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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

PACIFIC GAS AND ELECTRIC
COMPANY et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN MATEO
COUNTY,

Respondent;

HIND BOU-SALMAN et al.,

Real Parties in Interest.

A143049

(San Mateo County
Super. Ct . No. JCCP-4648-C)

PG&E CORPORATION et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN MATEO
COUNTY,

Respondent;

HIND BOU-SALMAN et al.,

Real Parties in Interest.

A143050

(San Mateo County
Super. Ct . No. JCCP-4648-C)

The consolidated petitions submitted by Pacific Gas and Electric Company, PG&E Corporation (together PG&E), and certain officers and directors of PG&E (collectively petitioners), challenge the superior court's August 4, 2014 order lifting the stay of the underlying derivative action pending resolution of federal criminal proceedings against PG&E.

The underlying derivative shareholder suits arise from the September 9, 2010 San Bruno rupture of a PG&E gas transmission line. That tragedy ultimately led to more than 100 tort actions against PG&E involving more than 470 plaintiffs. In December 2011 PG&E admitted that it had been negligent by using a pipeline with a defective weld and that this negligence had been the proximate cause of the September 9 rupture. This admission facilitated settlements of most of the tort suits stemming from the rupture.

On October 8, 2010, PG&E received a demand from the executrix of Francis McGarvey's estate, that it conduct an investigation into alleged breaches of fiduciary duty by its directors and officers, related to the September 9, 2010 gas line rupture. PG&E's Board of Directors declined to conduct an investigation at that time in light of various other ongoing investigations, lawsuits, and regulatory proceedings. Other shareholders subsequently filed in superior court a series of derivative suits against PG&E, alleging that they were excused from making a demand on the company because doing so would be futile.¹ On September 23, 2013, the court temporarily stayed the suits except for the purposes of filing a consolidated complaint and engaging in settlement discussions. An amended consolidated complaint was filed on June 10, 2014.

On April 1, 2014, the United States Attorney filed a criminal indictment against PG&E, followed by a superseding indictment on July 30, 2014. The superseding indictment alleges, among other willful violations, that PG&E obstructed the National Transportation Security Board's investigation, violated the Natural Gas Pipeline Safety Act, through its employees, who knowingly and willfully failed to gather relevant safety data, maintain accurate repair records, failed to identify and evaluate potential threats, and failed to prioritize particular pipeline segments as high risk.

The amended consolidated derivative complaint alleges that the gas line rupture stemmed from the corporate defendants' "knowing and systematic failure to properly maintain their gas transmission lines, ultimately resulting in the September 9, 2010

¹ In addition to the state court suits, a federal shareholder derivative complaint was filed, which was stayed on April 15, 2013.

explosion of gas transmission line 132 in San Bruno, California killing eight, injuring dozens and leaving a community physically destroyed.” It alleges “intentional or reckless breaches of [the individual defendants’] fiduciary duties that caused substantial losses to the Company.” It summarizes the allegations of the federal indictment against PG&E and asserts that the indictment “mirrors the allegations in this amended complaint and results from the widespread and pervasive violations of federal law that PG&E willfully and knowingly committed over a period of two decades.” Thus, there is significant overlap between the allegations in the federal indictment and those in the amended complaint in the derivative actions.

On May 19, 2014, PG&E, joined by the individual defendants, filed a motion to continue the stay of the derivative actions. The plaintiffs filed a motion to dissolve the stay. PG&E contended that if discovery were allowed to proceed it would be seriously harmed due to the pending criminal indictment. The plaintiffs argued that their need for discovery outweighed any harm to PG&E. Applying the balancing test set forth in *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, the superior court lifted the stay on August 4, 2014.

On September 15, 2014, the superior court reiterated its decision not to stay the derivative suit pending resolution of the criminal action, but did stay the proceedings pending its ruling on PG&E’s anticipated demurrer to the consolidated complaint. On September 23, 2014, petitioners filed their writ petitions challenging the denial of their requests for a more extended stay. The next day this court consolidated those petitions and directed petitioners to notify this court when the superior court ruled on the demurrer or entered any related orders affecting the stay.

On September 1, 2015, petitioners’ counsel informed this court that on August 28, 2015 the superior court entered an order overruling PG&E’s demurrers. On September 3, 2015, we temporarily stayed all proceedings in the consolidated derivative suit, requested informal briefing, and notified the parties, pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, that if circumstances so warranted, we might issue a

peremptory writ in the first instance. Informal briefing was completed on September 24, 2015.

After reviewing the parties' briefs, we conclude that the derivative suits must be stayed pending the outcome of the criminal proceedings. Unlike the situation in *Avant! Corp.*, *supra*, 79 Cal.App.4th 876, a defamation action against a corporation facing related criminal charges, in this derivative action the plaintiffs—suing on behalf of PG&E—seek to prove many of the same facts on which the federal authorities seek to impose criminal liability on PG&E. In determining whether to stay the present action, the court is not balancing the interests of another party against the interests of the corporate defendant, as in *Avant! Corp.*, but considering only the interests of PG&E, on behalf of which the derivative action is brought (see, e.g., *Hogan v. Ingold* (1952) 38 Cal.2d 802, 810-812; *Cotton v. Expo Power Systems, Inc.* (2009) 170 Cal.App.4th 1371, 1380), and which is the defendant in the criminal proceedings. The prosecution of the derivative claims, in which those acting on the corporation's behalf seek to establish the culpability of corporate agents and directors giving rise to the corporation's liability, directly conflicts with the corporation's efforts to avoid criminal liability. The corporation's current directors, charged with controlling corporate litigation (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108), have reasonably determined that it is therefore in PG&E's best interests to defer proceedings in the derivative action until the criminal proceedings have been concluded. We see no basis in the record before us to disagree with this determination. Other courts in similar situations have come to the same conclusion. (E.g., *South v. Baker* (Del Ch. 2012) 62 A.3d 1, 14; *Breault v. Folino* (C.D. Cal., Mar. 15, 2002, No. 5A CV 01-0826 GLT (ANx) 2002 U.S. Dist. Lexis 25587, pp. *3-4 [a derivative suit may only proceed when it is in the company's best interest]; *In re E.F. Hutton Banking Practices Litigation* (S.D.N.Y. 1986) 634 F.Supp. 265, 268-270 [where there are 14 pending suits in which directors, who would be named as defendants in a derivative suit, are key witnesses, a disinterested board could decide it would be best not to subject them to further litigation designed to undercut their veracity and general

effectiveness as witnesses]; *Wilson v. Tully* (N.Y.App.Div. 1998) 243 A.D.2d 229, 236 [where corporation is involved in multiple lawsuits and board members would be important witnesses in those suits, board could reasonably decide to vigorously defend the company in those suits rather than pursuing a “diametrically opposed” derivative action].)

CONCLUSION

The *Palma* procedure is appropriate “when petitioner’s entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue.” (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241.) Here the relevant issues have been fully explored in the informal briefing already submitted. No purpose would be served by further briefing or argument. Let a peremptory writ of mandate issue commanding respondent superior court to set aside and vacate its order, filed August 4, 2014, in *PG&E San Bruno Fire Cases*, San Mateo County Superior Court case No. JCCP 4648-C, and to enter a new order granting the requested stay pending conclusion of the federal criminal proceedings.²

² The application of James E. Brandt to appear *pro hac vice* is granted. The September 24, 2015 motion for judicial notice is granted with respect to exhibit 1 only (superseding indictment). (Evid. Code, §§ 452, 459.) The other requests that the court take judicial notice, filed respectively on September 14, 2015 and September 24, 2015, are denied as irrelevant.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.