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Case No. 6840-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICH II HOLDINGS LLC,
SEEVA II HOLDINGS LLC,
MICH HOLDINGS LLC,
and SEEVA HOLDINGS LLC,

Plaintiffs,

v.

RUBIN SCHRON
and CAM-ELM COMPANY LLC,

Defendants,

and

SMV PROPERTY HOLDINGS LLC
and SWC PROPERTY HOLDINGS LLC,

Nominal Defendants.

C.A. No. 6840-VCP

MEMORANDUM OPINION
Submitted: March 29, 2012
Decided: June 29, 2012

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PARSONS, Vice Chancellor.

This action is before the Court on a motion to stay or dismiss these proceedings in favor of certain other actions currently pending in New York Supreme Court. Plaintiffs, members of two real estate holding companies, brought this action for breach of fiduciary duty and breach of the companies' operating agreements against Defendant Rubin Schron, the companies' manager. In response to Plaintiffs' complaint, Schron moved to stay, or alternatively dismiss, these proceedings in favor of the earlier-filed New York actions, which Schron brought against Plaintiffs' owners and related entities.

For the reasons stated in this Memorandum Opinion, I find that this action and the New York actions are substantially similar, that the New York actions have been actively litigated for almost two years, and that the New York actions have the potential to resolve all or a substantial number of the claims at issue here. Therefore, this action will be stayed until the conclusion of the New York actions or further order of this Court.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiffs MICH Holdings LLC ("MICH I") and MICH II Holdings LLC ("MICH II" and together with MICH I, the "MICH Entities") are Delaware limited liability companies established for the purpose of owning equity interests in Nominal Defendants SWC Property Holdings LLC ("SWC") and SMV Property Holdings LLC ("SMV" and, together with SWC, the "Companies"). SMV and SWC are real estate holding companies that own properties leased to nursing home operating companies. MICH I owns a 2.5% interest in SWC and MICH II owns a 2.5% interest in SMV.

Plaintiffs SEEVA Holdings LLC ("SEEVA I") and SEEVA II Holdings LLC ("SEEVA II" and, together with SEEVA I, the "SEEVA Entities") are also Delaware limited liability companies established to own equity interests in SWC and SMV. SEEVA I owns a 5.5% interest in SWC and SEEVA II owns a 12.5% interest in SMV.

Defendant Rubin Schron is a New York-based real estate investor. Schron is the sole manager of SMV, SWC, and Defendant CAM-Elm Company LLC ("CAM-Elm").

CAM-Elm is the majority owner of both SMV and SWC, owning a 77.35% interest in SMV and an 83% interest in SWC. CAM-Elm is beneficially owned by Schron's children.

Nonparties Leonard Grunstein and Murray Forman are Schron's former lawyer and investment banker, respectively. Grunstein and Forman own 100% of the SEEVA Entities and more than 90% of the MICH Entities. They are also the sole managers of the MICH and SEEVA Entities.

Nonparty Lawrence Levinson is also a lawyer and a former colleague of Grunstein's at Troutman Sanders LLP ("Troutman Sanders"). Levinson is a minority owner of the MICH Entities.[1]

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[1] For purposes of simplicity, I refer to Grunstein, Forman, and Levinson, collectively, as "Grunstein," except where the distinction among those individuals is relevant. Likewise, I refer to Schron and all Schron-controlled entities, including CAM-Elm, as "Schron."

B. Facts and Procedural History

1. The Real Estate Transactions

The facts underlying this action (the "Delaware Action") and the related New York actions (the "New York Litigation") arise from the longstanding business relationship between Schron and Grunstein.[2] Beginning in 2003, Grunstein advised Schron on two complex real estate transactions (the "IHS and Mariner Transactions"). In those transactions, Schron acquired two different nursing home and health care services companies, Integrated Health Services, Inc. ("IHS") and Mariner, Inc. ("Mariner") and divided the companies' assets into operating company assets and real estate assets. Schron formed SMV and SWC as acquisition vehicles to effect the real estate transactions, and then transferred the operating company assets to third parties. Through the transactions, Schron effectively became the landlord of the properties on which the separate nursing home companies operate, receiving income through SMV and SWC from the rents charged to the operating company tenants. As compensation for their work in structuring and advising on the IHS and Mariner Transactions, Grunstein, Forman, and Levinson received equity interests in SMV and SWC.[3] The MICH and SEEVA Entities were set up by Grunstein as holding companies for those interests.

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[2] All facts are taken from the complaints in the Delaware Action and New York Litigation.

[3] Plaintiffs in this action contest whether Forman participated in the IHS and Mariner Transactions. Compl. (herein the "Delaware Complaint") ¶ 26. In any case, it is undisputed that Forman eventually received equity interests in SMV and SWC through his ownership interests in the MICH and SEEVA Entities. Thus,

Following the IHS and Mariner Transactions, Grunstein, Forman, and Levinson became beneficial owners of nursing home companies that were tenants of the properties owned by SMV and SWC. Nevertheless, Grunstein continued to advise Schron and the Companies on matters related to the properties, including matters related to their rights and powers as landlords of properties for which Grunstein-controlled entities were tenants. Schron asserts that this created a conflict of interest.

2. The litigation between Grunstein and Schron

Grunstein continued to work for Schron and the Companies until the fall of 2009, when Schron terminated their relationship. Shortly thereafter, in March 2010, the MICH and SEEVA Entities filed a lawsuit in New York Supreme Court (the "MICH/SEEVA New York Action") asserting derivative and direct claims against Schron for breach of fiduciary duty and breach of the operating agreements of SMV and SWC (the "Operating Agreements").[4] In their complaint in that action, the MICH and SEEVA Entities claimed that Schron, among other things, had engaged in self-dealing as manager of SMV and SWC. In particular, the MICH and SEEVA Entities challenged Schron's use of the Companies' funds in an interest rate swap Schron had entered into with Citibank (the "Citibank Swap") and for the payment of Schron's legal fees and settlement of a civil complaint relating to the sale of a Mariner subsidiary, Mariner Medical Supply ("MMS") to Omnicare, Inc. (the "Omnicare Transaction"). The MICH and SEEVA Entities also

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whether he directly participated in the IHS and Mariner Transactions is immaterial to the resolution of this motion.

[4] *MICH II Hldgs. LLC v. Schron*, No. 600736/10 (N.Y. Sup. Ct. Mar. 23, 2010).

alleged that, as manager of the Companies, Schron failed to keep proper books and records and to provide the members with audited financial statements for the Companies.

Schron responded to the MICH/SEEVA New York Action in June 2010 by filing a separate lawsuit in New York Supreme Court against Grunstein and related parties for breach of fiduciary duty and legal malpractice, among other things.[5] According to Schron's complaint in the New York Litigation (the "Schron Complaint"), Grunstein breached his fiduciary duties to him and committed professional and legal malpractice by advising Schron and the Companies on various transactions in which Grunstein, Forman, Levinson, and their affiliates held a conflicting interest due to their status as tenants of SMV and SWC. Similar to the MICH/SEEVA New York Action, the Schron Complaint challenges the Citibank Swap and Omnicare Transaction. Among other things, Schron alleges that Grunstein provided negligent advice in relation to those transactions. Schron also moved to dismiss the MICH/SEEVA New York Action.

In June 2011, the New York court dismissed the MICH/SEEVA New York Action on the basis that the Operating Agreements included forum selection clauses that required all suits *against* the Companies to be brought in Delaware.[6] The New York court held that, because the Companies were nominal defendants for purposes of the derivative

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5 *Schron v. Grunstein*, No. 650702/10 (N.Y. Sup. Ct. June 24, 2010).

6 *See* Defs.' Opening Br. ("DOB") Exs. N, O § 9.4 (SMV and SWC Operating Agreements) ("[A]ny claim against the company under this Agreement must be brought in the federal or state courts located in Delaware."). The forum selection clauses in both Operating Agreements are identical.

claims brought on their behalf, the MICH and SEEVA Entities' derivative claims were technically "against" the Companies and, therefore, had to be brought in Delaware.

On September 6, 2011, the MICH and SEEVA Entities filed this action, asserting many of the same claims they had brought in New York. Schron moved to stay or dismiss this action on October 10, 2011.

C. Parties' Contentions

Similar to Plaintiffs' complaint in the MICH/SEEVA New York Action, the Delaware Complaint alleges various direct and derivative claims against Schron for breach of fiduciary duty and breach of the Operating Agreements. Among other things, Plaintiffs claim that Schron misappropriated over $100 million from SMV and SWC, kept false and inaccurate books and records, and refused to provide the members with audited financial statements. Plaintiffs also aver that Schron improperly refused to recognize the MICH and SEEVA Entities as members of SMV and SWC and wrongfully has withheld distributions from the MICH and SEEVA Entities since April 2011.

Defendants have moved to stay this action on the grounds that the issues in the Delaware Complaint are substantially similar to the issues in the New York Litigation and the parties in both actions are functionally identical. Relying on the "first-filed" doctrine set forth in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*[7] and its progeny, Defendants contend that this action should be stayed until the conclusion of the New York Litigation to avoid the risk of inconsistent judgments.

[7] 263 A.2d 281 (Del. 1970).

Alternatively, Defendants seek dismissal of the Delaware Complaint on the basis that all of Plaintiffs' claims are derivative in nature and Plaintiffs are not qualified to serve as class representative parties for SMV and SWC.[8]

Plaintiffs assert that *McWane* is inapplicable to this action because the Operating Agreements contain valid forum selection clauses requiring Plaintiffs to bring their claims in Delaware. Furthermore, Plaintiffs aver that, even if *McWane* applies, this Court should not stay this action in favor of the New York Litigation because the parties and issues in New York are not substantially similar and, in any case, the New York court is incapable of rendering complete justice because it already has held that the claims now being asserted here can be litigated only in Delaware.

II. ANALYSIS

A. The Effect of the Forum Selection Clause

Plaintiffs argue that the motion to stay should be denied because the forum selection clauses in the Operating Agreements preempt *McWane* and require Plaintiffs' claims to be litigated in Delaware. Citing *Ingres Corp. v. CA, Inc.*,[9] Plaintiffs assert that "when there is an exclusive forum selection clause, courts should enforce that clause by denying a stay 'even if, absent any forum selection clause, the *McWane* principle might otherwise require a different result.'"[10] According to Plaintiffs, because the Operating

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[8] Having determined to stay this action, I do not address Defendants' arguments in support of their motion to dismiss.

[9] 8 A.3d 1143 (Del. 2010).

[10] Pls.' Ans. Br. ("PAB") 2 (quoting *Ingres*, 8 A.3d at 1145-46).

Agreements require them to bring their derivative claims exclusively in Delaware, *McWane* is inapplicable. In response, Defendants argue that, unlike *Ingres*, the forum selection clauses here are not fully exclusive and permit two valid, competing actions to proceed in different forums. Therefore, they assert that *Ingres* is not controlling.

Plaintiffs are correct that their derivative claims must be litigated in Delaware.[11] Plaintiffs' reliance on *Ingres*, however, is misplaced because the forum selection clause in that case was materially different than the one here. Section 9.4 of the Operating Agreements requires that:

> Each Member and Manager, for itself, himself and his or its heirs, personal representatives, successors and assigns, hereby consents to personal jurisdiction over him, it and them in the courts of the State of Delaware, and of any federal court located in Delaware in connection with any action or proceeding related to this agreement, and agrees that *any claim against the Company under this agreement must be brought in the federal or state courts of Delaware.*[12]

As the New York court already determined, this forum selection clause requires that claims against SMV and SWC be brought exclusively in Delaware. The forum selection clause is not exclusive, however, as to claims related to the Operating Agreements that are not directed against SMV and SWC. Such claims may be litigated in any forum, including New York.

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[11] *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2 286, 287 (Del. 1999) (upholding the validity of forum selection clauses in limited liability operating agreements).

[12] DOB Ex. N § 9.4 (emphasis added). The initial portion of § 9.4, dealing with personal jurisdiction, is nonexclusive; only the latter clause regarding "any claim against the Company" is exclusive.

In contrast, the forum selection clause in *Ingres* was broader, requiring the parties to that contract to bring:

> *any action or proceeding* in respect of *any claim* directly arising out of or *related to this Agreement,* whether in tort or contract or at law or in equity in any state or U.S. federal court sitting in The City of New York or in any state or U.S. federal court sitting in the State of Delaware . . . .[13]

In *Ingres*, the Supreme Court found *McWane* to be inapplicable when deciding whether to stay a Delaware action in favor of a first-filed California action because the forum selection clause required all actions to be litigated in either Delaware or New York. Recognizing that *McWane* is a default rule, the Supreme Court held that "where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause, even if, absent any forum selection clause, the *McWane* principle might otherwise require a different result."[14] In *Ingres*, a forum selection clause applied to the claims and proceedings being challenged, but only the second-filed, Delaware action complied with that clause. Therefore, the Court held that *McWane* was inapplicable and the express contract terms controlled.

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[13] *Ingres*, 8 A.3d at 1145 n.1 (emphasis in original). Admittedly, the exclusivity of the forum selection clause in *Ingres* is qualified in that it allows for the possibility that competing actions could be brought in New York and Delaware. The competing action in *Ingres*, however, was pending in California. Thus, the primary import of *Ingres* is that where an action is proceeding in Delaware consistent with the parties' agreement and another is proceeding in an unauthorized forum, a Delaware Court is not required to respect the first-filed status of the other action.

[14] *Id.* at 1145.

Here, the New York court already determined that the forum selection clause is not fully exclusive and that it does not apply, for example, to claims brought by the Companies.[15] As a result, although there are competing actions proceeding in Delaware and New York, none of those actions violates or is inconsistent with the forum selection clauses. Thus, this Court must look to its default rules under *McWane*.

B. *McWane* Analysis

In Delaware, "[i]t is an inherent power of the trial court, which is concomitant to the control vested in a trial court, to manage its affairs and to achieve the orderly disposition of its business."[16] As such, "[t]he granting of a motion to stay is not a matter of right, but rather rests within the sound discretion of the court."[17] In assessing which of multiple actions challenging the same conduct should proceed, Delaware courts follow the general rule that "litigation should be confined to the forum in which it is first commenced, and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by commencing litigation involving the same cause of action in

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15 PAB Ex. D at 7.

16 *Gebhart v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 157, 159 (Del. 1970); *accord Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1201 (Del. 1997) (noting that the Court of Chancery has "the inherent power . . . to control its own docket, manage its affairs, achieve the orderly disposition of its business and promote the efficient administration of justice").

17 *In re The Bear Stearns Cos. S'holder Litig.*, 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008) (citing *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996).

another jurisdiction of its own choosing."[18] Thus, "[u]nder the [*McWane*] first-filed rule, this Court freely exercises its broad discretion to grant a stay 'when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues.'"[19] As Chancellor Allen noted in *Carlton Investments v. TLC Beatrice International Holdings, Inc.*,

> the presence of these factors will indicate that the fair and efficient result is for the second-filed law suit to be stayed, so long as the first filed suit is proceeding reasonably promptly to an adjudication of claims that will eliminate or substantially reduce the need to pursue the second litigation.[20]

When determining whether to stay a proceeding under *McWane*, the Court is guided by considerations of "comity and the necessities of an orderly and efficient administration of justice."[21] In particular, the Court will consider whether a stay would (1) avoid "wasteful duplication of time, effort, and expense," (2) eliminate "the possibility of inconsistent and conflicting rulings and judgments," and (3) prevent "an unseemly race by each party to trial and judgment in the forum of its choice."[22] Moreover, as this Court previously has held, "when the allegations in a complaint are

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18 *Transamerica Corp. v. Reliance Ins. Co. of Ill.*, 1995 WL 1312656, at *3 (Del. Super. Aug. 30, 1995) (citing *McWane*, 263 A.2d at 283).

19 *Bear Stearns,* 2008 WL 959992, at *5 (quoting *McWane*, 263 A.2d at 283).

20 1995 WL 694397, at *2 (Del. Ch. Nov. 21, 1995).

21 *McWane*, 263 A.2d at 283.

22 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 5.01 (2010) (quoting *McWane*, 263 A.2d at 283).

essentially a subset of a larger group of prior-pending claims in another jurisdiction, complete and orderly justice is ordinarily more probable to ensue in the foreign court."[23]

1. The New York Litigation was first-filed

Although the MICH and SEEVA Entities initiated litigation in New York before Schron filed the separate New York Litigation, the MICH/SEEVA New York Action was later dismissed. The ground for that dismissal did not apply, however, to the New York Litigation. Moreover, Plaintiffs here do not seriously argue that, for purposes of *McWane*, the Delaware Action should be deemed to have preceded the New York Litigation.

2. The New York Litigation and Delaware Action have substantially similar parties and issues

Under *McWane*, the parties and issues in the competing actions need not be identical. "Instead, the courts examine whether the ultimate legal issues to be litigated will be determined in the first-filed action, and thus, repeatedly have held that *McWane* requires only a showing of '[s]ubstantial or functional identity.'"[24] Similar issues are those that arise out of a "common nucleus of operative facts."[25] Likewise, parties are considered substantially the same for purposes of *McWane* "where related entities are

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[23] *Kaufman v. Kumar*, 2007 WL 1765617, *2 (Del. Ch. June 8, 2007).

[24] *McQuaide v. McQuaide*, 2005 WL 1288523, at *4 (Del. Ch. May 24, 2005) (quoting *AT&T Corp. v. Prime Sec. Distrib., Inc.*, 1996 WL 633300, at *2 (Del. Ch. Oct. 24, 1996)); *see also Chadwick v. Metro Corp.*, 2004 WL 1874652, at *2 (Del. 2004) (ORDER) (*McWane* held to require "substantially similar parties and issues"); *Transamerica Corp.*, 1995 WL 1312656, at *3.

[25] *Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *4 (Del. Ch. Apr. 12, 1994).

involved but not named in both actions, referring to the exclusion [of those related entities] as 'more a matter of form than substance.'"[26]

a. Same parties

Defendants claim that the Delaware Action and New York Litigation involve functionally identical parties because the Schron parties are present in both actions and Grunstein and Forman are defendants in their individual capacities in New York and are present indirectly in the Delaware Action in their capacities as controllers of Plaintiffs, *i.e.*, the MICH and SEEVA Entities. According to Schron, although Grunstein, Forman, and Levinson are not 100% owners of the MICH Entities, their sole control and substantial ownership of the MICH and SEEVA Entities makes them functionally identical with those entities for purposes of *McWane*.

Plaintiffs, on the other hand, emphasize that the MICH and SEEVA Entities are not present in the New York Litigation. According to Plaintiffs, the failure of the New York Litigation to name the MICH and SEEVA Entities as defendants is critical under *McWane* because "Defendants' central argument for a stay is their speculation that it is possible that the New York Court might . . . enter an order somehow depriving the MICH and SEEVA Companies of standing in this Court by terminating their membership rights in SMV and SWC."[27] Plaintiffs argue that the MICH and SEEVA Entities would be necessary parties to any action seeking to terminate their membership interests in SMV

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[26] *McQuaide*, 2005 WL 1288523, at *4 (quoting *FWM Corp. v. VKK Corp.*, 1992 WL 87327, at *1 (Del. Ch. Apr. 27, 1992)).

[27] PAB 20.

and SWC. Thus, they contend that the New York court could not order rescission of their interests and, therefore, there is no merit to Defendants' assertion that Plaintiffs are at risk of being deprived of derivative standing in this Court. Plaintiffs also claim that Grunstein and Forman's lack of complete ownership over the MICH Entities means they are not substantially similar to those entities under *McWane*.

Having considered the arguments put forth by both parties, I find that the distinction between Grunstein and Forman and the MICH and SEEVA Entities is "more a matter of form than substance."[28] Under Delaware law, "if the parties in one suit own and control a party in another action, such parties will be deemed 'substantially identical' for purposes of a *McWane* analysis."[29] Grunstein and Forman are the sole managers of the MICH and SEEVA Entities, as well as their controlling shareholders. They own 100% of the equity in the SEEVA Entities and more than 90% of the equity in the MICH Entities. The remaining interests in the MICH Entities are held by Levinson, who is also a defendant in the New York Litigation, and another Troutman Sanders partner. Although the fourth owner of the MICH Entities is not a defendant in the New York Litigation, Troutman Sanders is, and it is reasonable to infer that, as a former colleague at Troutman Sanders, the fourth owner is closely related to Grunstein. For purposes of *McWane*, therefore, I find that the parties in the Delaware Action and New York

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[28] *FWM Corp.*, 1992 WL 87327, at *1.

[29] *Xpress Mgmt., Inc. v. Hot Wings Int'l, Inc.*, 2007 WL 1660741, at *4 (Del. Ch. May 30, 2007).

Litigation are substantially similar, regardless of whether rescission is possible in the New York Litigation.[30]

b. Same issues

Whether the issues in this action and the New York Litigation are substantially similar presents a more difficult question. This action was brought by the MICH and SEEVA Entities against Schron for breach of fiduciary duty and breach of the Operating Agreements relating to Schron's management of SMV and SWC, as well as his use of the Companies' funds for the Citibank Swap and the settlement of civil litigation that arose from the Omnicare Transaction. In contrast, the Schron Complaint in New York alleges breach of fiduciary duty, breach of contract, legal malpractice, professional negligence, fraud, and defamation, among other things, against Grunstein, Forman, Levinson, Troutman Sanders, and a host of related entities regarding the Omnicare Transaction, Citibank Swap, and various other transactions related to the Companies' management of their real estate properties.

In deciding the relative similarity of issues, the central focus is not whether "the issues precisely framed in the [Schron] Complaint are different from those asserted in the Delaware Complaint," but rather whether "both complaints arose from the same core conduct."[31] In other words, what matters for purposes of *McWane* is whether the issues

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30 *See infra* Part II.B.2.b.3.

31 *Citrin Hldgs. LLC v. Cullen 130 LLC*, 2008 WL 241615, at *3 (Del. Ch. Jan. 17, 2008).

in each complaint arise "out of a 'common nucleus of operative fact.'"[32] Here, Defendants claim that the Delaware Action and New York Litigation share a common nucleus of operative fact and that allowing litigation to proceed in both forums would create a substantial risk of inconsistent judgments. Specifically, Defendants argue that Plaintiffs' claims in this action related to the Citibank Swap and the Omnicare Transaction account for most of the liability and damages they seek to establish, but are already in dispute in the New York Litigation. Defendants also aver that there is a real possibility that the New York court could order rescission of the Grunstein and Forman interests in SMV and SWC, which effectively would moot this action.

Plaintiffs respond that the issues here primarily relate to Schron's management of the Companies, which is not in dispute in New York. Plaintiffs further contend that rescission of the MICH and SEEVA Entities interests in SMV and SWC is not possible in the New York Litigation due to the absence of certain indispensible parties. In addition, and in any case, they assert that the claims in this action have to be resolved in Delaware. According to Plaintiffs, if they are not allowed to proceed in Delaware, they effectively will be deprived of any forum in which to pursue their claims.[33]

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[32] *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park DR. BNK Investors, L.L.C.*, 2009 WL 3335332, at *7 (Del. Ch. Oct. 15, 2009).

[33] Plaintiffs argue that "comity and common sense" require this Court to allow their claims to proceed in Delaware and that staying these proceedings effectively would ignore the New York court's prior decision and the language of Section 9.4. PAB 17. In so arguing, Plaintiffs suggest that a stay of these proceedings would deprive them of any forum in which to litigate their claims. Plaintiffs' position, however, overlooks the substantial overlap and interrelationship among the issues presented in this action and the New York Litigation and the fact that staying these

Having considered the allegations and assertions made here and in the New York Litigation, I find that there are sufficiently overlapping issues in these proceedings relating to the Citibank Swap, the Omnicare Transaction and Schron's rescission claims such that "allowing both actions to proceed 'in tandem would either risk conflicting rulings or foster an unseemly race to judgment in each forum.'"[34]

1. The Citibank Swap

In September 2008, Schron personally entered into an interest rate swap with Citibank. Under the terms of the swap, Schron agreed to pay a fixed interest rate of 3.68% on a notional amount of $1 billion and Citibank agreed to pay Schron interest at the floating LIBOR rate. The swap was set up so that, if interest rates rose above 3.68%, Citibank would pay Schron the difference between LIBOR and 3.68%, and if interest rates fell below 3.68%, Schron would pay Citibank the difference between 3.68% and the lower LIBOR rate. Shortly after Schron entered into the Citibank Swap, the financial crisis of 2008 struck and interest rates plummeted. As a result, Schron had to make substantial payments to Citibank. In his capacity as the sole manager of SMV and SWC, Schron caused those Companies to pay the amounts owed to Citibank.

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proceedings would not prevent Plaintiffs from litigating their claims following the resolution of the New York Litigation. Plaintiffs will be able to pursue their claims in this Court after the resolution of the New York Litigation, assuming that the resolution does not moot Plaintiffs' claims. Hence, contrary to Plaintiffs' arguments, a stay of this action in favor of the New York Litigation under *McWane* would not violate the forum selection clause or the New York court's ruling requiring Plaintiffs' claims to be litigated here.

[34] *Choice Hotels*, 2009 WL 3335332, at *7 (quoting *Xpress Mgmt.*, 2007 WL 1660741, at *5).

In the New York Litigation, Schron alleges that having SMV and SWC pay for the swap losses was proper because the swap had been established for their benefit, *i.e.*, to hedge the risk of interest rate fluctuations to the properties the Companies owned. Citibank allegedly requested, however, that Schron personally enter into the swap on behalf of SMV and SWC because it considered Schron a better credit risk than the Companies. Schron further asserts that, despite knowing these facts, Grunstein, Forman, and Levinson breached their fiduciary duties to him by "[c]ausing, designing, counseling and approving the Citibank Swap for SMV/SWC and then claiming that the Citibank Swap was not entered into for SMV/SWC."[35] Schron also claims that Grunstein defamed him by telling other members of SMV that Schron stole $50 million from SMV to recoup personal investment losses relating to the Citibank Swap.[36] In the Delaware Action, the MICH and SEEVA Entities paint a different picture of the circumstances surrounding the Citibank Swap. They aver that Schron entered into the swap for his own benefit and then, when it started to lose money, misappropriated approximately $67 million from SMV and SWC to avoid paying the losses himself.

The claims and issues relating to the Citibank Swap in New York and Delaware are substantially similar. The complaints in the two jurisdictions present competing theories as to (1) the swap's intended purpose, (2) how it was set up, (3) who was liable for its losses, and (4) who was to benefit. The Delaware Plaintiffs protest, however, that

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[35] Schron Compl. ¶ 301.

[36] *Id.* ¶ 359.

Schron does not seek any declaration in New York on whether the Citibank Swap was a valid business expense of SMV and SWC. Yet, resolution of Schron's New York breach of fiduciary duty claims necessarily will require a determination of whether Schron or the Companies were ultimately responsible for the swap and, thus, whether having the Companies pay for the swap's losses was proper. Similarly, to prove his defamation claim in New York, Schron must prove that the statements made by Grunstein regarding the Citibank Swap were false.[37] Because one allegedly false statement is that Schron stole $50 million from SMV to recoup personal investment losses relating to the Citibank Swap, the New York court presumably will have to decide whether the Citibank Swap was, in fact, Schron's personal investment. A decision on that issue directly would affect the claims in this action, which allege that (1) Schron entered into the Citibank Swap for his own personal benefit, (2) the swap was not intended to benefit SMV and SWC, and (3) Schron's appropriation of funds from SMV and SWC to pay Citibank was improper. Whatever the outcome, the claims in Delaware and New York arise from a common nucleus of operative facts. Therefore, the issues relating to the Citibank Swap in this action and the New York Litigation meet the requirements of substantial similarity.

Furthermore, because the Citibank Swap is a central issue in both actions and accounts for more than half the damages Plaintiffs seek in the Delaware Action, the

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[37] *Dillon v. City of New York*, 261 A.D.2d 34, 38 (N.Y. Sup. Ct. 1999) ("The elements [of defamation] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se.").

substantial similarity on this issue alone is important to my *McWane* analysis. The alleged damages resulting from the Citibank Swap account for approximately $67 million of the $105 million Plaintiffs seek from their derivative claims. Therefore, I find that the primacy of the Citibank Swap in the Delaware Action and the substantial risk in both actions of inconsistent judgments relating to the swap strongly support staying this action under *McWane*.

2. The Omnicare Transaction

Defendants also claim that the two actions contain overlapping issues related to the Omnicare Transaction. In 2004, Schron, through Grunstein, negotiated the sale of MMS, a Mariner subsidiary, to Omnicare. Contemporaneously, Omnicare also agreed to a fifteen-year pharmacy services contract with Mariner and SavaSeniorCare LLC ("Sava"), an entity controlled by Grunstein. The alleged coupling of the MMS sale and the pharmacy services contract resulted in a government investigation under the Medicare Anti-Kickback Statute and a civil complaint against Omnicare, Schron, Grunstein, Forman, Mariner, and Sava, alleging that the sale of MMS was an illegal kickback from Omnicare in exchange for the pharmacy services contract. Although SMV and SWC were not named as defendants in the civil complaint, the Companies paid Schron's legal fees from the investigation and approximately $11 million related to his settlement with the government (the "Omnicare Settlement").

The New York Litigation includes claims for breach of fiduciary duty, legal malpractice, and professional negligence against Grunstein, among others, relating to the

Omnicare Transaction. Schron asserts that the New York defendants are liable for breach of fiduciary duty for

> failing to inform Schron about any of the legal risks to the transaction; failing adequately to protect Schron and the Schron Entities in the transaction; and failing to obtain the advice of an experienced independent expert in healthcare regulatory matters to give non-conflicted advice to Schron and SMV regarding the healthcare regulatory issues that related to Omnicare's execution of long-term pharmacy contracts contemporaneously with its purchase of MMS.[38]

In the Delaware Action, Plaintiffs challenge Schron's use of SMV and SWC funds to pay his legal fees and the Omnicare Settlement. According to Plaintiffs, "[t]here is no justification for using SMV's or SWC's funds to settle personal claims against Schron when SMV and SWC were not defendants."[39]

Having considered the claims relating to the Omnicare Transaction in New York and Delaware, I find that there are similarities, but not to the same degree as the Citibank Swap. At issue in the New York Litigation is whether Grunstein negligently structured the Omnicare Transaction in a way that resulted in a multimillion-dollar liability for Schron. To resolve those claims, the New York court, first, will have to consider the actions taken by Grunstein in structuring and executing the transaction and the capacity in which Schron was acting and, second, will need to determine whether Grunstein acted reasonably in advising Schron on the transaction. In contrast, the only issue in this action related to the Omnicare Transaction is whether Schron was entitled to indemnification

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[38] Schron Compl. ¶ 301.

[39] Del. Compl. ¶ 52.

from SMV and SWC. Still, resolution of that claim primarily will depend on the capacity in which Schron was acting and the express terms of the Operating Agreements. Hence, there likely will be at least some overlap in the underlying facts and the issues presented in the Delaware Action and the New York Litigation. Therefore, proceeding concurrently on the claims relating to the Omnicare Transaction in both New York and Delaware likely will create at least some risk of conflicting judgments.

Furthermore, as a practical matter, because resolution of the New York claims related to the Omnicare Transaction may resolve certain common factual issues and better inform this Court's consideration of Plaintiffs' claims, I find it advisable to wait until resolution of the New York Litigation before proceeding with these claims. Moreover, because the Omnicare claims in Delaware are for money damages only, there is little or no risk of ongoing harm from staying these claims and the effect of any delay can be remedied by prejudgment interest. Therefore, although the Omnicare claims in the competing actions potentially could be segregated and decided separately, that approach does not seem prudent. In light of the centrality of the Citibank Swap, the potential for the New York Litigation to better inform the factual basis for the Omnicare Transaction, as well as the Citibank Swap, and the minimal risk of harm resulting to Plaintiffs from staying adjudication of this claim, I consider it preferable to stay resolution of this claim under *McWane.*

3. Plaintiffs' Remaining Claims

Most of Plaintiffs' remaining claims in this action are sufficiently different from the New York Litigation that the underlying issues are not substantially similar within the

meaning of *McWane*. In addition to their claims regarding the Citibank Swap and the Omnicare Transaction, Plaintiffs allege, among other things, that: (1) Schron failed to keep accurate books and records for SMV and SWC or intentionally manipulated the books and records to give improper preferences to CAM-Elm and others; (2) the improper bookkeeping prevented the MICH and SEEVA Entities from receiving proper distributions; (3) Schron has failed to provide and distribute audited financial statements for SMV and SWC; and (4) Schron improperly refuses to recognize the MICH and SEEVA Entities as members of SMV and SWC and wrongfully has withheld distributions from the MICH and SEEVA Entities since April 2011.[40] The substance of these claims and the issues related to Schron's management of SMV and SWC do not appear to be in dispute in the New York Litigation.

Resolution of the remaining claims in this action does depend, however, on the MICH and SEEVA Entities status as members of SMV and SWC. Therefore, Defendants assert that, because Plaintiffs' claims in Delaware are premised on their status as minority members of SMV and SWC, Plaintiffs will have no standing to pursue those claims if the New York court rescinds their minority interests. As a result, Defendants argue that the possibility of rescission in the New York Litigation provides a further ground for staying these claims under *McWane*.

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[40] The distributions allegedly owed to the MICH and SEEVA Entities are being held in escrow. As of the oral argument on the pending motion to stay or dismiss, the total amount withheld from the MICH and SEEVA Entities was approximately $3.5 million. Tr. 17-18.

Plaintiffs disagree. They contend that the MICH and SEEVA Entities would be necessary parties to any action seeking to rescind or otherwise terminate the membership interests of those entities in SMV and SWC.[41] Defendants point out, however, that the Schron Complaint asks the New York court to order Grunstein, Forman, and Levinson "to relinquish all ownership interests (direct or indirect) in SMV [and] SWC . . . ."[42]

There is no dispute that the MICH and SEEVA Entities were established for the sole purpose of receiving equity interests in SMV and SWC. Therefore, instead of ordering direct rescission of the MICH and SEEVA Entities' membership interests in SMV and SWC, the New York court conceivably could order rescission of Grunstein, Forman, and Levinson's interests in the MICH and SEEVA Entities and perhaps even transfer those interests to Schron. If that occurred, Schron effectively would gain control of the MICH and SEEVA Entities and this litigation. As a result, although rescission would not directly deprive the MICH and SEEVA Entities of standing to pursue their claims, as a practical matter, resolution of the New York Litigation could enable Schron to force the MICH and SEEVA Entities to stop litigating in Delaware.

Whether the New York court can order rescission in the manner Defendants envision turns on New York law and should be decided in the New York Litigation. For purposes of this Memorandum Opinion, however, I find the possibility of relief in the nature of rescission in the New York Litigation to be sufficiently colorable as to provide

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41 PAB 20.

42 Schron Compl. at 94.

additional support for staying this action until that matter can be resolved. Rescission of Grunstein, Forman, and Levinson's membership interests in both SMV and SWC through the MICH and SEEVA Entities drastically would undermine Plaintiffs' ability to pursue their claims in this action and effectively could terminate, or materially reduce the scope of, these proceedings.

i. The escrow claim

Lastly, in terms of the issues presented, I note that, as to Plaintiffs' claim regarding Schron's wrongful escrowing of approximately $3.5 million in distributions allegedly owed to Plaintiffs, Defendants' counsel stipulated at oral argument that Defendants would waive Section 9.4 as to that claim if Plaintiffs brought it in New York.[43] In the interests of allowing prompt adjudication of Plaintiffs' equitable claims for release of those escrowed distributions, this Court has no objection to Plaintiffs filing their claim in New York so that it may be adjudicated there along with the rest of the New York Litigation. If the New York court determines that Plaintiffs' equitable claim relating to the escrow cannot proceed in New York for any reason, however, Plaintiffs may seek to reactivate their claim here and I will reconsider at that time whether the escrow claim should proceed in Delaware in parallel with the New York Litigation.

3. The New York court is capable of rendering prompt and complete justice

Finally, I find that the New York court is capable of rendering prompt and complete justice as to the issues before it. The New York Litigation has been proceeding apace for more than two years. A discovery master is overseeing the New York

[43] Mar. 29, 2012 Hr'g Tr. 51.

Litigation and millions of pages of documents and dozens of depositions already have been produced. In addition, various claims have been dismissed and partial summary judgment has been granted in three of the related New York actions.[44] As discussed *supra*, a decision in the New York Litigation has the potential to resolve several, if not all, of the claims and issues presented here, and I have no reason to doubt that the New York court can provide a prompt adjudication of the claims before it.[45] Moreover, "[u]nlike some cases in which this Court has refused to stay a later filed Delaware action, this is not a case raising novel or important issues of Delaware law (and, in particular, Delaware corporation law) or arising under a special statutory grant of jurisdiction, such as 8 *Del. C.* § 225."[46] Therefore, I find the New York court is capable of rendering prompt and potentially complete justice under *McWane*.

III. CONCLUSION

For all of the reasons stated in this Memorandum Opinion, I conclude that the New York Litigation was first-filed, involves substantially similar parties and issues, has been proceeding promptly, and likely will resolve at least some, if not all, of the issues in this action. Therefore, I grant Defendants' motion and stay this action until the conclusion of the New York Litigation or further order of this Court. The stay shall include Defendants' pending motion to dismiss under Court of Chancery Rule 12(b)(6).

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44 *See* Letter from Martin S. Lessner, Esq. to V.C. Parsons, Docket Item No. 20, C.A. No. 6840-VCP (Mar. 20, 2012).

45 *See Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1995 WL 694397, at *2 (Del. Ch. Nov. 21, 1995).

46 *Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 931 (Del. Ch. 1998).

IT IS SO ORDERED.