IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOSE DIAS, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 7199-VCG*
FREDERICK E. PURCHES, ANTHONY D'AGOSTINO, ESTHER EGOZI CHOUKROUN, GLENN GOPMAN, ROBERT MITZMAN, PARLUX FRAGRANCES, INC., PERFUMIA HOLDINGS, INC., and PFI MERGER CORP.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 22, 2012
Date Decided: March 5, 2012

Blake A. Bennett and Gregory F. Fischer, of COOCH AND TAYLOR, P.A., Wilmington, Delaware; OF COUNSEL: Donald J. Enright, of LEVI & KORSINSKY LLP, Washington, DC, Attorneys for Plaintiff.

Elizabeth Sloan, of BLANK ROME LLP, Wilmington, Delaware; OF COUNSEL: Alvin B. Davis and Digna B. French, of SQUIRE SANDERS (US) LLP, Miami, Florida, Attorneys for Defendants Parlux Fragrances, Inc., Frederick E. Purches, Glenn Gopman, Robert Mitzman, Esther Egozi Choukroun, and Anthony D'Agostino.

Raymond J. DiCamillo and Kevin M. Gallagher, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; OF COUNSEL: John J. Tumilty, of EDWARDS WILDMAN PALMER LLP, of Boston, Massachusetts, Attorneys for Defendants Perfumania Holdings, Inc., and PFI Merger Corp.

GLASSCOCK, Vice Chancellor

This matter is before me on the Parlux Defendants' Motion to Stay. The facts, briefly, are as follows. On December 23, 2011, Defendant Perfumania Holdings, Inc. ("Perfumania"), announced an agreement to acquire Parlux Fragrances, Inc. ("Parlux"). On January 5, 2012, Shirley Anderson, purportedly a stockholder of Parlux, filed an action challenging the acquisition in a Florida state court in Broward County (the "Florida Action"). On January 19, 2012, Arthur Weill filed a Motion to Intervene in the Florida Action; after that motion was denied, Weill filed on February 8, 2012, a stockholder class action complaint similar to Anderson's and moved to consolidate his case with the Florida Action (the "Weill Action"). On January 30, 2012, Plaintiff Jose Dias filed the instant action. All three actions seek to enjoin the takeover of Parlux, on behalf of a stockholder class, based upon similar allegations of inadequate disclosure and breach of fiduciary duty.

In this Motion, the Defendants seek a stay in favor the Florida Action under the doctrine explained in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*.[1] *McWane* makes clear that a stay is within the Court's sound discretion, and that in exercise of that discretion, the Court should give substantial weight to the fact that a first-filed action exists in another jurisdiction when determining whether a stay is appropriate. The *McWane* doctrine is based upon

[1] 263 A.2d 281 (Del. 1970).

principles of comity and efficient administration of justice.[2] According to the Defendants, this Court should defer to the Florida Action as it is the "first filed action."

It is common, as happened in the Florida action, for an announcement of a merger agreement to be followed by a quick complaint, often clad in boilerplate, seeking injunctive relief or damages, with the expectation that a substantial amendment to the complaint will ensue following discovery and once the proxy materials become available. In his novel *The Go Between*, L.P. Hartley famously observed that "[t]he past is a foreign country: they do things differently there."[3] So too is the practice of corporate law a foreign country. Imagine that the subject matter here involved instead an automobile accident. Assume that the Plaintiff was a passenger, who did not observe the accident which injured him. And imagine that within hours or days of the accident, Plaintiff's counsel filed a complaint stating, in effect, that "my client was injured in an automobile accident as a result of the bad acts of the Defendant, which bad acts will be more fully explained once the police report is issued." The fate of such a complaint in a tort case is predictable.

To the extent that I analogize between that situation and the Florida Action or any quickly-filed takeover complaint, the comparison is unfair in a variety of

[2] *McWane*, 263 A.2d at 283.
[3] L.P. HARTLEY, THE GO BETWEEN 17 (NYRB Classics 2002) (1953).

ways,[4] not least of which is that a complaint seeking to enjoin a merger is seeking to prevent, not redress, the "crash." The example is useful, however, because it illustrates one reason why this Court has been reluctant to defer automatically to a first-filed action in the stockholder class action context. Instead, when there are multiple suits filed within a short time, this Court has tended to employ a test similar to that used in addressing motions on *forum non conveniens* grounds,[5] and to consider whether the complaint in the competing jurisdiction is a better or fuller pleading than the Delaware complaint.[6] That is appropriate in this instance, where the initial complaint followed hard on the announcement of the merger agreement, with this action filed scant weeks later, and where the amended complaint in the Florida Action (the movant did not attach the original complaint) does not appear

[4] The initial Florida complaint was not attached to the pleadings; I have not read it, and it may be a model of particularity. My point is that complaints filed before the proxy issues seldom survive unamended.

[5] *In re The Bear Stearns Cos., Inc. S'holder Litig.*, 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008) ("Where the multiple actions are contemporaneously filed, however, this Court evaluates a motion to stay under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other." (internal quotation removed)); *see also County of York Employees Retirement Plan v. Merrill Lynch & Co., Inc.*, 2008 WL 4824053, at *3 (Del. Ch. Oct. 28, 2008) ("Actions filed close in time to each other are considered simultaneously filed in order to avoid encouraging a race to the courthouse." (internal quotation removed)). This Court has applied the *forum non conveniens* analysis in the context of stockholder derivative suits and class action suits. *See Ryan v. Gifford*, 918 A.2d 341, 349 (Del. Ch. 2007) ("Because the [representative] plaintiff is not the directly injured party, this Court proceeds cautiously when faced with the question of whether to defer to a first-filed derivative suit, 'examin[ing] more closely the relevant factors bearing on where the case should best proceed, using something akin to a *forum non conveniens* analysis.'" (quoting *Biondi v. Scrushy*, 820 A.2d 1148, 1159 (Del. Ch. 2003))); *see also Bear Stearns*, 2008 WL 959992, at *6 (applying the Court's reasoning in *Ryan* in the class action context).

[6] *See Ryan*, 918 A.2d at 349 (holding the adequacy of the complaint a more important factor than the first-filed status in considering the stay of a derivative action).

superior to the Delaware pleading, despite the fact that the complaint here *predates* the current amended complaint in the Florida Action.

The factors typically considered under a *forum non conveniens* analysis are: (1) whether Delaware law applies; (2) ease of access to proof; (3) whether the parties may compel the appearance of witnesses; (4) whether pending actions exist in other jurisdictions; (5) the importance, if any, of a view of the premises at issue; and (6) such other practical considerations as justice and judicial and litigants' economy may require.[7] These factors, considered together, do not convince me that a stay in favor of the Florida Action is appropriate. The matter involves a Delaware corporate citizen, and Delaware corporate law will apply. The availability of both witnesses and evidence is not a concern.[8] While Florida courts can and do apply Delaware law, this Court's familiarity with that law should tend to make the trial process less burdensome. Because this case involves a Delaware corporate citizen, the interest of this jurisdiction is great.[9] Our courts have a "'significant and

[7] *Id.* at 351.

[8] *Id.* ("most corporate litigation in the Court of Chancery involves companies with documents and witnesses located outside of Delaware"); *see also County of York Employees Retirement Plan*, 2008 WL 4824053, at *3 ("Second, access to proof may be marginally easier in New York, where the events largely transpired and Merrill has its corporate offices. Those circumstances are frequently handled with ease, and, therefore, this factor is entitled to little weight."); *Brandin v. Deason*, 941 A.2d 1020, 1026 (Del. Ch. 2007) ("As to the ease of access to proof, the law firms representing the defendants are well staffed and are fully capable of culling through potentially relevant documents regardless of the exact geographic location where this occurs.").

[9] *See County of York Employees Retirement Plan*, 2008 WL 4824053, at *3; *Ryan*, 918 A.2d at 349; *Brandin*, 941 A.2d at 1024; *Armstrong v. Pomerance*, 423 A.2d 174, 177 (Del. 1980) ("While courts of other jurisdictions may apply and enforce existing Delaware law, the

substantial' interest in 'overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations.'"[10]

The Defendants suggest two factors that they think should be determinative here, in addition to the "first-filed" status of the Florida Action. First, they argue that "significant" work has been performed by the Florida litigants and the Florida trial court. Discovery, however, is at an early stage in both jurisdictions. It does not appear that judicial efforts in the Florida Action—which include that court granting expedited discovery and hearing (and denying) an emergency motion by Weill to intervene—are so extensive as to require a stay. The Florida court has not yet (according to the Plaintiff here) consolidated the Florida Action and the Weill Action or appointed a lead plaintiff. By contrast, I have also heard argument on a Motion to Expedite, which was granted, and have, obviously, considered the instant motion as well. It does not appear that litigation has proceeded substantially further—or for that matter, further at all—in Florida than before me. Both the Florida and Delaware actions, in other words, are in their infancy.

The Defendants also argue that efficiency would be served by proceeding with this matter in Florida, because the same Florida trial court has been engaged in a derivative action (unrelated to the merger at issue here) involving Parlux and is

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development of Delaware law is quite properly the duty and responsibility of the Delaware Courts.").

[10] *In re Chambers Development Co. S'holders Litig.*, 1993 WL 179335, at *3 (Del. Ch. May 20, 1993) (quoting *Armstrong*, 423 A.2d at 177-78).

therefore, according to Defendants, "in fact intimately familiar with Parlux and many of the individual Defendants."[11] That action, which presumably involves entirely different issues, hardly recommends itself as a primer for this matter, despite the fact that, according to counsel, the derivative action has been before the Broward County court for the past half-decade.

Discounting, as I find appropriate, the (barely) first-filed nature of the Florida Action, I find nothing that indicates that this matter should be stayed in deference to the Florida Action. To the contrary, the interest of this state in the behavior of fiduciaries for its corporate citizens convinces me that the Motion to Stay must be denied.

To the extent that the foregoing requires an Order to take effect, IT IS SO ORDERED.

[11] Defs.' Mot. Stay 6.