venue. Upon full examination of the parties' submissions on these motions, and given the strong presumption in favor of proceeding with discovery, the discovery stay in this action should be lifted. The crux of defendants' dismissal motions is that the First Amendment and Georgia's anti-SLAPP law provide a complete defense to plaintiffs' federal RICO and state law claims predicated on defendants' knowing participation in a coordinated racketeering scheme and commission of numerous predicate acts. *See, e.g.*, Doc. 56-1 at 3-6; Doc. 60 at 10-12; Doc. 62 at

13-17. However, neither the First Amendment nor Georgia's anti-SLAPP law protects against the criminal, fraudulent, and intentional conduct alleged here. *See* Doc. 75 at 37-39, 41-45. It is also settled law that under the Supremacy Clause, Georgia's anti-SLAPP statute has no application to plaintiffs' federal RICO claims, or plaintiffs' state law claims asserted in federal court. *Id*. at 28-31, 33. Even if Georgia's anti-SLAPP statute applied to certain state law claims, it provides no basis for dismissal at the pleading stage where, as here, the Complaint's allegations state all the required elements of the asserted causes of action. *Id*. at 39-41.[1]

Moreover, as set forth in detail in plaintiffs' Response to defendants' Motions to Dismiss, defendants' challenges to the sufficiency of plaintiffs' RICO claims fare no better. *Id*. at 46-69. The Complaint details each defendant's direct role in the RICO enterprise and pleads that defendants acted in concert with one another, including hundreds of acts of mail and wire fraud, extortion and money laundering, in furtherance of a conspiracy to harm Resolute. In addition, the Complaint alleges that defendants' fraudulent campaign involved U.S.-based conduct, which targeted U.S.-based customers, and resulted in harm to Resolute's U.S.-based operations, including the loss of U.S.-based contracts, and closures at U.S.-based mills. *Id*. at 67-69.

Defendants have likewise proffered no basis for dismissal of any parties. GPI's assertion that it is not subject to RICO's nationwide jurisdiction is immaterial because the Complaint alleges that GPI is subject to personal jurisdiction in this Court under Georgia's long-arm statute by virtue of its own contacts and the contacts of its co-conspirators with this State in furtherance of the conspiracy. *Id*. at 86-88.

[1] In any event, if the Court were to determine that Georgia's amended anti-SLAPP statute applies to this federal action, that statute expressly provides that "if there exists a claim that the nonmoving party is a public figure plaintiff, then the nonmoving party shall be entitled to discovery on the sole issue of actual malice whenever actual malice is relevant to the court's determination [of the anti-SLAPP motion]." O.C.G.A. § 9-11-11.1(b)(2).

Accordingly, accepting all factual allegations as true and construing them in the light most favorable to plaintiffs -- as required on a motion to dismiss -- it is now clear that defendants' motions are certainly "no slam-dunk, nor so likely to be granted that it warrants the requested discovery stay" as required to depart from the presumption mandated by the rules. *S. Motors Chevrolet*, 2014 WL 5644089, at *2-3. Thus, plaintiffs respectfully request that the discovery stay be lifted.

II. Objective Scientific Evidence Demonstrates Defendants' Statements Constitute Calculated Falsehoods.

While no *prima facie* showing of falsity beyond the detailed allegations set forth in the Complaint is required at this juncture, the declarations of two renowned scientists, Professors Reich and Cubbage, submitted in connection with plaintiffs' response to defendants' Motions, unequivocally demonstrate the falsity of defendants' claims and undermine any assertion that defendants' conduct constitutes an "advocacy campaign."

A. Peter Reich, Ph.D., Declares That Defendants' Allegations About Resolute Demonstrate "A Fundamental Disregard for Scientific Reality."

Professor Reich, a recipient of the Nobel Prize equivalent in forest ecology (the BBVA Foundation Frontiers of Knowledge Award in Ecology and Conservation Biology) and a renowned scientist who has published over 500 peer-reviewed articles for international scientific publications, and has conducted research in the boreal, tropical and temperate ecosystems, opines that the defendants' allegations concerning Resolute's impact on the boreal forest demonstrate "a fundamental disregard for scientific reality." (Doc. 77 at ¶ 23.)

With respect to defendants' specific claims about Resolute, Professor Reich concludes that Resolute is not a "destroyer" of the boreal forest in any possible sense of the word. To the contrary, Canada retains about 90% of the original forest cover, "the nominal 0.02% of the boreal forest

'destroyed' annually is due to urban and industrial development: not Resolute's -- or any other forest product company's -- harvesting operations." (*Id.* ¶ 5.) In fact, Professor Reich concludes "virtually every one" of the acres of forest land harvested by Resolute in these regions "remains 'boreal forest' to this day." (*Id.* ¶ 12.)

Moreover, Professor Reich opines that defendants' claim that Resolute aggravates climate change "shows a fundamental disregard for scientific reality." (*Id.* ¶ 23.) According to Professor Reich, defendants' allegations about Resolute's impact on global warming fails to distinguish between timber harvests, which removes trees and results in new, replacement trees (forest remains forest), and deforestation, where trees are removed or burned, and no or very few trees remain, resulting in large movements of carbon dioxide into the atmosphere. Although significant deforestation does contribute to climate change, this effect is almost entirely in the tropics, and is notably not occurring in the boreal where Resolute operates. (*Id.* ¶¶ 6, 24.)

As set forth in Professor Reich's declaration, leading Canadian scientists (including Nobel Prize winner Werner Kurz) recently evaluated the impact of Canada's boreal forest on the global carbon cycle, and concluded that the managed portion (roughly half) of the Canadian boreal forest was "removing *more* carbon from the atmosphere than it was returning" because: (i) "some of the harvested wood products remained on land (did not decompose) and provided carbon storage; and (ii) total forest biomass increased over time, despite harvesting." (*Id.* ¶¶ 29-30 (emphasis added).) Therefore, Professor Reich declared that "there is no evidence that forestry management has accelerated the flow of carbon back into the atmosphere, and instead those lands act to cool the planet, slowing climate change." (*Id.* ¶ 32.) Thus, according to Professor Reich, "[t]hrough regenerating harvested areas, forest product companies (such as Resolute) have actually ***helped*** to slow the effects of climate change." (*Id.* ¶ 31.)

To the contrary, defendants' false allegations that Resolute is negatively impacting climate change are based on "cherry-pick[ed] and distort[ed] results from a study that is weakly related and largely irrelevant" and fails to consider "the state-of-the-art science of today." (*Id.* ¶ 38.) Defendants' widely dispersed misrepresentation that Resolute is contributing to global warming was "based on a computer modeling study that is not sufficient evidence for such a claim." (*Id.* (referencing study cited by defendants in support of their motion to strike).) Reviewing a far more recent paper, from "the same scientist" would have revealed that "the managed boreal forest is having a slight *cooling* effect on global climate." (*Id.*) Professor Reich concludes that a "[d]etailed examination of the supposed sources of scientific evidence [defendants allege] support their claims clearly show either intent to deceive, shoddy science, or both," and thus defendants' overall conclusion that Resolute "put[s] our global climate at risk" has no scientific basis in fact. (*Id.* ¶ 40.)

Finally, Professor Reich concludes that "Resolute's harvesting has not significantly impacted woodland caribou populations" because the "scientific literature demonstrates that caribou are most affected in . . . an area far from Resolute's operations . . ." (*Id.* ¶ 7.) However, even in those regions in Quebec and Ontario where woodland caribous are present, Resolute harvests in compliance with strict guidelines and regulations from the Quebec and Ontario provincial governments and certification standards which provide for protection of woodland caribou. (*Id.* ¶ 8; *see also* Doc. 76 at ¶¶ 10-13.) Professor Reich determined that, contrary to defendants' claims, "Resolute's activity, in the aggregate, is below the threshold of likely perceptible adverse impact on specific woodland caribou populations' sustainability" and that "Resolute offers no threat to the species' continued viability." (Doc. 77 at ¶ 9.)

B. Frederick Cubbage, Ph.D., Opines That Defendants' Conclusions Regarding Resolute's Global Impacts Based On Limited FSC Certificate Suspensions "Have No Scientific Basis Whatsoever."

Similarly, Professor Cubbage, a leading authority on forest certification and natural resource policy, makes clear that, contrary to defendants' oft-repeated claims, "[s]cientists cannot deduce global conclusions about sustainability, environmental impacts, climate change, or social welfare based on forest certification." (Doc. 76 at ¶ 41.)

Central to defendants' scheme to mislead Resolute's customers is the notion that the suspension of three FSC certificates (one of which was subsequently reinstated) -- out of more than fifty independent, third party audited certificates Resolute holds -- must "indicate unsustainable practices with substantial adverse global impacts." (*Id*. at ¶ 4.) In fact, based on his review of the underlying audit reports for the three suspensions that defendants repeatedly indicate demonstrate Resolute's "substantial adverse impact," Professor Cubbage opines that "Resolute's certifications were suspended for narrow (and debatable) technical issues" and "resulted from unachievable targets wholly outside of Resolute's control." (*Id*. at ¶¶ 33, 45.) Furthermore, Professor Cubbage diagnoses "possible bias" in each of the three certificate suspensions. (*Id*. at ¶ 34.) Ultimately, he concludes that an applicant, such as Resolute, in compliance with relevant federal and provincial laws, performing excellent forest management and social practices, should be certified under *any* standard. (*Id*.)

Assessing the entire body of Resolute's forest certification compliance history, Professor Cubbage recognizes that "Resolute's overwhelming compliance with FSC's and SFI's standards demonstrates an exemplary commitment to the principles and practice of sustainable forest management." (*Id*. at ¶ 4.) In fact, Professor Cubbage points out that 100% of Resolute's

forests were audited and certified by independent third parties, including the three forests suspended by the FSC. (*Id*. at ¶ 46.)

Professor Cubbage concludes that, "[b]ased on *objective and verifiable* scientific evidence," defendants' claim regarding the "global impact[]" drawn from Resolute's limited certificate suspensions "is simply incorrect." (*Id*. at ¶ 4 (emphasis added).) "There is *no scientific basis whatsoever* to generalize about global impacts from the loss of three (now, two) forest certifications." (*Id*. at ¶ 47 (emphasis added).)

In light of the incontrovertible scientific evidence offered by two world-class scientists, plaintiffs have rebutted any notion that defendants' legal challenge to plaintiffs' pleading is "clearly meritorious" or that plaintiffs' opposition is "so weak" or "*surely* destined for dismissal," so as to render discovery a futile exercise. Rather, plaintiffs have established that defendants' scheme was predicated on knowingly false information, disconnected from the scientific reality. Plaintiffs are, therefore, now entitled to the presumption that discovery should proceed at this juncture.[2]

CONCLUSION

For the foregoing reasons, this Court should lift the stay of discovery entered on September 22, 2016 (Doc. 66) and discovery should be permitted to proceed in compliance with the applicable federal and local rules.

[2] To the extent defendants deem any future not-yet-served discovery request to be overbroad or unduly burdensome, the appropriate course of action would be to meet and confer with plaintiffs to reach a resolution and, if necessary, petition the Court for appropriate relief. *See Renuen Corp. v. Lameira*, 2015 WL 1138462, at *2 (M.D. Fla. Mar. 13, 2015) (denying motion to stay discovery in RICO action pending motion to dismiss and directing defendants to file for a protective order to the extent they deemed plaintiffs' 108 document requests to be objectionable).

This 16th day of December, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing Plaintiffs' Memorandum of Law In Support of Motion to Lift Stay of Discovery with the Clerk of Court using the CM/ECF system and served upon counsel of record by electronic filing, as follows:

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This 16th day of December, 2016.

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