COURT OF CHANCERY OF THE STATE OF DELAWARE

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October 31, 2013

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Re: PECO Holdings Corp. v. Weil, et al.

C.A. No. 8448-VCN

Date Submitted: July 31, 2013

Dear Counsel:

Defendants' motion to stay presents the Court with a factual situation that can be resolved through a *McWane* analysis, which calls for a stay of this action. Although the Plaintiff deploys a variety of arguments, the Court concludes that Defendants have convincingly argued that the *McWane* doctrine applies, and, therefore, it grants Defendants' motion to stay.

I. BACKGROUND

Plaintiff PECO Holdings Corp. ("PECO") was formed in May 2005 to acquire Process Equipment Company of Tipp City ("Process Equipment"), a manufacturer of specialty machinery with operations in Tipp City, Ohio. As of July 2011, Process Equipment apparently had debt obligations of \$9.7 million and began considering a course of action to extinguish its debt. One particular transaction was contemplated to retire this debt, but Defendant Robert Weil ("Weil"), Process Equipment's Chief Executive Officer ("CEO") and a member of the Board of Directors of PECO, refused to participate. Weil was soon thereafter terminated as CEO and removed from the Board.

Weil initially brought suit in a New York state court in August 2011 (the "New York Action") in connection with his termination. In October 2011, Weil filed a lawsuit in an Ohio state court (the "Ohio Action") alleging breaches of contract and fiduciary duty against Process Equipment, PECO, and at least one natural person associated with the entities.

 $^{^1}$ Pl.'s Verified Compl. ¶ 3 ("Compl."). The Court takes all facts presented within this Background section from the Complaint unless otherwise noted.

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On October 25, 2011, apparently as part of a transaction intended to retire

Process Equipment's debt,² PECO merged through a short-form merger into a

subsidiary of New PECO Holdings Corp., Inc., a Delaware corporation ("New

PECO") pursuant to 8 Del. C. § 253. PECO was the surviving corporation, and it

became a wholly-owned subsidiary of New PECO.

On December 9, 2011, Weil filed an amended complaint in the Ohio Action

to include an additional plaintiff, a former manager of Process Equipment,

Defendant James Zahora ("Zahora"). This amended complaint included challenges

to the value Weil and Zahora received for certain PECO shares they owned

pursuant to the short-form merger, as well as allegations related to Weil's

termination.

As a result of discovery in the New York Action, it became clear that Weil

intended to challenge the consideration he received in the short-form merger. Weil

apparently later withdrew that challenge from the New York Action in February or

March of 2013, but indicated that he intended to bring these claims elsewhere.

PECO filed this action against Weil and Zahora (the "Defendants") in April 2013

² Defs.' Mem. in Supp. of Mot. to Stay Action at 2.

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(the "Delaware Action"). PECO seeks a declaratory judgment from this Court that

Defendants' sole recourse for challenging the value received for shares as a result

of the short-form merger is to pursue an appraisal action in the Delaware Court of

Chancery.³

II. CONTENTIONS

The Defendants argue that the facts of this case fall within the bounds of a

straightforward McWane analysis because the Ohio Action is first-filed, the issues

and parties in the Ohio dispute and the Delaware dispute are the same, and the

Ohio court is capable of providing prompt and complete justice. PECO did not

argue that McWane factors favor it. Instead, it makes several arguments on the

merits that the McWane doctrine is inapplicable. PECO also argues that it has

energetically moved for summary judgment in prior actions involving Weil and

that policies of judicial comity would not be violated if the Court declined to stay

the Delaware Action.

 3 Compl. ¶¶ 2; 43-48.

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III. ANALYSIS

A Delaware court's grant of a stay in favor of a first-filed foreign action is not a matter of right, but is instead within the sound discretion of the court.⁴ Where parties agree through a forum selection clause to litigate in a particular jurisdiction, Delaware law generally honors such agreements.⁵ If the parties have not agreed upon a specified jurisdiction, Delaware courts follow the *McWane* doctrine which generally favors granting a stay in the Delaware proceeding in favor of the foreign action where "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."

Even when the action in a foreign jurisdiction is first-filed, summary proceedings, such as an action under 8 *Del C*. § 225, require additional consideration beyond that provided for in *McWane*. In such cases, Delaware

⁴ See In re Bear Stearns Cos. S'holder Litig., 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008) (citing Adirondack GP, Inc. v. Am. Power Corp., 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996)).

⁵ See Ingres Corp. v CA, Inc., 8 A.3d 1143, 1145 (Del. 2010); Green Isle P'rs, Ltd., S.E. v. Ritz-Carlton Hotel Co., 2000 WL 1788655, at *2 (Del. Ch. Nov. 29, 2000) (citing Elf Atochem N. Am., Inc. v. Jaffari, 727 A.2d 286, 294 (Del. 1999)).

⁶ McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co., 263 A.2d 281, 283 (Del. 1970).

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courts will weigh the need for swift and expeditious resolution of these summary

proceedings against the McWane policies recommending comity and the efficient

administration of justice.⁷

A. Does the McWane Doctrine Favor a Stay?

Because PECO declined to ground its memorandum of law in opposition to

the motion to stay in the McWane doctrine, the Court will be brief in its analysis of

McWane's application to the present case and why the motion to stay will be

granted.8

First, the Ohio Action is a first-filed foreign action in which Defendants

allege breaches of contract and fiduciary duty. Discovery has commenced and a

trial date has been set. PECO argues that it has not "delayed in raising the

arguments set forth in its Motion for Summary Judgment." Perhaps this argument

was offered to deny or otherwise undermine the fact that the Ohio Action was first-

⁷ Choice Hotels Int'l, Inc. v. Columbus-Hunt Park DR. BNK Investors, L.L.C., 2009 WL 3335332, at *4 (Del. Ch. Oct. 15, 2009).

⁸ PECO offers certain arguments in that section of its memorandum entitled "[PECO] Did Not Delay in Raising this Issue" which may be directed to certain *McWane* factors. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Stay at 11-12. The Court will address PECO's arguments in the context of the particular *McWane* factors where it presumes those arguments would have been made had more focus been given to those factors.

⁹ *Id.* at 11.

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filed. However, the test to determine whether an action is first-filed is not whether

arguments contained within a motion for summary judgment are articulated often,

energetically, or in multiple fora. Instead, the test is whether the same parties and

issues are present before a court that is capable of providing prompt and complete

justice. PECO's argument does not counter Defendants' arguments explaining

how the first factor of *McWane* has been met.

Second, the parties necessary to resolve the dispute in the two actions appear

to be parties in both the Delaware Action and the Ohio Action. No argument has

been advanced by PECO which casts doubt on this factor.

Third, the issues appear to arise from a common nucleus of operative fact.

Although PECO seeks a declaratory judgment that appraisal is the sole remedy

under Delaware law available to Defendants, PECO has not adequately explained

how its claims in the Delaware Action arise from a set of facts different from the

facts of the claims related to the short-form merger that Defendants advanced in

the Ohio Action. Both sets of claims arise from a common nucleus of operative

fact: namely, the short-form merger.

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PECO argues that a "stay is not justified here because the ruling and relief

sought by [PECO] would in no way interfere with the Ohio case, nor . . . impose

any special burden on the parties" and that it seeks only a "narrow ruling." ¹⁰

PECO is correct that Delaware courts may in some instances, such as proceedings

under 8 Del. C. § 225 or cases involving novel and important issues of Delaware

law, prioritize certain narrow issues. However, PECO has not convincingly

articulated a reason why the Delaware Action should be prioritized now over the

Ohio Action. If PECO is correct that some of Defendants' claims in Ohio are

precluded because the Ohio court may not perform a statutory appraisal under

Delaware law, that court is fully capable of assessing the limits of its jurisdiction.

The parties have had notice of the Ohio Action involving the short-form merger for

two years. The Court declines to entertain PECO's late attempt to move that

litigation—or a significant part of it—to Delaware.

Finally, the Ohio court in all respects appears to be a court capable of

rendering prompt and complete justice to PECO. Certainly PECO has not

advanced arguments indicating otherwise. Although PECO has written several

¹⁰ *Id.* at 11-12.

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letters to the Court stating that the Ohio judge would apparently "welcome" this

Court's guidance on issues of Delaware law, 11 the Court views such assertions as

acknowledgements by the Ohio court of the principles of judicial comity—not as

statements of an unwillingness or reluctance to apply Delaware law. PECO has

not pointed out anything that would justify this Court's treading where the Ohio

court has been involved in resolving the parties' dispute for over two years.

B. PECO's Arguments on the Merits

PECO primarily focuses its opposition to the motion to stay on a variety of

arguments on the merits instead of explaining to the Court why McWane favors

denying the stay that Defendants request. 12 As noted, these arguments on the

merits may be resolved in the Ohio Action.

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¹¹ Pl.'s Letter dated August 21, 2013; see also Pl.'s Letter dated June 11, 2013.

¹² PECO argues that 8 *Del. C.* § 262 requires appraisal actions to be brought in the Delaware Court of Chancery, that § 262 must be strictly construed, that § 262 proceedings should be entitled to the same deference afforded to § 225 disputes under a *McWane* analysis, and that the Delaware Action should be treated as though a mandatory forum selection clause were present because § 262 should be strictly construed.

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IV. CONCLUSION

For the foregoing reasons, the Defendants' motion to stay is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K