

Mulacek v ExxonMobil Corp.

2022 NY Slip Op 34560(U)

September 13, 2022

Supreme Court, New York County

Docket Number: Index No. 655333/2021

Judge: Barry R. Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

PHILIPPE E. MULACEK, FIVE STERLING LP, THE STERLING MULACEK TRUST, and PETROLEUM INDEPENDENT & EXPLORATION LLC and GERARD RENE JACQUIN,

Plaintiffs,

- v -

EXXONMOBIL CORPORATION and EXXONMOBIL CANADA HOLDINGS ULC,

Defendants.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and values: 655333/2021, (blank), 001

DECISION & ORDER ON MOTION

HON. BARRY R. OSTRAGER

ExxonMobil Corporation and ExxonMobil Canada Holdings ULC (together "Exxon") have moved for an Order, pursuant to CPLR 3211(a)(1), (3), and (7), dismissing the Complaint in this action (NYSCEF Doc. No. 5) based on documentary evidence, plaintiffs' lack of standing, and failure to state a cause of action. Plaintiffs, former shareholders of InterOil Corporation ("InterOil"), seek damages for breach of contract arising out of a 2017 transaction pursuant to which Exxon acquired all outstanding InterOil stock for \$45 per share payable in Exxon stock, plus additional consideration contingent upon a post-closing estimate of the potential resources in certain oil and gas fields in Papua New Guinea.

After the stock purchase agreement closed, each InterOil shareholder had the right to receive a Contingent Resource Payment ("CRP") pursuant to the terms of the CRP Agreement dated as of February 22, 2017 (NYSCEF Doc. No. 14, Ex F). Any individual holder of InterOil shares or any group of holders of InterOil shares could forego the right to receive a CRP and instead initiate a dissenter's rights proceeding for the determination of the value of their InterOil

stock under Canadian law. Pursuant to the CRP Agreement, Exxon deposited potential contingent consideration into an escrow account, and former InterOil shareholders (except those who exercised dissenter's rights) became the "Holders" of Escrow Verification Receipts ("EVRs") evidencing their right to obtain a CRP. Passing many of the irrelevant arguments advanced by plaintiffs, the motion is, in all respects, granted.

The plaintiffs failed to dissent to any aspect of the transaction until this action was filed in September 2021, after other dissenting shareholders were unsuccessful in challenging the transaction. The relevant portion of Section 8.05 of the CRP agreement reads:

Notwithstanding anything to the contrary in this Agreement, only the Required Holders or the Holder Committee (with Required Holder approval) will have the right, on behalf of all Holders, by virtue of or under any provision of this Agreement, to institute any action or proceeding at law or in equity or in bankruptcy or otherwise upon or under or with respect to this Agreement, and no individual Holder or other group of Holders will be entitled to exercise such rights.

Thus, Section 8.05 of the CRP Agreement expressly prohibits individual shareholders, or small groups of shareholders such as plaintiffs, from initiating any action to enforce or challenge the CRP. Under the unambiguous terms of Section 8.05 of the CRP Agreement, the CRP can be challenged only by Required Holders and the Holder Committee (with Required Holder approval). The plaintiffs do not allege that they are Required Holders (i.e., the record Holder or Holders of more than 25% of EVR's). Nor is any plaintiff a member of the "Holder Committee" as defined in Section 5.01 of the CRP Agreement. Consequently, plaintiffs lack standing to belatedly pursue the claims they have asserted in their Complaint. In addition, the relevant agreements contain non-judicial dispute resolution procedures (see CRP Section 3.05), which is an additional and independent reason to dismiss the Complaint.

Accordingly, it is hereby

ORDERED that the motion by defendants ExxonMobil Corporation and ExxonMobil Canada Holdings ULC to dismiss this action in its entirety is granted, and the Clerk is directed to enter judgment accordingly. The September 22, 2022, oral argument and any other appearance is cancelled.

Dated: September 13, 2022



BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: