because the contract between Konica and COPI requires written assignment. While this is an accurate statement, I find Konica has acquiesced to the arrangement in fact and would be estopped from asserting otherwise. For over two years it has conducted business with COPI(DE) knowing COPI was the signatory for the dealer agreement. A party to a contract may waive a right under the terms of the contract. ***Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.***, Del. Supr., 297 A.2d 28, 33 (1972); ***Reeder v. Sanford School***, Del. Super., 397 A.2d 139, 141 (1979). That party simply must know of that right and intend to waive it. ***Id.***

The evidence suggests Konica both knew of the written assignment requirement and intended to waive it in doing business directly with COPI(DE). Accordingly, COPI(DE) did not violate The Act in representing itself as an authorized Konica dealer. *See id.* Thus, Counterclaimants cannot succeed on the merits. This obviates the need to discuss the two additional criteria a court weighs in granting a preliminary injunction. I deny Counterclaimants' request for a preliminary injunction enjoining COPI(DE) from representing itself as a Konica authorized dealer.

(c) COPI(DE)'s Use of the Word "Smart" in its Trade Name "SmartCopy"

Counterclaim Plaintiffs insist COPI(DE)'s use of "Smart" in its trade name "SmartCopy" for its cost-per-copy plan confuses customers to the detriment of SBS and Kelly. SBS uses the trade name "SmartPlan" for its version of the cost-per-copy plan common to the reprographics industry. They claim the term "Smart" violates The Act, 6 *Del.C.* § 2532(a)(2). *See supra.*

[14] In determining the likelihood of confusion, a court considers several factors: (1) the degree of similarity between the marks, (2) the similarity of the products for which the name is used, (3) the area and manner of concurrent use; (4) the degree of care consumers will likely exercise, (5) the strength of plaintiff's mark, (6) whether there has been actual confusion; and (7) the intent of the alleged infringer to foist his products as those of another. ***Draper***, 505 A.2d at 1290.

First, the marks are no similar more than ***Pepsi-Cola v. Cola-Cola.*** The public is as capable of distinguishing between the two as they regularly do between colas in the supermarket.

Second, the products - pay-per-copy plans - are similar. The trade names advertise a similar, but independent, derived, pay-per-copy plan.

There are some similarities between the plans, but essentially COPI(DE) uses a nationally franchised marketing plan distinct from SBS.

Third, COPI(DE) and SBS use their respective trade names in a common area and manner. Both market pay-per-copy plans in all three Delaware counties to the same type of consumer. COPI(DE) and SBS often compete for the same customer.

Fourth, consumers should not find it difficult to exercise care in distinguishing one plan from another.

Fifth, SBS began marketing its "SmartPlan" a few months before COPI(DE) began its nationally franchised "SmartCopy" campaign.

Sixth, SBS concedes it is unable to determine if there has been actual confusion.

Seventh, COPI(DE) did not begin using "SmartCopy" until after this litigation began. The name is very similar to "SmartPlan," and the product is very similar to its main competitor's. SBS used "Smart" in its pay-per-copy plan trade name before COPI(DE) did. The evidence does not show COPI(DE) necessarily intended to use "SmartCopy" before SBS began using "SmartPlan." Even if it planned to, SBS began using "SmartPlan" before COPI(DE) began with its permutation of "Smart."

COPI(DE) did not intentionally devise a similar name. COPI(DE) bought a franchised nationally development plan without any evidence of intent to overlap a direct competitor's existing plan.

Considering all factors, Counterclaimants do not succeed on the merits of their claim COPI(DE) violated The Act in using "SmartCopy" as a pay-per-copy trade name. SBS is not entitled to injunctive relief.

IV. CONCLUSION

In summary, I permanently enjoin Kelly from violating the restrictive covenants and from using COPI's confidential trade secret information consistent with the September 22, 1995 Temporary Restraining Order. To the extent Rossiter does have confidential COPI information, I permanently enjoin him from its use consistent with the September 22, 1995 Temporary Restraining Order. I enjoin SBS from utilizing any of COPI's confidential information in entering a business transaction with COPI's customers.

I deny Counterclaimants' Motion for a Preliminary Injunction. Until some facts are proved showing actual sales by SBS to COPI(DE) customers who but for Kelly's solicitation would continue to use COPI(DE)'s services and products, no accounting need be rendered. The remaining issues at law may be transferred to Superior Court.

Counsel will submit an agreed form of order consistent with this Opinion within ten days of the date docketed.

IT IS SO ORDERED.

EBY v. SCHROCK FAMILY CORP.

No. 1716-S

Court of Chancery of the State of Delaware, New Castle

July 12, 1996

This motion sought an injunction *pendente lite* to prevent the defending corporation from using income from an alleged joint venture business for any purpose other than ordinary operating expenses or reimbursing the plaintiff. In particular the motion sought to enjoin the corporation from using any venture income from paying its attorney fees in this suit.

The court of chancery, per Chancellor Allen, denied the plaintiff's motion holding that the matter cannot procedurally support the issuance of an injunction because (1) the record appeared insufficient to conclude that no material fact is in dispute with respect to a claim that payment of attorneys fees constitutes a violation of the joint venture agreement, and (2) plaintiffs failed to show a reasonable risk of irreparable injury if the injunction was not issued.

1. Corporations ⇐ 189(14)

Even if it is an arguable expense of the corporation itself, the legal fees accrued in defending a corporate joint venturer against an injunctive action arising from an alleged joint venture business is not an appropriate expense of a venture for purposes of determining its net income.

2. Judgment ⇐ 181(1)

A partial summary judgment will not be granted if the moving party can not show that are no genuine issues of material facts with

respect to the claim upon which the moving party seeks summary judgment.

3. Corporations ⇐ 549
Equity ⇐ 35
Injunction ⇐ 72

An injunction *pendente lite* against the expenditure by a defending corporate joint venturer of any income from an alleged joint venture business for any purpose other than the ordinary expenses of operating that business or the payments of amounts on the substantial amount allegedly advanced by the plaintiff towards the construction of the joint venture business is in the nature of an ancillary injunction designed to protect a court's jurisdiction or a property right of a plaintiff.

4. Corporations ⇐ 165
Secured Transactions ⇐ 168

An injunction *pendente lite* against the expenditure by a defending corporate joint venturer of any income from an alleged joint venture business for any purpose other than the ordinary expenses of operating that business or the payments of amounts on the substantial amount allegedly advanced by the plaintiff towards the construction of the joint venture business is similar to a creditor's request for a prejudgment injunction because even though the contract between the parties is called a joint venture agreement and their relationship surely entails some aspects of fiduciary relations, the plaintiff joint venturer held the deed to the property on which the structure representing their credit was erected.

5. Injunction ⇐ 14

At a minimum, in order to be awarded an injunction, plaintiff must show a reasonable risk of irreparable injury if the injunction is not issued.

Elizabeth M. McGeever, Esquire, of Prickett Jones Elliott Kristol & Schnee, Wilmington, Delaware; and John H. Williams, Jr., Esquire, of Law Offices of John Williams, P.A., Wilmington, Delaware, for plaintiffs.

Joshua M. Twilley, Esquire, and Louann Vari, Esquire, of Twilley, Street, Rich, Braverman & Hindman, P.A., Dover, Delaware, for defendants.

ALLEN, *Chancellor*

The suit is one by alleged joint venturers against the corporation with whom they have contracted ("Schrock Family Corporation" or "SFC"). It seems among other relief an accounting of joint venture funds and a declaration of the termination of the venture and the legal rights of plaintiffs with respect to properties used in the business. In addition to the corporate joint venturer, defendants are four individuals who serve as the majority of the directors of SFC. They are sisters of plaintiff Margaret Eby.

The pending motion is procedurally unusual. It seeks an injunction *pendente lite* against the expenditure by defendants of any income from the alleged joint venture business for any purpose other than the ordinary expenses of operating that business or the payment of amounts on the substantial amount allegedly advanced by plaintiffs towards the construction of the joint venture business. Specifically it seeks to enjoin SFC from using any venture income from paying its attorneys fees in this suit. The basis for this application is that until the credit advanced by plaintiffs is repaid, the joint venture agreement restricts the expenditure of joint venture income as ordinary and proper expenses of securing the Inn; that payment of attorneys fees in this suit is not an ordinary or proper expense of the joint venture (even if it is an appropriate expense of SFC); and if this relief is not now granted plaintiffs will be forced to incur the risk that SFC will later be unable to restore these funds. In support of this motion there is little of evidentiary weight supplied. Rather plaintiffs rely on what they take to be the strength of their argument on the merits of their claim.

I note that the amended complaint does not advance allegations concerning the payment of attorneys fees nor does it request an injunction respecting any such payments. It does, however, in the alternative, seek the appointment of a receiver for SFC.

[1] With respect to the merits of this preliminary motion, I am inclined to think that, considering the matter generally, plaintiffs have the better side of this issue -- a reasonable prospect of ultimately showing that application of cash flow of the Inn to pay SFC's legal fees in this suit constitutes a violation of the joint venture agreement. The joint venture agreement, in the form appended to the amended complaint (if unamended) appears on its face to limit the power of the Corporation to pay out "net income" to venturers except to plaintiffs so long as their advance has not been repaid. It is alleged (and doesn't seem to be contested) that plaintiffs have advanced sums that have not been repaid. (Indeed, apparently a major source of disagreement is how much

plaintiffs did and were authorized to advance). While some legal fees may of course constitute expenses of the business (imagine for example defense of a personal injury action arising from a patron falling at the Inn), it is quite likely that defense of this suit, while arguably an appropriate expense of the corporation itself, is not an appropriate expense of the venture for purposes of determining its "net income". But while I am frank to acknowledge this substantive reaction to the argument advanced, I conclude that the matter cannot procedurally support the issuance of an injunction now.

[2] Plaintiffs did not characterize their motion as a motion for summary judgment, in part I suppose because there is no claim in the amended complaint concerning it and in part because they have submitted no affidavits establishing the uncontested nature of all relevant facts. In their reply brief, however, plaintiffs do characterize their request for an injunction now as a motion for partial summary judgment. But considering in those terms the record appears insufficient for me to conclude finally at this time with requisite confidence that no material fact is in dispute with respect to a claim that payment of attorneys fees constitutes a violation of the joint venture agreement.

[3] In my opinion, the relief sought is in the nature of an ancillary injunction designed to protect the court's jurisdiction or a property right of plaintiff. *See E.I. DuPont de Nemours and Company, Inc. v. HEM Research, Inc.*, 576 A.2d 635 (Del.Ch. 1989). In *HEM* the court refused to enter a preliminary injunction to protect the plaintiffs ability to execute any judgment it might achieve in the face of an allegation that defendant was on the verge of insolvency. In *Brinati v. TeleSTAR, Inc.*, C.A.8118 (Del.Ch. September 3, 1985) the court granted a preliminary order enjoining a corporation subject to a contractual claim of a right to liquidate the corporation, from expending sums for certain purposes. In *Brinati* the court carefully evaluated affidavit evidence concerning solvency of defendants and concluding in the circumstances that an injunction was appropriate.

[4] The pending motion is similar to a creditor's request for prejudgment injunction because even though the contract between the parties is called a joint venture agreement and their relationship surely entails some aspects of fiduciary relations, the economic reality of the joint venture is that plaintiffs are very much like secured creditors. Plaintiffs hold a deed to the property on which the structure representing their credit was erected, but that land is subject to an option held by SFC to buy the land back. Under the deal SFC can buy back the land by paying off the credit extended plus interest. What is in dispute is how

much was legitimately spent or advanced and what is the option exercise price.

[5] Thus the preliminary order sought is in aid of recovery of amounts claimed to be due to SFC. But at a minimum in order to be awarded an injunction at this or a later stage plaintiffs must show a reasonable risk of irreparable injury if the injunction is not issued. This plaintiffs have not done or attempted to do. Thus, for example, it is perfectly possible that SFC is fully able to satisfy any judgment that may be entered in this action; it is possible that the value of the Inn is such that a commercial refinancing would satisfy the alleged debt owed to plaintiffs would be feasible; or that the individual defendants will contribute capital to SFC if need be once the amount of any debt to plaintiffs is adjudicated. Thus I cannot determine that plaintiffs face a prospect of irreparable injury from SFC using cash flow from the Inn to pay SFC's attorney in this suit. That may later be determined to have been a violation of the joint venture agreement and if so defendants shall be liable for any additional damages it can be shown to have caused, but that prospect does not constitute grounds to issue an injunction in the procedural posture of the case at this point.

For these reasons plaintiffs' motion will be denied. It is so ordered.

HACK v. LEARNING CO.

No. 14,657

KAS v. LEARNING CO.

No. 14,684

Court of Chancery of the State of Delaware, New Castle

October 29, 1996

The parties, through plaintiffs' counsel, forwarded a proposed final order dismissing the actions on the grounds of mootness. The proposed final order was based on a previous order of the court of chancery, per Vice-Chancellor Jacobs, that approved sending of a notice advising TLC

stockholders that these actions would be dismissed on mootness grounds, and summarizing the terms of the proposed final order.

The court of chancery, per Vice-Chancellor Jacobs, declined to approve the proposed final order even though it contained all of the summarized terms and was not objected to by the class.

1. Compromise and Settlement ⇐ 51, 57
Courts ⇐ 99(1), 99(3)

If a court is partly responsible for setting in motion an erroneous process, fairness requires a more developed explanation of why a proposed final order, even though it is not objected to, cannot be entered in its present form.

2. Compromise and Settlement ⇐ 6(1), 55
Corporations ⇐ 520

In a dismissal based on a negotiated settlement, the class receives consideration for the release of claims and the court approves fees based upon the benefit conferred by the settlement.

3. Compromise and Settlement ⇐ 10, 11, 13

A proposed dismissal cannot be structured as a negotiated settlement unless the dismissal is predicated on the basis of a negotiated settlement.

4. Compromise and Settlement ⇐ 51, 55

The court approval of a release of claims warrants an adjudication or a settlement of the claims.

5. Compromise and Settlement ⇐ 2
Corporations ⇐ 520

A settlement is a bargained-for dismissal and release of claims in exchange for consideration flowing to the class.

6. Compromise and Settlement ⇐ 51, 56
Corporations ⇐ 520
Courts ⇐ 87

If there is a bargained-for dismissal and release of claims in exchange for consideration flowing to the class, then it is appropriate for the final order to contain a release of claims and to provide for certification of the class and for court-awarded attorneys' fees.

7. Compromise and Settlement ⇐ 70
Corporations ⇐ 520, 523

A proposed final order containing language pertaining to a certification of the class, a release of claims, and a provision for court-awarded fees to plaintiffs' counsel clearly evidences that the parties intended to treat the dismissal as if it were a settlement.

8. Compromise and Settlement ⇐ 71
Courts ⇐ 520
Pretrial Procedure ⇐ 552

In a dismissal based on mootness, the court determines nothing and approves nothing except that the claims are being dismissed as moot. In that context, no claims are released, no class is certified, and no attorneys fees are awarded by any order of the court.

9. Corporations ⇐ 520
Pretrial Procedure ⇐ 552

In addition to satisfying the court that the case is moot, the only procedural requirement is that the shareholders be informed that the action will be dismissed on that basis.

10. Corporations ⇐ 189(14), 214, 520, 525
Pretrial Procedure ⇐ 552

If, as part of a mootness dismissal, the corporation agrees to pay plaintiffs' counsel attorneys' fees, that is a matter entirely between the corporation and plaintiffs' counsel.

11. Compromise and Settlement ⇐ 68
Corporations ⇐ 189(14), 214, 520, 522

Any payment of plaintiffs' counsel attorneys' fees must be disclosed to the shareholders in advance of any dismissal, because (1) the shareholders are entitled to know the full circumstances surrounding the negotiation of the dismissal and (2) the shareholders must be afforded the opportunity to object to the dismissal or to challenge the fee payment as waste in a separate litigation.

12. Corporations ⇐ 189(14), 214, 520, 522
Pretrial Procedure ⇐ 552

In a dismissal for mootness, the court neither approves nor disapproves a payment of attorneys' fees, and requires only disclosure of the fact that attorneys' fees in the agreed to amount will be paid.

13. Compromise and Settlement ⇐ 55, 56, 71
Corporations ⇐ 520

If a proposed form of a final order is tailored, and appropriate, to a case concluded by way of negotiated settlement, a court will not enter it unless the parties actually proceed to structure and present the proposed dismissal for approval as a negotiated settlement that provides consideration to the class.

14. Compromise and Settlement ⇐ 55, 56, 66, 69

If the parties proceed to structure and present the proposed dismissal for approval as a negotiated settlement that provides consideration to the class, a proceeding is required where the court evaluates that consideration and the value of the claims to be released.

15. Pretrial Procedure ⇐ 552

If the parties propose to structure that dismissal as one based on mootness, then the terms of final order must conform to the requirements for a dismissal based on mootness.

Pamela S. Tikellis, Esquire, of Chimicles, Jacobsen & Tikellis, Wilmington, Delaware, for plaintiffs.

Richard D. Allen, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendant The Learning Company.

James P. Hughes, Jr., Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, for defendant Broderbund Software, Inc.

JACOBS, *Vice-Chancellor*

Last Friday, Ms. Tikellis forwarded to me for signature a proposed final order dismissing these actions on the ground of mootness. A copy of that proposed final order is enclosed. After reviewing the proposed dismissal order, I telephoned Ms. Tikellis and told her I could not sign it and the reasons why.

Ms. Tikellis' surprised reaction prompted me to review the file in this matter. From that review I discovered that on August 14, 1996, I did enter an order approving the sending of a notice advising TLC stockholders that these actions would be dismissed on mootness grounds, and summarizing the terms of the proposed final order. Those terms included a certification of the class, a release of claims, and a provision for Court-awarded fees to plaintiffs' counsel. The Court is advised that the notice was sent to shareholders and that no objections were received. [1-3] Because the Court is partly responsible for setting in motion the process that brings us to this point, fairness requires a more developed explanation of why the proposed final order, even though it is not objected to, cannot be entered in its present form. In essence, the proposed order is tailored to a dismissal based on a negotiated settlement, wherein the class receives consideration for the release of claims and the Court approves fees based upon the benefit conferred by the settlement. But here the parties did not conclude a settlement and they did not predicate the dismissal on that basis. Rather, the basis for the proposed dismissal is that certain events occurred that (the plaintiffs contend) moots their claims.

[4] The problem here is that there is neither an adjudication nor a settlement of claims that would warrant court approval of a release of claims. In short, there is no consideration to the class that could support such a release.

[5-7] As previously noted, a settlement is a bargained-for dismissal and release of claims in exchange for consideration flowing to the class. In such circumstances it is appropriate for the final order to contain a release of claims and to provide for certification of the class and for court-awarded attorneys' fees. The presence of such provisions in the final order being proposed here clearly evidences that the parties intended

to treat this dismissal as if it were a settlement. Paragraph 2, which is a release of claims, describes the claims being released as the "settled" claims", and recites that they shall be "fully, finally and forever compromised, settled...dismissed with prejudice and release..." (emphasis added).

[8-9] In this case, however, there was no "compromise" and no claims have been "settled". The parties instead chose to predicate the dismissal grounds of mootness. But the "model" for a "mootness" dismissal, and its legal consequences, are quite different from a dismissal based on a settlement. In a dismissal based on mootness, the Court determines nothing, and approves nothing except that the claims are being dismissed as moot. In that context, no claims are "released", no class is "certified", and no attorneys fees are awarded by any order of the Court. The only procedural requirement (in addition to satisfying the Court that the case is moot) is that the shareholders be informed that the action will be dismissed on that basis.

[10-12] If, as part of a "mootness" dismissal, the corporation agrees to pay plaintiffs' counsel attorneys' fees, that is a matter entirely between the corporation and plaintiffs' counsel. The only concern of the Court is that any payment of fees be disclosed to shareholders in advance of any dismissal, because (i) the shareholders are entitled to know the full circumstances surrounding the negotiation of the dismissal and (ii) the shareholders must be afforded the opportunity to object to the dismissal or, (should they so decide) to challenge the fee payment as waste in a separate litigation. Thus, in a dismissal for mootness, the Court neither approves nor disapproves a payment of attorneys' fees, and requires only disclosure of the fact that attorneys fees in the agreed to amount will be paid.

[13-15] Because the proposed form of final order is tailored, and appropriate, to a case concluded by way of negotiated settlement, the Court will not enter it unless the parties actually proceed to structure and present the proposed dismissal for approval as a negotiated settlement that provides consideration to the class. That would require a proceeding in which I could evaluate that consideration and the value of the claims to be released. If, however, the parties propose to structure the dismissal as one based on mootness, then the terms of final order must conform to the requirements described above.

The Court regrets that it authorized the sending of notice before discovering the procedural defect in the form of dismissal order. The responsibility for the error must, however, be shared by counsel, who should not have submitted a proposed order of this kind without calling to the Court's attention the "settlement" characteristics of its terms. On

the other hand, the Court should have carefully scrutinized the proposed order before authorizing the sending of notice. In future cases it will.[1]

FINAL ORDER

WHEREAS, the parties have applied to dismiss the above-captioned actions (the "Actions") on the ground that they have become moot;

WHEREAS, it is the desire of all parties to the Actions finally to put to rest all claims asserted in the Actions or otherwise related to or arising out of the transactions and occurrences that gave rise to the Actions;

IT IS, THEREFORE, this ___ day of _____, 1996, ORDERED that:

1. A class of persons and entities who were shareholders of The Learning Company ("TLC" or the "Company") at any time from the close of business on July 31, 1995 through December 27, 1995, including their successors in interest, predecessors, legal representatives, trustees, heirs, assigns or transferees, immediate and remote, and excluding defendants (the "Class"), is hereby certified for all purposes.

2. Any and all claims, rights, demands, actions, causes of action, suits, damages, losses, obligations, matters and issues, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, material or immaterial, which have been, could have been or in the future can or might be asserted in the Actions based on the facts alleged therein or in any court or proceeding (including, without limitation, any claims arising under state or federal law or the common law) by plaintiffs or any member of the Class, whether individual, class, derivative, representative, legal, equitable or any other type or in any other capacity, which relate in any manner whatsoever, directly or indirectly, to the allegations, facts, events, transactions, occurrences, acts, representations, misrepresentations, omissions, or any other material cause whatsoever, or any series thereof, involved, embraced, set forth, referenced in or otherwise related in any way, directly or indirectly, to the complaints against any of the defendants in the Actions, their families, parent entities, affiliates, associates or subsidiaries and each of their respective present or former officers,

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[1]Nothing will have been lost or wasted if the parties decide to predicate the settlement on mootness grounds, because all that is needed is to conform the order of dismissal to the "mootness" model. Only if the dismissal is formally restructured as a settlement would a re-notice and a formal settlement hearing be required.

directors, stockholders, agents, employees, attorneys, representatives, advisors, investment advisors, investment bankers, commercial bankers, financial advisors, trustees, general and limited partners and partnerships, heirs, executors, personal representatives, estates, administrators, predecessors, successors, assigns, and any other person or entity acting for or on behalf of any defendant ("Settled Claims") shall be fully, finally, and forever compromised, settled, discharged, dismissed with prejudice and released, with the parties to bear their own costs.

3. Plaintiffs' counsel are awarded $_____ in attorneys' fees and expenses to be paid by SoftKey International Inc. by wire transfer as follows : $150,000 on the later of the date this Final Order is no longer appealable if an appeal is not filed, or if an appeal is filed, the date that this Final Order is affirmed (the "Effective Date"); $100,000 within 90 days of the Effective Date; and $100,000 within 180 days of the Effective Date.

4. The Court retains jurisdiction for purposes of enforcing this Order in accordance with its terms.

JOYCE v. CUCCIA

No. 14,953

Court of Chancery of the State of Delaware, New Castle

July 24, 1996

Plaintiffs brought this derivative suit on behalf of a corporation alleging breach of fiduciary duty by the director regarding the company's contractual right to repurchase shares of a deceased shareholder. Initial relief sought was damages, and no claim for specific performance of the repurchase option was made. Defendant-director, as provisional Administrator of deceased shareholder's estate, consented to appointment of a custodian, obviating the need for trial. Plaintiffs disagreed, contending that trial should go forward to determine contract and fiduciary duty claims. Defendants moved to stay the present action in favor of a prior-filed Louisiana action. Plaintiffs filed motion for leave to file a second amended complaint, adding claims for specific performance, and to expedite the proceedings because these claims

implicated the right to control a corporation which required prompt resolution.

The court of chancery, per Vice-Chancellor Jacobs, held that (1) leave to amend will be granted where objections are not raised in proper procedural context, (2) defendants' motion to stay was denied even if first-filed, where defendants intentionally withheld service until after commencement of plaintiffs' suit; and where a *forum non conveniens* analysis favors keeping litigation in Delaware, and (3) plaintiffs' motion to expedite was granted in part and denied in part where Delaware has an interest in the prompt adjudication of claims implicating right to control a corporation; however, the corporation is subject to a standstill order, whereby a custodian will be appointed.

1. Federal Civil Procedure ⇐ 821, 827, 830
   Pleading ⇐ 229, 233

Leave to amend will be granted where defendants did not articulate specific grounds for opposing the amendment, and where substantive dismissal arguments were not fully developed in the briefs, nor were they presented in the proper procedural context, which normally is a motion to dismiss pursuant to Rule 12(b)(6). DEL. CH. CT. R. 12(b)(6).

2. Abatement and Revival ⇐ 4
   Action ⇐ 68, 69(2), 69(4)

If the Louisiana action is a first-filed action in a court capable of doing prompt and complete justice, the court should freely exercise discretion in favor of granting a stay.

3. Abatement and Revival ⇐ 4
   Action ⇐ 68, 69(2)

The literal filing of the first complaint, without more, is not necessarily dispositive of the defendants' motion to stay an action.

4. Action ⇐ 69(2)

The defendants' intentional delay in causing process to be served until after the commencement of the lawsuit that they seek to have stayed is sufficient to defeat defendants' claim that the earlier lawsuit merits first-filed status.

5. Action ⇐ 69(2)

A plaintiff cannot file a complaint, keep that pleading in his back pocket by withholding service and not informing the adverse party of its pendency, and later, after defendant has filed his own, be heard to argue that the first complaint is a first-filed action meriting deference required by *McWane*.

6. Action ⇐ 69(2), 69(4)

A Louisiana court may not be capable of doing prompt justice where there is an upcoming election in the district that is to preside over such action.

7. Action ⇐ 68, 69(2)
Courts ⇐ 28

There are several factors that a court must consider in determining whether an action should be stayed on *forum non conveniens* grounds: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the pendency or non-pendency of a similar action in another jurisdiction, and (5) all other practical considerations that would make the trial easy, expeditious, and inexpensive.

8. Action ⇐ 68
Courts ⇐ 28

For defendants to prevail on motion to stay on *forum non conveniens* grounds, they must carry the burden of showing that they would be subjected to undue hardship and inconvenience if forced to litigate in Delaware.

9. Courts ⇐ 85(3)
Federal Civil Procedure ⇐ 1781
Parties ⇐ 24

Indispensable party objections under Rule 19 and jurisdictional objections under Rule 12(b)(6) should be raised in their proper procedural context, which is directly on a motion to dismiss, not as arguments in support of motion to stay. DEL. CH. CT. R. 12(b)(6), 19.

10. Corporations ⇐ 283(3)

Even where plaintiffs allege no cause of action under section 225, a specific performance claim which implicates the question of control of a Delaware corporation, by its nature implies that Delaware has an interest in the prompt adjudication of such disputes. DEL. CODE ANN. tit. 8, § 225 (1991 & 1996 Supp.).

11. Corporations ⇐ 283(3)

Where plaintiffs' claims implicate control of a Delaware corporation, they should be determined on a reasonably prompt basis.

12. Corporations ⇐ 283(3)

Plaintiffs chosen manner of proceeding, the fact that the corporation at issue is subject to a standstill order, and that a custodian will be appointed suggest that there is no dire urgency that requires immediately scheduling a final hearing as is customary in section 225 cases. DEL. CODE ANN. tit. 8, § 225 (1991 & 1996 Supp.).

Kenneth J. Nachbar, Esquire, and Katherine R. Witherspoon, Esquire, of Morris, Nichols, Arsht & Tunnel, Wilmington, Delaware; and Jordan D. Hershman, Esquire, Richard S. Sanders, Esquire, and Inez H. Friedman, Esquire, of Testa, Hurwitz & Thibeault, LLP, Boston, Massachusetts, of counsel, for plaintiffs.

Edward B. Maxwell, 2nd, Esquire, S. David Peress, Esquire, and James P. Hughes, Jr., Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, for defendants.

JACOBS, *Vice-Chancellor*

This action involves a dispute between the shareholders of CTC Minerals, Inc., an oil and gas company incorporated in Delaware and located in New Orleans, Louisiana ("CTC" or "the company"). CTC was founded in 1989 by plaintiff Roland J. Joyce, a Massachusetts resident ("Joyce") and the late C.T. Carden ("Carden") a resident of New Orleans. Joyce and Carden owned or controlled 50% of CTC's outstanding shares. After Mr. Carden died in September, 1995, his stepson, defendant L. Jay Cuccia ("Cuccia"), who is the provisional Administrator of Mr. Carden's estate and a CTC director, has managed the company on a day-to-day

basis. Shortly after Mr. Carden's death, disputes arose between Messrs. Joyce and Cuccia over the governance of CTC and the company's contractual right to repurchase Mr. Carden's CTC shares. This action, and another lawsuit brought by Mr. Cuccia (on behalf of the Carden estate) against Mr. Joyce in the Louisiana District Court, Succession of C.T. Carden,et. al. v. Joyce, La. Dist. Ct., C.A. No. 96-11004 ("the Louisiana action"), are two manifestations of the ongoing hostility between these parties.

Presently pending before this Court are three motions: (i) the defendant's motion to stay this action in favor of the Louisiana action, (ii) the plaintiffs' motion for leave to file a second amended complaint, and (iii) the plaintiffs' motion to expedite these proceedings. For the reasons discussed below, the motion for leave to amend will be granted, the motion to stay will be denied, and the motion to expedite will be granted in part and denied in part.

1. FACTS

To understand the facts that relate to these motions, a discussion of the background leading up to the dispute, as well as the procedural history of this case, is helpful. The facts are recited here in skeletal form, and in the interest of brevity no attempt is made to be comprehensive.[1]

Before Mr. Carden died, he and Mr. Joyce had entered into shareholders agreements in 1989 and 1994 providing, inter alia, that CTC would be entitled to repurchase the shares owned by Mr. Carden or Mr. Joyce if either died. After Mr. Carden died and a third director had resigned, Messrs. Cuccia and Joyce became CTC's sole directors. By that point the relationship between these two men had begun to sour.

In March of this year, Mr. Joyce submitted a board resolution calling for the repurchase by CTC of the shares owned by Mr. Carden's estate. That repurchase, if approved, would have resulted in Mr. Joyce becoming the sole owner of CTC, and Mr. Cuccia and the Carden estate being eliminated (respectively) as a director and stockholder. Mr. Cuccia, in his capacity as a director, voted against that resolution, thus blocking the repurchase. Subsequently, Mr. Joyce submitted a second resolution that would have authorized the company to borrow money from Mr.

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[1]Apparently unable to resist that urge, the parties managed to amass briefs that totaled over 120 pages, and which, when added to the affidavits, appendices, and other documents submitted on these relatively straightforward motions, resulted in a pile of paper several inches high.

Joyce to pay off a loan then in default from a major creditor (RIMCO). Mr. Cuccia voted against that resolution as well.

Four days after Joyce proposed his first resolution, Mr. Carden's widow and Mr. Cuccia, on behalf of the Carden estate, filed the Louisiana action against Mr. Joyce. In his Louisiana complaint, Mr. Cuccia claims (inter alia) that CTC has no valid contractual entitlement to repurchase the Carden estate's shares, that any such repurchase would be harmful to CTC, and that in proposing the stock repurchase Mr. Joyce violated his fiduciary duties to CTC and the Carden estate. Importantly, Mr. Cuccia's counsel instructed the Louisiana Court to withhold formal service of the Louisiana complaint. Only after the complaint in this action was filed was service in Louisiana later effected. According to Mr. Cuccia's counsel, service of the Louisiana complaint was withheld to enable the dispute to be resolved without further litigation.[2] In any event, the existence of the Louisiana action did not become known to the plaintiffs until after they had commenced this Delaware action.

On April 19, 1996, approximately one month after the filing of the Louisiana action, Mr. Joyce filed this Delaware action against Mr. Cuccia, both individually and as executor of the Carden estate. The complaint, as originally filed, alleged that Mr. Cuccia had breached his fiduciary duties by voting against the resolution that would have resulted in paying off the RIMCO debt. The primary relief sought was damages, and no claim for specific performance of the "repurchase option" provisions of the shareholders agreements was asserted. Joyce did move for a temporary restraining order, but that motion was mooted by Mr. Cuccia arranging to pay off the RIMCO loan before the TRO motion could be scheduled.

Nothing else occurred for almost six weeks, until May 31, 1996, when Mr. Joyce filed an amended complaint (i) joining as additional parties plaintiff Messrs. Robert Lofblad and Peter Harvey, whose CTC shares Joyce holds as nominee; and (ii) adding the claim that Mr. Cuccia's refusal to support Mr. Joyce's March resolution constituted a breach of his fiduciary duties, and reflected a deadlock necessitating the

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[2]At the same time the Louisiana action was filed, a second, identical complaint was filed by Cuccia in a different Louisiana jurisdiction (parish), which also was not served. The plaintiffs attempt to portray the filing of this second lawsuit (and its nondisclosure to this Court) as forum shopping. Mr. Cuccia explains that the second lawsuit was filed out of an abundance of caution because it was uncertain in which parish the late Mr. Carden resided. In any event, Mr. Cuccia says, the second lawsuit will be dismissed. Because the motion to stay will be denied on other grounds, it is unnecessary to delve into Mr. Cuccia's motives for filing two separate lawsuits.

appointment of a custodian pursuant to 8 Del. C. §226.[3] Again, however, the amended complaint did not plead any claim for specific performance of the shareholders agreements.

At a scheduling conference held on June 11, 1996, the Court scheduled a three day trial in August on the issue of whether a custodian should be appointed. The next day, Mr. Cuccia's counsel wrote a letter advising the Court that Cuccia had decided to consent to the appointment of a custodian, thereby obviating the need for a trial. Plaintiff's counsel disagreed, taking the position that the trial should nonetheless go forward to determine the plaintiffs' contract and fiduciary duty claims; specifically, whether the repurchase option had been properly exercised and if not, whether Mr. Cuccia had wrongfully blocked the exercise. The Court vacated the scheduled trial on the basis that its sole purpose would have been to determine whether a custodian should be appointed--an issue that is now conceded.

Thereafter, the defendants moved to stay this action (except as to the appointment of a custodian) in favor of their prior-filed Louisiana action. In response, the plaintiffs filed motion for leave to file a second amended complaint and to expedite the proceedings. The motion for leave to amend seeks to add claims for specific performance of the repurchase option provisions of the 1989 and 1994 shareholders agreements. The motion to expedite contends that these claims implicate the right to control CTC, and that the prompt resolution of those claims would break the director and shareholder deadlock currently plaguing CTC, and also would obviate the need for a custodian.

Other relevant facts are discussed where pertinent to the Court's analysis of the three pending motions, to which I now turn.

II. THE MOTION TO AMEND

The motion for leave to file the second amended complaint rests in a somewhat odd procedural posture. Although the defendants oppose that motion, neither side has squarely briefed that issue, yet despite that, the arguments advanced in support of (and in opposition to) the other two pending motions implicitly presuppose that the amendment will be granted. For this reason, the motion to amend is addressed first.

[1] Because the defendants do not articulate specific grounds for opposing the amendment, the Court can only speculate as to their

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[3]The amended complaint also alleged conduct by Mr. Carden, and later by Mr. Cuccia, claimed to amount to pervasive and ongoing breaches of their fiduciary duties to CTC and Mr. Joyce.

position. The defendants do argue, in opposition to the motion to expedite and in support of their motion to stay, that the proposed complaint does not state any claims upon which specific performance relief could be granted. However, those substantive dismissal arguments were not fully developed in the briefs, nor were they presented in the appropriate procedural context, which normally is a motion to dismiss pursuant to Rule 12(b)(6). Such obliquely presented objections cannot stand as an obstacle to an otherwise clear entitlement to amend. Accordingly, leave to amend will be granted.

III. THE MOTION TO STAY

I next consider the motion to stay. The defendants predicate that motion upon two grounds. The first, based upon McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co., Del. Supr., 263 A. 2d 281, 283 (1970)("McWane"), is that this action should be stayed because the Louisiana action is a "prior action pending...in a court capable of doing prompt and complete justice, involving the same parties and the same issues." McWane, 263 A.2d at 283. Alternatively, the defendants argue that if McWane is deemed inapplicable, this action should nonetheless be stayed on traditional forum non conveniens grounds. For the following reasons, the Court is unable to accept either argument.

A. The "First Filed Action" Argument

[2] The law is clear, and the parties do not dispute, that if the Louisiana action is a "first filed" action in a "court capable of doing prompt and complete justice," the Court should freely exercise its discretion in favor of granting a stay. McWane, 263 A.2d at 283. The parties advance a multitude of arguments favoring--and opposing--the application of that rule.

The plaintiffs contend that McWane does not apply for several reasons. First, they argue that because Mr. Cuccia made no effort to serve the complaint in the Louisiana action until after this action had been filed, the Louisiana action should not be deemed "first filed." Second, plaintiffs urge that even if the Louisiana action were regarded as first filed, it does not involve the same issues or parties as this action. Third, the plaintiffs contend that in any event, the Louisiana court is incapable of doing prompt and complete justice, because (i) the dispute in this case involves who will control (or, more precisely, who will own) CTC--an issue that requires a prompt, expedited judicial determination; (ii) the Louisiana court is incapable of providing such expedited

treatment, because an election will be held this coming Fall to select the judge who would hear the Louisiana action; and (ii) in all probability no trial would be scheduled or held for many months, due to the newly-elected judge's anticipated need for time to become familiar with the requirements of the position and the caseload.

The defendants dispute these contentions, and assert that all of McWane's requirements are satisfied here. The defendants contend that what matters legally is which of the two competing lawsuits was first filed, not which was first served, and by that measure the Louisiana lawsuit was clearly the first filed action. Defendants also argue that the parties in both lawsuits are identical, but an indispensable party would be missing in this Delaware action on the specific performance claim -- namely, Mrs. Carden, over whom this Court would have no in personam jurisdiction. Moreover, although the plaintiff's specific performance claims are not presently before the Louisiana court, they soon would be, because they must be asserted as compulsory counterclaims in the Louisiana action. Finally, the defendants dismiss as unsupported speculation the plaintiffs' assertion that a trial in Louisiana will be unduly delayed, and argue that any delay is attributable primarily to Mr. Joyce's filing dilatory motions in the Louisiana forum.

It is unnecessary to address all these issues, because I find that the defendants' McWane argument fails in at least two fundamental respects.

First, the Louisiana complaint was filed with explicit instructions to "PLEASE WITHHOLD SERVICE," and no steps were taken to serve it until after the complaint in this case was served and filed. This suggests that the Louisiana action, when filed, may have been intended not so much as a bona fide vehicle to seek judicial relief but, rather, as leverage to improve Mr. Cuccia's negotiating position against Mr. Joyce. Only after Mr. Joyce beat Mr. Cuccia to the punch by filing this Delaware action did he make any attempt to serve process in the Louisiana action. Had this Delaware lawsuit not been filed, it is far from certain that Mr. Cuccia would have even prosecuted his action in Louisiana.

[3-4] Mr. Cuccia, not surprisingly, disagrees. He argues that the delay in serving process is immaterial, because (he claims) the sole critical issue is which complaint was literally first "filed", and on that score his Louisiana action clearly qualifies. I cannot agree. The filing of the first complaint, without more, is not necessarily dispositive under McWane. Here, the defendant's intentional delay in causing process to be served until after the commencement of the lawsuit that he seeks to have stayed, is sufficient to defeat his claim that his (earlier) lawsuit merits "first filed" status.

[5] A plaintiff cannot file a complaint, keep that pleading in his "back pocket" by withholding service and not informing the adverse party of its pendency, and later, after the defendant has filed his own lawsuit, be heard to argue that the first complaint is a "first filed" action meriting the deference required by McWane. As Chancellor Allen has stated:

> The formality of filing a complaint, while taking no step to actually commence litigation, cannot alone have significance....Where plaintiff takes no steps to actually commence his litigation by summoning the defendant to answer...., while suit proceeds in another jurisdiction, the [plaintiff's] action cannot in any material respect be said to be the first filed action for purposes of determining in which jurisdiction the litigation should most appropriately proceed.

Stepak v. Tracinda Corp., Del. Ch., C.A. No. 8457, Allen, C., Mem. Op. at 17-18 (Aug. 18, 1989).[4]

[6] Second, even if the Louisiana action were deemed to be "first filed", the defendants have not persuaded me that the Louisiana forum is, in these circumstances, capable of doing "prompt" justice. As more fully discussed in Part IV below, the plaintiffs' specific performance claims do implicate a dispute over who will own, and therefore control, a Delaware corporation. Even though that dispute does not arise under 8 Del. C. §225, the control issue is one in whose prompt resolution Delaware has an interest. (As explained more fully below, that interest does not necessarily mandate the expedited schedule that plaintiffs seek here). It is undisputed that this coming Fall, a judicial election will take place in Louisiana that will determine who would preside over the Louisiana action. The undisputed record indicates that some time would be needed for the newly-elected judicial officer to become familiar with the docket. That inevitably will involve some delay, and the record supports the plaintiffs' position that there is presently no way to predict when the Louisiana case would go to trial. Although Mr. Joyce has filed a motion for a more definite statement, which necessarily will contribute to the

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[4] Stepak is factually different. There the complaint in the Delaware action was the one technically first filed, and no effort was made to serve that complaint for two years. Here, the Louisiana complaint was technically first filed, and service was withheld for two months -- over a week after this action was commenced. Those distinctions are not, however, legally significant. What was found to be critical in Stepak was the fact that no effort was made to serve the complaint, not the specific period of time that the complaint there remained unserved.

delay, the defendants have not satisfied me that plaintiffs could receive a prompt trial on the specific performance claims in Louisiana.

For these reasons, the defendants' McWane argument must be rejected.[5] I now turn to their alternative, forum non conveniens, ground for seeking a stay.

B. Forum Non Conveniens

[7-8] The defendants also contend that this action should be stayed on traditional forum non conveniens grounds. Under that doctrine, the Court must consider several factors, of which those relevant here are: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the pendency or non-pendency of a similar action in another jurisdiction, and (5) all other practical considerations that would make the trial easy, expeditious, and inexpensive. General Foods Corp. v. Cryo Maid- Inc., Del. Supr., 198 A.2d 681 (1964); Taylor v. LSI Logic Corporation, Del. Ch., C.A. 13915, Steele, V.C., Mem. Op.at 6 (June 21, 1996). For the defendants to prevail on a motion to stay on forum non conveniens grounds, they must carry the burden of showing that they would be subjected to undue hardship and inconvenience if forced to litigate in Delaware. ANR Pipeline Co. v. Shell Oil Co., Del. Supr., 525 A.2d 991, 992 (1987); see Williams Gas Supply Co. v. Apache Corp., Del. Supr., 594 A.2d 34, 36 (1991) (involving dismissal of action); Chrysler Ist Bus. Credit v. 1500 Locust, Del. Supr., 669 A.2d 104 (1995)(same).

In this case the record establishes only that some of the enumerated factors favor Louisiana while others favor Delaware. The defendants have not shown that they would suffer undue inconvenience and hardship if forced to litigate in Delaware, as a straightforward forum non conveniens analysis demonstrates.

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[5]Although I do not rest my decision on that basis, the Louisiana action is problematic for other reasons as well. Mr. Cuccia is a party to that action only in his representative, but not his individual, capacity, and CTC and the plaintiffs other than Mr. Joyce are not parties. Moreover, Mr. Joyce's specific performance claims are not before the Louisiana court. Only by asserting a counterclaim against Mr. Cuccia individually, and by joining CTC and the other plaintiffs as parties to that counterclaim, would there be an identity of parties and issues. The defendants contend that such a counterclaim is compulsory, i.e., must be asserted, under Louisiana law. The plaintiffs dispute that interpretation of Louisiana law. I need not resolve these matters, but do note that they further detract from the defendants' McWane argument.

1. Applicability of Delaware Law

Although the 1989 shareholders agreement provides that it will be governed by Louisiana law, the 1994 shareholders agreement (the second contract that plaintiffs seek to enforce) is silent as to which law governs. Moreover, the fiduciary claims alleged in the complaint are governed by Delaware law. Hence, this factor does not clearly predominate in favor of either Louisiana or Delaware.

2. Relative Ease of Access To Proof

It appears that many of the critical events alleged herein took place in Louisiana, that many of the critical records (CTC's records) are located at CTC's offices in Louisiana, and that several important witnesses (including Mr. Cuccia) are located in Louisiana. To that extent, this factor favors the Louisiana forum. On the other hand, other important witnesses reside in states closer to Delaware. Plaintiffs Joyce and Lofblad live in Massachusetts, plaintiff Harvey lives in Illinois, and Mr. Weidner (a former CTC director and RIMCO officer) lives in Connecticut. Thus, this factor does not clearly favor either forum.

3. Availability of Compulsory Process

Nor does the third factor predominantly favor either jurisdiction. Messrs. Cuccia and Joyce, who will both be critical witnesses, are subject to jurisdiction in Louisiana and Delaware. Other Louisiana-based witnesses (e.g., Messrs. King, Lovell, and Orihel) would be subject to compulsory process in Louisiana, but not Delaware. On the other hand, all witnesses are subject to compulsory process for deposition testimony which, at least as to certain witnesses, could be offered at trial. Based on the number (but not necessarily the importance) of the witnesses, at best this factor favors Louisiana--but only slightly.

4. Pendency of Prior Foreign Action

For the reasons stated in Part III(A) above, the Louisiana action will not be deemed first filed for purposes of this motion, and, in any event, will not be accorded significant weight.

5. Other Practical Considerations

Both sides argue different practical considerations as either requiring, or militating against, a stay. The defendants argue that an early disposition of the Louisiana action would moot this entire proceeding. While that argument is correct, as previously noted the defendants have failed to demonstrate that an "early" disposition of that action is likely. The defendants also contend that Mrs. Carden (who has not been sued here) is an indispensable party to this action, and that this Court lacks personal jurisdiction over her and also over the Carden estate (which has been sued here). The plaintiffs vigorously dispute this contention.

[9] Oddly, these arguments--which, if correct, could be case dispositive--are not raised squarely and directly on a motion to dismiss under Rule 19 and Rule 12(b)(2). Instead they are argued indirectly and obliquely as additional reasons to grant a stay. For that reason the indispensable party and jurisdictional objections will not be accorded significance in this setting. For the Court to consider and decide these hotly disputed arguments on their merits, they should be raised and presented in their proper procedural context, that is, directly on a motion to dismiss, not as arguments in support of a motion to stay.

For these reasons, the defendants' motion to stay will be denied.

IV. THE MOTION TO EXPEDITE

The third and final motion to be considered is the plaintiffs' motion to expedite. For the reasons next discussed, this motion will be granted only in part.

The plaintiffs have attempted to portray this case as one involving a contest over control of a Delaware corporation. Having done that, the plaintiffs next attempt to analogize the case to a summary proceeding under 8 Del. C. §225, which is routinely accorded expedited treatment, and they then conclude that expedited discovery and an expedited trial are similarly called for here.

In response, the defendants argue that the analogy to §225 is flawed, because there is no issue arising under Delaware law concerning the identity of CTC's lawful board of directors or officers, but only a dispute over a Louisiana contract claim. Next, the defendants contend that an expedited proceeding on those claims would be inappropriate, because the plaintiffs' "control" allegations fail to state a claim upon which relief can be granted. Finally, the defendants argue that the motion should be denied as a discretionary matter, because the plaintiffs' own

delay in asserting their specific performance claim--the complaint was twice amended before that claim was ever pleaded--shows that it is an afterthought intended solely to keep the litigation in Delaware and out of Louisiana, and belies any suggestion of urgency requiring an expedited adjudication.

Having considered these arguments, I conclude that both sides are, in some measure, correct.

[10] As a purely formal matter, even though the plaintiffs allege no cause of action under 8 Del. C. §225, the specific performance claim, by its nature, implicates the question of control of a Delaware corporation. To repeat, Delaware has an interest in the prompt adjudication of such disputes. The question is how prompt that adjudication should be, and the answer here (as in most cases) is discretionary and depends upon the particular facts and equities. One of those equities is that the plaintiffs themselves have waited for three months--and two successive evolutions of their complaint--to assert their specific performance claims. That fact makes the plaintiffs' suggestion of urgency appear contrived.

The defendants urge another "equity", namely, that the "control" allegations do not state a cause of action. However, that argument, like the defendants' indispensable party and lack-of-jurisdiction arguments, is potentially case dispositive yet again is made indirectly and obliquely rather than directly and frontally as a basis to dismiss under Rule 12 (b) (6). For that reason, the merits of that argument will not be considered in the procedural context of a motion to expedite. Rather, the argument will be considered in determining the precise manner of expedition to be granted.

[11-12] To summarize, the relevant circumstances are these: The Court has determined that the claims that are the subject of the plaintiffs' latest complaint should go forward in Delaware. Because those claims implicate control of a Delaware corporation, they should be determined on a reasonably prompt basis. However, the plaintiffs' chosen manner of proceeding, and the facts that CTC is subject to a standstill order and that a custodian will be appointed, suggest that there is no dire urgency that requires immediately scheduling a final hearing as is customary in §225 cases. That conclusion is reinforced by the fact that the defendants have articulated colorable defenses under Court of Chancery Rules 12(b)(2), 12(b)(6), and 19, some or all of which could result in dismissal should they be found to have merit.

These circumstances suggest that those defenses should be made the subject of motions to be briefed, presented, and decided on a reasonably prompt basis. During the pendency of those motions, all parties will be permitted reasonable expedited discovery, which shall be

usable both in this action and the Louisiana action. Should the defendants prevail on their (to-be-filed) motions, this action will be dismissed and the parties may proceed in Louisiana. If the defendants' motions are denied, this Court will schedule a hearing on the merits as soon as practicable following its decision denying the motions.

* * * *

For the above reasons, (i) the plaintiffs' motion for leave to amend is granted, (ii) the defendants' motion to stay is denied, and (iii) the defendants' motion to expedite is granted on the limited basis outlined above, and in all other respects, it is denied. IT IS SO ORDERED.

KINGSLAND HOLDINGS INC. v. BRACCO

No. 14,817

Court of Chancery of the State of Delaware, New Castle

July 22, 1996

After unsuccessfully attempting to satisfy a foreign money judgment against an individual and an Italian foreign corporation in certain foreign locales, plaintiffs commenced an action against defendants in Delaware requesting recognition and enforcement of the judgment. Plaintiffs alleged that defendants owned the stock of certain Delaware corporations and requested sequestration of that stock. Shortly after such sequestration proceedings, defendants denied ownership, asserting a subsidiary in the Netherlands owned such stock. Plaintiffs then initiated a concurrent prejudgment attachment in the Netherlands. A garnishment was granted in the Netherlands and a writ of summons was subsequently filed in the Netherlands action. Defendants filed a motion to stay the Delaware proceedings in favor of the Netherlands action.

The court of chancery, per Vice-Chancellor Chandler, in granting the stay, held that a proceeding in Delaware, occurring after the filing of and simultaneous with another proceeding in a foreign jurisdiction regarding the same subject matter, caused the garnishees significant undue

hardship and inconvenience with reference to two *Cryo-Maid* factors: compulsory process and practical considerations, especially where a garnishee had demonstrated that the proceeding in Delaware: (1) would involve a more costly and cumbersome procedure than the foreign jurisdiction because in Delaware the creditor must establish that Delaware has jurisdiction over the creditor by means of additional discovery, motions practice, and possible appeal, (2) this additional burden would only advance the Delaware proceeding to the point that the court would decide whether or not the creditor equitably owns the sequestered stock, and (3) only after this issue was decided would the Delaware action be at the procedural point that the foreign action was at the time such stay was requested.

1. Action ⇐ 68
   Courts ⇐ 28

The chancery court may stay actions *sua sponte.*

2. Action ⇐ 13

Whether a party has standing to seek relief in Delaware courts is a threshold question.

3. Action ⇐ 13
   Garnishment ⇐ 27, 194

Where garnishee corporation has significant interest in the ownership and control of their own capital stock, and where the record demonstrates that the action will involve significant costs to, and burden on, the garnishees, such a garnishee has standing to challenge the sequestration of their capital stock pursuant to Delaware's sequestration statute because that sequestration affects their rights and interests significantly.

4. Judgment ⇐ 615

Creditors may attempt to execute on judgments in more than one jurisdiction concurrently (one satisfaction rule).

5. Judgment ⇐ 830

Where creditors are attempting to execute on a judgment in more than one jurisdiction simultaneously, they must first convince the court that it procured its judgment in a fair proceeding before the court will recognize the creditor as a judgment creditor and the judgment itself.

6. Courts ⇐ 28

Where a party seeks recognition of a judgment via adversarial proceedings and an opposing party seeks to stay proceeding in favor of later filed proceedings, the court must use the *Cryo-Maid* factors in determining whether to grant such stay.

7. Action ⇐ 69(2)

When similar actions between the same parties involving the same issues are proceeding in multiple jurisdictions, either court, in its discretion, may hold the action in abeyance pending the outcome of the action because that power is inherent in every court's power to manage its docket.

8. Action ⇐ 69(2)

Generally, if the action before the court is the first filed action, the court will not stay its hand to permit the subsequent action to go forward.

9. Action ⇐ 69(2)
Courts ⇐ 28

If, according to facts and circumstances of a case, a court is convinced that the second filed proceedings may afford plaintiff prompt and complete justice, a court may choose to stay the first filed action in favor of the subsequent action.

10. Courts ⇐ 28

In determining whether to stay an action, Delaware courts will consider factors developed in traditional *forum non conveniens* analysis.

11. Courts ⇐ 28
Venue ⇐ 33, 36, 52

To prevail on a *forum non conveniens* motion, a defendant must establish with particularity that one of the following factors will cause defendants significant undue hardship and inconvenience if they are required to litigate in Delaware, and the overwhelming weight of those factors warrant a stay: (1) the pendency of similar actions in other jurisdictions; (2) whether the controversy is dependent upon the application of Delaware law; (3) the relative ease of access to proof; (4) the availability of compulsory process for witnesses; (5) practical considerations that would make the case easy, expeditious, and inexpensive; and, where relevant, (6) the possibility of viewing the premises.

12. Venue ⇐ 12, 42

To discourage forum shopping, Delaware courts prefer not to allow defendants to defeat plaintiff's choice of forum; however, where a plaintiff has filed both actions, the court may decide that, under the circumstances, it should give the plaintiff's initial choice of forum less weight.

13. Judgment ⇐ 830

Delaware, based on principles of comity, will recognize foreign judgments if it concludes that a foreign court with jurisdiction rendered the judgment after a full and fair trial.

14. Judgment ⇐ 830

Where a foreign court (1) approaches a question of whether to recognize a foreign judgment by considering issues similar to those that Delaware courts address; and (2) is concerned with the procedural fairness of foreign proceedings and will itself only recognize foreign judgments from non-treaty countries after making an inquiry into that procedure, the pendency of proceeding factor does not weigh in favor of either jurisdiction and does not support a garnishee's motion to stay the Delaware proceeding.

15. Courts ⇐ 21, 28

In general, if a case depends on the application of Delaware law, then a Delaware court should decide that issue of law rather than allowing another jurisdiction to interpret Delaware law.

16. Judgment ⇐ 818(1), 830

Where a foreign tribunal awarded an underlying judgment, applied its local laws in rendering such decision, and Delaware law was not at issue, such underlying judgment has no nexus with the state of Delaware.

17. Judgment ⇐ 818(1), 830

A case is not inextricably bound in Delaware law where, although the court will apply Delaware law in evaluating the fairness of the foreign judgment, Delaware law is important only secondarily and only because a creditor wishes to execute its judgment there.

18. Courts ⇐ 28

If a case is not inextricably bound in Delaware law nor in the law of a foreign jurisdiction where there is a similar pending proceeding, the applicable law factor does not weigh in favor of staying an action.

19. Courts ⇐ 28

If proof concerning an underlying judgment is located neither in Delaware nor in a foreign jurisdiction, and therefore the parties will not find it easier to access that proof in either jurisdiction, a garnishee seeking to stay a Delaware action has not demonstrated that the access to proof factor weighs in favor of their position that the foreign, rather than Delaware, action should go forward.

20. Garnishment ⇐ 194

Where garnishees and related parties move to quash a sequestration order regarding stock on the grounds that the related party does not directly own that stock, the parties in the Delaware action must first complete discovery on the issue of whether the court should attribute the assets of one entity to the related entity on the basis of fraud and the like.

21. Garnishment ⇐ 122, 194

If a Delaware court determines that a related party does not directly or equitably own garnished assets, then it must vacate its sequestration order and will not have authority to compel the related party to appear and submit to its jurisdiction.

22. Courts ⇐ 28
Garnishment ⇐ 126

Where a foreign court's exercise of jurisdiction and a creditor's ability to serve process in that foreign jurisdiction is more firmly established, less subject to challenge, and more certain, such compulsory process of service factor weighs in favor of staying the proceedings in Delaware so that the foreign action can proceed more quickly.

23. Courts ⇐ 28

Where garnishee not only has sufficient assets in a foreign jurisdiction to satisfy a judgment, but there is also no evidence nor any argument asserted that garnishee has attempted to move any such assets, a creditor can apply at any time to vacate a stay order in Delaware, should a similar foreign proceeding move at a slow pace.

24. Courts ⇐ 28

Where a creditor is not limited, in a foreign jurisdiction, to collecting an amount provisionally assessed by a foreign court in such jurisdiction, then the practical considerations factor is not determinative of whether a proceeding in Delaware should be stayed.

25. Courts ⇐ 28
Garnishment ⇐ 194

A garnishee's burden of demonstrating that they will suffer undue hardship if the court requires them to proceed in Delaware is not as stringent in an action where the moving party seeks a stay rather than a dismissal of the action.

26. Courts ⇐ 28
Garnishment ⇐ 126, 194

A garnishee has demonstrated that a proceeding in Delaware, which is proceeding simultaneously with an action in a foreign jurisdiction, will cause them undue hardship where (1) the Delaware action will involve a more costly and cumbersome procedure than the foreign jurisdiction because in Delaware the creditor must establish that Delaware has jurisdiction over the creditor by means of additional discovery, motions practice and possible appeal, (2) this additional burden will only advance the Delaware proceeding to the point that the court will decide whether or not the creditor equitably owns the sequestered stock, and (3) only after this issue will the Delaware action be at the procedural point that foreign action currently is.

27. Courts ⇐ 28
Garnishment ⇐ 126

An additional burden upon a garnishee because of the necessity of a creditor to establish that Delaware has jurisdiction over garnishee is unnecessary because creditor may get full satisfaction in a concurrent foreign proceeding following a more direct and efficient route.

28. Courts ⇐ 28
Garnishment ⇐ 126

Where garnishees establish with particularity that a proceeding in Delaware, while also party to a simultaneous proceeding in a foreign jurisdiction, will cause them significant undue hardship and inconvenience, the proceeding in Delaware will be stayed in favor of the foreign proceeding.

Grover C. Brown, Esquire, P. Clarkson Collins, Jr., Esquire, and Neal C. Belgam, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for plaintiff.

Josy W. Ingersoll, Esquire, Matthew P. Denn, Esquire, and Martin S. Lessner, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; and Dennis J. Block, Esquire, and Irwin H. Warren, Esquire, of Weil, Gotshal & Manges, New York, New York, of counsel, for garnishees.

CHANDLER, *Vice-Chancellor*

On January 18, 1988, the High Court of the State of Saint Vincent and the Grenadines[1] awarded Owens Bank, a company registered in Saint Vincent, a money judgment against defendants Bracco, SpA, an Italian corporation, and Fulvio Bracco (collectively "Bracco") in the amount of nine million Swiss francs, plus interest and costs. Plaintiff Kingsland Holdings, Inc. ("Kingsland") is Owens Banks' successor in interest. On previous occasions, Kingsland unsuccessfully attempted to satisfy this judgment in, among other locales, England and Italy.

In early 1996, Kingsland commenced this Delaware action, asking the Court of Chancery to recognize and to enforce the foreign money judgment rendered against Bracco. At that time, Kingsland alleged that its judgment against Bracco had grown in value to approximately $20 million, including interest and costs. Bracco, SpA itself is not incorporated in Delaware. In its verified complaint, Kingsland alleged that Bracco owns, directly or indirectly, the stock of the three Delaware corporations which make up the Bracco Delaware Group. To compel Bracco as a nonresident defendant to appear, this Court sequestered the stock of the Bracco Delaware Group pursuant to 10 Del. C. § 366. Thus, the three companies which make up the Bracco Delaware Group are the garnishees in this action.

During the sequestration proceedings, Bracco denied that it directly owns the Bracco Delaware Group stock and contended that its subsidiary in the Netherlands, Bracco Holdings B.V., actually owns the stock. As a result, Kingsland initiated a prejudgment attachment based on the same Saint Vincent judgment in the Netherlands on May 1, 1996. On May 2, 1996, the District Court in Amsterdam granted Kingsland's petition for prejudgment garnishment against Bracco Holdings B.V. and, subsequently, Kingsland filed a writ of summons with respect to the debt claim. Although Kingsland represented to the Dutch Court that its claim against Bracco is now more than $37 million, the Dutch Court provisionally assessed the claim at only $11.8 million.

On June 4, 1996, garnishees filed a motion to stay the Delaware proceedings in favor of the Netherlands action. Kingsland opposes a stay and wishes to pursue the satisfaction of its judgment concurrently in Delaware and the Netherlands. I heard argument on the motion to stay on July 18, 1996 and my decision follows.

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[1]Saint Vincent, a Caribbean state, is a member of the Commonwealth of Great Britain.

I. ARGUMENTS AND ANALYSIS

Garnishees offer the following contentions in support of their argument that the Court should stay this action pending the resolution of the Netherlands action. First, the cause of action and judgment Kingsland pursues against Bracco in the Netherlands are the same as in the present case. Additionally, the Netherlands Court has provisionally garnished the stock of Bracco Holdings, B.V. to ensure that Kingsland will be able to satisfy its judgment against Bracco. although Kingsland claims that its judgment is now worth $37 million and the Netherlands tribunal garnished only $11.8 million worth of assets, garnishees insist that the attached assets are sufficient to satisfy the judgment.

Second, garnishees note that since Bracco denies direct ownership of the garnishees' stock, the Delaware Court must determine, as a threshold issue, whether it has jurisdiction to hear the action. This determination will involve additional discovery on the question whether the Court should pierce the corporate veil and attribute the ownership of the Bracco Delaware Group stock to Bracco. In contrast, garnishees assert the Netherlands action should be less difficult to resolve. They emphasize that Bracco directly owns the stock of Bracco Holdings, B.V. Thus, the Netherlands tribunal will not have to address ownership as a threshold issue and can proceed directly to the merits of the case. Garnishees believe that the Court should conserve its resources, as well as the resources of the parties, by staying the Delaware action. Garnishees argue that the Court granted a stay in favor of an arbitration proceeding on similar grounds in Phillips Petroleum Co. v. ARCO Alaska, Inc., Del. Ch., C.A. No. 7177, Brown, C. (Aug. 3, 1983), and suggest that this Court should apply a similar analysis in the present case.

Garnishees also insist that the delay in the Delaware proceedings will not unduly prejudice Kingsland because the Netherlands action may provide full satisfaction of the judgment. If the Netherlands action proceeds too slowly or does not provide full relief, then Kingsland may ask this Court to vacate its stay order. Relying on Life Assurance Co. v. Associate Investors Int'l Corp., Del. Ch., 312 A.2d 337 (1973), garnishees stress that where, as in the present action, a party seeks a stay, rather than a dismissal of the action, the moving party is subject to a lesser burden of proof.

Garnishees suggest that allowing Kingsland to proceed here will subject all involved to wasteful duplication of time, effort, and expense so that the Court should stay this action in the interest of justice. Moreover, garnishees emphasize that Kingsland, itself, filed the second action. Relying on Sumner Sport Inc. v. Remington Arms Co., Del. Ch.,

C.A. No. 22842, Chandler, V.C. (March 4, 1993), and Hurst v. General Dynamics Corp., Del. Ch., 583 A.2d 1334, n.9 (1990), garnishees ask the Court to refuse to give respect to plaintiff's choice of forum.

A. Standing

As an initial matter, Kingsland answers by challenging garnishees' standing to seek a stay of these proceedings. Kingsland insists that the Court should not permit garnishees to seek a stay of these proceedings since, in Kingsland's view, the Court can address garnishees complaints regarding the burden of responding to discovery in this action via the discovery procedures provided in the Chancery Court Rules. Because they lack standing, Kingsland suggests that garnishees' only recourse is to seek a protective order rather than a stay of the proceedings.

[1] Garnishees, in contrast, contend that they have standing to seek a stay of this action because of their rights and interests in the ownership and control of the Bracco Delaware Group stock, as well as in protecting themselves from the burdens of unnecessary discovery. Moreover, garnishees correctly point out that this Court may stay actions sua sponte. Council of South Bethany Beach v. Sandpiper Development Co., Del. Ch., C.A. No. 935, Brown, V.C. (Oct. 14, 1981), Let. op. at 5. Thus, garnishees argue that Kingsland is simply "splitting hairs" by challenging garnishees' standing.

[2] Whether one has standing to seek certain relief is a threshold question, so I do not consider Kingsland's argument to be one of "splitting hairs." See Mills v. Trans Caribbean Airways, Inc., Del. Supr., 272 A.2d 702, 704 (1970). Nonetheless, the Supreme Court in Mills clearly held that a garnishee may have standing to challenge a statute if it shows that its rights or interests are affected by an application of a statute.

[3] On the present record, garnishees appear to have standing to challenge the sequestration of their capital stock pursuant to Delaware's sequestration statute because that sequestration affects their rights and interests significantly. First, garnishees have a significant interest in the ownership and control of their own capital stock. Second, the record demonstrates that this action will involve significant cost to, and burden on, garnishees. This burden of litigation ultimately may be unnecessary.

B. Status: Judgment Creditor or Litigant

Next, Kingsland asserts that the Court should deny the motion to stay because, as a judgment creditor, it is entitled to pursue satisfaction

of its judgment in multiple fora. Kingsland relies on the "one satisfaction" rule, which means that although a plaintiff may pursue numerous avenues of relief simultaneously, that litigant is entitled to only one satisfaction of the claim. This rule, Kingsland argues, protects debtors and allows creditors to attempt to collect in different locales simultaneously.

Kingsland also argues that the Court should not apply the traditional test for determining whether to stay this action. Kingsland notes that while courts generally apply a *forum non conveniens* analysis in determining whether to stay an action, courts do not apply such an analysis in the case of a post-judgment creditor attempting to collect in several jurisdictions. Thus, Kingsland asserts that it is merely a judgment creditor, attempting to satisfy a judgment, so that the Court should not apply a *forum non conveniens* analysis in its evaluation of the stay motion.

Garnishees see things differently, asserting that Kingsland is not merely attempting to satisfy a judgment. They note that Kingsland's petition asks the Court to recognize the judgment under principles of international comity. To make its decision, the Court will hold an adversarial hearing to determine whether Kingsland procured the judgment in a fair proceeding. If the Court decides to recognize the judgment after that hearing, then Kingsland may execute on the judgment against the sequestered stock. Thus, garnishees assert that in evaluating the motion to stay, the Court must consider traditional *forum non conveniens* factors with emphasis on the practical considerations involved. [4-6] Kingsland's argument has great logical appeal, and I agree with its general proposition that creditors may attempt to execute on judgments in more than one jurisdiction concurrently. However, in the present case, Kingsland must first convince the Court that it procured its judgment in a fair proceeding before this Court will recognize the foreign judgment. de la Mata v. American Life Ins. Co., 771 F. Supp. 1375 (D.Del. 1991), aff'd, 961 F.2d 208 (3d Cir. 1992). If it prevails in that regard, the Court will recognize Kingsland as a judgment creditor and allow Kingsland to proceed against Bracco's assets in Delaware. Thus as a technical matter, Kingsland has not yet attained the status of a judgment creditor in Delaware. Kingsland is not simply a judgment creditor attempting to satisfy a judgment in Delaware. It is a party seeking recognition of a judgment by a Delaware court via adversarial proceedings so that Delaware will recognize it as a judgment creditor. Consequently, I conclude that the Court must use the factors established in General Foods Corp. v. Cryo-Maid, Inc., Del. Supr., 198 A.2d 681 (1964), as refined by

later Supreme Court decisions, in determining whether to stay these proceedings in favor of later filed proceedings.

C. Standards for Determining Whether to Stay a Proceeding

[7-9] When similar actions between the same parties involving the same issues are proceeding in multiple jurisdictions, either court, in its discretion, may hold that action in abeyance pending the outcome of the other action. Every court maintains the inherent power to stay proceedings as part of its power to manage its docket. General Foods Corp. v. Cryo-Maid, Inc., Del. Supr., 198 A.2d 681, 682-83 (1964). Generally if the action before it is the first filed action, the court will not stay its hand to permit the subsequent action to go forward. Id. However, according to the facts and circumstances of the case, if the court is convinced that the second-filed proceedings may afford plaintiff prompt and complete justice, a court may choose to stay the first filed action in favor of the subsequent action Id. See also McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., Del. Supr., 263 A.2d 281, 283 (1970).

[10] In Cryo-Maid, the Supreme Court stated that motions to stay are similar, conceptually, to *forum non conveniens* motions. Thus, in determining whether to stay an action, Delaware courts will consider factors developed in traditional *forum non conveniens* analysis. Cryo-Maid. Del. Supr., 198 A.2d at 683-84. See also McWane, Del. Supr., 263 A.2d at 284 (reaffirming that, in evaluating motions to stay, Delaware courts should apply established rules of *forum non conveniens* even when a party filed the other action after the Delaware action).

[11] More recently, the Supreme Court reaffirmed that to prevail on a *forum non conveniens* motion, a defendant must establish with particularity that one of the following Cryo-Maid factors will cause defendants significant undue hardship and inconvenience if they are required to litigate in Delaware and the overwhelming weight of those factors warrant a stay:

(1) The pendency of similar actions in other jurisdictions;
(2) Whether the controversy is dependent upon the application of Delaware law;
(3) The relative ease of access to proof;
(4) The availability of compulsory process for witnesses;

(5) Practical considerations that would make the case easy, expeditious and inexpensive.[2]

See Chrysler First Business Credit Corp. v. 1500 Locust Ltd. Partnership, Del. Supr., 669 A.2d 104, 106-07 (1995).

[12] In motions to stay situations, usually the plaintiff files the first action and then the defendant files the subsequent action in a different forum. To discourage forum shopping, Delaware courts prefer not to allow defendants to defeat the plaintiff's choice of forum. Id. at 105. However, in cases where the plaintiff filed both actions, the court may decide that under the circumstances, it should give the plaintiffs initial choice of forum less weight. Sumner Sports Inc. v. Remington Arms Co., Del. Ch., C.A. No. 11841, Chandler, V.C. (March 4, 1993), Mem. Op. at 18.

D. Argument on and Analysis of Cryo-Maid Factors

Although arguing that the Court should not apply the Cryo-Maid *forum non conveniences* factors in this case, Kingsland contends that even under such an analysis, the Court should not stay the Delaware proceedings. Kingsland insists that the Court, in weighing the Cryo-Maid factors, should conclude that those factors do not favor staying this action. In contrast, garnishees assert that practical considerations involved in the present action weigh in favor of this Court staying the present proceedings.

1. Pendency of Other Proceedings

With respect to the pendency of other proceedings, Kingsland argues, the Netherlands action does not involve the same issues as the Delaware action so that this Court should not stay these proceedings. Kingsland underscores the fact that the Netherlands, unlike Delaware, is a civil code jurisdiction. Citing to Weems, Enforcement of Money Judgments Abroad, Vol. I NET — 3 to 5 (Matt. Bender 1994) ("Weems"), Kingsland notes that Dutch courts begin their analysis in determining whether to recognize a foreign judgment by referring to bilateral or multilateral treaties which the Netherlands adopted for enforcement of foreign judgments. If a treaty governs the treatment of the parties, then a Dutch court will recognize the foreign judgment

[2]In addition, where relevant, the Court should consider the possibility of viewing the premises.

without question. However, as in this case where no treaty applies, Netherlands courts do not, as a rule, recognize the foreign judgment unless the plaintiff prevails in an adversarial proceeding with respect to that judgment. Thus, Kingsland contends that the issues that the Dutch Court would consider are quite different from the issues that a Delaware court would consider in a recognition hearing.

Garnishees dispute Kingsland's contention that the issues a Netherlands tribunal will visit will be quite different from those a Delaware Court will consider. Garnishees stress that Netherlands courts generally recognize foreign judgments even where no treaty applies if the forum that issued the judgment was convenient and protected the defendants' procedural rights. Thus, garnishees conclude that the Dutch approach is parallel to Delaware's.

[13-14] After reviewing Weems and other authorities, I conclude that Dutch courts appear to approach the question whether to recognize a foreign judgment by considering issues similar to those that Delaware courts address. Stated simply, Delaware, based on principles of comity, will recognize foreign judgments if it concludes that a foreign court with jurisdiction rendered the judgment after a full and fair trial. de la Mata, 771 F. Supp. at 1381. Similarly, Dutch courts are concerned with the procedural fairness of foreign proceedings and will only recognize foreign judgments from non-treaty countries after making an inquiry into that procedure. Thus, one would expect that Kingsland and Bracco will make similar offers of proof in either locale. Consequently, this factor does not weigh in favor of either jurisdiction and does not support garnishees' motion to stay the Delaware proceedings.

Kingsland argues that the fact that it initiated the Delaware proceeding first is determinative of the issue. However, as I previously noted, where the plaintiff filed both actions, the court may decide that under the circumstances, it should give the plaintiff's initial choice less weight. Sumner Sports Inc. v. Remington Arms Co., Del. Ch., C.A. No. 11841, Chandler, V.C. (March 4, 1993), Mem. Op. at 18.

2. Applicable law

[15-16] As a general principle, if a case depends on the application of Delaware law, then a Delaware court should decide that issue of law rather than allowing another jurisdiction to interpret Delaware law. Cryo-Maid, Del. Supr., 198 A.2d at 683. The Saint Vincent tribunal which awarded the underlying judgment applied its local laws in rendering its decision, and Delaware law was not at issue. Thus, the underlying award

that Kingsland asks this Court to recognize and enforce has no nexus with the state of Delaware.

[17-18] Although this Court will apply Delaware law in evaluating the fairness of the Saint Vincent judgment, in reality Delaware law is important here only secondarily and only because Kingsland wishes to execute its judgment here. Thus, this case is not inextricably bound in Delaware law. Similarly, the underlying judgment is not closely tied to Dutch law. Since Dutch law is not implicated to a greater degree than Delaware law, I conclude that this factor does not weigh in favor of staying the action.

3. Access to Proof

Proof of the underlying debt and the validity of the Saint Vincent judgment is located in the Caribbean. In the Delaware action only, Kingsland must convince the Court to pierce Bracco's corporate veil and attribute the assets of the Bracco Delaware Group directly to Bracco. To that end, Kingsland has sought evidence on this threshold jurisdictional issue from the Bracco Delaware Group and other companies located in Delaware and New Jersey. Since the garnishees have not produced the requested documents, the Court does not know whether these requests will bear fruit. However, since the Netherlands Court will not need to grapple with this issue, the parties will not need access to this information to proceed there.

[19] Since the documentation concerning the underlying judgment is located neither in Delaware nor in the Netherlands, the parties will not find it easier to access that proof in either jurisdiction. Accordingly, garnishees have not demonstrated that this factor weighs in favor of their position that the Netherlands action, rather than the Delaware action, should go forward.

4. Compulsory Process for Witnesses

[20-21] Since Bracco directly owns the stock of Bracco Holdings, B.V., Kingsland may serve process on Bracco in the Netherlands. In contrast, in Delaware, Kingsland must prevail in its efforts to seize Bracco's assets to compel Bracco's appearance. Notably, in the Delaware action, Bracco and garnishees have moved to quash the sequestration of the Bracco Delaware Group Stock on the grounds that Bracco does not directly own that stock. Thus, the parties in the Delaware action must first complete discovery on the issue whether the Court should attribute the Bracco Delaware Group's assets to Bracco on the basis of fraud or

the like. If this Court determines that Bracco does not directly or equitably own the garnishes assets, then it must vacate its sequestration order and will not have the authority to compel Bracco to appear and submit to jurisdiction.

[22] In contrast, the effectiveness of the service of process in the Netherlands is more certain since Bracco directly owns the stock of Bracco Holdings, B.V. Because the Dutch Court will not have to determine, as a preliminary issue, whether Bracco indeed owns the garnished assets, one would expect that action to proceed more efficiently.

It appears on this record that the Netherlands action will involve a more simplified and efficient procedure than the Delaware action because it will not require that Court to address the complex jurisdiction issue that this Court will face. Accordingly, the Dutch Court's exercise of jurisdiction and Kingsland's ability to serve process on Bracco appears more firmly established and less subject to challenge in the Netherlands. Because it appears that compulsory service of process in the Netherlands is more certain there, this factor weighs in favor of staying the proceedings here so that the Netherlands action can proceed more quickly.

5. Other Practical Considerations

Kingsland asserts that the Court should not deny it the opportunity to proceed as expeditiously as possible on all possible fronts until it satisfies its judgment. Since the outcome of the Netherlands action is not yet known, and since it might not result in a complete satisfaction of the judgment, a stay may delay Kingsland's enforcement efforts without benefit. Kingsland also notes that a delay will cause it to face additional and intervening risk of the assets' value decreasing or other creditor achieving a greater priority over such assets.

[23] In reply, garnishees note that Kingsland can always apply to this Court to vacate its stay order should the Netherlands action move at a slow pace. Since Bracco, apparently, has sufficient assets in the Netherlands to satisfy the judgment, I agree with garnishees. Bracco has not attempted to move any assets since Kingsland instituted the Delaware litigation and Kingsland has not argued that Bracco plans to shuffle assets so as to thwart Kingsland's attempt to satisfy its judgment.

Kingsland also expresses concern that because the Dutch Court provisionally assessed the claim at $11,850,000, the Dutch action is under-secured. Kingsland asserts that the judgment has grown in value and is currently worth $37 million. Garnishees dispute the accuracy of

Kingsland's calculations. They note that the underlying judgment calls for a six percent interest rate. Garnishees insist that it is mathematically impossible for the judgment to have grown to $37 million unless Kingsland calculated the interest at an annual rate of 20 percent. Garnishees also note that other non-attached assets might be available to satisfy a Netherlands judgment.

[24] Regardless of the dispute over the value of the judgment, it is clear that Bracco's holdings in Netherlands exceed the value of the judgment even if that judgment is worth $37 million. Since Kingsland is not limited to collecting the amount provisionally assessed, this factor is not determinative of the issue. I am convinced that the Netherlands Court is able to effectuate complete justice in this case.

Garnishees' main argument in support of their motion to stay is a practical one: They contend that the threshold issue of jurisdiction via stock ownership involves costly and burdensome discovery and motion practice. Garnishees note that in attempting to gain evidence of fraud or the like, Kingsland has served on garnishees subpoenas for production of at least 16 categories of documents that will require garnishees to produce virtually every document in any way referring to a sale of assets from Bristol-Myers Squibb to garnishees. The Netherlands action may proceed without this additional cumbersome step.

In considering these practical factors, on the one hand, I recognize that Kingsland has a strong interest in satisfying this judgment, especially after pursuing it for so many years. If the Netherlands Court refuses to recognize the judgment or if the assets do not satisfy the judgment then a stay may, in the end, have been a waste of time. And if the delay causes Kingsland a hardship in developing evidence to support its theory of ownership, or if Bracco moves assets, then the delay will have prejudiced Kingsland.

On the other hand, garnishees have demonstrated that litigating this matter in Delaware is particularly burdensome as it involves additional expenses and efforts that will not be required in the Netherlands case at all. Specifically, garnishees need not be involved in the Netherlands litigation at all. In addition, Bracco must defend itself on both continents simultaneously.

Since the Netherlands Court appears able to provide Kingsland complete and prompt relief, this case appears to be the very type to which former Chancellor Brown referred when he stated:

> [G]iven the enormous burden that would be involved in the simultaneous litigation of the basic controversy with many of the same witnesses and attorneys on two [continents] at

> the same time, I think common sense dictates that this case should be stayed . . . ."

Phillips Petroleum Co. v. ARCO Alaska, Inc., Del. Ch., C.A. No. 7177, Brown, C. (Aug. 3, 1983) at 10. Notably the Phillips Court granted a stay on factors which are present in this case -- extensive extra document production and discovery, numerous rulings required on issues not related to the merits of the action, and no delay in a final resolution to the case. [25-27] The garnishees' burden of demonstrating that they will suffer undue hardship if the Court requires them to proceed in Delaware is not as stringent in an action where, as here, the moving party seeks a stay rather than a dismissal of the action. Life Assurance Co. v. Associate Investors Int'l Inc., Del. Ch., 312 A.2d 337 (1973). Nonetheless, garnishees have demonstrated that proceeding in Delaware, while simultaneously proceeding in the Netherlands, will cause them undue hardship. I base this finding upon the fact that the Delaware action will involve a more costly and cumbersome procedure than the Netherlands action because in Delaware, Kingsland must establish that Delaware has jurisdiction over Bracco. Establishing jurisdiction will involve additional discovery, motions practice and possible appeal. Moreover, this additional burden will only advance the Delaware proceeding to the point that the Court will decide whether or not Bracco equitably owns the sequestered stock. Only after this issue is decided will the Delaware action be at the procedural point that the Netherlands action is currently. This burden upon garnishees is unnecessary because Kingsland may get full satisfaction in the Netherlands following a more direct and efficient route. Additionally, because it appears that compulsory service of process in Delaware is less certain than in the Netherlands, this factor weighs in favor of staying the proceedings so that the Netherlands action can proceed without this action hindering the smooth progression of those proceedings.

III. CONCLUSION

[28] Garnishees have established with particularly that proceeding in Delaware will cause them significant undue hardship and inconvenience with reference to two Cryo-Maid factors: compulsory process and practical considerations. The record does not offer any counterweight to these factors. In weighing all those factors I conclude that they warrant a stay of the Delaware action. Accordingly, this Court will stay the present action in favor of the Netherlands action. However, if the Netherlands action does not proceed in a timely fashion because, among

other possible occurrences, the Netherlands Court determines that it lacks jurisdiction over Bracco, then Kingsland may move to dissolve the stay and reactivate its Delaware action. See Life Assurance Co. v. Associate Investors Int'l Inc., Del. Ch., 312 A.2d at 342.

IT IS SO ORDERED.[3]

NEBENZAHL v. MILLER

No. 13,206

Court of Chancery of the State of Delaware, New Castle

August 26, 1996
Revised August 28, 1996

Plaintiff, shareholder of defendant Athlone Industries, Inc. (Athlone), brought a class action against the merger of defendant Athlone into defendant Allegheny Ludlum Corporation (ALC). The suit was brought against both corporations, individually named directors of Athlone, and Morgan Stanley & Company (Morgan). Plaintiff alleged that the defendant directors breached their fiduciary duties to Athlone stockholders in that (1) the directors who negotiated the merger were self-interested, (2) the merger was approved even though fifty percent of the directors were self-interested and those directors dominated the board, and (3) the merger was executed at an unfair price. Plaintiff also alleged that defendants ALC and Morgan aided and abetted the Athlone directors in their breach. All defendants have moved to dismiss the complaint.

The court of chancery, per Vice-Chancellor Steele, granted defendants' motion to dismiss the complaint, holding that plaintiff had only pled conclusory statements with no facts to support her contention that the merger was unfair. Also, the court found that where there are no facts supporting that a fiduciary breached a duty, there can be no action for aiding and abetting that breach.

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[3]This decision also effectively disposes of Kingsland's pending motion to compel discovery.

1. Pretrial Procedure ⇐ 678, 681

For a motion to dismiss, the courts only consider those matters the parties refer to in the pleadings.

2. Pretrial Procedure ⇐ 679, 681

For a motion to dismiss, the courts consider all pled facts as true and draw all inferences in the light most favorable to the nonmoving party.

3. Pretrial Procedure ⇐ 679, 681

For a motion to dismiss, the courts will not accept conclusory allegations as true.

4. Pretrial Procedure ⇐ 624, 678, 681

The courts will not dismiss a complaint unless it appears to a reasonable degree of certainty that the plaintiff would not be entitled to relief under any set of facts which the plaintiff could prove in support of its claim.

5. Corporations ⇐ 307, 310(1), 310(2)

Directors must exercise due care in carrying out their fiduciary duties and act in the best interest of the shareholders and the corporation.

6. Corporations ⇐ 310(1)

The business judgment rule protects the actions of directors by affording them the presumption that they acted on an informed basis and in the honest belief that they acted in the best interest of the corporation.

7. Corporations ⇐ 310(1), 310(2), 320(11)

The plaintiff has the burden of rebutting the presumption of the business judgment rule by showing that the directors breached their duty of loyalty or duty of due care in reaching their decision.

8. Corporations ⇐ 320(11)

If the plaintiff fails to meet the burden of rebutting the presumption of the business judgment rule, the directors are insulated from liability.

9. Corporations ⇐ 310(1), 310(2), 320(11)

If the plaintiff meets the burden of rebutting the presumption of the business judgment rule, the burden shifts to the defendant directors to prove the entire fairness of the challenged transaction by establishing both fair dealing and fair price.

10. Corporations ⇐ 310(2), 314(1)

The plaintiff can rebut the business judgment rule and shift the burden to the defendant where the plaintiff can prove that the interested director controls or dominates the board as a whole or where the interested director failed to disclose his interest to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction.

11. Pretrial Procedure ⇐ 679, 681

Where the plaintiff provides no facts to support an attenuated statement, it will be considered by the court to be a mere conclusory allegation which cannot be considered for a motion to dismiss.

12. Pretrial Procedure ⇐ 679, 681, 687

Conclusory allegations alone cannot be the platform for launching an extensive litigious fishing expedition for facts through discovery in the hope of finding something to support them.

13. Corporations ⇐ 320(7), 320(11)

Where the facts pled by the plaintiff demonstrate the applicability of the safe harbor created by Delaware law, plaintiff bears the burden of pleading facts which allege the transaction to be unfair. DEL. CODE ANN. tit. 12, § 144 (1995).

14. Corporations ⇐ 116, 310(1), 310(2), 314(1)

Defendants may avail themselves of the safe harbor protection and the business judgment rule to remove the taint of self-interest where the self-interested directors (1) disclosed the conflict to a majority of disinterested directors who later approved the transaction, even if the disinterested directors are less than a quorum; or (2) the directors disclose the self-interest to the stockholders who approve the transaction; or (3) a court finds the transaction fair to the corporation. DEL. CODE ANN. tit. 12, § 144 (1995).

15. Corporations ⇐ 310(2), 314(1)

A defendant may not be able to avail himself of Delaware's safe harbor provision where the plaintiff alleges and proves a transaction to be unfair.

16. Corporations ⇐ 310(1), 310(2)

Section 144's protection will not be mechanically applied.

17. Corporations ⇐ 320(7)
Pretrial Procedure ⇐ 644

For a motion to dismiss to be denied, the plaintiff who pleads facts indicating the applicability of the safe harbor to a director must then allege facts showing the transaction to be unfair.

18. Corporations ⇐ 310(1), 310(2), 314(2)

Where the directors have a substantial interest in the form of a lucrative payout from the challenged transaction, it is the type of self-interested conduct to which section 144 applies.

19. Corporations ⇐ 310(1), 310(2), 314(1)

Where a majority of disinterested directors approve the terms of a merger after full disclosure by the interested directors of the details of their conflict, the director defendants may avail themselves of the protection of section 144.

20. Corporations ⇐ 310(1), 310(2), 314(1)

Where the director-defendants disclosed their self-interest in the proxy statement to the shareholders and the majority of the stockholders approved the merger, the director-defendants may avail themselves of the protection of section 144.

21. Corporations ⇐ 310(1), 310(2), 320(7)
Pretrial Procedure ⇐ 644

Even in weighing the pleadings in the light most favorable to plaintiff, there exists no facts supporting a claim that the merger was unfair where: (1) there was extensive, arm's-length negotiations that took place over one and a half years, (2) there was active shopping of the merger corporation to all interested parties, (3) the directors relied on a favorable fairness opinion, and (4) all the directors considered all facets of the proposed merger before approving it.

22. Corporations ⇐ 310(1), 310(2)

A fact is material to a merger where there is a substantial likelihood that a reasonable investor would view its disclosure as having significantly altered the total mix of information available.

23. Pretrial Procedures ⇐ 644, 681

In order to be entitled to relief, plaintiff must at least plead facts showing that she can meet the burden of establishing an unfair transaction.

24. Conspiracy ⇐ 1
Corporations ⇐ 307

To succeed on a claim for aiding and abetting in a breach of fiduciary duty, plaintiff must prove (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a nonfiduciary defendant knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary.

25. Conspiracy ⇐ 1
Corporations ⇐ 307
Pretrial Procedure ⇐ 681

Where a plaintiff does not state a claim that a fiduciary breached its duty to the corporation, she cannot maintain her action against a nonfiduciary defendant for aiding and abetting.

26. Conspiracy ⇐ 1
Corporations ⇐ 307
Pretrial Procedure ⇐ 681

Where a plaintiff does not show facts indicating knowing participation of the nonfiduciary defendants, she cannot prevail on a claim for aiding and abetting.

27. Conspiracy ⇐ 1
Corporations ⇐ 307

A court can infer a nonfiduciary's knowing participation only if a fiduciary breaches its duty in an inherently wrongful manner, and the plaintiff alleges specific facts from which the court could reasonably infer knowledge of the breach.

28. Pretrial Procedure ⇐ 679, 681

A defendant's motion to dismiss will be granted where the plaintiff alleges mere conclusions and no facts suggesting that the defendant participated in the alleged breaches of fiduciary duty.

29. Conspiracy ⇐ 1
Corporations ⇐ 307

Where there are no pleaded facts that a fiduciary breached its duty, a nonfiduciary cannot aid and abet.

Irving Morris, Esquire, of Morris and Morris, Wilmington, Delaware; Law Offices of Joseph H. Weiss, New York, New York, of counsel; and Stull, Stull & Brody, New York, New York, of counsel, for plaintiff and the class.

R. Franklin Balotti, Esquire, Daniel A. Dreisbach, Esquire, Todd C. Schiltz, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and David A. Brownlee, Esquire, of Kirkpatrick & Lockhart, Esquire, Pittsburgh, Pennsylvania, of counsel, for defendant Allegheny Ludlum Corporation.

A. Gilchrist Sparks, III, Esquire, and Donna L. Culver, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendant Morgan Stanley & Co. Incorporated.

Edward P. Welch, Esquire, and Randolph K. Herndon, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, for defendant Athlone Industries, Inc. and the individual defendants.

STEELE, *Vice-Chancellor*

I. CONTENTIONS OF PARTIES

On October 25, 1993, Plaintiff, Mala Nebenzahl ("Nebenzahl"), brought this class action challenging the merger of Athlone Industries, Inc. ("Athlone") into a wholly-owned subsidiary of Allegheny Ludlum Corporation ("ALC"). Vice Chancellor Hartnett denied Plaintiff's request for a preliminary injunction on November 8, 1993. Plaintiff then abandoned her claim for a permanent injunction. Plaintiff, a stockholder of Athlone, alleges the Athlone directors ("Director Defendants") breached their fiduciary duties to the Athlone stockholders because (1) self-interested directors negotiated the merger of Athlone into ALC ("the Merger"); (2) the Director Defendants approved the merger even though fifty percent were self-interested and dominated the board; and (3) the Director Defendants executed the merger at an unfair price because they valued only one subsidiary of the target corporation and failed to consider the value the directors had themselves assigned to two other subsidiaries. Plaintiff also alleges Defendant ALC directly or indirectly aided and abetted the Athlone directors in their breaches of fiduciary duties. In addition, Plaintiff names Morgan Stanley & Co. ("Morgan Stanley") as a defendant. Plaintiff alleges Morgan Stanley aided and abetted the Athlone directors. Plaintiff amended the *Complaint* on May 5, 1995.[1] She seeks a judgment against Defendants jointly and severally: (1) declaring this to be a proper class action and certifying Plaintiff as the

[1]Plaintiff again amended the *Complaint* on June 19, 1996. The parties submitted their respective memoranda on *Defendants' Motion to Dismiss* before Plaintiff's second amendment.