

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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|--|---------------------|
| UBS SECURITIES LLC , a Delaware) | CIVIL ACTION NUMBER |
| Limited Liability Company,) | |
|) | N11C-10-001 JOH |
| Plaintiff) | |
| v.) | |
|) | |
| PENTWATER CAPITAL) | |
| MANAGEMENT, L.P. , a Delaware) | |
| Limited Partnership) | |
|) | |
| Defendant) | |

Submitted: January 6, 2012

Decided: January 11, 2012

MEMORANDUM OPINION

*Upon Motion of the Defendant to Dismiss, or In the Alternative to Stay Proceedings –
DENIED IN PART AND GRANTED IN PART*

Appearances:

Michael A. Weidinger, Esquire, and Seton C. Mangine, Esquire, of Pinckney, Harris & Weidinger, LLC, Wilmington, Delaware, and Bradley J. Butwin, Esquire, and Daniel L. Cantor, Esquire (Argued), and Charles J. Nerko, Esquire, of O’Melveny & Myers LLP, New York, New York, Attorneys for Plaintiff UBS Securities LLC

Andre G. Bouchard, Esquire (Argued), of Bouchard Margules & Friedlander, P.A., Wilmington, Delaware, and Gus A. Paloian, Esquire, and Michael R. Levinson, Esquire, and Jason J. DeJonker, Esquire, and M. Ryan Pinkston, Esquire, of Seyfarth Shaw LLP, Chicago, Illinois, Attorneys for Defendant Pentwater Capital Management, L.P.

HERLIHY, Judge

On September 22, 2011, Defendant Pentwater Capital Management, L.P. (“Pentwater”), filed a declaratory judgment action (the “Illinois action”) in the Chancery Division of the Circuit Court of Cook County, Illinois, against UBS Securities LLC (“UBS”) involving a dispute over a securities offering by one of UBS’ investment banking clients. Eleven days later on October 3, 2011, UBS filed a claim against Pentwater in this Court (the “Delaware action”) alleging breach of contract and promissory estoppel arising out of the same transactions and occurrences. On the same day it also moved to dismiss the Illinois action with prejudice on the grounds that Pentwater’s declaratory judgment action was improper and that the Delaware case was now pending. On October 12, 2011, Pentwater moved this Court to dismiss or stay the Delaware action. Argument on UBS’ motion to dismiss the Illinois action is scheduled for February 14, 2012. For reasons of judicial comity, this Court will stay the Delaware action until the Cook County Circuit Court decides UBS’ motion to dismiss. Pentwater’s motion to dismiss is DENIED, without prejudice, at this time.

*Factual Background*¹

In early 2011, Pentwater and UBS initiated negotiations for Pentwater to buy a portion of securities to be issued upon the planned merger of Cumulus Media Inc. (“Cumulus”) with Citadel Broadcasting Corporation. In March, Pentwater signed a “Commitment Letter” which it provided to UBS, with certain conditions, to contribute

¹ The facts as recited are summarized from Plaintiff UBS’ complaint, Pentwater’s motion and exhibits, and UBS’ response to the motion.

\$25 million toward UBS' purchase of Cumulus Class A Common Stock at \$4.34 per share or less.² In April, UBS contracted with Cumulus for it to buy \$125 million of such securities which UBS was to sell, in turn, to various other purchasers of which Pentwater was to be one.

UBS alleges it sent a "Securities Purchase Agreement" to Pentwater in May 2011. The Agreement was between Cumulus, UBS and each purchaser of Cumulus Shares.³ Section 9.7 of the Agreement clearly specified that it will be governed by and construed according to Delaware law.⁴ Each potential purchaser had to execute a "Purchaser Signature Page," which among other things made it a party to the Agreement. Each purchaser when signing that page had to specify where notice was to be sent regarding any issue or matter in the Agreement. Presumably, if the deal had gone through, Pentwater would have signed one of these pages. UBS alleges the UBS-Cumulus Transaction closed on September 16, 2011.⁵ While that allegation as stated does not make it clear, it has to mean not only did UBS and Cumulus execute the Securities Purchase Agreement, but each purchaser from UBS did also, save Pentwater. UBS does not identify any of the other purchasers. In failing to do so, it does not list

² UBS Complaint, Exhibit 1.

³ Pentwater Motion to Dismiss, Exhibit A. (The Agreement is attached to this exhibit as Exhibit D.

⁴ *Id.*

⁵ UBS Complaint, ¶ 27.

the addresses where they are to be sent notice which could assist in various considerations this Court must undertake in addressing the issues raised.

Because of language in the Agreement about the types of equities to be involved, UBS and Pentwater had various discussions concerning the nature of the securities to be purchased, centering primarily on common stock versus warrants (and the convertibility of the latter) and restrictions on distribution of the common stock to non-US persons. These discussions continued through June and July, during which time the share price steadily declined and the parties' relationship deteriorated. In late July, Pentwater asserted that its obligations under the Commitment Letter had expired, claiming in an email that the deadline for the execution of the Stock Purchase Agreement had expired and that it considered the matter closed.⁶ UBS persisted in trying to address Pentwater's concerns regarding stock versus warrants, convertibility and distribution restrictions, and insisted that Pentwater remained bound by the Commitment Letter. At the end of August, UBS demanded, unsuccessfully, that Pentwater sign the Stock Purchase Agreement, and again demanded, unsuccessfully, that Pentwater provide the \$25 million immediately prior to the Cumulus deal closing on September 16.

The UBS-Cumulus transaction closed on September 16, 2011, but Pentwater did not contribute \$25 million.⁷ On September 22, 2011, Pentwater filed the Illinois action. On October 3, 2011, UBS moved to dismiss Pentwater's action primarily based

⁶ UBS complaint, ¶ 21.

⁷ UBS complaint, ¶ 27.

on the argument that the claims upon which Pentwater relies are events past. Argument on UBS' motion is scheduled for February 14, 2012 in Illinois.

On November 16, 2011, Pentwater filed its first set of document requests and interrogatories in the Illinois action. On December 14, 2011, UBS moved to stay discovery pending resolution of its underlying motion. The Cook County Circuit Court denied the motion for discovery or stay on December 26, 2011.

Parties' Contentions

Pentwater argues that the Court should dismiss or stay the Delaware case based on the principles of judicial comity and efficiency articulated in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*⁸ Alternatively, it asks for the same relief based on considerations of *forum non conveniens*. UBS counters that *McWane* is inapplicable because Pentwater's Illinois action is an improper attempt to manipulate the machinery of litigation, and should not be accorded as a "prior action" under *McWane* in any event. It contends that the *forum non conveniens* argument must show that Pentwater will suffer an overwhelming hardship to litigate in Delaware, and that the balance of factors still favors UBS despite that burden.

Applicable Standards

The question of whether to dismiss or issue a stay in an action based either on *McWane* or *forum non conveniens* is generally within the sound discretion of the trial

⁸ 263 A.2d 281 (Del. 1970).

court.⁹ As to *McWane*, such discretion should be exercised freely in favor of the 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 . . .¹⁰ The policies underlying this free exercise “in favor of the stay” are:

that, as a general rule, 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 another jurisdiction of its own choosing; [and] that these concepts are impelled by considerations of comity and the necessities of an orderly and efficient administration of justice.¹¹

Its exercise is still discretionary, however; and no party has an affirmative right to a stay “by reason of a prior action pending in another jurisdiction involving the same

⁹ *States Marine Lines v. Domingo*, 269 A.2d 223 (Del. 1970); *McWane* at 283. It is worth noting that *McWane* was itself decided as a *forum non conveniens* question, and subsequent treatment by the courts of this State have not entirely clarified the relationship between the doctrines. One possible harmonization is that *McWane* controls when the requirements articulated in the cited passage – particularly the temporal priority of the foreign-filed action – are met, and that the *forum non conveniens* analysis governs otherwise. See *BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 WL 702382, at *2 (Del. Super. Feb. 25, 2010). As an additional gloss, a number of cases indicate that where Delaware has a particular interest in interpreting critical or emerging aspects of its own law, relinquishment of jurisdiction to a foreign forum may be less appropriate. See, e.g., *In re Topps Co. S'holders Litigation*, 924 A.2d 951 (Del. Ch. 2007) (Internal affairs doctrine; Derivative action); *Xpress Mgmt., Inc. v. Hot Wings Intern., Inc.*, 2007 WL 1660741 (Del. Ch. May 30, 2007); *Caithness Res., Inc. v. Ozdemir*, 2000 WL 1741941 (Del. Ch. Nov. 22, 2000).

¹⁰ *McWane* at 283. *McWane* itself establishes the preference in favor of a stay when these conditions are satisfied, since in it the Delaware Supreme Court found the Superior Court to have abused its discretion by *not* issuing a stay under the circumstances.

¹¹ *Id.*

parties and the same issues.”¹²

At this point in the particular procedural posture of this case and the pending argument in Illinois, this Court views the analysis as only involving whether to issue a stay and on a limited basis. It is premature and perhaps an ill advised step to analyze this case on *forum non conveniens* grounds either regarding issuing a stay or dismissing this action.

Discussion

The determination whether this action should be stayed pending the resolution of the threshold decision pending argument in Illinois involves several factors, not entirely overlapping. By date alone, there is no dispute that Pentwater filed its action first; eleven days prior to this action.

As Chancery has eloquently stated, however:

The determination of which action was filed first is a question of fact determined by reference to the underlying procedural facts. The Court, however, does not make that determination mechanically or using a bright-line test. Rather, this Court’s complementary objectives of discouraging both forum shopping and contrived races to the courthouse require a more nuanced analysis.¹³

McWane endorses the principle that the place where a Delaware defendant first chose to litigate should be respected.¹⁴ But *McWane* is factually inapposite save that the

¹² *Id.*

¹³ 2005 WL 3277911 (Del. Ch. Nov. 23, 2005)(Footnotes omitted).

¹⁴ 263 A.2d 281, 283 (Del. 1970).

first action filed was in Alabama like the first filed action here was Illinois. But this and any other court must look to the other unique facts in *McWane*: (1) the contract was made in Alabama, (2) it involved the construction of an iron production plant in Alabama, and (3) the contract was governed by Alabama law.¹⁵ Pentwater's agreement with UBS was part of a much larger stock purchase agreement involving shares in Cumulus, a Delaware corporation, and UBS, a Delaware limited liability company. In so many ways, therefore, this case is not *McWane*.

Here, Pentwater chose to file its action in Illinois, but six days after the deal of which it was to be a part went through without it. All events leading up to that point in time upon which Pentwater seems to be relying to justify its alleged non-compliance, September 16, 2011, had transpired. Pentwater is apparently claiming that those prior events meant it has no liability to UBS. Yet, even though Pentwater claimed to UBS in late July that the deadline for it to sign on had expired, it waited nearly two months to file its declaratory judgment action. Those two months clearly would have been the time frame in which to do so, if anything were to be filed.

Its liability, if any, results from an alleged breach of contract; a breach which had, *even in its own view*, exposed it to potential liability. Clearly, UBS is the "natural plaintiff" in the Delaware action and the overall juxtaposition of the parties.¹⁶ Why

¹⁵ *Id.* at 282.

¹⁶ *Compare E-Birchtree, LLC v. Enterprise Prod. Operating, L.P.*, 2007 WL 914644 (Del. Super., January 18, 2007).

else would Pentwater file its pre-emptive Illinois action? UBS does not dispute that the Illinois Circuit Court is unable to resolve the underlying litigation. The parties there are the same as here. On the basis of who first filed a law suit, therefore, a stay is justified.

But all of this overlooks: (1) the “nuanced” analysis needed and (2) potentially rewarding Pentwater for its race to the courthouse. It is not coincidental that it filed for discovery *after* UBS’ motion to dismiss to bootstrap its “first filed” argument. This is a breach of contract action. Pentwater’s run to the courthouse in Cook County by filing a declaratory judgment action “to soften the impact of an imminent suit elsewhere for the purpose of gaining an affirmative judgment... requires a closer look at the deference historically accorded a prior filed action.”¹⁷

One such fact is this Court’s concern about the inconsistency in Pentwater’s argument and actions. It had two months to file an action here or in Illinois at a more legally appropriate time but waited. It now “hides behind” the first filed premise. There are legions of Delaware cases, mostly from Chancery, reviewing the “first filed” issue. They are helpful, but as with this case, fact driven to a large extent.

While this Court has serious reservations whether it should “bless” or “reward” Pentwater’s Illinois action as “first filed” under Delaware law, judicial comity, at this time, trumps the need to do so. Oral argument on UBS’ motion to dismiss Pentwater’s

¹⁷ *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *4 (Del. Super. April 25, 1989).

action is scheduled next month and raises a threshold issue much better in the perview of the court there. This Court will not presume or be presumptuous to presume the outcome of the motion.

This Court stays this Delaware action until the Cook County Circuit Court rules on UBS' motion to dismiss. Counsel are to promptly notify this Court of that court's decision.

Conclusion

For the reasons stated herein, defendant Pentwater Capital Management, L.P.'s motion to stay is GRANTED until the Cook County Circuit Court rules on plaintiff UBS Securities, LLC's motion to dismiss. Decision on Pentwater's motion to dismiss or stay based on grounds of *forum non conveniens* is DENIED, without prejudice.

IT IS SO ORDERED.

J.