IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHEL RAPOPORT, WILLIAM A. MARQUARD, THOMAS R. WALL, IV, and ROBERT A. YOUNG, III,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1035-N
THE LITIGATION TRUST OF MDIP INC., a Delaware express trust, and STEPHEN S. GRAY, JULIE DIEN LEDOUX and CAROL MCDONALD, in their capacity as trustees for the Litigation Trust of MDIP Inc.,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: August 9, 2005
Decided: November 23, 2005

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Michael F. Bonkowski, Esquire, SAUL EWING LLP, Wilmington, Delaware; Howard B. Levi, Esquire, Richard F. Lubarsky, Esquire, LEVI LUBARSKY & FEIGENBAUM LLP, New York, New York, *Attorneys for Defendants*

PARSONS, Vice Chancellor.

Before the Court are a motion to enjoin the prosecution of an allegedly later filed action in Ohio and a motion to dismiss or stay this action in favor of the Ohio action. The parties' dispute concerns the pre-bankruptcy filing conduct of certain directors of the former Mosler, Inc. ("Mosler") and is one dispute among several arising out of Mosler's bankruptcy. For the reasons stated in this memorandum opinion, the Court concludes that the two actions were, for purposes of these motions, simultaneously filed and declines to stay this action on *forum non conveniens* grounds.

I. BACKGROUND[1]

A. The Parties

Plaintiffs Michael Rapoport ("Rapoport"), William A. Marquard, Thomas R. Wall, IV, and Robert A. Young (collectively the "Directors") were directors of Mosler from at least 1996 until and including August 6, 2001.[2] During this time, Rapoport was also Chief Executive Officer of Mosler.[3]

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[1] The facts are taken from the pleadings, the affidavit of Paul J. Lockwood ("Lockwood Aff.), attached to Plaintiffs' Opening Brief ("POB"), the affidavit of Richard F. Lubarsky ("Lubarsky Aff.), attached to Defendants' Opening Brief ("DOB"), the reply affidavit of Lockwood ("Lockwood Reply Aff."), attached to Plaintiffs' Reply Brief ("PRB"), the affidavit of Davis Lee Wright, attached to PRB, and the reply affidavit of Lubarsky ("Lubarsky Reply Aff."), attached to Defendants' Reply Brief ("DRB"). The majority of the facts pertinent to the pending motions are undisputed; where the parties do dispute a fact, it is so noted.

[2] Lockwood Aff. ¶ 2; *see also* Lubarsky Aff. ¶ 3 (Directors were directors of Mosler from 1995 to 2001).

[3] Lubarsky Aff. ¶ 3.

Mosler was a Delaware corporation headquartered in Ohio.[4] It filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code in the District of Delaware on August 6, 2001.[5] On August 17, 2001, Mosler sold substantially all of its assets to a third party.[6]

The Litigation Trust of MDIP Inc. (the "Trust"), a defendant in this action, was created pursuant to Mosler's Second Amended Joint Plan of Liquidation (the "Liquidation Plan").[7] The Liquidation Plan assigned any and all of Mosler's potential claims to the Trust.

Defendants Stephen S. Gray, Julie Dien Ledoux and Carol McDonald (collectively the "Trustees") are trustees of the Trust. They have been sued only in their capacity as trustees.

B. The District of Delaware Action

In August 2003, the Trust sued the Directors for breach of fiduciary duties in the U.S. District Court for the District of Delaware (the "District of Delaware Action").[8] All parties actively litigated the case and trial was scheduled to begin on June 6, 2005.[9] In

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4 *Id.* ¶ 5.

5 *Id.* ¶ 4; Lockwood Aff. ¶ 3.

6 Lockwood Aff. ¶ 4.

7 *Id.* ¶ 7; Lubarsky Aff. ¶ 8.

8 Lockwood Aff. ¶ 8; Lubarsky Aff. ¶ 9. *See also Litig. Trust of MDIP, Inc. v. Rapoport*, 2004 WL 3101575 (D. Del. Nov. 29, 2004) (denying defendants' motion to dismiss for failure to state a claim).

9 Lubarsky Aff. ¶ 10; *see also* Lockwood Aff. ¶¶ 13–15.

January 2005, the Directors filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[10] On May 25, 2005, the district court dismissed the District of Delaware Action for lack of subject matter jurisdiction.[11]

C. The Chancery Action

The day after the Directors moved to dismiss the District of Delaware Action, they filed suit against the Trust in this Court seeking a declaratory judgment that they "did not breach their fiduciary duties as directors or officers of Mosler" (the "Chancery Action").[12] The Directors and the Trust agreed to stay the Chancery Action until the Directors terminated the stay.[13] On May 10, 2005, the Directors filed an Amended Complaint in this action that added the Trustees as defendants.[14] On May 25—the same day the district court dismissed the District of Delaware Action—counsel for the Directors terminated the stay and so notified counsel for the Trust.[15]

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10 Lockwood Aff. ¶ 10.

11 *Litig. Trust of MDIP, Inc. v. Rapoport*, 2005 WL 1242157, at *4 & n.5 (D. Del. May 29, 2005) (assuming without deciding that the relevant citizenships for purposes of diversity jurisdiction were those of the creditor-beneficiaries of the Trust and finding that neither the citizenships of the creditor-beneficiaries nor those of the Trustees were completely diverse from the citizenships of the Directors).

12 Compl. at 7; Lockwood Aff. ¶ 11.

13 Lockwood Aff. ¶ 12; Lubarsky Aff. ¶ 19.

14 Am. Compl. at 1; Lockwood Aff. ¶ 16; Lubarsky Aff. ¶ 18.

15 Lockwood Aff. ¶ 19; Lubarsky Aff. ¶ 20.

D. The Ohio Action

The very next day, the Trust sued the Directors in the Ohio Court of Common Pleas alleging the same breaches of fiduciary duties that it had alleged in the District of Delaware Action (the "Ohio Action").[16]

E. The Pending Motions

On June 3, 2005, the Directors moved to enjoin the Trust and Trustees[17] from prosecuting the Ohio Action on the ground that the Chancery Action was the first filed action.[18] On June 8, the Trust moved to dismiss or stay the Chancery Action on the ground that, under Delaware law, the Ohio Action was filed first.[19] The Court heard argument on both motions on August 9, 2005. Per the Court's request, the Directors and the Trust submitted supplemental letter briefs addressing the applicability of *HFTP Investments, L.L.C. v. Ariad Pharmaceuticals, Inc.*[20] in these circumstances.[21]

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16 Lubarsky Aff. ¶ 21 ("The Ohio Action involves the same parties and fiduciary duty claims as in the [District of Delaware Action]."); Lockwood Aff. Ex. C (Ohio Action Complaint). The only difference between the parties to the Ohio Action and the Chancery Action is that the Directors named the Trustees of the Trust in addition to the Trust as defendants in the Chancery Action.

17 For purposes of the pending motions, the Trust and Trustees are indistinguishable. As such, they will be referred to collectively as the "Trust."

18 POB at 7.

19 DOB at 9–10.

20 752 A.2d 115 (Del. Ch. 1999).

21 Letter from Paul J. Lockwood, Esq. to the Court (Aug. 30, 2005) ("Lockwood Letter"); Letter from Richard F. Lubarsky, Esq. to the Court (Aug. 30, 2005) ("Lubarsky Letter").

II. ANALYSIS

A. Legal Framework

The granting of a stay rests within the sound discretion of the trial court.[22] The threshold issue when deciding whether to stay an action in this Court in favor of an action pending elsewhere is which action was filed first. If the action in this Court is the first-filed action, "our courts will uphold a plaintiff's choice of forum except in the rare case where that choice imposes overwhelming hardship on the defendant."[23] If the foreign action is the first-filed action, "principles of fairness, comity, judicial economy and the possibility of inconsistent results generally favor the granting of a stay."[24] If the actions were contemporaneously filed, our courts will evaluate a motion for a stay "under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other."[25]

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22 *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996) (citing *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970)).

23 *United Phosphorus, Ltd. v. Micro-Flo, LLC*, 808 A.2d 761, 764 (Del. 2002).

24 *Kurtin v. KRE, LLC*, 2005 WL 1200188, at *3 (Del. Ch. May 16, 2005) (internal citation omitted); Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery § 5-1 (2005) [hereinafter *Wolfe & Pittenger*] ("Under the so-called first-filed rule, a Delaware court typically will defer to a first-filed action in another forum and will stay Delaware litigation pending adjudication of the same or similar issues in the competing forum.").

25 *Wolfe & Pittenger* § 5-1[a] (citing cases); *HFTP Invs.*, 752 A.2d at 122 (holding that where two actions are simultaneously filed, the question for the Court is "towards which of the two competing fora do the *forum non conveniens* factors preponderate?") (citing *New Castle County v. Acierno*, 1995 WL 694426 (Del. Ch. Oct. 19, 1995)).

The determination of which action was filed first is a question of fact determined by reference to the underlying procedural facts.[26] The Court, however, does not make that determination mechanically or using a bright-line test.[27] Rather, this Court's complementary objectives of discouraging both forum shopping[28] and contrived races to the courthouse[29] require a more nuanced analysis.

B. *United Phosphorus* Does Not Control

The Trust argues that this case is on all fours with *United Phosphorus*.[30] In that case, the plaintiffs filed an action in the District Court for the District of Delaware alleging state and federal claims (the "Federal Action").[31] The defendant moved to dismiss for failure to state a federal cause of action. While that motion was under

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26 *Azurix Corp. v. Synagro Techs., Inc.*, 2000 WL 193117, at *3 (Del. Ch. Feb. 3, 2000); *Kingsland Holdings Inc. v. Bracco*, 1997 WL 55954, at *1 (Del. Ch. Feb. 4, 1997).

27 *Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 928 (Del. Ch. 1998); *In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *7 (Del. Ch. Apr. 18, 2001) ("[T]he *McWane* doctrine does not denude a trial court of all discretion simply based on the fact that there are situations where actions should be considered to have been filed contemporaneously.").

28 *Kurtin*, 2005 WL 1200188, at *7 ("Delaware courts have long discouraged forum shopping.") (internal citation omitted); *see also United Phosphorus*, 808 A.2d at 764 (noting that both *forum non conveniens* standards discourage forum shopping).

29 *Azurix*, 2000 WL 193117, at *3 (noting "Court's desire to avoid rewarding the winner of a race to the courthouse.") (citing *Tex. Instruments, Inc. v. Cyrix Corp.*, 1994 WL 96983, at *3–4 (Del. Ch. Mar. 22, 1994)).

30 DOB at 12; DRB at 2–4.

31 *United Phosphorus*, 808 A.2d at 763.

consideration, the defendant filed an action in state court in Georgia asserting claims very similar to those asserted by the plaintiffs in Delaware (the "Georgia Action").[32] The district court eventually granted the defendant's motion to dismiss and the U.S. Court of Appeals for the Third Circuit affirmed.[33] The plaintiffs then filed an action in the Delaware Superior Court (the "Superior Court Action") that repeated "all of the factual allegations and all of the state law claims" from the original Federal Action.[34] Soon thereafter, the defendant moved to dismiss or stay the Superior Court Action in favor of its first-in-time Georgia Action. The Superior Court granted that motion under the *McWane* first-filed rule.[35]

The Delaware Supreme Court reversed, concluding that, "to give effect to the policies guiding our *forum non conveniens* holdings, the [Superior Court Action] must be considered the first filed."[36] The Supreme Court reasoned that, for *forum non conveniens* purposes, "the two salient facts are that: 1) [United Phosphorous] did not voluntarily abandon its first choice of forum, and 2) when forced to refile in State court, [United

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32 *Id.*

33 *Id. United Phosphorous Ltd. v. Micro-Flo LLC*, 276 F.3d 582 (Table) (3d Cir. 2001).

34 *United Phosphorus*, 808 A.2d at 763.

35 *United Phosphorus, Ltd. v. Micro-Flo, LLC*, 797 A.2d 1208, 1213–16 (Del. Super. 2001) ("The first-filed doctrine, as set forth in [*McWane*], holds that the Court has the discretion to stay or dismiss an action pending before it 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.'"), *rev'd*, 808 A.2d 761 (Del. 2002).

36 *United Phosphorus*, 808 A.2d at 764.

Phosphorous] repeated the exact same state law claims as it raised in its original federal complaint."[37] The Supreme Court then observed that United Phosphorous chose to litigate in Delaware and held that the Superior Court Action "is a continuation of the viable claims from the Federal Action."[38] As such, the Court remanded the case to the Superior Court for a determination of whether the defendant could satisfy the heavy burden of establishing overwhelming hardship to overcome the plaintiffs' choice of forum in the first-filed action.[39]

The Trust argues that, "[a]s in *United Phosphorous*, in this case: (1) the Trust originally sued in a federal court and asserted state law claims, (2) the state law claims were dismissed for lack of subject matter jurisdiction; and (3) the Trust refiled the state law claims in a state court."[40] Accordingly, the Trust concludes, the Court should deem the Ohio Action a continuation of the District of Delaware Action and thus the first-filed action for purposes of the pending motions.[41]

The Trust's argument elides a key aspect of the *United Phosphorous* decision. There, as here, the plaintiff originally "chose to litigate in Delaware."[42] When the Federal Action was dismissed in *United Phosphorous*, however, the plaintiff, unlike the

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37 *Id.* at 765.

38 *Id.*

39 *Id.*

40 DRB at 2.

41 *Id.*

42 *United Phosphorous*, 808 A.2d at 765.

Trust, refiled *in Delaware state court*. "In short," wrote the Supreme Court, the plaintiff "is pursuing its original plan to litigate in Delaware and [the defendant who filed in Georgia] is forum shopping."[43] *United Phosphorous* thus does not stand for the proposition that a plaintiff whose state law claims are dismissed from federal court may choose to refile in any state court with jurisdiction over the parties and effectively receive the benefit of the earlier filing date of the federal action. Where, as here, the plaintiff in a federal action refiles the state law claims in a state court of a state other than where the federal court is located, *United Phosphorous* does not control.[44]

The Trust also makes much of the meaning of "forum." In some contexts, it may well mean, as the Trust argues, "a particular court, tribunal or judicial body."[45] And, Delaware courts generally do respect a plaintiff's choice of forum.[46] For purposes of determining whether *United Phosphorous* controls here, however, the meaning of forum urged by the Trust is not persuasive. The *United Phosphorous* decision turned on the

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43 *Id.*

44 The Trust's citations to *Kurtin* and *W.C. McQuaide, Inc. v. McQuaide*, 2005 WL 1288523 (Del. Ch. May 24, 2005), DOB at 14, do not save its argument. In both *Kurtin* and *McQuaide*, this court cited *United Phosphorous*, in dicta, in a review of Delaware case law addressing motions to stay or dismiss. *See Kurtin*, 2005 WL 1200188, at *4 ("Where the substance of the original case remains unchanged, however, the courts have viewed the filing of intervening suits *in other jurisdictions* as forum shopping and have maintained the case's first-filed status.") (emphasis added) (citing *United Phosphorous*, 808 A.2d at 765); *McQuaide*, 2005 WL 1288523, at *4 (same).

45 DRB at 3.

46 *Wolfe & Pittenger* § 5-1 ("*McWane* and its progeny establish a strong preference for the litigation of a dispute in the forum in which the first action relating to such dispute is filed.") (citing cases).

geographical aspect of forum selection: the plaintiff "chose to litigate in Delaware" and then "pursu[ed] its original plan to litigate in Delaware."[47]

Further distinguishing the situation in this case from that of *United Phosphorous* is the Trust's blatant forum shopping in search of a jury trial.[48] In *United Phosphorous*, it was the defendant who was forum shopping.[49] Here, it is the Trust, by abandoning its initial choice of Delaware after the parties had fully prepared the case for trial here.

C. The Chancery Action and the Ohio Action Should be Treated as Contemporaneously Filed

The Court's conclusion that *United Phosphorous* does not control this case does not end the first-filed inquiry because the Directors are unquestionably forum shopping, too. It is a long-established general rule that "a party should not be permitted to defeat its adversary's choice of forum by commencing litigation involving the same cause of action in another jurisdiction of its own choosing."[50] The Chancery and Ohio Actions admittedly involve the same parties and the same claims.[51] The Directors filing of the Chancery Action was an attempt not so much to defeat its adversary's choice of forum as

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47 *United Phosphorous*, 808 A.2d at 765.

48 *See* DOB at 18–19 (describing desire for a jury trial); DRB at 4 (same).

49 *United Phosphorous*, 808 A.2d at 765.

50 *Kurtin*, 2005 WL 1200188, at *4 (citing *Dura Pharm.*, 713 A.2d at 928); *McQuaide*, 2005 WL 1288523, at *4 (citing *McWane*, 263 A.2d at 283).

51 Lockwood Aff. ¶ 20 ("The Ohio Action is essentially a mirror image of [the Chancery Action]."); Lubarsky Letter ¶ 4 ("The two competing actions are 'mirror-image' cases in that one (the Ohio Action) asserts the Trust's substantive claims for damages, whereas the other (the Chancery Action) asserts only claims for declaratory relief arising out of the Trust's claims.").

to preempt them from abandoning their initial choice and filing a new suit in a different state. In other words, the Directors raced to this courthouse—while the District of Delaware Action was pending—to secure first-filed status for the Chancery Action in the event its motion to dismiss succeeded. While this is not a classical race to the courthouse, where opposing parties file within hours, if not minutes, of each other,[52] it is a race nonetheless. The Directors had no other reason to file the Chancery Action while the District of Delaware Action was pending. In such races, this court has not hesitated to treat the cases as contemporaneously filed.[53]

It is also well known that this Court takes a rather dim view of "tactical maneuvers and improper manipulation of the litigation process by parties who seek to invoke the principles of comity and efficiency underlying the *McWane* doctrine."[54] It is unlikely that the Directors had any intention of prosecuting the Chancery Action unless the District of Delaware Action was dismissed.[55] Rather, it is more likely that the filing of the Chancery Action was a tactical maneuver designed to confer first-filed status on the

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[52] *See, e.g.*, *In re IBP*, 2001 WL 406292 (treating complaints filed five hours apart as if they had been filed contemporaneously).

[53] *Wolfe & Pittenger* § 5-1[a] n.19 (citing cases).

[54] *Id.* at text accompanying n.38. Although parties often engage in these maneuvers in an attempt to have a Delaware action stayed, the Court will not take a brighter view of them when they are aimed at staying a foreign action.

[55] *See* Lockwood Aff. ¶ 12 (describing agreement "to extend time for Trust to answer, move, or otherwise respond to the complaint in [the Chancery Action]" entered into shortly after the Directors filed the Chancery Action); Lubarsky Aff. ¶ 19 ("Other than that agreement, there was no activity in the Chancery Action for nearly three months, from its filing on January 20 until the Directors served their amended complaint on May 10.").

Directors. The Court will neither reward the winner of a race to the courthouse nor the manipulator of the litigation process by affording them first-filed status and imposing the accompanying heavy burden on the opposing party to defeat their choice of forum. Therefore, the Court will not treat the Chancery Action as first-filed,[56] but rather concludes that, under the present circumstances, the Chancery Action and the Ohio Action should be considered contemporaneously filed.[57]

D. The *Forum Non Conveniens* Factors Preponderate Towards Delaware

Since the Chancery and Ohio Actions "must be considered contemporaneously filed, neither action commands the high ground which would otherwise force the court to

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[56] The Trust's argument that the Chancery Action should be "disregarded" for purposes of determining which action was first filed because it is a declaratory judgment action, DOB at 11, is without support in the case law. *See Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 36 (Del. 1991) (affirming Superior Court decision that, notwithstanding its language, accorded first-filed status to a declaratory judgment action); *but see In re Delta & Pine Land Co. S'holders Litig.*, 2000 WL 1010584, at *5 (Del. Ch. July 17, 2000) (declining, in dicta, to accord first filed status to a later-filed cross claim for declaratory judgment). Rather, Delaware courts engage in a "more discerning analysis" of the relevant *forum non conveniens* factors where the first-filed action seeks a declaratory judgment. *Wolfe & Pittenger* § 5-1[a]. Where, as here, the Directors' decision to file a declaratory judgment action was "merely strategic [and] not inequitable," *Am. Legacy Found. v. Lorillard Tobacco Co.*, 2002 WL 927383, at *4 (Del. Ch. Apr. 29, 2002), and "justice may be had without hardship to any party," *id.*, this Court will not "disregard" the Chancery Action.

[57] The Trust's filing of the Ohio Action immediately after the dismissal of the District of Delaware Action supports treating it and the Chancery Action as contemporaneously filed. The Trust refiled as soon as it knew it needed to. Conversely, the Directors had no need to file their action until after the dismissal of the District of Delaware Action. The fact that they filed the Chancery Action earlier is inconsequential, as evidenced by the Directors' voluntary agreement to stay that action.

approach the analysis in a manner which defers to a plaintiff's choice of forum."[58] The Court therefore will employ a traditional *forum non conveniens* analysis.[59] Six factors are relevant for purposes of this analysis: (1) the applicability of Delaware law; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the possibility of a view of the premises; (5) the pendency or nonpendency of a similar action in another jurisdiction; and (6) all other practical considerations that would make the trial easy, expeditious and inexpensive.[60] In balancing these factors, the Court focuses on which forum would be the more "easy, expeditious, and inexpensive in which to litigate."[61] This approach leads to the following burden of persuasion for purposes of the motion to stay: "towards which of the two competing fora do the *forum non conveniens* factors preponderate?"[62] The resolution of this question rests within the

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58 *Azurix Corp.*, 2000 WL 193117, at *4; *see also HFTP Invs.*, 752 A.2d at 122 (holding that where two actions were contemporaneously filed, the Court will decide a motion to stay "without giving deference to either party's choice of forum.").

59 *Azurix Corp.*, 2000 WL 193117, at *4.

60 *Wolfe & Pittenger* §§ 5-1, 5-2 & n.9 (noting that the Delaware courts have grafted the sixth factor on to the five factors enunciated by the Delaware Supreme Court in *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964), *overruled on other grounds, Pepsico, Inc. v. Pepsi-Cola Bottling Co.*, 261 A.2d 520 (Del. 1969)); *Azurix Corp.*, 2000 WL 193117, at *4; *HFTP Invs.*, 752 A.2d at 122–23.

61 *HFTP Invs.*, 752 A.2d at 122.

62 *Id.*; *see also Azurix Corp.*, 2000 WL 193117, at *4 (holding that moving party must demonstrate "on balance" that *forum non conveniens* factors warrant a stay). For the Chancery Action to be *dismissed*, the Trust "would have to demonstrate that it would suffer undue, overwhelming or significant hardship if it is required to litigate in Delaware." *Id.* at *4.

discretion of the trial court, "to be determined in light of all the facts and circumstances and in the interest of the expeditious and economic administration of justice.[63]

1. The applicability of Delaware law

Delaware law unquestionably governs this dispute. The Directors seek a declaratory judgment that they did not breach the fiduciary duties they owed Mosler or, alternatively, a declaration that Mosler's 102(b)(7) provision precludes the recovery of money damages for any breach(es) they may have committed.[64] Mosler was a Delaware corporation.[65] "It is now well-established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs."[66] A corporation's internal affairs include "those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders."[67] The fiduciary duties owed by directors and officers to the corporation unquestionably pertain to the relationships among the corporation and its officers and directors. Therefore, Delaware law governs this dispute.

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63 *Wolfe & Pittenger* § 5-2; *Apple Computer, Inc. v. Exponential Tech., Inc.*, 1999 WL 39547, at *14 & n.61 (Del. Ch. Jan. 21, 1999) (noting significant discretion afforded the trial court in deciding motion to stay).

64 Am. Compl. ¶¶ 13, 14, 18.

65 Lockwood Aff. Ex. A ¶ 6 ("At all relevant times, Mosler was a Delaware corporation . . . .").

66 *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–93 (1987)).

67 *Id.*

Although the applicability of Delaware law is not conclusive in every *forum non conveniens* analysis,[68] "actions raising novel and substantial issues of Delaware corporate law are best resolved in Delaware courts."[69] This action will likely raise at least one novel issue of Delaware corporate law: whether directors and officers' duties change materially in the face of "deepening insolvency."[70] This action also raises "substantial issues" of Delaware corporate law. Indeed, the liability or lack thereof of the Directors will turn on their compliance with their duties of good faith and loyalty, as elucidated by the Delaware courts. Such questions of substantive Delaware corporate law "are more properly decided here rather than another jurisdiction, even though the other jurisdiction's courts are quite capable of applying Delaware law and rendering prompt justice."[71] Further, the Delaware Supreme Court has observed, albeit in another context, that "Delaware has a substantial interest in defining, regulating and enforcing the

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68 *Wolfe & Pittenger* § 5-2[a] (citing cases).

69 *In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at *3 (Del. Ch. May 20, 1993) (internal citation omitted).

70 *See* Am. Compl. Ex. A ¶ 3 (Trust alleging in District of Delaware Action that Directors "[r]ecklessly failed to appropriately respond to the company's deepening insolvency"). *See* Donald F. Parsons, Jr., V.C., Del. Ct. of Ch., Recent Developments in the Wonderful World of Fiduciary Duties from *Disney* to the Zone of Insolvency, Address at the SMU Corporate Counsel Symposium (Oct. 28, 2005) (manuscript on file with the SMU Law Review) (observing that the question of whether directors and officers duties change in the zone of insolvency is a "relatively new and uncharted issue"). For a thorough exposition of whether directors owe any special duties in the zone of insolvency, *see Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 787–92 (Del. Ch. 2004).

71 *In re Walt Disney Co. Derivative Litig.*, 1997 WL 118402, at *3 (Del. Ch. Mar. 13, 1997).

fiduciary obligations which directors of Delaware corporations owe to such corporations and the shareholders who elected them."[72]

The Court therefore concludes that the applicability of Delaware law weighs heavily in favor of this forum.

2. The relative ease of access to proof

Mosler's headquarters were located in Hamilton, Ohio.[73] Some marginal inconvenience thus normally would arise if documents had to be brought to Delaware.[74] The parties, however, were ready to go to trial in Delaware in the District of Delaware Action less than two weeks after that case was dismissed.[75] The Court therefore accepts the Directors' assertion that most of the relevant documents were already in Delaware and, if the Court stays this action, would have to be moved to Ohio.[76] In any event, the potential inconvenience of having to transport documents is slight because, as then Vice

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72 *Armstrong v. Pomerance*, 423 A.2d 174, 180 n.8 (Del. 1980) (internal quotation omitted).

73 Lubarsky Aff. ¶ 5.

74 *HFTP Invs.*, 752 A.2d at 123 ("Because ARIAD has its principal place of business in Massachusetts, it will bear some marginal inconvenience in producing documents in either New York or Delaware.").

75 Lubarsky Aff. ¶¶ 15–16; PRB at 15. The New Castle County Courthouse is located just a few blocks away from the federal courthouse in Wilmington, Delaware.

76 POB at 12; PRB at 15.

Chancellor, now Chief Justice Steele observed, "[m]odern methods of information transfer render concerns about transmission of documents virtually irrelevant."[77]

Similarly, modern methods of transportation lessen the Court's concern about the travel of witnesses who live neither in Delaware nor Ohio. Sixteen of the nineteen witnesses identified by the Trust in the District of Delaware Action do not reside in Delaware or Ohio and, in fact, are scattered around the country.[78] In addition, two of the additional, "important fact witnesses" identified by the Trust in briefing the pending motions reside in Texas and Kentucky.[79] Thus, among the witnesses identified by the Trust in the District of Delaware Action and in briefing the pending motions, only five of 23 reside in Ohio, while none reside in Delaware. The five Ohio witnesses will suffer some inconvenience if they ultimately are called to Delaware to testify, but where, as here, "there is no single forum or locality in which the bulk of witnesses . . . is located . . . the location of witnesses . . . [does] not weigh in favor of one forum or the other."[80]

In sum, (1) the majority of relevant documents are likely located in Delaware, and, if they are not, can be moved here with only marginal inconvenience; (2) several witnesses are located in Ohio; and (3) the majority of the witnesses are scattered around

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77 *Asten v. Wangner*, 1997 WL 634330, at *3 (Del. Ch. Oct. 3, 1997).

78 Lockwood Reply Aff. Ex. B (attaching Trust's List of Witnesses from the District of Delaware Action).

79 Davis Aff. ¶¶ 5, 8.

80 *Wolfe & Pittenger* § 5-2[b].

the country. Accordingly, this factor is neutral. It neither favors nor disfavors this forum.

3. The availability of compulsory process for witnesses

For this factor to favor the Trust, it must have identified the witnesses and "the specific substance of their testimony."[81] Further, for this factor to be relevant, the other forum should "provide a substantial improvement as to the number of witnesses who would be subject to compulsory process."[82] Of the nineteen non-party witnesses identified by the Trust, five live in Ohio.[83] Ohio thus provides some improvement over Delaware in terms of the number of witnesses subject to compulsory process. Because the Trust failed to identify the relative importance of its various witnesses or what they would testify to, the Court cannot determine how much of an improvement Ohio would be over Delaware. One fact relevant to that issue is the Trust's declared intention to bring the five Ohio witnesses to Delaware to appear in its chosen forum until the Federal Action was dismissed. Indeed, the Trust's readiness to proceed to trial as the plaintiff in the District of Delaware Action suggests that the improvement would not be substantial.

Where, as here, "potential witnesses are located in numerous jurisdictions, so that no single forum has a distinct advantage in terms of the availability of compulsory

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81 *Id.* § 5-2[c].

82 *Id.*

83 The Trust identified nineteen potential witnesses in the District of Delaware Action, but four of them are the defendant Directors. Lockwood Reply Aff. Ex. B. The Trust identified four additional witnesses in briefing the pending motions, Lubarsky Aff. ¶ 27, for a total of nineteen potential nonparty witnesses.

process, such circumstance will militate against a stay or dismissal absent a specific showing of hardship by the defendant."[84] Again, the Trust has made no such showing. In addition, to the extent the nonparty witnesses are fact witnesses, the Trust could obtain their testimony by deposition.[85]

Accordingly, the availability of compulsory process favors Ohio, but only very slightly.

4. The possibility of a view of the premises

The parties have presented no evidence that this factor is relevant. As such, it neither favors nor disfavors this forum.

5. The pendency or nonpendency of a similar action in another jurisdiction

The Chancery and Ohio Actions are mirror images of each other.[86] Moreover, there is no reason to believe that the Ohio court cannot fully adjudicate the parties' dispute and provide full, final and complete relief.

There is also no evidence that if this Court declined to stay this action, then it and the Ohio Action would be on a collision course. Neither the Trust nor the Directors have "taken any steps to advance the progress of the Ohio Action."[87] Further, there is no

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84 *Wolfe & Pittenger* § 5-2[c].

85 *HFTP Invs.*, 752 A.2d at 123.

86 *See supra* n.51.

87 Letter from Richard F. Lubarsky, Esq. to the Court ¶ 4 (Oct. 6, 2005). In the PRB, the Directors assert that "counsel for the Trust has advised the Directors that the Trust will proceed in Ohio absent an injunction." PRB at 18. Absent any direct evidence of the Trust's intentions, the Court will not presume that the Trust will take actions that could put this action and the Ohio Action on a collision course.

evidence that the Ohio court has a particular or strong interest in resolving this dispute, as opposed to having it proceed in this Court.[88]

"Since [the Chancery Action] does not differ significantly from the [Ohio Action] nor can this Court provide relief that the [Ohio] court cannot,"[89] this factor is neutral. It neither favors nor disfavors this forum.

6. All other practical considerations

The Trust argues that both Mosler's historic significant contacts with Ohio and the present location of "dozens of unsecured creditors of Mosler on whose behalf this action has been brought" in Ohio give Ohio a stronger interest in resolving this controversy than Delaware.[90] Although Delaware courts occasionally have considered such contacts in the context of a *forum non conveniens* analysis,[91] the Court finds the Trust's argument significantly undercut by its original decision to litigate this dispute in Delaware. That decision, and the Trust's failure to explain why these contacts with Ohio have become any more significant now in the wake of the dismissal of the District of Delaware Action, cause the Court to conclude that the Trust's contacts argument deserves little weight.

Further, the Court notes that Mosler's past incorporation in Delaware weighs slightly in favor of litigation here. Delaware has an interest in opening its courts to

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88 The parties have represented to this Court that the "Notice of Report" sent by the Ohio court appears to have been "generated by the Ohio Court in the ordinary course." Letter from Richard F. Lubarsky, Esq. to the Court ¶ 4 (Oct. 6, 2005).

89 *Azurix*, 2000 WL 193117, at *6.

90 DRB at 8–9.

91 *Wolfe & Pittenger* § 5-2[f].

Delaware entities, like Mosler was and the Trust is, in order to provide a forum in which they may seek justice.[92] This is especially so where the dispute between the parties involves the internal affairs of a Delaware corporation.

The Trust also argues that the possibility of a jury trial in the Ohio Action weighs in favor of that forum. This Court, however, consistently has rejected such pleas.[93] As noted by Chief Justice Steele, it is likely that "our Delaware corporate citizens often find it advantageous to be based in a state where business disputes can be resolved without a jury trial . . . ."[94]

Finally, the Court will consider the motives of the parties in filing their respective actions.[95] In this situation, both parties clearly are forum shopping. The Trust is forum shopping based on its preference for a jury trial; the Directors are forum shopping in that they presumably would prefer to keep this case in Delaware, where the Trust originally filed it, and to take advantage of this Court's familiarity with Delaware corporate law and nonjury trials. The motives of the parties tip the scales slightly in favor of the Directors because "this is not a case where [they] ha[ve] chosen a forum solely to inconvenience

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92 *Id.*

93 *Id.*; *Asten*, 1997 WL 634330, at *3 ("I can find no Delaware case that says that our non-jury Court of Chancery should yield dispute resolution between its Delaware corporate citizens to jury trials in other jurisdictions."); *Azurix*, 2000 WL 193117, at *7 ("[T]he parties relative taste for lay resolution of their purely commercial dispute[] is not relevant to my decision.").

94 *Asten*, 1997 WL 634330, at *3.

95 *See Wolfe & Pittenger* § 5-2[f] (noting Delaware courts consideration of the motives of each party).

the defendant."[96] Rather, Delaware was Mosler's state of incorporation, this dispute is governed by Delaware law, and, perhaps most importantly, the Trust initially brought suit and prosecuted its case until it was trial-ready in Delaware.

Accordingly, this last, catch-all factor weighs slightly in favor of Delaware.

Taking all of the relevant *forum non conveniens* factors into account, the Court concludes, in the exercise of its discretion, that they preponderate towards Delaware. Therefore, the Trust's motion to dismiss or stay this action in favor of the Ohio Action will be denied.

E. Injunction

It is well-settled that this Court "is empowered to enjoin a party to an action from removing the subject of the controversy to a foreign jurisdiction by filing a later action or proceeding in a foreign forum."[97] It is equally well-settled, however, that the exercise of such authority "is discretionary in nature and should be exercised cautiously."[98] A sense of comity owed to the courts of other states drives this caution.[99]

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96 *Leach v. Solar Bldg. Sys., Inc.*, 1999 WL 252386, at *3 (Del. Ch. Apr. 8, 1999).

97 *Ivanhoe Partners v. Newmont Mining Corp.*, 1988 WL 34526, at *3 (Del. Ch. Apr. 7, 1988) (internal citations omitted).

98 *Wolfe & Pittenger* § 5-3 (citing cases); *Household Int'l, Inc. v. Eljer Indus., Inc.*, 1993 WL 133065, at *2 (Del. Ch. Apr. 22, 1993) ("I do not read *ANR v. Shell* as holding that the Court of Chancery is obligated in each case to enjoin prosecution of a later filed suit between the same parties whenever it determines that a first filed suit in Chancery should not be stayed.").

99 *See Household Int'l, Inc. v. Eljer Indus., Inc.*, 1995 WL 405741, at *1 ("In both instances [where the plaintiff sought to enjoin the defendant from prosecuting a later-filed action] the denial of the injunction was premised upon a sense of comity owed to the courts of the State of Texas . . . ."); *Wolfe & Pittenger* § 5-3

Where the courts of Delaware have issued injunctions in aid of jurisdiction, they have done so in favor of a first-filed Delaware action.[100] In fact, the Court has found no case enjoining the prosecution of a contemporaneously filed action in another jurisdiction. This Court's sense of comity towards the courts of other states would seem to counsel against such an injunction, especially where, as here, the court in the Ohio Action has yet to address whether it should stay its hand in favor of this action. As former Chancellor Allen observed, the better practice is to rely upon the comity of sister state courts to respect the judgment of this Court that this controversy ought to be heard in Delaware.[101]

In declining to grant an injunction in favor of its jurisdiction, the Court has proceeded with the understanding that a collision with the Ohio Action is not imminent. No action has been taken with respect to the Ohio Action and it remains to be seen whether the Trust will challenge, in the Ohio Action, the decision of this Court to hear

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("[R]ecent case law tends to reflect this cautious approach by giving a great deal of weight to considerations of comity.").

100 *See, e.g.*, *Household Int'l*, 1995 WL 405741, at *3 (enjoining prosecution of later-filed Texas suit); *Air Prods. & Chems., Inc. v. Lummus Co.*, 235 A.2d 274, 278 (Del. Ch. 1967) (enjoining defendant from bringing suit in Puerto Rico when a suit between the same parties concerning the same controversy was pending in the Delaware Superior Court); *Williams Natural Gas Co. v. BHP Petroleum Co.*, 574 A.2d 264 (Table) (Del. 1990) (enjoining prosecution of later-filed suit between the same parties concerning the same controversy).

101 *Household Int'l*, 1993 WL 133065, at *2 ("I confess my preference is to issue such an injunction only on rare occasions. It would seem to me the better practice to rely upon the comity of sister state courts to respect the judgment that has now been made concerning the feasibility of litigating these claims in the first filed jurisdiction.").

this controversy.[102] If the circumstances change, and a collision course seems unavoidable, this Court would entertain a renewed motion to enjoin the Trust from proceeding with the Ohio Action.[103]

III. CONCLUSION

For the reasons stated, the Trust's motion to stay or dismiss this action is DENIED, and the Directors' motion to enjoin the prosecution of the Ohio Action also is DENIED.

IT IS SO ORDERED.

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[102] *See supra* at II.D.5.

[103] *See Household Int'l*, 1995 WL 405741, at *3 (enjoining prosecution of later-filed suit in Texas after Texas court declined to stay prosecution of later-filed suit); *Williams Natural Gas Co.*, 574 A.2d 264 (enjoining parties from proceeding with a later-filed action to avoid a "collision course").