IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

XPRESS MANAGEMENT, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	C.A. No. 2856-VCL
	)	
HOT WINGS INTERNATIONAL, INC. and DEBRA BARRON,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

Submitted: April 26, 2007
Decided: May 30, 2007

Joel E. Friedlander, Esquire, John M. Seaman, Esquire, BOUCHARD, MARGULES & FRIEDLANDER, Wilmington, Delaware, *Attorneys for the Petitioner.*

Brett D. Fallon, Esquire, Michael A. Weidinger, Esquire, MORRIS JAMES LLP, Wilmington, Delaware, *Attorneys for the Respondents.*

LAMB, Vice Chancellor.

A stockholder of a Delaware corporation that is claimed to be a joint venture between it and a co-investor petitions under 8 *Del. C.* § 273 for a judicial dissolution of the corporation. The co-investor and the corporation move to stay this proceeding in favor of prior-filed litigation between the parties currently going forward in a Canadian court. Since certain rights of the Canadian government are implicated by the first-filed Canadian litigation and because important questions about the nature and extent of the corporation's property rights are at issue in that case, the court will exercise its discretion to stay this proceeding pending the outcome of the litigation in Canada. A stay is also warranted by the clearly supported inference that this lawsuit is merely the latest effort by the stockholder's principal to usurp business opportunities of the corporation through use of his superior financial resources to create an oppressive array of multi-jurisdictional litigations.

I.

A. The Parties

The petitioner is Xpress Management, Inc., a British Columbia corporation owned by Alan Ackerman with a principal place of business in Vancouver, British Columbia, Canada. Xpress is one of two 50% stockholders of the corporate respondent, Hot Wings International, Inc., a Delaware corporation with its principal place of business in Kelowna, British Columbia, Canada. Debra Barron,

Hot Wings's co-respondent, is the company's other 50% stockholder, and acts as its sole director, officer, and employee.

B. The Facts

Formed in 2003, Hot Wings is a concept company whose business plan involves the development of wing airfoil modification technology for Cessna aircraft. Initially, the company issued 50 shares of common stock each to Xpress and Barron with the basic understanding that Xpress and Ackerman would provide financing for the company. Barron, in return for her equity, would operate the company day-to-day and would cause AOG Air Support, Inc., a company founded by Barron and her husband, to undertake the task of modifying the airfoils.

Ackerman initially purchased a prototype aircraft for Hot Wings. Another of Ackerman's entities, Parnell Global Investments ("PGI"), made a $1.2 million loan to Hot Wings on May 21, 2005. Only one month later, Ackerman, purportedly acting out of concern over what he claims were significant self-dealing transactions by Barron with Hot Wings, told his co-investor that no future financing would be forthcoming. Strapped for the cash needed to meet the company's operating expenses, Barron infused nearly $200,000 of her own money into Hot Wings and sold certain components she deemed unnecessary for the initial FAA certification process for the wing airfoil.

The parties vehemently disagree over the facts relating to the company's success, or lack thereof, during 2005. Barron says that a number of dealers committed to buy aircraft kits immediately upon certification. She projects tens of millions of dollars in net profits for Hot Wings once that process is complete. In contrast, Ackerman claims that Hot Wings, having never once turned a profit, continues to have a bleak chance of ever doing so, especially with Barron at the helm.

Following his termination of financing to the company, Ackerman initiated a series of unsuccessful legal actions in Canadian courts. On December 30, 2005, Xpress filed suit against Hot Wings in British Columbia and obtained an *ex parte* order appointing a bankruptcy receiver for the company. In its suit, Xpress contended that Ackerman's mother was the beneficial owner of the prototype aircraft. On August 25, 2006, the Canadian court discharged the bankruptcy receiver and dismissed the action, finding "no merit" to the claim of beneficial ownership.[1]

Ackerman then filed a document purporting to register a security interest in Hot Wings's assets in favor of PGI. Shortly thereafter, Ackerman, acting through PGI, filed another *ex parte* petition seeking the appointment of a bankruptcy

[1] *Xpress Mgmt, Inc. v. Hot Wings Int'l, Inc.*, No. S056802, Vancouver Registry, transcript of oral reasons for judgment, at ¶ 26 (B.C. Supr. Ct. Can. Aug. 25, 2006).

receiver for Hot Wings. Although it initially entered the *ex parte* order, the Canadian court set the order aside on February 20, 2007 after Hot Wings had a chance to appear. Finding that the PGI loan was not yet due and payable, the Canadian court again dismissed a bankruptcy petition brought against Hot Wings. Costs were assessed against PGI, as the Canadian court "concluded that there was both material misstatement of facts and material omission in relation to the *ex parte* application for a receiving order."[2]

While Ackerman pursued his quest to have Hot Wings liquidated, AOG's assets were sold in a bankruptcy proceeding in Canada. This sale directly bears on the asset composition of Hot Wings. Xpress maintains that all of the airfoil technology was owned by AOG, and that an Ackerman affiliate, Arctic Aerospace, Inc., purchased this intellectual property at the bankruptcy sale. Xpress claims this is necessarily the case because AOG acquired the intellectual property rights from the Canadian government and the relevant contract provisions prohibited foreign companies from owning technology financed through the Canadian government. Thus, Hot Wings, being a Delaware corporation, could never have legally owned the intellectual property. Barron disagrees, claiming that Hot Wings has owned the

[2] *In the Matter of the Bankruptcy of Hot Wings Int'l, Inc.*, No. VAB061598, Vancouver Registry, transcript of oral reasons for judgment, at ¶ 31-32 (B.C. Supr. Ct. Can. Feb. 20, 2007). Parnell filed an affidavit claiming that the security agreement existed and was properly executed. No such agreement, however, was ever executed, and Barron offered evidence in Canada that she never authorized the execution or registration of a security agreement.

technology rights all along. According to her, all AOG had were rights under an exclusive manufacturing and marketing licensing agreement with Hot Wings that has since been terminated. Barron argues that the intellectual property rights, which she values at $32 million, remain in Hot Wings's hands.

During the AOG bankruptcy sale process, AOG's and Hot Wings's physical assets were commingled, ending up in a hangar facility under the control of an Ackerman affiliate. To recover its assets, Hot Wings obtained an *ex parte* injunction from a Canadian court on March 23, 2007, allowing Hot Wings to retake control and possession of its assets, including the design drawings, airfoil prototypes, and modification kits.

Shortly after the injunction issued, Hot Wings informed Ackerman that it was negotiating a third-party sale of the prototype aircraft for $375,000. Alarmed at this prospect, Ackerman moved to set aside the injunction.[3] The Canadian court dismissed Ackerman's application, but entered a standstill order prohibiting Hot Wings from selling any of its assets without leave of court.[4]

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[3] Xpress contends that Hot Wings's actions contemplate a fire sale of the aircraft and that the fair market value of the asset is $1.2 million. While Hot Wings and Barron have repeatedly offered to sell the aircraft to Xpress or Ackerman at that price, both have refused.

[4] The order mandates that:

> Hot Wings International, Inc. and all persons acting on [its] behalf, and any and all persons having notice of the terms of this Order be restrained from selling, agreeing to sell, pledging, hypothecating, leasing, or otherwise alienating or disposing of any [of Hot Wings's assets] . . . until further Order of this Court.

Hot Wings Int'l, Inc. v. Stolairus Aviation, Inc., No. S072011, Vancouver Registry, preservation order, at 1 (B.C. Supr. Ct. Can. Apr. 5, 2007).

Xpress filed this action on April 3, 2007. The relief sought is a judicial dissolution of Hot Wings pursuant to the special provisions of 8 *Del. C.* § 273 pertaining to the dissolution of joint venture companies.[5] Two weeks after the filing of its petition, Xpress submitted a motion for entry of a status quo order. In response, the respondents filed a motion to stay this case pending resolution of the Canadian litigation. This court heard oral argument on April 26, 2007 and denied the motion for a status quo order, except to a limited extent.[6] The rationale for that decision rested upon Xpress's failure to make the requisite showing of irreparable harm, as its interest in Hot Wings is adequately protected by the standstill order of the Canadian court. However, this court reserved judgment on the motion to stay, and now turns to the parties' contentions with respect to that motion.

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[5] Section 273 is entitled "Dissolution of Joint Venture Corporation Having 2 Stockholders." Section 273(a), in pertinent part, provides:

> If the stockholders of a corporation of this State, having only 2 stockholders each of which own 50% of the stock therein, shall be engaged in the prosecution of a joint venture and if such stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing of the assets used in such venture, either stockholder may . . . file with the Court of Chancery a petition stating that it desires to discontinue such joint venture and to dispose of the assets used in such venture in accordance with a plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporation be dissolved.

The court observes that a substantial threshold question appears to exist as to whether Hot Wings is, in fact, a "joint venture corporation" subject to dissolution under section 273. The resolution of that issue is likely to involve substantial discovery and the need for fact finding by the court as to the parties' intentions in forming Hot Wings.

[6] The order entered does prevent Hot Wings or Barron from issuing any securities of the company without leave of this court.

II.

Hot Wings and Barron urge the court to stay this action for two interrelated reasons. First, they argue the ownership of the intellectual property assets is an issue that is presently being litigated in Canada, and is one which the Canadian court has a strong judicial interest in resolving. Due to the Canadian court's familiarity with the parties and their arguments regarding ownership of the airfoil technology, the respondents say this court should allow that action to conclude before this suit is litigated. Such an orderly disposition, they claim, would substantially narrow the issues to be decided in the section 273 case and would allow this matter to proceed summarily thereafter.

Second, the respondents contend that a stay is warranted because Xpress has improperly invoked section 273. According to Barron and Hot Wings, the filing of this suit is merely another step in Ackerman's campaign to wrongfully obtain the company's valuable technology for himself at a nominal cost, a campaign which Ackerman has previously fought (and has previously lost) on several occasions in Canada. The respondents say Xpress has artificially contrived the stockholder deadlock in this case by representing to this court that the proposed sale of the prototype aircraft is a sale of substantially all the company's assets. Confident that it will prevail on the merits in Canada, the respondents note that when the intellectual property is included on the company's balance sheet, the prototype

aircraft represents only a small fraction of Hot Wings's total value. Since Barron is the company's sole officer and director, she should be free to exercise her managerial discretion to sell the aircraft to generate cash flow for Hot Wings, especially since Xpress and Ackerman have refused to meet the ongoing financing needs of the business. The respondents thus posit that the Canadian tribunal should first decide the intellectual property dispute before the judicial dissolution process is initiated here, as ownership of those assets could greatly inform this court's perception of whether Xpress is attempting to expropriate Hot Wings's business opportunities.

In opposition to the respondents' motion, Xpress says that because (in its view) relief under section 273 is available only from this court, due to the unique statutory nature of such a claim this court should grant a stay only in exceptional circumstances, which Xpress believes are not present here. Furthermore, Xpress argues that the ownership of the intellectual property related to the Cessna project is wholly irrelevant to a determination of whether Xpress has satisfied the required elements of a section 273 claim. Since this court has substantial discretion to fashion appropriate relief under that statutory provision–by, for example, appointing an impartial receiver who could independently decide whether to continue pursuing the Canadian lawsuit–Xpress contends that allowing the

dissolution action to proceed alongside the Canadian case would not prejudice the company in any material way.

III.

The familiar legal standard espoused in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*[7] governs the court's consideration the motion *sub judice*. Under *McWane*, a Delaware court will typically exercise its discretion to stay litigation when (1) a first-filed prior pending action exists in another jurisdiction, (2) that action involves similar parties and issues, and (3) the court in the other jurisdiction is capable of rendering prompt and complete justice.[8] Concerns of judicial economy and the avoidance of conflicting judgments require that, "as a general rule, litigation should be confined to the forum in which it is first commenced, and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit" by commencing duplicative litigation in another jurisdiction.[9]

Only two of the *McWane* considerations merit serious discussion here. The parties do not dispute that Hot Wings's March 23 action is currently pending in Canada and predates Xpress's petition in this court by nearly two weeks. The Canadian litigation, then, satisfies the first-filed prong.

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[7] 263 A.2d 281 (Del. 1970).
[8] *Id.* at 283.
[9] *Id.*

Our jurisprudence has consistently recognized that, with regard to the second *McWane* factor, the parties and issues in the competing litigations are not likely to be exactly identical. A Delaware court, therefore, must "balance the lack of complete identity of parties [and issues] against the possibility of conflicting rulings which could come forth if both actions were allowed to proceed simultaneously."[10] With respect to similarity of the litigants, the court does not read the parties' submissions as refuting the assertion that, while Xpress is not a named defendant in the Canadian action, affiliates of Ackerman are directly involved in that litigation. This court has previously indicated that, if the parties in one suit own and control a party in another action, such parties will be deemed "substantially identical" for purposes of a *McWane* analysis.[11] The court is convinced this is the case here.

To assess whether legal issues are sufficiently related to warrant a *McWane* stay, the courts of this State typically focus on whether the issues involve a "common nucleus of operative facts," and whether allowing the cases to progress in tandem would either risk conflicting rulings or foster an "unseemly race to

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[10] *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *3 (Del. Super. Apr. 25, 1989) (cited by DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 5-1[c], at 5-17 (2005)).

[11] WOLFE & PITTENGER, § 5-1[c], at 5-18 (citing *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996)). Xpress essentially concedes that Ackerman controls the entities involved in the Canadian litigation initiated by Hot Wings on March 23. *See, e.g.*, Letter from John M. Seaman to Vice Chancellor Stephen P. Lamb, at 2 (Apr. 26, 2007) ("Prior pending litigation between joint venturers is not unusual in Section 273 actions.").

judgment" in each forum.[12] Although issues only "directly related" or "immediately relevant" to the dissolution of the company are properly raised in a section 273 proceeding,[13] in order for Hot Wings to be dissolved and for its assets to be distributed in an orderly and final manner, some court–either the Court of Chancery or the Canadian court–must first determine which assets the company owns. This patent risk of conflicting rulings is made all the more precarious by the notion that this court, were it called upon to decide the intellectual property issue, would be legally opining on the nuances of a contract to which the Canadian government is a party. Under these circumstances, it makes far more sense to allow a Canadian court to decide the intellectual property ownership issue.[14] Thus, the second *McWane* factor weighs in favor of a stay here.

The third *McWane* factor–whether or not a foreign court is capable of rendering the same prompt and complete justice as a Delaware court might–is often influenced by this State's interest in the particular subject matter of the Delaware case.[15] Although the Canadian court is in a position to adjudicate the matter before

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[12] WOLFE & PITTENGER, § 5-1[c], at 5-19 (citing *Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 930 (Del. Ch. 1998) and *Transamerica Corp. v. Reliance Ins. Co.*, 1995 WL 1312656, at *6-8 (Del. Super. Aug. 30, 1995)).
[13] *In re Magnolia Clinical Research, Inc.*, 2000 WL 128850, at *1 (Del. Ch. Jan. 3, 2000) (citing *In re Data Processing Consultants, Ltd.*, 1987 WL 25360, at *5 (Del. Ch. Nov. 25, 1987)).
[14] *See Transamerica*, 1995 WL 1312656, at *6 (noting that resolution of certain issues in a foreign adjudication would substantially narrow the questions that the Delaware court was called upon to decide).
[15] WOLFE & PITTENGER, § 5-1[d], at 5-21 (citing *Joyce v. Cuccia*, 1996 WL 422339 (Del. Ch. Jul. 24, 1996)).

it quickly due to its familiarity with the facts and circumstances surrounding the parties' relationship here, section 273, like many other summary proceedings under the Delaware General Corporation Law, directly implicates the internal affairs of a Delaware company.[16] It is an indisputable proposition that this State has a strong, and often paramount, interest in seeing such disputes resolved in a rapid, orderly, and predictable manner.[17] Due in large part to this pressing interest, a summary proceeding initiated in the Court of Chancery will often be allowed to proceed despite the pendency in a foreign court of a related prior-filed action between the same litigants.[18]

The single fact that a later-filed Delaware action is a summary proceeding, however, does not always require denial of a *McWane* motion to stay. Indeed, the court in *Carvel v. Andreas Holding Corp*. recognized as much.[19] Confronted with an 8 *Del. C.* § 225 proceeding to determine whether directors were properly elected, the *Carvel* court noted that the defendants' motion to stay required balancing the "*McWane* policies of comity and promoting the efficient administration of justice" against the policies implicated by section 225–namely, to

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[16] *See Data Processing*, 1987 WL 25360, at *5 (drawing comparisons between section 273 and other Delaware statutes providing for summary adjudication of internal corporate disputes).
[17] *See, e.g.*, *Fuisz v. Biovail Techs., Ltd.*, 2000 WL 1277369, at *1 (Del. Ch. Sept. 6, 2000) (noting the importance of summary proceedings in the context of 8 *Del. C.* § 145(k)); *Oralco, Inc. v. Bradley*, 1992 WL 332106, at *4 (Del. Ch. Dec. 15, 1992) (noting such an interest in the context of a suit brought under 8 *Del. C.* § 225).
[18] WOLFE & PITTENGER, § 5-1[d], at 5-21 to 5-23.
[19] 698 A.2d 375 (Del. Ch. 1995).

expeditiously resolve uncertainty within the corporation and to "promote uniformity of construction of Delaware law."[20] Finding that a stay was merited, the *Carvel* court relied upon the incisive reasoning of Chancellor Duffy years earlier in *Japan Lease Int'l Corp. v. Lyons Container Services, Inc.*, in which he stated:

> I recognize that the Court of Chancery has statutory responsibilities under [section] 225 and that it generally supervises the internal affairs of a Delaware corporation. And it is important in the administration of our corporation law that there be a uniformity of construction. But I am not persuaded that these considerations mandate the Court to decide any controversy submitted under the corporation law statutes no matter what actions may be pending between the parties in other jurisdictions. I think that we still have an obligation to look at all of the attendant circumstances and make a decision which includes a consideration of the orderly and efficient administration of justice as we see it in light of the binding case law.[21]

An examination of the attendant circumstances in *Carvel* revealed that the foreign court was in a position to resolve the prior-filed litigation promptly and could do so in a manner that would not risk any imminent or irreparable harm to the corporate enterprise.[22] Furthermore, the court in *Carvel* emphasized the strong interest the foreign tribunal had in deciding the particular dispute before it, and was hesitant to needlessly encroach upon an area of the foreign court's legitimate supervision and authority.[23]

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[20] *Id.* at 378.
[21] 1973 WL 461, at *2 (Del. Ch. May 8, 1973) (cited by *Carvel*, 698 A.2d at 378 n.1).
[22] *Carvel*, 698 A.2d at 379 n.3.
[23] *Id.* at 379.

In this case, contrary to what Xpress would have this court believe, Hot Wings does not face a threat of imminent harm if the dissolution process is stayed while the Canadian court resolves the issues before it. The standstill order in place there prohibits a sale of the prototype aircraft without court approval, and such approval could depend, in part, on a resolution of the rightful ownership of the disputed intellectual property.[24] As in *Carvel*, the Canadian court here has a strong provincial interest in seeing the intellectual property issue resolved locally, since those assets are potentially subject to ownership restrictions imposed by the Canadian government. Thus, powerful practical considerations move this court to grant the respondents' motion.

The decisional authority of this court pertaining to a motion to stay in a section 273 action does not contradict this conclusion. As Xpress observes, the fact that another litigation involving the parties is proceeding elsewhere, generally speaking, should not prevent a joint venturer from exercising its statutory rights under section 273.[25] However, relevant precedent is clear that when the other party can point to uncontested facts which raise a specter of bad faith conduct by the party seeking dissolution, the Court of Chancery's inherent equitable discretion

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[24] The Canadian court is, no doubt, perfectly capable of interpreting and enforcing the stockholder vote requirements in the case of sales of all or substantially all the assets of a corporation that are found in 8 *Del. C.* § 271(a), as they may relate to the possible sale of the prototype aircraft.

[25] *Magnolia Clinical*, 2000 WL 128850, at *1; *Data Processing*, 1987 WL 25360, at *5.

should not stand idle. Indeed, this court cannot permit a litigant to manipulate the statutory process embodied in section 273 with an eye towards "exploit[ing] a specific future business opportunity personally that would rightfully belong to the company if it should happen to continue to exist as a going concern at that future time."[26]

The uncontested facts certainly raise such an inference here. Most troubling are the underlying facts relating to Ackerman's conduct of the litigations in Canada. Rather than seek dissolution of Hot Wings in 2005 (when his allegations of self-dealing against Barron first surfaced), Ackerman simply cut off financing to Hot Wings and then waited more than six months to initiate *ex parte* bankruptcy proceedings. Not only were both of his bankruptcy petitions eventually dismissed for lack of merit by the Canadian courts, but the predicate of the second petition suffered from a blatant and inexcusable factual misrepresentation. While such a history of dealings, at this stage of the case, does not warrant an outright dismissal of the petition, Xpress's and Ackerman's actions nonetheless substantially affect the court's decision to exercise its equitable discretion to stay this case pending the resolution of the Canadian proceedings.

Section 273 is an important provision of Delaware corporate law. It enables deadlocked joint venturers "to bring closure to what has become an inefficient and

[26] *Data Processing*, 1987 WL 25360, at *4.

unworkable relationship."[27] Its saliency as a dispute resolution mechanism, though, is somewhat lessened when the party invoking it has, on numerous occasions, initiated (and lost) litigation in another jurisdiction where the main goal was to accomplish substantially the same relief as a Delaware court could provide if a dissolution action had been brought here in the first place. Certainly, a court should be wary when section 273 is invoked as a statutory panacea by a purported joint venturer who, having failed before in its effort to break up the company and having eschewed the power of this court for so long, suddenly maintains that a rapid and summary dissolution is the appropriate method through which the corporation's best interests will be served. In the circumstances present here, the equitable powers this court enjoys to manage its own docket and to provide for the efficient and orderly administration of justice outweigh, at least in the foreseeable future, this particular petitioner's statutory right to an immediate dissolution under section 273.

IV.

For the foregoing reasons, the respondents' motion to stay this action in favor of previously-filed litigation currently proceeding in Canada is GRANTED. Counsel for Hot Wings shall promptly prepare and submit an appropriate order on notice.

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[27] *Magnolia Clinical*, 2000 WL 128850, at *1.