IN RE U.S. LIQUIDS SECURITIES LITIGATION

2005 | Cited 0 times | S.D. Texas | September 13, 2005

ORDER

Pending before the court are Individual Defendants, EarlBlackwell, Greg Orr, and Mike Lawlor's (hereinafter the"Defendants") and Motion for More Definite Statement (Doc. 131),Defendants' Motion for Summary Judgment on Standing (Doc. 146);also pending are the Plaintiffs' (i) Cross-Motion to Strike thePurported "Answers" of the Individual Defendants, (ii)Cross-Motion for Summary Judgment as to Liability, and (iii)Opposition to Defendants' Motion for a More Definite Statement(Doc's 137, 138, & 135, respectively, though contained in oneDocket Instrument), the Plaintiffs' Motion for a ContinuancePursuant to Fed.R.Civ.P. 56(f) and for Leave to Supplement theRecord (Doc. 153), Plaintiffs' Motion for Leave to DeposeWitnesses Confined in Prison (Doc. 155) and Motion for ExpeditedConsideration of such request (Doc. 164), Plaintiffs' Motion toContinue Expert Witness Designation Cutoff for Environmental andDue Diligence Experts (Doc. 158) and Motion for ExpeditedConsideration of such request (Doc. 162).

This securities class action was filed on August 31, 1999,naming as defendants U.S. Liquids, Inc., and three individualdefendants. (Doc. 1.) On April 14, 2000, all defendants appearedand defended by filing a Motion to Dismiss the ConsolidatedComplaint (Doc. 30), which motion was subsequently the subject ofextensive briefing. On January 23, 2001, the court issued aMemorandum Opinion and Order on the Motion to Dismiss (Doc. 41),granting dismissal as to all claims under the Securities ExchangeAct of 1934, and denying the motion as to the claims brought under the Securities Act of 1933. By Order entered April29, 2002 (Doc. 88), and the Order of June 12, 2002 (Doc. 97), thecourt dismissed Plaintiffs' Section 12(2) claims for lack ofstanding. Therefore, solely pending before the court arePlaintiffs' claims under Sections 11 and 15 of the Securities Actof 1933.

After its initial Memorandum Opinion of January 23, 2001, hadthere been no request for leave to amend, and had the courtsimply denied the motion to dismiss, Federal Rule of CivilProcedure 12(a)(4)(A) would have required Defendants to filetheir answers within 10 days of the court's order. This timetablewas modified by the court's order stating

Plaintiffs are granted leave to file an amended complaint, if they are able, to cure the pleading deficiencies under the PLSRA and the Exchange Act or to inform the Court that they will not do so, within thirty days of the receipt of this order. If appropriate, Defendants may file a supplemental motion to dismiss. (Doc. 41, pp. 86-87.)In fact, on February 26, 2001, Plaintiffs requested additionaltime to replead (Doc. 42), which the court granted through March9, 2001. (Doc. 43.) On March 9, 2001, after being given 45 daysto replead, Plaintiffs informed the court they did not intend

todo so. (Doc. 44.)

On October 23, 2002, the parties jointly moved to stay the case(Doc. 111) to permit resolution of a pending action involvingNational Union Fire Ins. Co. of Pittsburgh which had suedDefendants (Nat'l Union Fire Ins. Co. v. U.S. Liquids, Inc.,No. H-01-1980 (S.D. Tex.), and in which action the Honorable SimLake granted summary judgment ruling that the insurer had noobligation (1) to indemnify Defendants under a directors' andofficers' insurance policy or (2) to advance defense costs inthis matter. (See Doc. 117.) The court granted the request forstay on October 24, 2002. (Doc. 112.) On March 9, 2004,Defendants gave notice that the insurance proceeding had beenresolved against coverage (Doc. 116), and, on April 30, 2004,Plaintiffs moved to reactivate the case. (Doc. 117.) On August19, 2004, Defendant U.S. Liquids filed a suggestion of bankruptcy(Doc. 121), which, having invoked the automatic stay of thebankruptcy rules, was subsequently lifted by the court with respect to theindividual Defendants, at the Plaintiffs' request on December 17,2001. (Doc. 124.)

On March 1, 2005, after a scheduling order had been entered inthe instant action (Doc. 130), and after the individualDefendants had substituted counsel, Defendants filed a Motion forMore Definite Statement (Doc. 131), wherein they requested thatpursuant to Fed.R.Civ.P. 12(e), the court order Plaintiffs toclarify their sixty page, 154 paragraph complaint, to addresswhich claims Plaintiffs asserted still remained active after thecourt's orders, such that Defendants could address such claims inan appropriate answer. At this point, Defendants had not yetfiled an answer in the instant action. Notwithstanding thisrequest, Defendants filed answers for each of the individualDefendants on March 8, 9, and 16, 2005. (Doc's 132-34.)

In response, Plaintiffs filed a (i) Cross-Motion to Strike thePurported "Answers" of the Individual Defendants, (ii)Cross-Motion for Summary Judgment as to Liability, and (iii)Opposition to Defendants' Motion for a More Definite Statement.(Doc's 135, 137 & 138, hereinafter referred to as "Doc. 135" forsake of simplicity.) Initially, Plaintiffs argue that Defendantsfailed to answer the Consolidated Complaint four years ago,either ten days after the court's partial denial of the motion todismiss under Fed.R.Civ.P. 12(a)(4)(A), or more probably,after Defendants had opted not to modify their complaint, and hadfailed to move under Fed.R.Civ.P. 6(b)(2), for permission tofile an answer after it was due. (Doc. 135, p. 1.) Therefore,Plaintiffs argued, Defendants answers should be stricken,Defendants should be deemed to have admitted all of theallegations in the Complaint, except as to damages, and as aresult, Plaintiff's Motion for Summary Judgment be granted.(Id. at p. 2.)

Fed. Rule Civ. P. 6(b) permits a act to be done "upon motionmade after the expiration of the specified period" where "thefailure to act was the result of excusable neglect." Factors tobe considered under the "excusable neglect" standard include "thedanger of prejudice [to the non-moving party], the length of the delay and itspotential impact on judicial proceedings, the reason for thedelay, including whether it was within the reasonable control ofthe movant, and whether the movant acted in good faith." MidwestEmployers Cas. Co. v. Williams, 161 F.3d 877, 879 (5th Cir.1998) (citing Pioneer Investment Servs Co. v. Brunswick AssocsLtd. P'ship, 507 U.S. 380, 395 (1993)).

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The court agrees with Defendants that Plaintiffs' request thatDefendants' answers be struck, and the allegations of Plaintiffs'Consolidated Complaint be treated as admitted and that summaryjudgment should be entered against Defendants, finding themliable under Sections 11 and 15 of the Securities Act amounts, inreality, to a request for an entry of default. (Doc. 144, pp.7, 17); See Meehan v. Snow, 652 F.2d 274, 276-77 (2d Cir.1981). The court emphasizes that default has not been entered inthis case by either the clerk or the court. Defendants havepresented arguments that default not be entered following the"good cause" standard for a consideration of a Rule 55(c) motion.Federal Rule of Civil Procedure 55(c) provides that "[f]or goodcause shown the court may set aside an entry of default and, if ajudgment by default has been entered, may likewise set it asidein accordance with Rule 60(b)." Though the court is dealing herewith the "good cause" standard applicable to a default, the courtnotes that default judgments are generally disfavored as thepolicy preference is for obtaining decisions on the merits.Lindsey v. Prive Corp., 161 F.3d 886, 893 (5th Cir. 1998). TheFifth Circuit stated in Systems Signs Supplies v. United StatesDep't of Justice, 903 F.2d 1011, 1013 (5th Cir. 1990) that "[t]oestablish good cause, a litigant must demonstrate "at least asmuch as would be required to show excusable neglect, as to whichsimple inadvertence or mistake of counsel or ignorance of therules usually does not suffice," and "[a]dditionally, theclaimant must make a showing of good faith and establish "somereasonable basis for noncompliance within the time specified."Id. (citing Winters, 776 F.2d 1304, 1306 (5th Cir. 1985)(superseded on other grounds). The Court of Appeals "has left open the question whether thestandard for relief from entries of default (Rule 55(a)) is morelenient than that for a default judgment (Rule 55(b))"; however,the court generally examines the same factors. Id. at 653(citing CJC Holdings, Inc. v. Wright & Lato, Inc., 979 F.2d 60,63 n. 1 (5th Cir. 1992)). The requirement of "good cause" hasgenerally been interpreted liberally. Id. (citing Amberg v.Federal Deposit Ins. Corp., 934 F.2d 681, (5th Cir. 1991). Threefactors are examined for determining "good cause": (1) whetherthe failure to act was willful; (2) whether setting the defaultaside would prejudice the adversary; and, (3) whether ameritorious claim has been presented. Lacy v. Sitel Corp.,227 F.3d 290, 292 (5th Cir. 2000). These factors are not `talismanic,' and other factors may also be considered, includingwhether the defendant acted expeditiously to correct thedefault." Id. (citing Dierschke v. O'Cheskey (In reDierschke), 975 F.2d 181, 184 (5th Cir. 1992).

In determining whether to enter a default judgment, the court may consider a variety of factors such as whether the defaulting party's failure to plead or otherwise defend was merely technical or de minimis or whether the default resulted from dilatory tactics or bad faith. Other factors that may influence the exercise of the court's discretion are the possibility of prejudice to plaintiff; the merits of the plaintiff's substantive claim; the sufficiency of the complaint; the sum at stake; and whether the default was due to excusable neglect. Prive, 161 F.3d at 893 (citing 10 James Wm. Moore et al., Moore's Federal Practice ¶ 55.20(2)(b) (3d ed. 2005).Furthermore, the district court need not consider all thefactors. CJC Holdings, Inc., 979 F.2d at 64.

The "willfulness" inquiry involves asking whether the party'sneglect was excusable. CJC Holdings, Inc., 979 F.2d at 64. Inlooking at the procedural history of this case involving severalstays and delays, the court does not consider Defendants' failureto file their answers earlier to be willful, especially

asPlaintiffs did not begin emphasizing Defendants' failure to fileanswers until rather recently. With respect to prejudice, thereis no prejudice to the Plaintiffs where" the setting aside of thedefault has done no harm to plaintiffs except to require them toprove their case; rather, "the plaintiff must show that the delaywill result in the loss of evidence, increased difficulties in discovery, or greateropportunities for fraud and collusion." Lacy, 227 F.3d at 293.As asserted by Defendants, Plaintiffs themselves requested anextension of time to answer after the court issued its Memorandumand Opinion on January 23, 2001; in addition, the partiesconducted a case management conference, exchanged initialdisclosures and extensive discovery, actively litigated classcertification issues, and attempted to reach an out of courtsettlement. (Doc. 144, Robertson Aff., Exh. 1, ¶ 6.)Additionally, Defendants argued that Plaintiffs were notprejudiced (Doc. 144, p. 9) because, as of Defendants' writing onApril 13, 2005, Plaintiffs had sufficient time to continue withdiscovery under the scheduling order. (Doc. 130.) Under the thirdfactor, even in the absence of willful neglect or unfairprejudice, a district court may have the discretion not toupset a default judgment if the defaulting party fails to presenta meritorious case sufficient to support a finding on the meritsfor the defaulting party. See Id. (emphasis added). AsDefendants discuss, the Defendants have defended and arecontinuing to defend in this action utilizing various theorieswhich they are able to specify, and several important issues anddefenses remain pending in the case. (Doc. 144, pp. 10-11.)Finally, the court finds that there is a general absence ofevidence pointing to bad faith such that the neglect, if any,which occurred here would be excusable. Starting with the court'spermissive language in its order of January 23, 2001 (Doc. 41,pp. 86-87), and the Plaintiffs' requests for additional time toreplead (Doc. 42.), the prolonged nature of this case, caused bystays, parallel litigation, and settlement negotiations, make theDefendants' failure to file answers excusable, especially asPlaintiffs also did not argue that such a default was worthy of a"death penalty sanction" until recently.

Therefore, the court will Deny Defendants, Earl Blackwell, GregOrr, and Mike Lawlor's (hereinafter the "Defendants") Motion forMore Definite Statement (Doc. 131), and will accept Defendants'answers as presently filed while Denying Plaintiffs' Cross-Motionto Strike the Purported "Answers" of the Individual Defendants (Doc's 137).As a result, the court will deny Defendants' Cross-Motion forSummary Judgment as to Liability. (Doc. 138.)

The court does not presently rule on Defendants' Motion forSummary Judgment on Standing (Doc. 146), but while taking suchmotion under consideration in light of its prior rulings and theapplicable law, the court agrees that discovery in which theparties wish to engage should continue post-haste and withflexible scheduling deadlines owing to the complexity of thisaction. Therefore, the court orders that several other steps maybe taken the first of which being that Plaintiffs' Motion for aContinuance Pursuant to Fed.R.Civ.P. 56(f) and for Leave toSupplement the Record (Doc. 153) is Granted and Plaintiffs shouldcontinue discovery with respect to the standing issues. Withrespect to Plaintiffs' Motion to Continue Expert WitnessDesignation Cutoff for Environmental and Due Diligence Experts(Doc. 158) and Motion for Expedited Consideration of such request(Doc. 162), the court finds that the Motion for ExpeditedConsideration (Doc. 162) is Moot, but Grants Plaintiffs' Motionto Continue Expert Witness Designation Cutoff for Environmentaland Due Diligence Experts

(Doc. 158) and orders the parties tofile their expert witness witness designations on or beforeOctober 31, 2005. Furthermore, with respect to Plaintiffs' Motionfor Leave to Depose Witnesses Confined in Prison (Doc. 155) andMotion for Expedited Consideration of such request (Doc. 164),once again the court finds the latter (Doc. 164) is Moot, butGrants Plaintiffs' Motion for Leave to Depose Witnesses Confinedin Prison (Doc. 155).

Accordingly, it is hereby

ORDERED that Defendants, Earl Blackwell, Greg Orr, and MikeLawlor's (hereinafter the "Defendants") Motion for More DefiniteStatement (Doc. 131), and Plaintiffs' Cross-Motion to Strike thePurported "Answers" of the Individual Defendants (Doc. 137) andCross-Motion for Summary Judgment as to Liability (Doc. 138) areDENIED; it is further ORDERED that while Defendants' Motion for Summary Judgment onStanding (Doc. 146) WILL REMAIN PENDING UNDER CONSIDERATION,Plaintiffs' Motion for a Continuance Pursuant to Fed.R.Civ.P.56(f) and for Leave to Supplement the Record (Doc. 153) isGRANTED; and, it is further

ORDERED that while Plaintiffs' Motions for ExpeditedConsideration (Doc. 162 and 164) are MOOT, the underlying Motionsfor Leave to Depose Witnesses Confined in Prison (Doc. 155) andMotion to Continue Expert Witness Designation Cutoff forEnvironmental and Due Diligence Experts (Doc. 158) are GRANTEDand the court GRANTS that the presently active Scheduling Order(Doc. 130) is AMENDED to permit parties to file their expertwitness designations on or before October 31, 2005.