

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

BROOKSTONE PARTNERS ACQUISITION :  
XVI, LLC, directly and derivatively on behalf of :  
WOODCRAFTERS HOME PRODUCTS :  
HOLDING, LLC, :

Plaintiff, :

v. :

**C.A. No. 7533-VCN**

ABRAHAM TANUS, an individual, TAN U.S. :  
GROUP, INC., a Delaware corporation, and :  
TRUSTONE PRODUCTS, LLC, a Delaware :  
limited liability company, :

and :

Defendants, :

WOODCRAFTERS HOME PRODUCTS :  
HOLDING, LLC, :

Nominal Defendant. :

**MEMORANDUM OPINION**

Date Submitted: September 7, 2012

Date Decided: November 20, 2012

Kevin R. Shannon, Esquire, Matthew F. Lintner, Esquire, and Ryan W. Browning, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, and Steven J. Thompson, Esquire, Lisa C. Sullivan, Esquire, and Maura M. McIntyre, Esquire of Ungaretti & Harris LLP, Chicago, Illinois, Attorneys for Plaintiff.

Neal J. Levitsky, Esquire, Seth A. Niederman, Esquire, and Carl D. Neff, Esquire of Fox Rothschild LLP, Wilmington, Delaware, and Jason N. Zakia, Esquire and Michelle Holmes Johnson, Esquire of White & Case LLP, Miami, Florida, Attorneys for Defendant Abraham Tanus.

NOBLE, Vice Chancellor

Plaintiff Brookstone Partners Acquisition XVI, LLC (“Brookstone”) alleges in this action (the “Delaware Action”) breach of contract and breach of fiduciary duty claims against Defendant Abraham Tanus (“Tanus”) and entities he controls, Defendants Tan U.S. Group, Inc. (“Tan U.S.”) and TruStone Products, LLC (“TruStone”) (collectively, the “Defendants”) regarding Tanus’s acquisition of, and control over, Design Imaging and V&B, two suppliers of Nominal Defendant Woodcrafters Home Products Holding, LLC (“Woodcrafters” or the “Company”). Ownership of Woodcrafters traces back to Brookstone and Tanus. According to Brookstone, Tanus, despite contractual and fiduciary obligations to Woodcrafters, acquired Design Imaging and V&B for his own benefit and to the detriment of Woodcrafters and, thus, Brookstone.

Tanus, however, two weeks before Brookstone commenced the Delaware Action, filed an action in Texas (the “Texas Action”) in which he sought a declaration that he had not breached either his employment agreement with Woodcrafters or Woodcrafters’ limited liability company agreement when he (and entities he controls) acquired Design Imaging.<sup>1</sup> Tanus has moved to dismiss (or, alternatively, to stay) the Delaware action in favor of the Texas Action. This is the Court’s decision on that motion.

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<sup>1</sup> *Woodcrafters GP, LLC v. Brookstone Partners Acquisition XVI, LLC*, No. C-1174-12-C (Tex. 139th Dist. Hidalgo County, filed May 1, 2012).

## I. BACKGROUND

### A. *The Parties*

Woodcrafters, a manufacturer of home furnishing products, is a Delaware limited liability company governed by the Amended and Restated Limited Liability Company Agreement (the “LLC Agreement”).<sup>2</sup> The LLC Agreement provides that Woodcrafters is to be controlled by a board of up to six managers. Two of those managers are designated by Brookstone. The remaining four managers are selected by two entities that Tanus owns and controls.<sup>3</sup>

Tanus is, and at all relevant times has been, a manager and officer of the Company.<sup>4</sup> Tanus is also the Chief Executive Officer of Woodcrafters Home Products, LLC (“WHP”),<sup>5</sup> a wholly-owned subsidiary of Woodcrafters. Brookstone, as a member of Woodcrafters, claims the benefits from all of the obligations that Tanus owes to WHP.<sup>6</sup> Tanus’s employment with WHP is governed by an executive employment agreement (the “Employment

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<sup>2</sup> First Am. & Suppl. Direct & Deriv. Compl. (“Compl.” or “Complaint”) ¶ 14. The facts are drawn primarily from the Complaint.

<sup>3</sup> RST Texas Real Estate, L.P. (“RST Texas”) and Woodcrafters TX, L.P. (“WC TX”) have the ability to designate four managers. RST Texas is managed by its general partner, RST Texas Real Estate G.P., LLC, the sole member of which is Tanus. WC TX is managed by its general partner, Woodcrafters G.P., LLC (“WC GP”), the sole member of which is Tan U.S. The Company is substantially owned by Tan U.S., WC GP, and Brookstone. *Id.* at ¶¶ 15-20, Ex. A, Sched. I.

<sup>4</sup> *Id.* ¶ 7.

<sup>5</sup> *Id.* at ¶ 31.

<sup>6</sup> *Id.*

Agreement”).<sup>7</sup> Tanus is President and majority stockholder of Tan U.S., which owns all or a majority of the membership interests in TruStone.

### B. *Factual Background and Procedural History*

On May 1, 2012, Tanus and certain of his affiliates initiated the Texas Action against, among others, Brookstone.<sup>8</sup> In the Texas Action, Tanus seeks a declaratory judgment that he did not breach the LLC Agreement and the Employment Agreement when, in June 2011, TruStone acquired Design Imaging.<sup>9</sup> Tanus alleges that he brought the potential acquisition of Design Imaging to the attention of the Company’s board of managers, but they declined to acquire it. With the full knowledge of the board, he then proceeded with TruStone’s acquisition of Design Imaging.<sup>10</sup> Since at least 2009, Design Imaging has been a

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<sup>7</sup> *Id.* at Ex. B. Even though Tanus’s Employment Agreement is with WHP, and Woodcrafters appears to be a holding company, the Complaint, as well as the parties’ briefs, refer exclusively to Woodcrafters as the operating entity.

<sup>8</sup> The plaintiffs in the Texas Action are Tanus and two Tanus-controlled entities that are also members of the Company: WC GP and Tan U.S. The Defendants are Brookstone and seven named individuals, who are also members of the Company. *Id.* at Ex. A, Sched. I.

<sup>9</sup> Defs.’ Opening Br. in Supp. of Def. Abraham Tanus’s Mot. to Dismiss or Stay the First Am. Suppl. Direct and Deriv. Compl. (“Defs.’ Opening Br.”) Ex. G, ¶ 38 (the Texas complaint). Whether TruStone acquired the material assets of Design Imaging or Design Imaging itself is uncertain and ultimately irrelevant for purposes of the Court’s analysis.

<sup>10</sup> *Id.* at Ex. G ¶ 26. Unlike in the Delaware Complaint, which claims that Tanus presented the Design Imaging opportunity to the Company’s board after TruStone acquired it, it is not clear in the Texas Action whether TruStone’s acquisition of Design Imaging preceded Tanus’s offer to the board. For the purposes of this memorandum opinion, however, this factual disparity is irrelevant.

“crucial business partner” of Woodcrafters and critical to its product offerings.<sup>11</sup> The parties do not dispute that the Texas Action requires that the Texas court construe Section 7.5 of the LLC Agreement<sup>12</sup> and Paragraph 2(b) of the Employment Agreement.<sup>13</sup>

On May 15, 2012, two weeks after the initiation of the Texas Action, Brookstone responded by filing this Delaware Action.<sup>14</sup> Unquestionably, the Delaware Action has more breadth and depth than the Texas Action. Brookstone, which has the right to sell Woodcrafters to a third party as of February 2013, alleges in its Complaint that Tanus is attempting to devalue the Company because

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<sup>11</sup> Compl. ¶¶ 63-64. Plaintiffs allege that 15-20 percent of the Company’s revenues derived from products that incorporate Design Imaging technology. That technology allows it to mimic stone, granite, and marble countertops by laying a thin film on top of solid surface countertops.

<sup>12</sup> Section 7.5 of the LLC Agreement provides: “Nothing in this Agreement shall be deemed to restrict in any way the rights of any Manager to conduct any other business or activity whatsoever, and Managers shall not be accountable to the Company or to any other Member with respect to that business or activity; provided, however, that nothing in this Section 7.5 shall affect or supersede any such restrictions imposed on a Manager by any other contract or agreement to which both the Company and/or any of its Affiliates, and such Manager are a party, including any employment agreement between the Company and the Manager if the Manager is also an Officer or employee of the Company.” *Id.* at ¶ 26, Ex. A.

<sup>13</sup> Paragraph 2(b) of the Employment Agreement provides: “During the Employment Period, Executive shall . . . devote his best efforts and his full business time and attention . . . to the business and affairs of the Company and its Subsidiaries. Executive shall perform his duties and responsibilities to the Company hereunder to the best of his abilities in a diligent, trustworthy, businesslike and efficient manner. Notwithstanding the foregoing, so long as such activities do not interfere with Executive’s obligations with the Company or breach any provisions of this Agreement or the Contribution Agreement, Executive may manage personal and family investments and real estate.” *Id.* at Ex. B.

<sup>14</sup> Brookstone admits that the Delaware Action was filed in response to the Texas Action, but argues that Tanus’s first-filed action was an improper attempt to obtain a favorable forum. Brookstone contends that before the filing of the Texas Action it believed the parties were on their way to resolving their disputes. Once Brookstone realized that a cooperative resolution was not likely, it filed its complaint in Delaware. Pl.’s Resp. Br. in Opp’n to Def. Abraham Tanus’s Mot. to Dismiss or Stay First Am. and Suppl. Direct and Deriv. Compl. (“Pl.’s Resp. Br.”) at 2-3.

Tan U.S. and WC GP—entities that Tanus controls—have the right to match any price and terms a third party may offer. As part of this scheme to devalue Woodcrafters, Brookstone alleges that Tanus caused Woodcrafters to make two unauthorized prepayments totaling \$6.8 million on a promissory note to Tan U.S. These unauthorized prepayments have allegedly constrained the Company’s liquidity and materially increased the risk that the Company may violate the terms of its senior debt agreement. In addition, Brookstone alleges that Tanus usurped two corporate opportunities belonging to the Company when Tanus, through two entities he controls, acquired Design Imaging and V&B<sup>15</sup> without providing sufficient information to the Board to consider these acquisitions. Finally, Brookstone alleges that Tanus has threatened to terminate or disrupt various suppliers’ (including Design Imaging’s and V&B’s) relationship with Woodcrafters. Brookstone contends that these actions are intended to decrease the purchase price any independent third party may offer for Woodcrafters, so that Tanus can purchase the Company at an artificially depressed price.<sup>16</sup>

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<sup>15</sup> V&B operates a ceramic plant in Saltillo, Mexico. It supplies a ceramic sink product to the Company. The Complaint does not provide any more information about V&B, such as its importance to the Company as a supplier. Perhaps this suggests that the alleged usurpation of V&B may not be as important as the alleged usurpation of Design Imaging. Compl. ¶ 78.

<sup>16</sup> Compl. ¶¶ 103, 109.

Count I of the Complaint alleges that Tanus breached various provisions of the LLC Agreement, including Section 7.5.<sup>17</sup> Count II alleges that Tanus breached various provisions of his Employment Agreement, including Section 2(b).<sup>18</sup> Counts III, IV, and V allege that Tanus (1) as an officer of the Company, breached his fiduciary duties of loyalty, care, and good faith, and (2) as a manager of the Company, breached his duty of good faith.<sup>19</sup> Count VI alleges that certain Tanus-controlled entities—Tan U.S. and TruStone—knowingly aided and abetted Tanus’s alleged wrongdoing.<sup>20</sup>

## II. CONTENTIONS

Under the *McWane* doctrine,<sup>21</sup> Tanus argues that this Court should dismiss, or alternatively, stay the Delaware Action because there is a prior action pending in Texas involving substantially the same issues and parties and the Texas court is capable of rendering prompt and complete justice. Tanus further argues that where, as here, the Delaware Action is not the first-filed action and is a reactive lawsuit, this Court should give the customary deference to plaintiff’s initial choice

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<sup>17</sup> The Complaint alleges that Tanus also breached Sections 9.1(c) and 7.1(d). Section 9.1(c) addresses the scope of the duties owed by managers to the Company. Section 7.1(d) outlines circumstances in which the approval of all managers is required before an individual manager can act.

<sup>18</sup> Other provisions that Tanus allegedly breached are Sections 2(d) and 7(b). Section 2(d) contains certain representations and warranties made by Tanus. Section 7(b) provides that Tanus cannot interfere with the Company’s business relationships with its suppliers.

<sup>19</sup> Count IV is a derivative claim alleging bad faith. Count V is a direct claim alleging bad faith.

<sup>20</sup> Compl. ¶ 128. The Defendants in the Delaware Action are Tanus, Tan U.S., and TruStone. Woodcrafters is the Nominal Defendant.

<sup>21</sup> *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng’g Co.*, 263 A.2d 281 (Del. 1970).

of forum.<sup>22</sup> Tanus contends that both the Texas and Delaware actions involve the exact same issue: whether Tanus’s conduct was consistent with the terms of the LLC Agreement and his Employment Agreement. As for the additional alleged breaches of those agreements asserted against Tanus, he argues that Brookstone should assert those allegations as counterclaims in the Texas Action because they arise from a common nucleus of operative facts.<sup>23</sup> Finally, Tanus argues that where, as here, the Texas court has already determined that the Texas Action will proceed, this Court should stay the Delaware Action to avoid duplicative efforts and inconsistent rulings.<sup>24</sup>

In response, Brookstone argues that the Texas Action, unlike the Delaware Action, does not involve facts about Tanus’s \$6.8 million in unauthorized prepayments, Tanus’s usurpation of the V&B corporate opportunity, or the threats to disrupt supplier relationships.<sup>25</sup> It also attempts to distinguish the two actions by arguing that the Texas Action turns on whether Tanus is permitted to *own* Design Imaging, while the Delaware Action turns on whether Tanus usurped a corporate opportunity when he *acquired* Design Imaging.<sup>26</sup> Even if the scope of the two actions were identical, Brookstone argues that Tanus’s preemptive attempt to obtain a declaration of “non-breach” is not the sort of action entitled to “first-filed”

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<sup>22</sup> Defs.’ Opening Br. at 6-7.

<sup>23</sup> *Id.* at 7-8.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> Pl.’s Resp. Br. at 13.

<sup>26</sup> *Id.* at 14.

deference under *McWane*.<sup>27</sup> Finally, Brookstone argues that Delaware is the more appropriate forum because of the “important and complex” issues of Delaware law that must be resolved in these actions.<sup>28</sup>

### III. ANALYSIS

The decision of whether to stay or to dismiss a Delaware action in favor of a first-filed foreign action is a matter of discretion for the Court.<sup>29</sup> Under the *McWane* doctrine, 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.”<sup>30</sup> “If the foreign action is first-filed, principles such as fairness, comity, judicial economy and the possibility of inconsistent results generally favor the granting of a stay.”<sup>31</sup> Thus, the *McWane* doctrine supports a stay when (1) there is a prior action pending

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<sup>27</sup> *Id.* at 14-15.

<sup>28</sup> The “important and complex” issues that Brookstone believes must be decided involve the scope of the duty of good faith when fiduciary duties have been disclaimed in the LLC Agreement. *Id.* at 17-18.

<sup>29</sup> *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 2011 WL 3371493, at \*6 (Del. Ch. Aug. 5, 2011), *aff’d*, 34 A.3d 1074 (Del. 2011).

<sup>30</sup> *McWane Cast Iron Pipe Corp.*, 263 A.2d at 283; *see Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 (Del. 2010) (“[W]here the Delaware action is *not* the first-filed, the policy that favors strong deference to a plaintiff’s initial choice of forum requires the court freely to exercise its discretion in favor of staying *or dismissing* the Delaware action.”) (emphasis in original).

<sup>31</sup> *W.C. McQuaide, Inc. v. McQuaide*, 2005 WL 1288523, at \*3 (Del. Ch. May 24, 2005); *see McWane Cast Iron Pipe Corp.*, 263 A.2d at 283 (The *McWane* doctrine seeks to avoid “the wasteful duplication of time, effort and expense that occurs when judges, lawyers, parties and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts. Also to be avoided is the possibility of inconsistent and conflicting rulings and judgments and an unseemly race by each party to trial and judgment in the forum of its choice.”).

elsewhere, (2) involving the same parties, and (3) the same issues, and (4) the court in the other jurisdiction is capable of rendering prompt and complete justice.<sup>32</sup> However, the “use of a declaratory judgment action to anticipate and soften the impact of an imminent suit elsewhere for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a prior filed action.”<sup>33</sup>

#### A. *Texas is the First-Filed Action*

As to the first prong of *McWane*, the parties do not dispute that the Texas Action was filed first or that there is a pending action elsewhere. Tanus filed the Texas Action on May 1, 2012. Trial in that action is scheduled for spring 2013. The Delaware Action was filed two weeks after the Texas Action, on May 15, 2012. Thus, the first prong of the *McWane* doctrine is satisfied.

#### B. *Same Parties*

Although the parties to the Texas and Delaware Actions are not identical, both actions involve substantially the same parties.<sup>34</sup> Courts have found parties to be “substantially the same under *McWane* where related entities are involved but

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<sup>32</sup> See *McWane Cast Iron Pipe Corp.*, 263 A.2d at 283.

<sup>33</sup> *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at \*4 (Del. Super. Apr. 25, 1989); see also *Air Prods. & Chems., Inc. v. Lummus Co.*, 252 A.2d 545, 547 (Del. Ch. 1968), *rev'd on other grounds*, 252 A.2d 543 (Del. 1969) (suggesting that less deference should be afforded when there is “jockeying for position” by “resort to declaratory judgment for the purpose of defensively establishing priority as to forum”).

<sup>34</sup> Woodcrafters is not a party to the Texas Action, but is a Nominal Defendant in the Delaware Action, in which no relief is sought against it. In addition, all of the members of Woodcrafters are parties to the Texas Action.

not named in both actions, referring to the exclusion as ‘more of a matter of form than substance.’”<sup>35</sup> In addition, courts have held the parties in competing actions to be “substantially identical” where differences between the parties can be remedied by joinder.<sup>36</sup> Here, the only party to the Delaware Action that is not named in the Texas Action is TruStone. Brookstone alleges that Tan U.S., which is a party to both actions, owns a majority interest in TruStone. Therefore, because Tan U.S. controls TruStone, there is substantial or functional identity of all parties in both actions. Furthermore, TruStone could be joined to the Texas Action.<sup>37</sup>

### C. *Same Issues*

The third prong of *McWane* requires a showing of substantial or functional identity of issues or claims.<sup>38</sup> “[T]he pragmatic focus is on whether the claims ‘are closely related and arise out of the same common nucleus of operative facts.’”<sup>39</sup>

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<sup>35</sup> *W.C. McQuaide, Inc.*, 2005 WL 1288523, at \*4 (quoting *FWM Corp. v. VKK Corp.*, 1992 WL 87327, at \*1 (Del. Ch. Apr. 27, 1992)); see also *AT&T Corp. v. Prime Sec. Distributors, Inc.*, 1996 WL 633300, at \*3 (Del. Ch. Oct. 24, 1996) (“The *McWane* test applies where the two actions involve the same parties *or persons in privity with them.*”) (emphasis in original).

<sup>36</sup> See *W.C. McQuaide*, 2005 WL 1288523, at \*4; *Macklowe v. Planet Hollywood, Inc.*, 1994 WL 586835, at \*3 (Del. Ch. Oct. 4, 1994).

<sup>37</sup> Tanus has represented that TruStone will not object on personal jurisdiction grounds if Brookstone asserts the same aiding-and-abetting claim made against TruStone here in the pending Texas Action. Reply Br. in Supp. of Def. Abraham Tanus’s Mot. to Dismiss or Stay the First Am. and Suppl. Direct and Deriv. Compl. ¶ 1 n.1. Brookstone may assert these claims as counterclaims in the Texas Action. See Tex. R. Civ. P. 97(b) (“A pleading may state as a counterclaim any claim against an opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim.”).

<sup>38</sup> See *W.C. McQuaide*, 2005 WL 1288523, at \*4.

<sup>39</sup> *EuroCapital Advisors, LLC v. Colburn*, 2008 WL 401352, at \*2 (Del. Ch. Feb. 14, 2008) (quoting *Dura Pharma., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 930 (Del. Ch. 1998)); see also *W.C. McQuaide*, 2005 WL 1288523, at \*4; *Sagarra Inversiones, S.L.*, 2011 WL 3371493, at \*6

For purposes of this analysis, the Court will consider Brookstone's claims according to the three main factual allegations in the Complaint.

1. Tanus's Usurpation of Two Corporate Opportunities

First, Brookstone contends that Tanus usurped two corporate opportunities of the Company when he acquired, through his entities, Design Imaging and V&B (the "Usurpation Claims"). Brookstone argues that the Texas Action is different because it seeks a declaration that Tanus is permitted to own Design Imaging in accordance with the LLC Agreement and the Employment Agreement. The Delaware Action, according to Brookstone, concerns whether Tanus properly acquired Design Imaging.

This is a distinction without much of a difference. It does not change the fact that the Texas Action and Counts I and II of the Delaware Action will turn on the interpretation of Section 2(b) of the Employment Agreement and Section 7.5 of the LLC Agreement. The Complaint alleges in Count I that Tanus breached the LLC Agreement by wrongfully usurping opportunities rightfully belonging to the Company. In Count II, the Complaint alleges that Tanus breached Section 2(b), among other sections, of the Employment Agreement when he wrongfully acquired Design Imaging and V&B. Except for the inclusion of V&B in the Delaware

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(explaining that the Court must determine "whether the ultimate legal issues to be litigated will be determined in the first-filed action" and this requires "only a showing of substantial or functional identity of the parties and issues.") (original quotations omitted).

Action, these claims are essentially identical to the Texas Action, and the facts underlying each claim are also the same.<sup>40</sup>

Brookstone then argues that the Texas Action does not address the alleged usurpation of the V&B corporate opportunity. That is true. But the facts giving rise to this alleged usurpation are—at least to some extent—similar to the facts underlying the wrongful acquisition of Design Imaging.<sup>41</sup> Most importantly, determining whether Tanus usurped the V&B opportunity requires the same contractual interpretation of Section 2(b) of the Employment Agreement and Section 7.5 of the LLC Agreement as the determination of whether Tanus usurped the Design Imaging opportunity. The risk of conflicting interpretations cautions against having these claims continue in parallel proceedings. Thus, the Usurpation Claims in Counts I and II involve substantially the same issues and facts as the Texas Action.

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<sup>40</sup> See *W.C. McQuaide, Inc.*, 2005 WL 1288523, at \*6 (“The fact that one action seeks an order compelling issuance of stock certificates and the other seeks a declaratory judgment that the Company need not issue the certificates, is a matter of form, not substance. . . .”); *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2011 WL 300252, at \*7 (Del. Super. Jan. 24, 2011 (“[I]t is worth noting that the form of the claims—whether breach of contract or declaratory relief—is of no consequence in determining the factual origin of the claims or interpretation of the contractual provisions.”)).

<sup>41</sup> For example, the Complaint alleges that Tanus proposed the acquisition of both Design Imaging and V&B in the same board meeting. Prior to that meeting, Tanus provided the board with a sparse one-page document describing the two corporate opportunities. The Complaint further alleges that Tanus refused to provide additional information for either opportunity and forced an immediate vote of the board of managers on the question of whether to acquire Design Imaging and V&B. Compl. ¶¶ 69-74, 78-82.

Brookstone further alleges in Counts III, IV, and V that Tanus violated his fiduciary duties of good faith, loyalty, and care when he, among other things, wrongfully acquired Design Imaging and V&B.<sup>42</sup> According to Brookstone, these fiduciary claims distinguish this action from the Texas Action, which contains no claims that Tanus breached or did not breach his fiduciary duties to the Company.<sup>43</sup>

However, the mere fact that these claims are stated differently does not necessarily establish that they do not arise from a common nucleus of operative facts. In *Schnell*, this Court was faced with a similar question as here: that is, whether to dismiss or stay a Delaware action in favor of a prior filed action pending in New York.<sup>44</sup> The Delaware complaint alleged that directors breached

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<sup>42</sup> Counts III and IV allege that Tanus, as an officer of the Company, breached his fiduciary duty of loyalty, care, and good faith, and as a manager of the Company, breached his fiduciary duty of good faith, when he wrongfully acquired Design Imaging and V&B. Count V alleges that Tanus, in his capacity both as a manager of the Company and as a representative of the members of the Company, breached his duty of good faith when he acquired Design Imaging and V&B. Finally, Count VI alleges that Tan U.S. and TruStone knowingly aided and abetted Tanus's wrongdoing. Under Delaware law, a limited liability company such as Woodcrafters may "provide for the limitation or elimination of any and all liabilities . . . for breach of duties (including fiduciary duties) of a member [or] manager" except that the LLC "may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing." 6 *Del. C.* §18-1101(e). Here, in accordance with Delaware law, the LLC Agreement specifically disclaims all fiduciary duties of managers except that a manager must act in "good faith." Compl. Ex. A § 9.1(c).

<sup>43</sup> Tanus contends that these fiduciary claims will not require an interpretation of Section 2(b) of the Employment Agreement or Section 7.5 of the LLC Agreement, the two provisions at issue in the Texas Action. While that may be true to some extent, the LLC Agreement specifically provides for some fiduciary duties, and therefore, the LLC Agreement, as a whole, may inform whether or not Tanus violated his fiduciary duties to the Company, thereby implicating the risk of inconsistent judgments. As an aside, it would be difficult, although perhaps not impossible, for Tanus to have complied both with the terms of the LLC Agreement and his Employment Agreement while simultaneously breaching his fiduciary duties.

<sup>44</sup> *Schnell v. Porta Systems Corp.*, 1994 WL 148276, at \*1 (Del. Ch. Apr. 12, 1994).

their fiduciary duties owed to shareholders because of material misrepresentations in various press releases and financial statements. That complaint also alleged that “defendants’ misrepresentations, concealments, and nondisclosures amounted to fraud.”<sup>45</sup> The New York complaint, which alleged various federal securities law violations, claimed that defendants conspired to “conceal adverse material information, . . . defraud purchasers, and . . . maintain an artificially high market price.”<sup>46</sup> It also alleged that defendants recklessly made untrue statements of material fact. The Court noted that the New York complaint “cites and quotes at length the same press releases and financial reports contained in the Delaware Complaint.”<sup>47</sup> Despite the fact that the federal securities claims may have required prima facie allegations different from the state claims, the Court held that “they are actually the same claims and arise out of the same transactional facts.”<sup>48</sup>

Citing *Raymond Revocable Trust*, Brookstone argues that this Court has declined to stay or dismiss Delaware actions despite similarities in actions pending elsewhere.<sup>49</sup> In *Raymond*, the Delaware action was a shareholder derivative suit

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<sup>45</sup> *Id.* at 4.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* at 4; see *AT&T Corp.*, 1996 WL 633300, at \*2 (“AT&T’s effort to ‘repackage’ its Massachusetts [contract] claim in this Delaware proceeding as a claim for breach of fiduciary duty” does not change the fact that “this Delaware proceeding is ‘in substance and effect’ the same as AT&T’s earlier-filed Massachusetts action . . .”).

<sup>49</sup> *Raymond Revocable Trust v. Mat Five LLC*, 2008 WL 2673341 (Del. Ch. Jun. 26, 2008). Brookstone cites other cases in support of this argument. However, like *Raymond*, each is distinguishable from the facts present here.

alleging that the defendants breached their fiduciary duties by omitting material information from an exchange offer memorandum sent to investors prior to a tender offer. In a prior-filed New York action, plaintiffs alleged that defendants made material misleading statements in connection with a similar tender offer.<sup>50</sup> Despite some “overlapping facts between the two cases,” the court declined to apply the *McWane* doctrine because the New York action had “nothing to do with the disclosures made in the exchange memorandum.”<sup>51</sup> In addition, the court noted that the New York complaint was filed before the exchange memorandum was sent to investors.<sup>52</sup>

Unlike the competing actions in *Raymond*, which had “some overlapping facts” but none that arose from the same transaction, the similarities between the competing actions here are significant. Both actions arise from Tanus’s acquisition and ownership of Design Imaging. Although the fiduciary duty claims in the Delaware Action may be stated differently and require prima facie allegations different from the contract claims in the Texas Action, they clearly arise out of the same transactional facts. Just as the two complaints in *Schnell* relied upon the same press releases and financial statements, both the Texas and Delaware complaints contain similar facts leading up to and culminating in Tanus’s

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<sup>50</sup> *Id.* at \*3 n.10.

<sup>51</sup> *Id.* at \*4.

<sup>52</sup> *Id.*

acquisition of Design Imaging. Thus, the Usurpation Claims in Counts III, IV, and V of the Delaware Action are in “substance and effect” the same as the claims in the Texas Action.<sup>53</sup>

## 2. Supplier Threat Claims

Second, Brookstone contends that Tanus breached (1) various provisions of the LLC Agreement (Count I) and the Employment Agreement (Count II) and (2) his fiduciary duties (Counts III, IV, and V) when he threatened to terminate (or not renew) the Company’s contracts with Design Imaging, Zoe,<sup>54</sup> and V&B (the “Supplier Threat Claims”).<sup>55</sup> Brookstone, of course, argues that these claims are substantially different from the claims set forth in the Texas Action because they do not arise from a common nucleus of operative facts.

Although the Supplier Threat Claims are not in the Texas Action, there are some factual similarities between the competing actions. Tanus’s acquisition and ownership of Design Imaging and V&B preceded, and likely enabled, his alleged threats to terminate Design Imaging’s and V&B’s contracts with the Company.

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<sup>53</sup> See *supra* note 48.

<sup>54</sup> Zoe, which Tanus allegedly owns and controls, is a supplier of mirrors and pallets used in the Company’s products. Compl. ¶ 85.

<sup>55</sup> Compl. ¶ 103. The Complaint alleges that Tanus threatened to terminate the Company’s contract with “New Ceramic.” New Ceramic is alleged to be V&B. *Id.* at ¶ 86. These provisions are Sections 2(b), 2(d), and 7(b). Section 2(d) states that Tanus “represent[ed] and warrant[ed] to the Company that (i) he has no other commitments or obligations of any kind to anyone else which would hinder or interfere with his acceptance of his obligations hereunder, or the exercise of his best efforts as an employee of the Company or its Subsidiaries.” Compl. ¶ 34, Ex. B. Section 7(b) provides that Tanus may not interfere with the Company’s business relationships with, among others, its suppliers. *Id.* at ¶ 35.

Thus, at least to some extent, Brookstone's allegation that Tanus wrongfully threatened to terminate Design Imaging's contract arises out of the same transactional facts as the Texas Action. The Supplier Threat Claims will also require an interpretation of Sections 2(d) and 7(b) of the Employment Agreement. More importantly, it may also require an interpretation of Section 2(b), specifically whether Tanus has devoted his best efforts to the business and affairs of the Company. Therefore, the Court is persuaded that these claims are closely related to the issues in the Texas Action.

### 3. Unauthorized Prepayment Claims

Finally, Brookstone contends that Tanus, acting on behalf of Woodcrafters, made two unauthorized prepayments on a subordinated note to Tan U.S., an entity he controls and owns. For these acts, Brookstone alleges that Tanus breached various sections of the LLC and Employment Agreements and violated his fiduciary duties to the Company (the "Unauthorized Prepayment Claims").

These claims have even less factual overlap with the Texas Action than the Supplier Threat Claims. In fact, the only overlapping issue may be the interpretation of Section 2(b) of the Employment Agreement. However, under *McWane*, this Court need only find substantial or functional identity of issues and claims. Because the primary claims and substantive issues in both actions concern whether Tanus properly acquired and owns Design Imaging and V&B, the Court

concludes that Brookstone's claims, as a whole, are closely enough related to the Texas Action to satisfy the third prong of *McWane*.<sup>56</sup>

D. *Is the Texas Court Capable of Rendering Prompt & Complete Justice?*

“A similarly important factor in determining whether a stay is appropriate . . . is a court's ability to render justice.”<sup>57</sup> Rendering justice entails accurately applying controlling law as well as ensuring that all parties necessary to a complete resolution are joined (or can be joined by service of process) in a competing action. Tanus has represented that TruStone would not object on personal jurisdiction grounds if Brookstone asserts in the Texas Action the same aiding-and-abetting claim made against TruStone here.<sup>58</sup> Thus, the Texas court would have jurisdiction over all the parties necessary to provide justice.

Brookstone argues that this Court is better able to render complete justice because its claims involve emerging issues of Delaware law that are “important and complex.” Specifically, it contends that where, as here, a company's operating

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<sup>56</sup> See Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 5.01(c), at 5-23 (2011) (“Delaware courts have often granted stays even though the parties and issues involved in the various pending actions were not identical. In such cases, the courts have determined that principles of comity favor granting a stay, notwithstanding the lack of complete identity among the issues and/or parties.”); *W.C. McQuaide, Inc.*, 2005 WL 1288523, at \*5 (noting that although the Pennsylvania action was broader (than the Delaware action) because it included “claims for a declaratory judgment on the size of the Board and the invalidity of various actions, breach of fiduciary duty and an accounting . . . both actions still would include claims calling into question the validity of the purported stock transfers to [defendant].” As a result, the Court held that the Delaware action and the Pennsylvania action involved “functionally the same issues.”)

<sup>57</sup> *Ryan v. Gifford*, 918 A.2d 341, 349 (Del. Ch. 2007).

<sup>58</sup> See *supra* note 37.

agreement disclaims fiduciary duties but expressly preserves the duty of good faith, there is not a well-developed body of decisional authority on which a foreign court may rely.

It is true that “Delaware has an important policy interest in having its courts speak to . . . emerging issues in the first instance, creating a body of decisional authority that directors and stockholders may confidently rely upon.”<sup>59</sup> However, the application of fiduciary duties in the context of a limited liability company agreement is not novel. Moreover, interpretation of the LLC Agreement, which is governed by Delaware law, does not pose any novel issues either.<sup>60</sup> Nor are the issues under Delaware law presented in the Texas Action or Delaware Action so complex and difficult that there is any reason to doubt that the Texas court would be capable of applying Delaware law and delivering justice to the parties. Therefore, in this regard, the Court is persuaded that the Texas court is fully capable of rendering justice.

Even if the scope of the two actions were identical and even if the Texas Court is capable of rendering complete justice, Brookstone argues that because Tanus has engaged in defensive forum shopping, this Court should not give the

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<sup>59</sup> *In re Topps Co. S’holders Litig.*, 924 A.2d 951, 960 (Del. Ch. 2007) (case involving fiduciary duties of directors in the merger and acquisition context); see *Brandin v. Deason*, 941 A.2d 1020, 1024 (Del. Ch. 2007) (“Delaware courts have a sizable interest in resolving such novel issues to promote uniformity and clarity in the law. . . .”) (denying stay of first-filed Delaware action that “potentially raises novel issues of Delaware law.”); *Ryan*, 918 A.2d at 350 (shareholder derivative action related to backdating stock options).

<sup>60</sup> The Employment Agreement is governed by Texas law.

typical *McWane* deference to the first-filed Texas Action. Brookstone specifically contends that Tanus filed for a declaration of non-breach in an improper attempt to obtain his preferred forum. Delaware courts have given less deference to a plaintiff's choice of forum when there is a "jockeying for position" by "resort to declaratory judgment for the purpose of defensively establishing priority as to forum."<sup>61</sup>

Tanus may have filed suit in Texas defensively to obtain his preferred forum.<sup>62</sup> The record is sparse on this issue. But even assuming that it is true, the Court is not persuaded that—for this reason alone—it should allow the Delaware Action to proceed. First, none of the cases cited by Brookstone in support of giving less deference to Tanus's first-filed action relied upon defensive forum-shopping alone in upholding or denying a stay.<sup>63</sup> Second, the *forum non*

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<sup>61</sup> *Air Prods. & Chems., Inc.*, 252 A.2d at 547; *see also E-Birchtree, LLC v. Enterprise Prods. Operating L.P.*, 2007 WL 914644, at \*3 (Del. Super. Jan. 18, 2007) (quoting *In re Delta and Pine Land Co. S'holders Litig.*, 2000 WL 1010584, at \*5 (Del. Ch. July 17, 2000)) ("Delaware courts take a 'rather dim view of declaratory judgment claims of non-breach made for purposes of forum shopping.'"); *but see Household Int'l, Inc. v. Eljer Indus., Inc.*, 1993 WL 133065, at \*1 (Del. Ch. Apr. 22, 1993) (even if a first-filed declaratory judgment action was filed to defeat the defendant's choice of forum, "it does not disentitle plaintiff from the use of this forum, where justice may be had without hardship to any party.").

<sup>62</sup> In its brief, Brookstone contends that it was lulled in thinking that Tanus no longer had any intention of terminating Woodcrafters' relationship with three Tanus-controlled suppliers. To its surprise, Tanus filed the Texas Action when Brookstone still believed (incorrectly) that an amicable resolution was possible. *See supra* note 14.

<sup>63</sup> Nor are the cases cited by Brookstone based on exactly the same circumstances as here. For example, in *In re Delta & Pine Land Co.*, the foreign first-filed action was static, pending the outcome of the Delaware action. 2000 WL 1010584, at \*2. In *E-Birchtree, LLC*, the Court stayed a first-filed Delaware action seeking declaratory judgment because of the potential for inconsistent results. 2007 WL 914644, at \*3. And in *Playtex Inc.*, the Court stated that "because

*conveniens* factors slightly tip in favor of staying the Delaware Action.<sup>64</sup> Woodcrafters, its executives, and the majority of its managers reside in Texas. Thus, a substantial majority of the witnesses and evidence is located in Texas, not Delaware. Moreover, there are no facts that gave rise to this claim that occurred in Delaware. Although the LLC Agreement is governed by Delaware law, the Employment Agreement is governed by Texas law.<sup>65</sup>

Other practical reasons favor a stay of the Delaware Action. Under Delaware law, “all claims arising from a common nucleus of operative facts ought to be brought in the same court at the same time whenever possible.”<sup>66</sup> If this Court were to grant a stay for the Usurpation Claims, but allow the Unauthorized

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it is not clear that the [foreign] action can provide complete justice and because of the anticipatory nature of that action, [defendant’s] motion to dismiss will be considered under the more stringent standard set forth in those cases in which there was no prior action pending.” 1989 WL 40913, at \*5.

<sup>64</sup> If *McWane* did not apply to these actions, the Court would apply the traditional *forum non conveniens* standard. These factors include: “1) the applicability of Delaware law to the controversy; 2) the relative ease of access to proof; 3) the availability of compulsory process for witnesses; and 4) all other practical considerations that would make the trial easy, expeditious, and inexpensive.” *Playtex, Inc.*, 1989 WL 40913, at \*5-6. To dismiss the Delaware Action, Tanus would have to show that these factors weigh overwhelmingly in favor of the Texas Action (i.e. defendant would have to suffer significant hardship and inconvenience if required to litigate in Delaware). *Id.*; see also *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P’ship*, 669 A.2d 104, 107 (Del. 1995). To succeed on a motion to stay litigation based on *forum non conveniens*, there is some debate as to whether a defendant must show “overwhelming hardship and inconvenience” or merely demonstrate that the relevant factors preponderate or tip in his favor. See *In re Citigroup Inc. S’holder Deriv. Litig.*, 964 A.2d 106, 117 n. 16 (Del. Ch. 2009); *In re Bear Stearns Cos., Inc. S’holder Litig.*, 2008 WL 959992, at \*5 n. 22 (Del. Ch. Apr. 9, 2008); *Brandin*, 941 A.2d at 1024 n. 13. Because the Court relies upon the *McWane* doctrine in granting a stay here, it need not address this issue.

<sup>65</sup> Dismissal of the Delaware Action is not warranted because the *forum non conveniens* factors do not weigh overwhelmingly in favor of the Texas Action. In other words, this case could be litigated in Delaware without any undue burden or hardship on the parties.

<sup>66</sup> *Schnell*, 1994 WL 148276, at \*4; *Dura Pharm., Inc.*, 713 A.2d at 930.

Prepayment Claims and Supplier Threat Claims to proceed, then the parties would be forced to engage in overlapping piecemeal litigation. Moreover, because the Texas Action is set to proceed to trial, “judicial resources [would] be wasted in having both courts expending their efforts in attempting to address this issue until one of the courts actually decides the issue.”<sup>67</sup> The parties would unavoidably and unnecessarily waste resources while engaging in duplicative efforts.

Most importantly, if the Texas and Delaware actions proceed simultaneously, there is a risk of inconsistent interpretations of the LLC Agreement and the Employment Agreement and ultimately, inconsistent judgments.<sup>68</sup> In *Davis Insurance Group, Inc.*, this Court granted a stay despite the fact that (1) there was “not an absolute identity of parties and issues before this Court and the Pennsylvania court” and (2) the “traditional *forum non conveniens* analysis favor[ed] denial of the stay.”<sup>69</sup> The Court held that “the possibility of inconsistent interpretations of the Employment Agreement and inconsistent rulings from the two courts on the issue of whether [a former employee] breached the Employment Agreement outweighs the *forum non conveniens* factors . . . .”<sup>70</sup> Accordingly, where, as here, the *McWane* doctrine is satisfied and the principles of

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<sup>67</sup> *FWM Corp.*, 1992 WL 87327, at \*2.

<sup>68</sup> *See Davis Ins. Group, Inc. v. Ins. Associates, Inc.*, 1998 WL 892623, at \*3-4 (Del. Ch. Dec. 3, 1998).

<sup>69</sup> *Id.* at 3-4.

<sup>70</sup> *Id.* at 3.

comity and judicial efficiency strongly favor a stay, this Court will grant Tanus's motion to stay the Delaware Action in favor of the first-filed Texas Action.

#### **IV. CONCLUSION**

For the foregoing reasons, Tanus's motion to stay the Delaware Action is granted; his motion to dismiss is denied. Depending on what happens in the Texas Action, which is still in its initial stages, the Court might, upon appropriate application, move forward with the Delaware Action. For example, if Tanus fails to prosecute the Texas Action, or if the April 2013 trial fails to occur,<sup>71</sup> the Court would consider lifting the stay.

An implementing order will be entered.

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<sup>71</sup> Even though the Texas Action is first-filed, an unanticipated failure of the Texas Court to render, or to remain capable of rendering, prompt justice could be grounds for permitting the Delaware Action to proceed. *See Joyce v. Cuccia*, 1996 WL 422339, at \*5 (Del. Ch. July 24, 1996).