in the Offering Circular seems to be premised on the theory that everything told to a potential investor is material to the recipient of a tender offer. I am aware of no such blanket rule and, considering the information that was provided about Drexel's projections and assumptions, I am not satisfied that plaintiff has met its burden of establishing a likelihood that the omitted information would significantly alter the "total mix" of information provided to the stockholders. *See T. S. C. Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

Absent a finding of inadequate or inaccurate disclosures, stockholders generally should be allowed to decide for themselves whether to tender or not. This is not a case where the offeror, "who has a fiduciary duty to the offeree, structures the offer in such a way as to result in an unfair price being offered and the disclosures are unlikely to call the unwary stockholders' attention to the unfairness." *Joseph v. Shell Oil Co.*, Del. Ch., 482 A.2d 335, 341 (1984). Accordingly, plaintiff's unfair price claim will not support injunctive relief.

Based on the foregoing analysis, I conclude that plaintiff's motion for a preliminary injunction must be denied. As a result, it is unnecessary to decide defendants' various motions to dismiss at this time.

IT IS SO ORDERED.

MANN v. OPPENHEIMER & CO.

No. 7275

Court of Chancery of the State of Delaware, New Castle

April 4, 1985

Defendant, Oppenheimer, moved to dismiss a proposed class action arising out of the defendant's offer to exchange certain 18% volume-indexed subordinated debentures for 12 3/4% subordinated debentures. The purported representatives of the two classes of plaintiff bondholders, or those who proceeded with the exchange and those who did not, alleged violations of sections 17(a) and 12(2) of the Securities Act of 1933. They also alleged common law fraud in

connection with defendant's representation of an intent to redeem the volume-indexed debentures some time after July 1, 1983, if the offer did not attract sufficient interest from the bondholders.

The court of chancery, per Vice-Chancellor Walsh, treating the motion to dismiss as a motion for summary judgment, granted the defendant's motion on the grounds that: (1) as to the claim predicated on section 17(a), Congress did not afford a private remedy; (2) as to the remaining claims, the defendant's representation of an intent to redeem the volume-indexed debentures was not coercive or fraudulent when the defendant had the present ability to so redeem the debentures.

1. Pleading ⟹ 343, 350(1)

A motion to dismiss is treated as a motion for summary judgment when the moving party submits matters outside the pleadings in support of the motion. DEL. CH. CT. R. 12(b)(6).

2. Corporations ⟹ 473

Securities Regulation ⟹ 132

Even where a provision of an indenture expressly requires notice to the trustee of the indenture before institution of "any action to enforce any remedy under the indenture," a security holder may institute an independent action where special circumstances, such as fraud, insolvency, or violation of a statute exist.

3. Action ⟹ 3

In the absence of an express authorization of the maintenance of a private right of action under section 17(a) of the Securities Act of 1933, the test to be applied in determining whether such an action is to be implied is solely one of congressional intent.

4. Securities Regulation ⟹ 104

In view of the absence from section 17(a) of an express provision for a civil remedy, the "carefully crafted structure" of the Securities Act, the exclusion of section 17(a) from a House committee report listing the sections of the Act that create and define the civil liabilities, and the express provision for enforcement of section 17(a) by criminal sanctions and injunctions under the Act, section 17(a) was not intended by Congress to afford a civil remedy.

5. Corporations ⟹ 473

Securities Regulation ⟹ 132

Where a plaintiff sues under section 12(2) of the Securities Act on an offer to exchange "old" and "new" debentures, that plaintiff must have availed himself of the offer to have standing to sue individually under section 12(2), but may sue if in the capacity of trustee to one who has so availed himself.

6. Securities Regulation ⟹ 27

A statement of intent to redeem debentures by a given date, accompanied by redemption restriction language stating that the debentures could not be redeemed before a later date "from or in anticipation of moneys borrowed having an effective interest cost. . . less than 16%, per annum," was neither fraudulent nor in violation of section 12(2) of the Securities Act of 1933 as a matter of law when the offering company had the ability to redeem the debentures.

Vernon R. Proctor, Esquire, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware, and Mordecai Rosenfeld, Esquire, of New York, New York, for plaintiffs.

Donald A. Bussard, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, and Dennis J. Block, Esquire, Joseph S. Allerhand, Esquire, and Marjorie L. Cohen, Esquire, of Weil, Gotshal & Manges, New York, New York, for defendant.

WALSH, *Vice-Chancellor*

This proposed class action alleges violations of Sections 17(a) and 12(2) of the Securities Act of 1933 (15 USCA §77g(a), 771(2)) and common law fraud in connection with defendant Oppenheimer & Co., Inc.'s ("Oppenheimer") offer to exchange certain 18% volume-indexed subordinated debentures ("Volume-Indexed Debentures") for 12 3/4% subordinated debentures ("New Debentures"). The plaintiffs, R. Allan Martin and Sylvia Martin Mann, purport to represent two separate classes of bondholders: Those who exchanged their Volume-Indexed Debentures pursuant to the exchange offer, and those who declined the exchange. Both classes claim they were injured by Oppenheimer's representation in its offering circular that it intended to redeem the Volume— Indexed Debentures some time after July 1, 1983, if the exchange offer did not attract sufficient

interest from the bondholders. Plaintiffs contend that because Oppenheimer could not legally redeem the Volume-Indexed Debentures before July 1, 1986, this statement was misleading and coerced certain bondholders to exchange their Volume-Indexed Debentures, and adversely affected the market value of these securities. Oppenheimer has moved to dismiss the Complaint on the ground that since it could redeem the securities, as a matter of law, its statement to that effect was not improper.

[1] Because Oppenheimer has submitted matters outside the pleadings in support of its position, its motion to dismiss will be treated as one for summary judgment. Chancery Court Rule 12(b); *Danby v. Osteopathic Hosp. Ass'n.,* Del. Ch., 101 A.2d 308 (1953), *aff'd,* Del. Supr., 104 A.2d 903 (1954). Plaintiffs contend that if the matter is so viewed they are entitled to, and require, additional discovery. *Danby, supra,* at 315; *Selva & Sons, Inc. v. Nina Footwear, Inc.,* Fed. Cir., 705 F.2d 1316, 1322-23 (1983). Plaintiffs, however, have not demonstrated a need for further particularized discovery and it does appear that the issue is one of law turning upon the interpretation of documents which are concededly genuine. Accordingly, the matter will be treated as a motion for summary judgment with the usual burden upon Oppenheimer. *Nash v. Connell,* Del. Ch., 99 A.2d 242 (1953); *Del. State Troopers Lodge No. 6 v. O'Rourke,* Del. Ch., 403 A.2d 1109 (1979).

The terms of the debentures and the sequence of events are not in dispute. In July, 1981, Oppenheimer issued and sold the Volume-Indexed Debentures to the plaintiff classes. The interest rate on these securities was designed to range between 18 and 22% depending upon the volume of trading on the New York Stock Exchange. Because the average daily trading volume of stocks listed on the NYSE has remained above a certain level, the Volume-Indexed Debentures have at all relevant times yielded the maximum 22%.

According to the terms of the Indenture, and as disclosed in the prospectus, Oppenheimer was restricted in its ability to redeem the Volume-Indexed Debentures by the following provision:

> No redemption of the Debentures will be permitted prior to July 1, 1986, directly or indirectly, from or in anticipation of moneys borrowed having an effective interest cost which is less than 16%, per annum.

The plaintiffs allege in their complaint that the legal effect of this restriction on redemption is to prohibit any redemption of the Volume-Indexed Debentures prior to July 1, 1986, "unless said deben-

ture holders would then be able to make an investment with a substantially comparable rate of return." Complaint ¶ 11. Oppenheimer interprets the restrictive language differently, however, contending that it gave it the right to redeem the debentures at any time so long as the redemption was funded from a source other than moneys borrowed at an interest rate of less than 16% per annum.

In an effort to reduce the interest expense of the Volume—Indexed Debentures, Oppenheimer made an offer of exchange on March 2, 1983, by which it proposed to issue $1,275 principal amount of the New Debentures plus accrued interest on the Volume-Indexed Debentures for each $1,000 principal amount of Volume-Indexed Debentures surrendered. It stated in the exchange offer that "if the major portion of the outstanding volume-indexed debentures is not exchanged pursuant to this Exchange Offer, the Company [Oppenheimer] presently intends to redeem the remaining volume-indexed debentures at some time after July 1, 1983." Although the interest rate on the new debentures was only 12. 75%, as compared with 22% for the Volume-Indexed Debentures, Oppenheimer represented in the offering circular that the value of the new debentures represented a premium over the redemption price that the bond holders would otherwise receive. It also disclosed in the offering circular the redemption restriction language, previously quoted, as it had appeared in the earlier prospectus.

In response to the exchange offer 86% of the Volume-Indexed Debentures were exchanged for the New Debentures. The plaintiff class who participated in the exchange now claims that they were coerced into exchanging their securities by the false and misleading statement in the offering circular regarding Oppenheimer's ability to redeem the Volume-Indexed Debentures. The plaintiff class not participating in the exchange claims it was harmed by the adverse effect the fraudulent statement had upon the market value of its debentures. Hence the claims for violations of Sections 17(a) and 12(2) of the Securities Act of 1933, and common law fraud claims.

Oppenheimer seeks summary judgment on a variety of grounds. First, it argues that by not giving notice to the Indenture Trustee the plaintiffs did not satisfy a condition precedent to bringing suit; second, it is contended that Section 17(a) of the Securities Act does not afford a private right of action; third, that class of plaintiffs, represented by Martin individually, who did not participate in the exchange, lack standing to assert a cause of action under Section 12(2) of the Securities Act; fourth, because it had the legal right to

redeem the Volume— Indexed Debentures, its stated intention of redeeming those securities was not false and misleading; and finally, Oppenheimer maintains that the plaintiffs' request for equitable relief under their State law claims must fail because there was an adequate remedy at law.

I

First to be considered is Oppenheimer's claim that the plaintiffs do not have standing to pursue this action because they did not give notice to the Indenture Trustee prior to bringing suit. The Volume-Indexed Debenture states:

> [N]o holder of any Debenture may institute any action to enforce any remedy under the Indenture unless the Trustee declines or fails to exercise its powers or to institute such action after written notice from such holder of a default and request other holders of a majority in aggregate principal amount of all Debentures then outstanding and after reasonable opportunity and unless, if the Trustee is entitled thereto, security and indemnity is offered to it, all as more fully provided in the Indenture.

[2] The plaintiffs counter that they may bring suit because the Indenture provision only restricts suits brought "under or upon" the indenture. By contrast, the present action alleging fraud and violations of the Securities Act, argue plaintiffs, is brought independently of the indenture. In this regard, the plaintiffs cite *Harff v. Kerkorian,* Del. Ch., 324 A.2d 215 (1974), wherein this Court indicated that where special circumstances, such as fraud, insolvency or violation of a statute, exist a security holder may maintain an action independently of the debenture. There is merit in plaintiffs' position. Even though this dispute may implicate the terms of the Indenture, the allegations of fraud and Federal security law violations are sufficient to support an independent action. *Harff, supra* at 222. Thus, the plaintiffs need not have given notice to the Trustee prior to bringing suit.

I I

Oppenheimer next seeks to dismiss the plaintiffs' claim under Section 17(a) of the Securities Act on the ground that no private right of action exists under that section. The plaintiffs respond by

tracing the similarities between §17(a) and Rule 10b-5 promulgated under the Securities Exchange Act of 1934 which does permit a private right of action.

Section 17(a), which makes it unlawful to defraud investors by any device, scheme or artifice in the offer or sale of securities, does not expressly authorize the maintenance of a private right of action. Such express authority is embraced only in §§11 and 12. Although the United States Supreme Court has not determined whether an implied right of action exists under Section 17(a), the Court has previously articulated four factors to be considered in determining whether a private right of action may be implied under a federal statute. *Cort v. Ash,* 422 U.S. 66 (1975). In more recent decisions, the Supreme Court has narrowed the test essentially to one of Congressional intent. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560, 575-76 (1978); *see Hill v. Der,* D. Del., 521 F. Supp. 1370, 1375 (1981). The recent refinements of the Supreme Court's test for implying a private right of action from a federal statute, apparently track the Court's general reluctance to imply civil actions. *Touche Ross & Co., supra,* at 574; *Hill v. Der, supra,* at 1375.

In the absence of a definitive statement by the Supreme Court of the United States, the availability of a private right of action under §17(a) has been the subject of much discussion by the Federal Judiciary. Although the Third Circuit has not ruled upon this question, *see, Walck v. American Stock Exchange, Inc.,* 3rd Cir., 687 F.2d 778, 789 n. 16 (1982), the United States District Court for the District of Delaware has concluded that no private right of action exists under §17(a). *Hill v. Equitable Trust Co.,* D. Del., 562 F. Supp. 1324, 1345 (1983); *Hill v. Der, supra.*

In *Hill v. Der, Judge Latchum* noted a number of factors that suggest that Congress did not intend to provide for civil actions under §17(a). First, the language of §17(a) does not provide for a private right of action. Second, in listing the sections of the Securities Act that create and define the civil liabilities, the House Committee report referred only to Sections 11 and 12. *See,* H. Rep. No. 85, 73rd Cong., 1st Sess. 9-10 (1933). Third, the "carefully crafted structure" of the Securities, which provides for only limited civil remedies under 12(2) for the same type of fraudulent conduct as is proscribed in §17(a), would be disrupted by implying broader civil remedies under §17(a). And finally, because Congress expressly provided for enforcement of §17(a) through criminal sanctions under §24 of the Securities Act, 15 U.S.C. §77x, and through injunctions by the Securities and Exchange Commission under §20 of the Se-

curities Act, 15 U.S.C. §77t, it is difficult to imagine that Congress simply forgot to include an intended private civil remedy under §17(a). *Hill v. Der, supra,* at 1377-78; *Transamerica Mortgage Advisors, supra.*

[3] The similarities that plaintiffs note between Rule 10b-5, where the Supreme Court has implied a private right of action, and §17(a) of the Securities Act do not warrant a different result. The Supreme Court has acknowledged that its decision to grant an implied right of action under Rule 10b-5 was simply a product of the "25-year-old acceptance by the lower federal courts of an implied action under §10(b) [of the Securities Exchange Act]." *Touche Ross & Co., supra,* at 577-78 n.19; *Hill v. Der, supra,* at 1378 n. 4. More important, the implication of a civil action from a federal statute must rest upon an analysis of legislative intent. It cannot be inferred solely from another statute proscribing similar conduct.

Finally, the decision in *Unit, Inc. v. Kentucky Fried Chicken Corp.,* Del. Super., 304 A.2d 320 (1973) wherein the Superior Court implied a civil cause of action under §17(a) relied upon early federal district court decisions which had implied a private right of action under §17(a). It is questionable precedent in light of the Supreme Court's more recent test for implying civil remedies. The thoughtful analysis of Judge Latchum in *Hill v. Der, supra,* though not binding on this Court is persuasive.

[4] Because §17(a) does not afford the plaintiffs a civil remedy, the defendant's motion for summary judgment with respect to this claim is granted.

III

Oppenheimer also seeks to dismiss the claim brought under §12(2) of the Securities Act with respect to the plaintiff Martin, individually, and on behalf of those bondholders who did not participate in the exchange offer. It contends that Martin has no standing to challenge the exchange offer under §12(2) because he did not purchase the New Debentures. Plaintiffs tacitly concede this point in their brief, merely noting that Martin has standing *as trustee* to bring this action under §12(2) on behalf of those bondholders who did exchange their Volume-Indexed Debentures for New Debentures.

[5] Section 12(2) provides for limited civil remedies for persons who have been defrauded in purchasing securities. The remedy of a security holder is limited to rescission. A party who no longer owns the security may recover damages instead. Since Martin did not purchase the new securities, and therefore cannot seek an available

remedy under §12(2) he plainly does not have standing individually to bring suit under §12(2). Although it is not entirely clear from the body of the plaintiffs' complaint, a fair reading of the complaint along with the prayers for relief demonstrates that plaintiffs only seek rescission under §12(2) for the class of plaintiffs who did purchase New Debentures. Plaintiff Martin, as trustee for Alana Martin Frumkes, clearly has standing to seek rescission under §12(2). Martin, individually, seeks an accounting, declaratory, and injunctive relief by virtue of alleged common law fraud. Of course, he has standing to pursue this State law cause of action on behalf of the plaintiff class who presently hold the Volume— Indexed Debentures.

I V

Turning to the substantive merits of its motion, Oppenheimer seeks a ruling that it was legally able to redeem the Volume-Indexed Debentures prior to July 1, 1986, and thus its statement of an intend to so redeem the debentures was neither fraudulent nor in violation of §12(2).

The redemption restriction langauge, disclosed by Oppenheimer in the Offering Circular, states that it may not redeem the Volume-Indexed Debentures prior to July 1, 1986, with moneys borrowed at less than 16%. The plaintiffs maintain that the legal effect of this restriction is to forbid the issuer from redeeming the debentures unless the bondholders are then able to reinvest their funds so as to maintain a comparable rate of return. This interpretation is at variance with the plain langauge of the redemption restriction. Such a redemption limitation merely protects the bondholders, for a designated term, from falling interest rates which enable the issuer to borrow funds at a rate of interest below 16% in order to pay off the debentures. *Morgan Stanley & Co. v. Archer Daniels Midland Co.*, S.D.N.Y., 570 F. Supp. 1529 (1983); *Franklin Life Insurance Co. v. Commonwealth Edison Co.*, S.D. Ill., 451 F. Supp. 602 (1978); American Bar Foundation, *Commentaries on Model Indenture Provisions*, p. 477 (1971). Thus, in *Franklin Life* and *Morgan Stanley*, indenture provisions parallel to the one present here were construed to permit redemption without regard to whether the bondholders could then reinvest those funds at the same rate of interest.

In *Franklin Life* and *Morgan Stanley*, it was also argued that the redemption of the securities violated the redemption restriction because the issuers' borrowed funds were obtained at a rate exceeding the limit contained in the indenture. In both cases it was noted that the issuers did not use borrowed funds to redeem the securities, but

rather financed the redemption through selling stock and warrants to the public. The plaintiffs note, however, that Oppenheimer could not have redeemed the volume-indexed securities through equity financing because it is not a publicly-held company and its balance sheets demonstrate its inability to redeem the debentures without a borrowing. Thus plaintiffs conclude that because interest rates in the market place were less than 16% and Oppenheimer's borrowed funds were obtained at rates of less than 16%, Oppenheimer was precluded, as a matter of law, from redeeming the volume-indexed securities during that time.

The plaintiffs' argument is purely hypothetical because Oppenheimer did not, in fact, redeem the debentures. In both *Franklin Life* and *Morgan Stanley* the courts were called upon to decide whether actual redemptions violated the redemption restrictions of the indenture. In both instances the Court ruled that the companies did not finance the redemptions through borrowing funds at less than the rate of interest stated in the indenture. By contrast the plaintiffs ask this Court to find, as a matter of law, that the defendant could not have redeemed the Volume-Indexed Debentures. The fact remains, however, that Oppenheimer had the ability to redeem the debentures at the time of the exchange offer through various means, including borrowing funds at 16% or becoming a public company through an initial offering of stock. Admittedly, the means by which Oppenheimer could redeem the Volume-Indexed Debentures were restricted by the indenture provision. However, the defendant fully disclosed those limitations in the offering circular. Moreover, in view of the high rate of interest it was paying to the bondholders (22%) it plainly had an incentive to redeem those debentures even if to do so it had to borrow funds at 16%.

[6] The plaintiffs also make the novel argument that the exchange in fact was a redemption because the bondholders were fraudulently coerced into exchanging their Volume-Indexed Debentures for the New Debentures. The plaintiffs' argument does not stand analysis. The bondholders were given a choice of whether to exchange their Volume-Indexed Debentures for the New Debentures, and a number of plaintiffs, including Martin, opted to retain the Volume-Indexed Debentures. In any event because I have determined that Oppenheimer had the ability to redeem those debentures under certain circumstances, which were not impossible of achievement, its statement to that effect could not, as a matter of law, amount to coercion or fraudulent misrepresentation. Oppenheimer's motion for summary judgment with respect to its alleged violations of §12(2) of the Se-

curities Act and common law fraud must be granted. IT IS SO ORDERED.

V

In view of the conclusion that there is no legal basis for the plaintiffs' allegations of fraud against Oppenheimer either under the Securities Act or on a common law basis, it is unnecessary to determine whether the plaintiffs' requested equitable relief should be dismissed because of an adequate remedy at law.

MONHEIT v. CHALK

No. 6433

Court of Chancery of the State of Delaware, New Castle

April 16, 1985

Plaintiffs seek an award of attorney fees in this stockholder derivative suit brought to challenge the making and subsequent extensions of a loan extended by D.C. Trading and Development Corporation to Diversified Media, Inc. Both corporations are alleged to be dominated by defendants O. Roy Chalk and his wife, Claire Chalk. Suit was originally brought in a New York State Court, but personal jurisdiction of that court over Mr. and Mrs. Chalk was challenged and remained unresolved for three years. This Delaware action was filed in an effort to obtain *in personam jurisdiction* over Mr. and Mrs. Chalk. No action was taken in this Delaware suit; and a few months after it was filed, both issues were mooted by the repayment of the loan.

This filing of plaintiffs' application for attorney fees occurred two and a half years later. The court of chancery, per Vice-Chancellor Hartnett, denied the application for fees.

1. Corporations ⟹ 214

When litigation brought on behalf of shareholders results in a corporate fund being created or augmented, then recovery of attorney fees and disbursements will be had from that fund.

2. Corporations ⟹ 214

Pecuniary benefit to the corporation is not the only prerequisite to an award of fees in a derivative action because recovery of fees can also be had if there is a specific and substantial benefit to the corporation other than a purely monetary benefit.

3. Corporations ⟹ 214

Counsel fees in a shareholder suit will be granted even if a claim is mooted or settled provided that: (1) the claim was meritorious when filed, (2) the defendants took action producing a benefit to the corporation before a judicial resolution was achieved, and (3) the benefit was causally related to the lawsuit.

4. Corporations ⟹ 214

Once the plaintiff has demonstrated that defendant did convey a benefit to a corporation before judicial resolution was achieved in a shareholder derivative suit, the defendant bears the burden of demonstrating the lack of causal connection between that benefit and the litigation.

5. Corporations ⟹ 320(12)

Any fee award must be reasonable.

6. Workmen's Compensation ⟹ 1983

Factors to be considered in determining the reasonableness of a fee as found in the Delaware Lawyer's Code of Professional Responsibility include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved, and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent. CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (DR 2-106(B)).

7. Costs ⟹ 172

In order for a claim to meet the test of having been meritorious

when suit was filed, it must have been able to have withstood a motion to dismiss on the pleadings, and the plaintiff must have possessed knowledge of provable facts which have a reasonable likelihood of ultimate success.

Pamela S. Tikellis, Esquire, of Biggs & Battaglia, Wilmington, Delaware, for plaintiff.

David A. Drexler, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendants.

HARTNETT, *Vice-Chancellor*

Plaintiffs seek an award of attorney fees in this stockholder derivative suit brought to challenge the making, and subsequent extensions, of a loan extended by D.C. Trading and Development Corporation ("D.C. Trading") to Diversified Media, Inc. ("DMI"). Both corporations are alleged to be dominated by defendants O. Roy Chalk and his wife, Claire Chalk. The complaint alleged that the loan was improvident—both when made and at the time of each extension. Suit attacking the transaction was originally brought in a New York State Court but personal jurisdiction of the New York Court over Mr. and Mrs. Chalk was challenged and remained unresolved there for three years. This Delaware action was then filed in an effort to obtain *in personam* jurisdiction over Mr. and Mrs. Chalk. No action was taken in this Delaware suit and a few months after it was filed, both actions were mooted by repayment of the loan. Two and a half years later, plaintiffs filed an application for attorneys' fees and expenses. The application must be denied.

I

D.C. Trading and DMI were subsidiaries of Trans-Carribbean Airways until December of 1968, when Trans-Carribbean distributed its holdings in D.C. Trading to its shareholders pro rata. Its DMI holdings were similarly distributed in March of 1971.

D.C. Trading is a Delaware corporation which, since 1973, has been principally engaged in various real estate enterprises, charter and sightseeing bus operations, and the operation of a travel agency. Mr. Chalk is alleged to be the President and Chairman of its Board, while his wife is Secretary, Treasurer, and a Director. DMI is a New York corporation. Its main asset appears to have been a Spanish

language newspaper. Mr. Chalk is alleged in the complaint to be the President and Chairman of the Board, as well as the single largest shareholder, of DMI. D.C. Trading and DMI allegedly shared offices in New York.

In October of 1978, plaintiffs filed an action in the Supreme Court of the State of New York for New York County challenging transactions by D.C. Trading's Board of Directors which allegedly violated the directors' fiduciary duty to the shareholders. The challenged acts primarily centered around an $800,000 loan made to DMI by D.C. Trading on June 10, 1976. This loan was allegedly made when both D.C. Trading and DMI were in financial difficulties and notwithstanding the fact that D.C. Trading allegedly, within one year of the making of this loan, wrote off as uncollectible $40,695 which was due and owing to it from DMI and its subsidiaries. This two year loan was subsequently extended. On June 5, 1978, it was extended until June 10, 1979. On June 6, 1979, it was extended until June 10, 1980. On June 16, 1980, the loan was extended to June 10, 1981, even though it was already in default.

The New York action was vigorously defended. After almost three years of litigation concerning whether the New York Court had personal jurisdiction over the Chalks, the Delaware action was commenced in April of 1981. In July or August of 1981, the loan was repaid and both this action and the New York action were effectively mooted.

In February of 1984, plaintiffs filed their application for attorneys' fees of $90,000 and for reimbursement of disbursements of $2,160 in this Court. Defendants oppose the granting of any attorney fees to the plaintiffs.

I I

[1,2] It is well settled that when litigation brought on behalf of shareholders results in a fund being created or augmented, recovery of attorneys' fees and disbursements will be had from that fund. *Allied Artists Pictures Corp. v. Baron,* Del. Supr., 413 A.2d 876 (1980). Pecuniary benefit to the corporation is not, however, the only prerequisite to an award of fees because recovery of fees may also be had if there is a specific and substantial benefit to the corporation other than a purely monetary benefit. *Id.* and *Chrysler Corporation v. Dann,* Del. Supr., 223 A.2d 384 (1966).

[3,4] Counsel fees will be granted even if a claim is mooted or settled provided that (1) the claim was meritorious when filed, (2)

the defendants took action producing a benefit to the corporation before a judicial resolution was achieved, and (3) the benefit was causally related to the lawsuit. *Baron, supra.* Once a plaintiff has demonstrated that a benefit occurred, the defendant bears the burden of demonstrating the lack of a causal connection. *Id.*

[5,6] Any fee award, however, must be reasonable. *Richman v. DeVal Aerodynamics, Inc.*, Del. Ch., 185 A.2d 884 (1962). The Delaware Supreme Court has stated that the factors to be considered in considering the reasonableness of a fee are to be found in the Delaware Lawyers Code of Professional Responsibility ("DR"). *General Motors Corporation v. Cox,* Del. Supr., 304 A.2d 55 (1973). "DR" lists eight non-exclusive factors to be considered in determining the reasonableness of an attorney's fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or by the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent.

Compare *Sugarland Industries, Inc. v. Thomas,* Del. Supr., 420 A.2d 142 (1980).

III

It first must be determined, therefore, whether plaintiff is entitled to any fee in this action. Although there has been no such adjudication, defendants assert that this Court does not have *in personam* jurisdiction over the defendants and therefore the suit could not have achieved any benefit for the shareholders. Plaintiffs claim jurisdiction under 10 *Del. C.* §3114, the Delaware long-arm statute permitting personal service of process upon non-resident directors. The issues revolves around the fact that the provisions of this statute are not

applicable to causes of action arising prior to September 1, 1977. 61 *Del. Laws,* Ch. 119, §§2 and 4. Although the challenged loan was originally made in 1976, it was subsequently extended in 1978, 1979, and 1980. Each of these extensions was made after the effective date of 10 *Del. C.* §3114 and each extension is alleged to be a wrongful act. It would appear, therefore, that this court does have *in personam* jurisdiction over the defendants and could have addressed the issue of the allegedly wrongful extensions of the loan.

I V

[7] In order for a claim to meet the test of having been meritorious when suit was filed it must have been able to have withstood a motion to dismiss on the pleadings, and the plaintiffs must have possessed knowledge of provable facts which held up some reasonable likelihood of ultimate success. *Chrysler Corporation v. Dann, supra.*

The complaint in this case does sufficiently state a claim which would have survived a motion to dismiss. It appears unlikely, however, that plaintiffs, at the time suit was filed, had knowledge of such facts as would have given them a reasonable likelihood of success. Although the Chalks were alleged to have stood on both sides of the transaction, the Chalks' holdings in D.C. Trading and DMI were approximately equal. They, therefore, would have been unlikely to have benefitted from injuring one corporation in order to enrich the other. More importantly the loan, although perhaps given at a time when D.C. Trading was not in the best financial condition, was at a competitive rate of interest and was fully secured by DMI's principal asset, the 80% stock ownership of El Diario Publishing Co., Inc. Also, Mr. Chalk took no part in the deliberations and the vote authorizing the original loan. The material information concerning the loan was all disclosed in public filings at the time the loan was made and information concerning the extensions was similarly made public. As a consequence, it seems unlikely that plaintiffs had a reasonable likelihood of success when suit was filed.

V

The $800,000 loan has now been repaid. Plaintiffs therefore claim that the defendants have, in response to the suit, taken action which may have benefitted the corporation before a judicial resolution was achieved. It appears, however, that the repayment of the loan was not causally related to the institution of this Delaware action.

The funds for repayment of the loan were produced from the

sale of the principal asset of a newspaper owned by El Diario Publishing Co., Inc. —a subsidiary of DMI. This sale is shown by Joseph P. Cooney's affidavit to have been contemplated as early as January of 1981. Negotiations for the sale to a subsidiary of Gennett Co., Inc. were begun in January of that year and an Asset Purchase Agreement was reached in June of 1981 calling for a price of $9 million.

This case was filed in April of 1981. Negotiations for the sale had been going on for three months prior to the filing of this suit. It therefore appears that the loan was repaid because DMI's subsidiary sold off its one substantial asset. Because negotiations for the sale were well underway before this suit was filed, it is not reasonably likely that this suit caused the repayment of the loan.

Plaintiffs' application for counsel fees and disbursements is therefore denied. IT IS SO ORDERED.

MOUNT VERNON CORP. v. GEORGE WASHINGTON CORP.

No. 8030

Court of Chancery of the State of Delaware, New Castle

May 28, 1985

Plaintiff, Mount Vernon Corporation, sought a preliminary injunction to postpone or adjourn an annual shareholders meeting of defendant, George Washington Corporation. Plaintiff claimed that defendant's abrupt six day notice of the meeting was an attempt to prevent plaintiff from engaging in a proxy context.

In a related and simultaneous action in the United States District Court for the District of Columbia, the court had issued a preliminary injunction prohibiting plaintiff from voting any proxies obtained in connection with the meeting.

The court of chancery, per Vice-Chancellor Walsh, held that, where a court of competent and preemptive jurisdiction had prohibited plaintiff from seeking proxies for the shareholders meeting,

it was such prohibition and not defendant's manner of notice of the meeting which prevented plaintiff from seeking proxies. Therefore, plaintiff was unable to show irreparable harm resulting from defendant's conduct. Plaintiff's motion for preliminary injunction was denied.

1. Injunctions ⟹137

Where a court of competent and preemptive jurisdiction had issued a preliminary injunction preventing plaintiff from seeking proxies, plaintiff could not show irreparable harm caused by defendant since the preliminary injunction, and not defendant's abrupt notice of the annual shareholders meeting, prevented plaintiff from voting proxies.

Joseph A. Rosenthal, Esquire, of Morris & Rosenthal, P.A., Wilmington, Delaware, for plaintiff.

R. Franklin Balotti, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendant.

WALSH, *Vice-Chancellor*

Plaintiff, Mount Vernon Corporation ("Mount Vernon"), the owner of approximately 5 percent of the outstanding shares of the defendant, George Washington Corporation ("GWC"), seeks a preliminary injunction to stay, or, alternatively, require the adjournment of, a GWC stockholders' meeting scheduled for May 29, 1985. The present application is but part of a larger dispute between the parties concerning claims of corporate waste and improper issuance of stock. This matter was considered on an expedited basis because of the notice given by GWC on May 10, 1985, and received by plaintiff on May 13, 1985, that the annual meeting of shareholders would occur within 19 days.

Plaintiff contends that the abrupt notice of the annual meeting represents an attempt by management of GWC to prevent plaintiff from engaging in a proxy contest which it has been planning since February. Plaintiff claims that it has been attempting through filings with the Securities and Exchange Commission and state regulatory agencies (made necessary by the fact that GWC is an insurance holding company) to place itself in a position to persuade other stockholders that a change in GWC management is needed. GWC counters that the annual meeting has been called in conformity with

the corporate bylaws and, although the notice is short, it is adequate under the circumstances.

At the time of oral argument on May 24, 1985 counsel did not advise the Court that the parties were litigating the merits of Mount Vernon's proxy materials in the United States District Court for the District of Columbia. That action involved a claim by GWC that Mount Vernon's proxy materials were in violation of Section 13(d) of the Securities Exchange Act of 1934 and a counterclaim by Mount Vernon also alleging Securities Act violations but complaining of the timing and manner of notice of the annual meeting as well. Mount Vernon sought relief, *inter alia,* in the form of deferral of the annual meeting.

Earlier today, before this Court was able to issue a decision on Mount Vernon's motion for a preliminary injunction, the Court was advised that Judge Gerhard Gesell of the United States District Court for the District of Columbia had issued a preliminary injunction prohibiting Mount Vernon from "directly or indirectly" voting any proxies obtained by it in connection with the scheduled May 29 meeting. *George Washington Corporation, et al. v. Mount Vernon Corporation,* D.D.C., Civil Action 85-1625, May 28, 1985 (ORDER). Judge Gesell denied Mount Vernon's application for a temporary restraining order to delay the scheduled annual meeting.

[1] Under the circumstances, and apart from the merit of Mount Vernon's claim of manipulation of the processes of the annual meeting, this Court is faced with the prospect that a party seeking equitable relief in the form of postponement or adjournment of an annual meeting in order to engage in a proxy contest has been prohibited by a Court of competent, and preemptive, jurisdiction from voting such proxies. Although Mount Vernon views this development as a temporary setback which might be cured by supplemental proxy material filings, it cannot suggest when it will be free to resume its proxy efforts. Regardless of how long the preliminary injunction may remain in effect, its existence precludes the assertion of irreparable injury since it, not the conduct of GWC management, denies Mount Vernon the opportunity to participate in the annual meeting through the use of proxies. The harm thus perceived is simply not within the power of this Court to remedy. Accordingly, the motion for preliminary injunction must be denied.

IT IS SO ORDERED.

NEWS INTERNATIONAL v. WARNER COMMUNICATIONS, INC.

No. 7420

Court of Chancery of the State of Delaware, New Castle

April 10, 1985

Two shareholders of Warner Communications motioned to intervene and sought to vacate a stipulation of dismissal between News International and Warner. They alleged that the dismissal failed to comply with Del. Ch. Ct. R. 23.1. The former parties joined and opposed the shareholder's action.

In the original action, News sought to enjoin the consummation of an agreement between Warner and Chris-Craft Industries, Inc. This agreement allowed Chris-Craft to acquire a 19% interest in Warner and in essence secure veto power over a change in Warner management. The court of chancery denied News' motion for preliminary injunction because Chris-Craft was independent and was under no obligation to vote its shares in favor of Warner. A stipulation of dismissal with prejudice followed.

In deciding whether the underlying action was a derivative suit, the court of chancery, per Vice-Chancellor Walsh, held that the original plaintiff News had intended to bring an individual rather than derivative cause of action. The dismissal was not subject to the notice and court approval provisions of Del. Ch. Ct. R. 23.1. Since the action between News and Warner was not pending and fraud and collusion were absent, intervention under Del. Ch. Ct. R. 24 was inappropriate.

1. Corporations ⟹ 189(2), 211(2)

The body of the complaint, not the intention of the plaintiff, determines whether a complaint states a derivative or individual cause of action.

2. Corporations ⟹ 202

A shareholder may maintain an individual action to redress corporate wrongs which either: (1) cause an injury to that shareholder that is distinct from that suffered by other shareholders, or (2) involves a contractual right such as the right to vote or assert majority control.

3. Corporations ⟹ 202

The wasting of corporate assets, breach of fiduciary duties and conspiracy to do such, are causes of action that must be maintained in a derivative rather than individual capacity.

4. Corporations ⟹ 204, 207 1/2

A complaint does allege a "special injury" to a plaintiff's voting rights when it alleges that the management of another corporation acquired a veto power over all shareholder actions subject to an 80% supermajority voting requirement by virtue of a transfer of stock to that corporation.

5. Corporations ⟹ 210, 211(1)

Where the alleged wrongdoing supports a cause of action in favor of the corporation as well as one in favor of the shareholder individually, the shareholder may proceed with his individual action. The intention of the plaintiff determines whether he brings the suit in his individual rather than derivative capacity.

6. Corporations ⟹ 202, 211

Where a plaintiff brings an individual action, he may only prosecute those claims in his complaint which are individual in nature. Derivative claims may be dismissed and are not subject to the requirements of Del. Ch. Ct. R. 23.1, unless the plaintiff is willing and able to assume his fiduciary duty to the other shareholders.

7. Corporations ⟹ 211

When a plaintiff intends only to bring an individual cause of action, dismissal is not subject to the notice and court approval provisions of Del. Ch. Ct. R. 23.1.

8. Corporations ⟹ 202

Del. Ch. Ct. R. 24 governing intervention of parties applies only to pending actions, except where a judgment must be reopened because of fraud and collusion between the parties to the prejudice of the intervenors rights.

Martin P. Tully, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, and Squadron, Ellenoff, Plesent & Lehrer, New York, New York, for plaintiff.

Rodman Ward, Jr., Esquire of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, for defendants Warner Communications, Inc. and the Warner Director Defendants.

Charles S. Crompton, Jr., Esquire, of Potter Anderson & Corroon, Wilmington, Delaware, for defendants Chris-Craft Industries, Inc., BHC, Inc., and Herbert J. Siegel.

Joseph A. Rosenthal, Esquire, and Norman M. Monahit, Esquire, of Morris and Rosenthal, P.A., Wilmington, Delaware, and Stanley Nemser, Esquire, Stephen I. Rabin, Esquire, and Patricia I. Avery, Esquire, of Wolf Popper Ross Wolf & Jones, New York, New York, for Proposed Intervenors.

Walsh, *Vice-Chancellor*

This matter is before the Court on a "case within a case." It represents the effort of two shareholders of Warner Communications, Inc. ("Warner") to vacate a stipulation of dismissal in order to reactivate claims, they view as derivative, originally asserted by the plaintiff, News International plc, an English Company ("News") the largest shareholder of Warner. The former antagonists have joined forces to oppose the reopening of their now resolved dispute.

On January 6, 1984, News instituted the underlying action against Warner and certain members of its board of directors, Chris-Craft Industries, Inc. ("Chris-Craft"), and BHC, Inc. ("BHC"), challenging a transaction between the defendants whereby Warner exchanged a 19% interest in its stock for a stock interest in BHC, a wholly-owned subsidiary of Chris-Craft. Approximately two months later, the parties resolved their differences through an agreement under which Warner purchased News' entire holdings of Warner stock. On March 19, 1984, the parties filed a stipulation of dismissal, with prejudice, pursuant to Chancery Rule 41(a)(1). Three days after the stipulation of dismissal was filed two Warner shareholders, Barbara K. Lipton and Michael Ceasar (the "Proposed Intervenors"), moved to vacate the dismissal as failing to comply with Chancery Rule 23.1, and to intervene in this action under Chancery Rule 24. The original parties oppose the Proposed Intervenors' attempt claiming that because News brought, or intended to bring, an individual action, Chancery Rule 23.1 does not apply and there is no independent basis for intervention.

The question of whether the underlying action was a derivative suit requiring Court approval for its dismissal requires an examination of the facts of the controversy between News and the original defendants. In October, 1983, News, an English Company controlled by Rupert Murdoch, began purchasing shares of Warner on the open market. On December 1, 1983, News filed a 13D with the Securities and Exchange Commission disclosing that it had acquired an interest in Warner of approximately 6.7%. By December 7, News had increased its holdings to approximately 7%. Since that time, News has neither purchased any additional shares, nor formally expressed an intention to acquire control of Warner.

By the end of December, and apparently in response to News' interest in it, Warner had finalized an agreement with Chris—Craft and BHC by which Chris-Craft, through its ownership of BHC, would control a 19% stock interest in Warner. Because Warner has in place 80% supermajority voting requirement for certain shareholder action, including the removal of directors, Chris—Craft secured, in effect, veto power over a change in management.

In filing this action News alleged that the Chris-Craft transaction deprived it of its voting rights, wasted corporate assets, and was designed to entrench management. Initially, News sought to enjoin consummation of the Warner-Chris-Craft transaction. Chancellor Brown refused to grant a preliminary injunction, noting that because Chris-Craft did not appear to have any obligation to vote its Warner shares with Warner management, the transaction would not "deprive the plaintiff of any voting right or position which it now has." *News International plc v. Warner Communications, Inc.*, Del. Ch., C.A. No. 7420, slip op. at 3, Brown C, (January 12, 1984).

Following the reproachment and the buy-out of Murdoch many Warner shareholders, including the Proposed Intervenors, filed suit in this and other courts challenging both the repurchase of News' shares and the exchange of stock between Warner and Chris-Craft. In these actions, News was designated as a defendant, along with Chris-Craft and BHC, on the ground that it conspired with Warner in its breach of fiduciary duty. The Proposed Intervenors seek to take over the reins of this suit, and realign News as a defendant by adding additional claims against News.

The Proposed Intervenors first contend that the dismissal of this action is subject to Chancery Rule 23.1 because it states derivative claims. The original parties assert that the complaint sets out individual claims, and furthermore, regardless of the nature of these claims, News' intention to bring individual claims precludes the

application of Chancery Rule 23.1 for purposes of dismissal. The applicability of Chancery Rule 23.1 to the dismissal in this action is pivotal not only with respect to the propriety of the dismissal, but also with respect to the timing of the motion for intervention.

[1,2] The intention of a plaintiff does not control whether a complaint states a derivative or an individual cause of action. *Elster v. American Airlines, Inc.*, Del. Ch., 101 A.2d 219, 223 (1953); *Moran v. Household International, Inc.*, Del. Ch., C.A. No. 7730, slip. op. at 18, Walsh, V.C. (January 29, 1985). The Court determines the nature of the action from the body of the complaint. Although it is sometimes difficult in practice to distinguish between individual and derivative claims, a shareholder may maintain an individual action to redress wrongs which either: (1) cause an injury to that shareholder that is distinct from that suffered by other shareholders, or (2) involve a contractual right, such as the right to vote or assert majority control, that extends to the shareholder, *qua shareholder*, rather than to the corporation. *Moran, supra.*

[3,4] The complaint here clearly supports individual as well as derivative causes of action. News alleged that Warner directors wasted corporate assets and breached their fiduciary duty, and that the other defendants conspired in those wrongs. These plainly are wrongs to the corporation which may be maintained by a shareholder only in his derivative capacity. In addition, the complaint sets out individual claims. Although News has not suffered any distinct harm to its 7% stock interest in Warner because it has not alleged a desire to gain control of Warner through its block position, *See Moran, supra*, Slip. op. at 20, the complaint does allege "special injury" to plaintiff's voting rights. *Elster, supra; Colonial Securities Corp. v. Allen*, Del. Ch., C.A. No. 6778, Slip. op. at 7, Longobardi, V.C. (April 18, 1983). Specifically, News alleges that Warner management secured for itself veto power over all shareholder actions subject to the 80% supermajority voting requirement by virtue of the transfer of its stock to Chris-Craft and BHC. *Compare, Colonial Securities Corp., supra.* News was permitted to maintain an individual action to protect its contractual rights. Chancellor Brown's conclusions in his decision denying preliminary injunction to the effect that Chris-Craft appeared to be independent and under no obligation to vote its shares in favor of Warner management speak to the merit of this claim, not to its nature. Clearly, News' complaint states both derivative and individual claims.

[5,6] Where, as here, the alleged wrongdoing supports a cause of action in favor of the corporation as well as one in favor of the

shareholder individually, the shareholder may proceed with his individual action. *Elster, supra; Moran, supra.* The intention of the plaintiff determines whether he brings the suit in his individual or derivative capacity. Thus intent continues to be of significance notwithstanding the gravamen of the claims. Of course, where a plaintiff brings an individual action he may only prosecute those claims in his complaint which are individual in nature. If it is determined that certain claims are merely derivative, they are subject to dismissal unless the plaintiff is willing and able to assume his fiduciary obligations to other shareholders. Moreover, because a plaintiff in this situation never intended to assume a fiduciary relationship to other shareholders, he will not be forced to shoulder such a burden. For this reason, dismissal of derivative claims which are brought in a shareholder's individual capacity are not subject to the requirements of Chancery Rule 23.1.

[7] Determining whether a plaintiff intended to bring an individual or derivative suit is difficult where the complaint itself does not so specify. The Proposed Intervenors note that News made statements in its press releases and in its complaint that displayed concern for the interests of all Warner shareholders, and not merely itself. However, despite this professed concern for the welfare of other Warner shareholders, I conclude that News only intended to bring this suit individually, and not on behalf of Warner. First, it was not unusual for News to make statements as to the plight of shareholders generally for the purpose of gaining public support in its fight against Warner management. Litigation over corporate control is usually accompanied by orchestrated public relations efforts designed to picture each side as the champion of shareholder interests. Furthermore, News made no effort to comply with the demand requirements of Rule 23.1. Moreover, rather than plead futility of demand, *Aronson v. Lewis,* Del. Supr., 473 A.2d 805 (1984), News argued that it need not comply with Rule 23.1 because it brought individual claims. Although such an argument cannot create an individual action where the complaint does not support one, it does reflect a plaintiff's intention to bring an individual, rather than a derivative, claim. Thus, because I find that News intended to bring only an individual cause of action, dismissal was not subject to the notice and court approval provisions of Rule 23.1.

The Proposed Intervenors argue that they should be permitted to intervene in this action and, in effect, vacate the parties' stipulation of dismissal for the purpose of prosecuting the derivative claims as well as new claims against News. The original parties to the suit

contend that the intervenor's application to intervene under Chancery Rule 24 is not timely because this action is no longer pending having been properly dismissed through stipulation by the parties.

[8] Generally, Chancery Rule 24 governing intervention of parties applies only to pending actions. *Braasch v. Mandel,* Del. Supr., 172 A.2d 271, 273 (1961). An exception to this rule exists for "the reopening of judgments entered by reason of collusion and fraud between the parties to the prejudice of intervenor's rights." *Id.* at 274. This case does not fit within the exception. Because, as noted, the parties were free to stipulate to a dismissal of this action without regard to Chancery Rule 23.1, there is no improper conduct to warrant vacating that dismissal. Moreover, the dismissal of this individual action will not prejudice the rights of any Warner shareholder, other than News, to pursue derivative claims arising out of the Chris-Craft exchange or the News repurchase. Approximately 20 other lawsuits have been filed by Warner shareholders since the repurchase of News' shares. In at least one of those actions personal jurisdiction over News has been effected. The Proposed Intervenors have filed four actions, including two in this Court, challenging the Warner-Chris-Craft exchange transaction and the buy-back of News' stock. The Proposed Intervenors must look to those actions to assert their claims. The motion to intervene in this action and vacate the stipulation of dismissal must be denied.

Finally, inasmuch as I have concluded that dismissal of the underlying action was not controlled by Chancery Rule 23.1, I do not reach the question whether a timely motion to intervene would have been granted under Chancery Rule 24.

IT IS SO ORDERED.

PATERSON v. HANBY

Nos. 6354 & 6062

Court of Chancery of the State of Delaware, New Castle

April 24, 1985

Plaintiffs, as minority stockholders of a closely held corporation,

filed claims against the controlling stockholder alleging mismanagement and last corporate opportunity resulting from defendant's refusal since 1961 to divulge requested corporate information. In this action defendant moved for partial summary judgment on the grounds that the latter claim was barred by the statute of limitations as well as by laches and estoppel.

Viewing the facts as most favorable to the plaintiffs, the court found that plaintiffs' claim fell within the *Bovay* exception, tolling the statute of limitations, and that their delay in preserving the claim was not unreasonable under the unusual circumstances.

The court of chancery, per Vice-Chancellor Walsh, denied the motion, observing that the disputed issues of fact should be resolved at trial.

1. Judgment ⟹ 181(31), 185(6)

On a motion for partial summary judgment, defendant is not entitled as a matter of law to prevail where there are disputed issues of material fact and where movant's actions as fiduciary give rise to unusual circumstances.

Stephen E. Herrmann, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for plaintiffs.

William H. Sudell, Jr., Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendant.

WALSH, *Vice-Chancellor*

This consolidated action involves efforts by certain minority shareholders of a closely-held corporation, Olen F. Phillips Realty Co. ("OFP") to recover for loss of corporate opportunity and mismanagement attributable to the alleged breach of fiduciary responsibility by OFP's majority shareholder, Samuel C. Hanby ("Hanby"). The plaintiffs and Hanby's former wife together own 10% of OFP's common stock while Hanby and entities he controls own the balance. Hanby has moved for partial summary judgment with respect to the corporate opportunity claims on the ground that such claims are barred by the applicable statute of limitations as well as by laches and estoppel.

The facts, as developed in the discovery record, are viewed from a perspective which favors plaintiffs as the non-movants. At one time Hanby owned all the shares of OFP. In 1951 he offered minority

interests to the plaintiffs at a time when all three were partners in a real estate firm, Hanby, Patterson and Schwartz, now Patterson Schwartz & Associates. OFP owned four apartment buildings in the vicinity of Tenth and Jefferson Streets in Wilmington and the rentals received from these buildings constituted its income. Because of his controlling position, Hanby managed the day-to-day operations of OFP. Both Schwartz and Patterson were directors and officers of OFP until 1961 when the plaintiffs and Hanby came to a parting of the ways. Since that time Hanby has refused requests from plaintiffs for financial information about OFP.

Between 1962 and 1967 plaintiffs initiated litigation in the Superior Court and in this Court attacking Hanby's handling of OFP affairs and seeking information concerning the corporation's financial dealings. The results of these suits were inconclusive in resolving plaintiffs' grievances or providing them with information concerning OFP's financial operation since 1961.

After plaintiffs and Hanby became estranged, Hanby purchased in his own name and for his own use three real estate parcels which were adjacent to OFP property. The purchases were:

(a) 1010 Jefferson Street on June 23, 1961

(b) 506 Delaware Avenue on May 28, 1965

(c) 1012 Jefferson Street on January 13, 1967

Plaintiffs claim that one of the purposes of their unsuccessful demands for financial information about OFP during the years spanning these purchases was to determine if OFP was in a position to have purchased any of the properties obtained by Hanby. In essence, plaintiffs claim they were simply unable, because of Hanby's denial of information, to form a judgment as to whether Hanby was diverting to himself an OFP opportunity. It was not until 1981 in the course of discovery in the "stock list" phase of this consolidated action that plaintiffs learned through the deposition of Carol Hanby, Hanby's wife and the then President of OFP, that the financial affairs of OFP were "reasonably well intertwined" with Hanby's corporate *alter ego, S. C. Hanby, Inc.,* also a defendant in this action. In Mrs. Hanby's words: "in order to see one, you have to see the whole thing." Plaintiffs also apparently learned, or suspected, at that time that Hanby had been reallocating rents received from a common tenant between OFP's property and the adjacent properties to the detriment of OFP. They concluded that Hanby had following the same pattern in acquisition of the properties. Upon receiving this information the plaintiffs immediately filed the claims alleging lost corporate opportunity.

Hanby's motion for partial summary judgment proceeds on the basis that plaintiffs concededly had knowledge of the disputed transaction for at least fourteen years, and in the case of the 1961 acquisition for almost 20 years. Moreover, Hanby contends, as knowledgeable realtors the plaintiffs presumably were aware of the prices paid for the properties and the exact identity of the purchasers. Finally, it is argued that the plaintiffs have not been reluctant to litigate other phases of their ongoing dispute with Hanby and their failure to assert the corporate opportunity claim constitutes such unreasonsable delay as to constitute laches.

Plaintiffs do not contest the chronology of the events underlying their corporate opportunity claims but deny that their delay was unreasonable under the unusual circumstances in which they found themselves: minority shareholders who were excluded from access to information which might have placed them on notice of a breach of fiduciary duty by a controlling shareholder.

[1] Plaintiffs acknowledge, as they must, that shareholder derivative actions, and actions akin to such claims, seeking recovery of damages to shareholder interests are governed by the three-year statute of limitations embraced in 10 *Del. C.* §8106. *Halpern v. Barran,* Del. Ch., 313 A.2d 139, 141 (1973). In *Halpern,* Chancellor Duffy refused to apply the statute of limitations tolling rule announced in *Bovay v. H. M. Byllesby & Co.,* Del. Supr., 38 A.2d 808 (1944), in the absence of an allegation of fraudulent self-dealing on the part of the fiduciary directors resulting in personal profit. Hanby argues that this case does not fit within the unusual holding in *Bovay,* while plaintiffs view Hanby's conduct as the type of egregious conduct to which *Bovay* finds application.

If plaintiffs are afforded the usual deference for summary judgment purposes and the complaint is fairly read *in toto*, their claim of lost corporate opportunity may be deemed to fall within the *Bovay* exception. The lost corporate opportunity claims are characterized in the complaint as improper and wrongful acts on the part of Hanby and in the Fifth Cause of Action which appears to be a "catch-all" or summary of the various claims justifying the appointment of a receiver, Hanby and those allied with him have been accused of "fraudulently" disregarding the rights of the minority shareholders. Moreover, it is clearly alleged in paragraphs 8 and 9 of the Complaint that Hanby profited personally from the alleged self-dealing. The conduct under review may thus be viewed as acts of commission on the part of a fiduciary, rather than mere failures or dereliction. Such conduct, when it results in personal profit, may constitute such a

serious breach of trust as to be assertable notwithstanding the applicable statute of limitations. *Laventhol, Krekstein, Horwath & Horwath v. Tuckman,* Del. Supr., 372 A.2d 168, 169 (1976).

The question of the actual or imputed knowledge which plaintiffs possessed is a disputed factual matter which does not, on this record, lend itself to summary judgment disposition, particularly in the light of Hanby's efforts to frustrate plaintiffs' attempts to secure financial information concerning OFP. At this juncture plaintiffs are entitled to the inference that the first knowledge they received that OFP might have been in a position to acquire the adjacent properties was through Carol Hanby's deposition in 1981. Whether earlier events placed them on notice must await the development of a fuller record at trial.

Hanby next argues that, apart from the applicability of 10 *Del. C.* §8106, the long delay of plaintiffs in asserting the corporate opportunity claims is so unreasonable under the circumstances that assertion of the claim should be barred under the doctrine of laches or its counterpart—equitable estoppel.

If, as noted, plaintiffs' corporate opportunity claim is deemed an "extraordinary" case under the *Bovay* standard it is timely filed regardless of the difficulty the defendant—fiduciary may be forced to endure to defend a claim so far removed in time. But even if the claim is arguably subject to this defense of laches, or equitable estoppel, an essential element of that defense is in serious dispute. Hanby contends the long passage of time has resulted in an inability to present evidence to contest the claim because witnesses have died and records destroyed. Plaintiffs respond that certain records such as income tax returns, cancelled checks and bank statements are retrievable and would be probative on the question of OFP's general financial condition in the years in which the disputed transactions occurred.

It is recognized that, as a practical matter, plaintiffs must prove their corporate opportunity claim from evidence which is now, or formerly was, in the defendants' possession. To the extent that such evidence has been destroyed in the normal course of the retirement or scheduled destruction of OFP's business records and is not now producible, plaintiffs' claim may fail of proof even though Hanby, as a controlling shareholder, may bear the burden of demonstrating the intrinsic fairness of his transaction with OFP. *Getty Oil Company v. Skelly Oil Company,* Del. Supr., 267 A.2d 883 (1970); *Sinclair Oil Corp. v. Levien,* Del. Supr., 280 A.2d 717 (1971) and *Borden v. Sinskey,* 3rd Cir., 530 F.2d 478 (1976). Hanby, as the person most knowl-

edgeable of OFP's financial ability during the years in question, is available as is Carol Hanby and, presumably, defendants' version of the disputed events will be fully presented. To the extent defendants' position lacks documentary support, such deficiency is readily explained by the passage of time. In short, it is simply premature to determine at this time that defendants will necessarily be prejudiced in the presentation of their position by the effect of the passage of time. Such a determination is better left to the trial which must occur, in any event, with respect to the other claims which have not been made the subject of the present motion for summary judgment.

In view of the disputed issues of fact which subsist in this record and because of the unusual circumstances in which Hanby exercised his role as a controlling shareholder in a closely-held corporation defendants' motion for summary judgment must be denied.

IT IS SO ORDERED.

PHILLIPS PETROLEUM CO. v. ARCO ALASKA, INC.

No. 7177

Court of Chancery of the State of Delaware, New Castle

May 15, 1985

Plaintiffs, Phillips Petroleum Co., Mobil Oil Corp., and Chevron U.S.A., Inc., seek the dissolution of a stay on a declaratory judgment action to interpret the Prudhoe Bay Unit Operating Agreement (Operating Agreement). The Operating Agreement provides a formula for determining the plaintiffs' and defendants' ownership interests in Alaska's north Slope oil field and requires submission of the ownership percentage issue to binding arbitration if the owners cannot agree. Plaintiffs request judicial review and interpretation of the Operating Agreement, contending the arbitration board has no authority to determine the binding effect of previous subcommittee agreements.

The court of chancery, per Vice-Chancellor Walsh, dissolved the stay on the declaratory judgment action, because the purpose of

the stay—to allow arbitration to proceed without interference of parallel litigation in the court of chancery—has been served and because two of plaintiffs' original claims had not been mooted through arbitration.

1. Arbitration ⟹ 23.3

In an action seeking interpretation of certain provisions of an operating agreement, the submission of claims to an arbitration board prior to judicial filing does not serve as a waiver of the right to judicial review.

2. Arbitration ⟹ 29.1

The filing of a claim in the California courts regarding selection of arbitrators does not give California exclusive jurisdiction over all matters relating to the arbitration agreement.

3. Declaratory Judgment ⟹ 43

The availability of another remedy does not, in itself, warrant dismissal of a declaratory judgment action.

4. Courts ⟹ 28

The factors which control application of the *forum non conveniens* doctrine are: the applicability of Delaware law; the relative ease of access to proof; the availability of compulsory process for witnesses; whether a similar action in another jurisdiction is pending; and all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.

5. Courts ⟹ 28

In applying the *forum non conveniens* doctrine, a heavy burden is placed on the defendant to show that a significant hardship will result.

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WALSH, *Vice-Chancellor*

The plaintiffs, Phillips Petroleum Company, Mobil Oil Corporation, and Chevon U.S.A., Inc., seek a declaratory judgment interpreting the Prudhoe Bay Unit Operating Agreement ("Operating Agreement") which governs the plaintiffs' and defendants' ownership interest in Alaska's North Slope oil field. This action has been stayed since August, 1983, pending resolution of arbitration proceedings allocating the parties' relative ownership interests in the North Slope oil field in accordance with the Operating Agreement. The plaintiffs now seek to dissolve the stay on the basis that the arbitration proceedings will soon be concluded.

I

All of the plaintiffs and defendants are Working Interest Owners, or Unit Owners, of oil and gas leases in the Prudhoe Bay Field on the North Slope. The defendants, Arco Alaska, Inc., Sohio Alaska Petroleum Company, Exxon Corporation, Atlantic Richfield Company and Sohio Petroleum Company presently own a 94% interest in the field, while the plaintiffs own a 5% interest. The remaining interest is owned by others not parties to this action.

On April 1, 1977, the parties entered into the Operating Agreement which provides a formula for allocating their respective ownership interests in the field's production. By the terms of the agreement, ownership percentages are determined by the amount of oil and gas contained in the pores of the underground rock located within the parties' tracts-termed HydroCarbon Pore Volume (HPV). The parties were to determine their respective ownership interests based upon HPV amounts by January 1, 1982. The Operating Agreement pro-

vided that if the parties did not reach an agreement by that date the redetermination of ownership interests would be submitted to binding arbitration as to "those issues involving HPV values on which the Working Interest Owners are not finally agreed at the time of the preliminary hearing. . . ." §37.103, Operating Agreement.

To facilitate the negotiations between the Unit Owners, a hierarchy of committees and task groups was established to gather data and calculate the HPV values. During the course of negotiations from 1980 until early 1982, one group known as the "Equity Subcommittee," which functioned under the Unit Owners Committee, reached agreement with respect to certain technical aspects of the HPV redetermination. Plaintiffs claim these are final agreements which are binding upon the Unit owners, and outside the scope of arbitration. The defendants contend that all but two of the agreements were merely "interlocutory" under §38.206(c) of the Operating Agreement and remain subject to arbitration. On October 8, 1982, two of the defendants, Arco Alaska and Exxon, commenced arbitration proceedings pursuant to the Operating Agreement, after the parties were unable to resolve their final differences over HPV amounts.

During preliminary hearings before the Arbitration Board ("the Board") the plaintiffs sought to limit the submission of evidence in the arbitration proceedings in three ways. First, they contended that the agreements endorsed by the Equity Subcommittee were "finally agreed" upon within the meaning of §37.103, and thus not subject to arbitration. Second, plaintiffs asserted that because the Operating Agreement referred to redetermination of HPV "as of January 1, 1982," well data collected after that date should be excluded. Finally, they argued that the defendants' use of a "permeability cut off" factor was contrary to the Operating Agreement and certain subcommittee agreements. The plaintiffs disputed the Board's authority to determine the arbitrability of, or to resolve, these issues. By its final prehearing order of April 12, 1983, the Board ruled against plaintiffs, holding that it would receive data with respect to the disputed issues and decide at a later time whether such evidence should be considered in making its final HPV redetermination.

On May 3, 1983, the day the final arbitration hearings were to begin, the plaintiffs filed the present action in this Court contending that the Board had no authority to determine the binding effect of the subcommittee agreements, and seeking an interpretation of the Operating Agreement. The defendants sought to dismiss the suit on

various jurisdictional grounds, or alternatively, to stay this action pending the conclusion of arbitration. In addition, the defendants moved to stay all discovery until the arbitration proceedings were concluded. Chancellor Brown, in his decision of August 3, 1983, *Phillips Petroleum Company v. Arco Alaska, Inc.*, Del. Ch., C.A. No. 7177, Brown, V.C. (August 3, 1983), stayed the present action, as well as all discovery, pending the conclusion of the arbitration, and deferred ruling upon defendants' motion to dismiss. He ruled that because of the potential magnitude of discovery this action should be stayed so as not to interfere with the Arbitration proceedings but he also noted that the Board's ruling may moot certain of plaintiffs' claims.

The lengthy arbitration has proceeded since 1983, and the seventh and final segment was concluded in March, 1985. The Board is now engaged in the Volumetrics phase of the proceedings and has requested the parties to attempt to agree upon the final values. If the parties disagree upon final HPV amounts it is still possible that another hearing will be held by the Board. During the arbitration proceedings the plaintiffs' third claim regarding the permeability cut-off factor was decided in their favor and has become moot. In addition, the Board has instructed the parties to compute two sets of final HPV values—one set on the basis that the subcommittee agreements are binding, and the other set on the assumption that those agreements were not final. Although two sets of results are being calculated, it appears that the Board has decided to accept the results which exclude the subcommittee agreements. Thus, two of the plaintiffs' claims—whether the parties "finally agreed" upon the subcommittee determinations and whether the parties were permitted to use well data collected after January 1, 1982,—apparently remain viable issues in the present action.

The plaintiffs now seek to dissolve the stay for the purpose of allowing this Court to rule upon defendants' motion to dismiss, arguing that it is now clear that the Arbitration will not moot two of its claims. Plaintiffs state that no additional action need be taken in this action until after the Board issues its final award, so that this action will not interfere with the arbitration proceedings. The defendants oppose the dissolution of the stay until after the issuance of the Board's final award. They note that an additional hearing is still possible in Seattle, Washington if the parties do not agree on the final HPV redetermination.

Plaintiffs' present effort is intended to remove the jurisdictional roadblock created by the defendants' motion to dismiss. Their mo-

tivation in moving to dissolve the stay even before the arbitration is finally concluded became clear at oral argument. In a previous arbitration proceeding in San Diego under the same Operating Agreement, the parties instituted a summary confirmation action in California. The plaintiffs fear that if defendants file a similar type confirmation proceeding at the conclusion of this arbitration, this Court, not having addressed the merits, and with the stay in effect, will lose its jurisdiction to a California court. The plaintiffs find this particularly objectionable because the summary confirmation proceeding offers limited judicial review and may not involve discovery.

Although I am not particularly concerned at this point with this Court "losing" its jurisdiction to a later-filed action, whether in California or elsewhere, I am satisfied that the stay should be dissolved in order to decide defendants' motion to dismiss. The stay has served its intended purposes. The arbitration has been allowed to proceed without the interference of parallel litigation in this Court. In addition, one of plaintiffs' three original claims has been mooted through arbitration. But it appears almost certain that two of plaintiffs' issues will not be mooted, and a ruling upon the defendants' motion to dismiss will in no way impede the conclusion of the arbitration. Therefore, the stay should be dissolved in this action to consider defendants' motion to dismiss.

Defendants Arco and Exxon requested further briefing on their motion to dismiss in the event that the plaintiffs' motion to dissolve the stay was granted. The parties, however, fully briefed this motion in 1983, when it was originally filed, and again briefed it here in connection with plaintiffs' present motion. Under the circumstances, I do not believe that further briefing would be of assistance to the Court, but will only serve to further delay the matter. Accordingly, I turn to the merits of defendants' motion to dismiss.

I I

As designated in the Operating Agreement, California procedural law and Alaska substantive law control the arbitration proceedings. Alaska law will similarly govern the ultimate merits of plaintiffs' claim for contract interpretation. Of course, Delaware law controls the plaintiffs' ability to maintain this suit under Delaware's Declaratory Judgment Act.

The plaintiffs seek a declaratory judgment to interpret certain provisions of the Operating Agreement. In this regard they rely upon Section 38.006 of Article 38 of the Operating Agreement:

> The Board shall have no authority to decide any questions of law. However, the Board is authorized to interpret and administer the provisions of this Article 38 and to interpret any other provisions of this Agreement insofar as may be required for performance of the Board's duties pursuant to this Article 38. Nothing herein, however, shall bar any Working Interest Owner from seeking a judicial interpretation or construction of such provisions.

[1] Defendants first argue that plaintiffs have waived their right to judicial review by submitting their claims to arbitration before filing this action. They note that plaintiffs did not seek court intervention until after the Board decided to receive certain evidence on the disputed issues. In addition, note defendants, plaintiffs presented evidence as to the arbitrability of these issues and submitted evidence as to their merits at final hearing. I do not view the plaintiffs' begrudging appearance before the Board as a waiver. The plaintiffs have at all times disputed the Board's authority to arbitrate these issues and have consistently protected their position on the record before the Board. Moreover, after the Board decided that it would receive evidence and decide the merits of these issues, the plaintiffs immediately filed this suit seeking an interpretation of the Operating Agreement. After issuance of the stay, plaintiffs noted objections to the authority of the Board to decide the legal effect of the subcommittee agreements, as well as the well data cut-off date. It is clear that plaintiffs have never agreed, either through words or conduct, that these issues should be subject to arbitration. The defendants' motion to dismiss on this basis must be denied.

[2] The defendants' next attack on the complaint proceeds on the claim that the California Superior Court has exclusive jurisdiction over all matters relating to the agreement to arbitrate because the plaintiffs had filed a claim in that Court with respect to the selection of arbitrators. The defendants rely upon the California Code of Civil Procedure, Section 1292. 6, which provides that after a party files a petition to compel arbitration under the California Arbitration Act, that Court retains jurisdiction over any later-filed petitions relating to that arbitration proceeding. Although defendants acknowledge that plaintiffs did not file a petition to compel arbitration under that Act, they argue that plaintiffs' San Francisco suit should be treated as such. The defendants' argument is somewhat strained. The plaintiffs filed suit in San Francisco objecting to the process for selecting arbitrators under the Operating Agreement after defendants Arco and Exxon commenced the arbitration proceedings. The San Fran-

cisco court subsequently dismissed plaintiffs' action. The California phase of this dispute is dissimilar to the cases cited by defendants in which arbitration was compelled under California's Arbitration Act and jurisdiction retained over disputes that arose in the course of the arbitration proceeding. The plaintiffs' suit was not brought under California's Arbitration Act, and, in any event, is no longer pending.

The defendants argue next that because plaintiffs actually seek to review the arbitration award they may only do so in a proceeding to confirm or vacate the award under the Delaware Arbitration Act. Defendants note, however, that the Delaware Arbitration Act precludes jurisdiction in this Court because the arbitration was not conducted in this state. I find no merit in this argument. Assuming, without deciding, that the plaintiffs may not bring an action to confirm or vacate the arbitrators' award in Delaware, it is clear that they have not attempted to do so. They do not seek review of the final award of the Board, but rather seek a judicial interpretation of their contractual rights under the Operating Agreement and invoke Delaware's Declaratory Judgment Act as a jurisdictional basis. Although the Board did make rulings prior to this suit with respect to the arbitrability of these issues, this action is not, strictly speaking, a review of those decisions. Rather, the Operating Agreement expressly provides for an independent judicial interpretation or construction of its provisions and the plaintiffs are merely exercising the right granted to them by the Operating Agreement.

Despite the defendants' arguments to the contrary, it is clear that this Court has jurisdiction under Delaware's Declaratory Judgment Act. The statutory basis is complemented by Section 38.006 of the Operating Agreement which confers upon any Working Interest Owner an absolute right to seek a judicial interpretation or construction of its provisions. There is some ambiguity implicit in the Board's power to interpret and apply the provisions of the Operating Agreement, but this does not diminish the Working Interest Owners' right to seek an independent ruling by a Court. Of course, the Operating Agreement does not contemplate that a party will arbitrate an issue and then, having lost, seek *de novo* judicial review of that issue. However, this is not the situation here. The plaintiffs brought this action at the beginning of the arbitration proceedings, and consistently disputed any effort by the arbitrators, none of whom are law-trained, to interpret the agreement.

Declaratory relief appears the appropriate vehicle for defining the parties' respective rights. The Declaratory Judgment Act, 10 *Del.*

C. §6501 *et. seq.* is designed to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." 10 *Del. C.* §6512. As a matter of discretion, the Court may refuse to grant declaratory relief where such a remedy would serve no useful purpose. *Clemente v. Greyhound Corp.,* Del. Super., 155 A.2d 316, 321 (1959). Such is the case either where declaratory relief "will not terminate the uncertainty or controversy giving rise to the proceedings," 10 *Del. C.* §6506, or where another available remedy would be more effective. *Clemente, supra.* A declaratory judgment declaring the legal effect of the subcommittee agreements and the well data cut-off date certainly would terminate the controversy giving rise to this action. Defendants claim, however, that this action should be dismissed because plaintiffs have available an alternative remedy: a proceeding to confirm or vacate the final award of the Arbitrators under the appropriate state's Arbitration Act. The plaintiffs dispute the adequacy of that remedy.

[3] The availability of another remedy does not, in itself, warrant dismissal of a declaratory judgment action. Chancery Court Rule 57; *Clemente, supra.* The defendants rely upon *Mason v. Board of Pension Trustees,* Del. Super., 468 A.2d 298, 299-300 (1983), *aff'd,* 473 A.2d 1258 (1983), wherein the Superior Court held that a declaratory judgment action is unavailable to review decisions of the State Board of Pension Trustees because the statute provides for a different remedy. *Mason,* however, involved an attempt to invoke declaratory relief as a means of reviewing a completed administrative proceeding which denied a pension claim. To permit the appeal to be determined under the guise of declaratory relief would be tantamount to treating the prior administrative hearings as a nullity, even though the Pension Board had clearly acted within its authority. *Mason* is inapposite to the present situation.

In the present action, a proceeding to vacate or confirm the final award of the arbitrators plainly is not an effective remedy. First, despite the language of the Operating Agreement which expressly permits the Working Interest Owners to seek a judicial interpretation of its provisions, the vacation/confirmation proceedings is not an available remedy until after the final award is issued. Second, proceedings to vacate or confirm the final award may not afford the plaintiffs an opportunity for discovery, as would a declaratory judgment suit.

At least one of the defendants, Sohio, has asserted a position at variance with its present stance. Some time after the stay was

granted in this action, Sohio filed suit in Texas against Arco and Exxon[1] seeking an interpretation of the Operating Agreement with respect to the San Diego Arbitration. Arco and Exxon challenged the Court's jurisdiction to maintain that action under Texas' Declaratory Judgment Act on grounds similar to defendants' claims here. The Texas Court rejected that assertion holding that it had jurisdiction to maintain the declaratory judgment action, since the Working Interest Owners had an "absolute right" under §38.006 to have the court construe and interpret the Operating Agreement.

The defendants contend that the Texas litigation is inapposite to the present situation because the Texas suit was instituted and decided *before* the San Diego Arbitration began. Although this timing difference justified the stay that was granted to defendants in 1983, the ultimate availability of declaratory relief remained unaffected. The Texas court recognized that the timing of the suit was "crucial," but noted that an interpretation of the Operating Agreement could be sought either before or concurrently with an arbitration proceeding. Of course, plaintiffs filed this action before the final hearings began, and objected to the Board's authority to decide the subcommittee agreements and well data cut-off issues throughout the proceedings. This is not a case where a party agrees to arbitrate a claim, while at the same time preserving its right to relitigate that claim in the event it loses. Thus, the Texas litigation, which involved a Declaratory Judgment Act similar to Delaware's Act, demonstrates the appropriateness of this suit, notwithstanding the timing differences in the filings of the two suits.

[4,5] Finally, the defendants seek to dismiss this action on the basis of *forum non conveniens.* It is somewhat premature to address this contention because, at present, there is no competition between judicial forums although I recognize that a confirmation/vacation proceeding in California following the final arbitration ruling will pose such a conflict. It is not amiss, therefore, to address the merits of defendants' *forum non conveniens* argument. The factors which control application of the doctrine are well defined: the applicability of Delaware law; the relative ease of access to proof; the availability of compulsory process for witnesses; whether a similar action in another jurisdiction is pending; and all other practical problems that would make the trial of the case easy, expeditious and inexpensive. *McWane Cast Iron P. Corp. v. McDowell-Wellman,* E. Co., Del. Supr.,

1. Plaintiffs in this suit, Mobil, Phillips and Chevron were orginally named as defendants in that action, but later were realigned as plaintiffs. Because of the parties' relative interests Sohio controlled the litigation for plaintiffs.

263 A.2d 281 (1970). A heavy burden is placed on defendant to show that, on the basis of these factors, a significant hardship will result. *State Marine Lines v. Domingo,* Del. Supr., 269 A.2d 223, 225 (1970).

An analysis of the above-stated factors suggests that dismissal of this action for *forum non conveniens* is unwarranted. First, the defendants contend that Delaware has no connection with this case, since none of the evidence, witnesses or corporate headquarters of the parties are located in this state. Although the defendants are correct, the parties involved here are large corporations each with headquarters in different states. Moreover, the evidence and witnesses apparently are in New York, Texas, California, Washington and Alaska. Thus, there is no obvious choice of forum for this litigation which may demonstrate a particular hardship on defendants. To the contrary, litigation in any state would involve a significant amount of travel for the parties, lawyers and witnesses.

The defendants also note that Alaska law will control in this case. However, this factor alone does not warrant dismissal under the *forum non conveniens* doctrine. *Kolber v. Holyoke Shares, Inc.,* Del. Supr., 213 A.2d 444, 446 (1965). This Court often applies the law of foreign jurisdictions. *Id.* Whatever hardship will flow from forum selection appear to favor plaintiffs not the defendants. Because the arbitration proceedings are drawing to a close in Seattle, Washington, the plaintiffs' relief at this point may be limited to a proceeding to vacate the final award of the Arbitrators under another State's Arbitration Act. As noted previously, such proceedings provide only limited judicial review, and may not permit discovery. Deference to that limited proceeding would be unfair to the plaintiffs who had exercised their right to seek a judicial interpretation of the Operating Agreement at the beginning of the arbitration proceedings. Under the present circumstances the defendants clearly have not met their burden by making "a showing of hardship with such particularity as to move the discretion of the Trial Court in its favor." *State Marine Lines, supra.*

In sum, the defendants' motion to dismiss must be denied for reasons detailed above. However, although I have dissolved the stay in this action, the stay on discovery will remain in effect until the Arbitrator's final award is issued so as not to delay the completion of that phase of the dispute. At that time, the plaintiffs may proceed to exercise their rights under the Operating Agreement without the risk of interference with the arbitration proceedings.

An appropriate order should be submitted.