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Case No. 6790-VCN

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

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| ODN HOLDING CORPORATION, a Delaware corporation, OAK HILL CAPITAL PARTNERS III, L.P., a Cayman Islands exempt limited partnership, OAK HILL CAPITAL MANAGEMENT PARTNERS III, L.P., a Cayman Islands exempt limited partnership, LAWRENCE NG, ROBERT L. MORSE, JR., ALLEN MORGAN, WILLIAM J. PADE, JEFFREY KUPIETZKY, SCOTT JARUS, and KAMRAN POURZANJANI, | : | |
| Plaintiffs, | : | |
| v. | : | **C.A. No. 6790-VCN** |
| FREDERICK HSU, individually and as Trustee of THE FREDERICK HSU LIVING TRUST UNDER TRUST AGREEMENT DATED MARCH 14, 2007, | : | |
| Defendant. | : | |

**MEMORANDUM OPINION**

Date Submitted: January 31, 2012
Date Submitted: March 30, 2012

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NOBLE, Vice Chancellor

## I. INTRODUCTION

This action arises out of Plaintiff Lawrence Ng's sale (the "Sale") of a majority of the common stock of Plaintiff ODN Holding Corporation ("ODN") to Plaintiff Oak Hill Capital Partners III, L.P. ("Oak Hill Partners") and Plaintiff Oak Hill Capital Management Partners III, L.P. ("Oak Hill Management" and collectively, with Oak Hill Partners, "Oak Hill"). Defendant Lawrence Hsu initially filed an action challenging the Sale in this Court on October 22, 2009 (the "First Delaware Action"). Hsu dismissed the First Delaware Action with prejudice two weeks after it was filed, and no defendant ever appeared in that action. More than twenty months later, Hsu and three other plaintiffs filed another action challenging the Sale in the Superior Court of the State of California (the "California Action"). Three weeks after that, the defendants in the California Action filed the current action (the "Second Delaware Action"), seeking, among other things, a declaration that they did not commit certain wrongs alleged in the California Action. Hsu has moved to dismiss or, alternatively, to stay the Second Delaware Action in favor of the California Action. This is the Court's decision on that motion.

## II. BACKGROUND[1]

A. *The Parties*

ODN is a Delaware corporation that owns and operates non-party Oversee.net ("Oversee"), a California corporation that engages in online marketing and advertising, specializing in selling, developing, and registering internet domain names. At all relevant times, ODN's board of directors (the "Board") consisted of eight members—Defendant Hsu and Plaintiffs Ng, Robert L. Morse, Jr., William J. Pade, Allen Morgan, Jeffrey Kupietzky, Scott Jarus, and Kamran Pourzanjani. Plaintiffs Morse and Pade are also partners of Oak Hill.

Oak Hill Partners and Oak Hill Management are Cayman Islands exempt limited partnerships. Oak Hill currently owns approximately 54% of ODN's outstanding common stock, and all of ODN's Series A Preferred Stock.

Ng is the sole trustee of the Lawrence Ng Living Trust (the "Ng Trust"), a California living trust that currently owns approximately 18% of ODN's outstanding common stock.

Hsu is the sole trustee of the Hsu Trust, a Washington living trust that owns approximately 25.55% of ODN's outstanding common stock.

[1] Except in noted instances, the factual background is based on the allegations in the Verified Complaint filed in the Second Delaware Action (the "Second Delaware Complaint").

B. *Factual Background and Procedural History*

Ng and Hsu created Oversee in 2000. From its creation until December 2007, Oversee was owned solely by Ng and Hsu (or family trusts controlled by them). On December 20, 2007, Ng and Hsu contributed all of the shares of Oversee stock that they controlled to ODN in exchange for an equal number of shares of ODN common stock, and Oversee became a wholly-owned subsidiary of ODN. Also on December 20, Oak Hill entered into an agreement with ODN, Ng, and Hsu, whereby Oak Hill agreed to purchase 53,380,783 shares of ODN Series A Preferred Stock for approximately $150 million. Moreover, those same parties entered into another agreement, which provided that ODN would repurchase some of the common stock held by the Ng and Hsu Trusts for $75 million. Following the execution of those agreements, (a) Ng controlled 41,788,256 shares of ODN common stock (representing approximately 54.5% of ODN's then-outstanding common stock), (b) Hsu controlled 34,190,391 shares of ODN common stock (representing approximately 44.5% of ODN's then-outstanding common stock), and (c) Oak Hill owned 53,380,783 shares of ODN Series A Preferred Stock (representing all outstanding shares of ODN's Series A Preferred Stock).

On December 31, 2008, Oak Hill entered into stock option agreements with Ng and Hsu. The Ng stock option agreement gave Oak Hill the right to acquire, from the Ng Trust, up to 10,447,064 shares of ODN common stock, and the Hsu

stock option agreement gave Oak Hill the right to acquire, from the Hsu Trust, up to 8,547,598 shares of ODN common stock. Also on December 31, ODN, Ng, Hsu and Oak Hill entered into a stockholders' agreement (the "Stockholders' Agreement"). The Stockholders' Agreement contains a first offer provision and a co-sale right provision. Under the first offer provision, if certain stockholders (including Ng and Hsu) decide to sell any of the common shares of ODN stock that they control, they are required to provide ODN with a notice (a "First Offer Notice"), informing ODN how many shares they are transferring and to whom. ODN then has a right (a "Right of First Offer") to purchase those shares. If ODN decides to exercise its Right of First Offer, then ODN and the selling stockholder are required to negotiate, in good faith, the terms of a sale. If ODN does not exercise its Right of First Offer, then "each stockholder with a right of first offer co-sale (a 'Co-Sale Right') may participate pro rata in a sale of the shares that were formerly subject to ODN's Right of First Offer."[2] At all relevant times, Ng and Hsu had Co-Sale Rights.

In August 2009, Oak Hill, Hsu, and Ng began discussing potential transactions in which Oak Hill would purchase some of the shares of ODN common stock controlled by Ng and Hsu. On September 3, 2009, Hsu and Ng sent First Offer Notices to ODN, indicating their interest in selling some of the ODN

[2] Second Delaware Complaint ¶ 34.

stock that they controlled to Oak Hill. On September 9, 2009, the Board met to discuss those First Offer Notices. At that meeting, Ng informed the other Board members that Oak Hill had submitted a proposal to purchase some of the ODN shares held by the Ng and Hsu Trusts, but that Hsu had found Oak Hill's offer price to be too low. Ng also informed the Board that Hsu had offered to purchase the shares held by the Ng Trust on the same terms as offered by Oak Hill, and that he (Ng) was interested in selling his shares to either ODN or Hsu. At the same meeting, the Board set up a committee of disinterested directors (the "Disinterested Directors"), consisting of Morgan, Jarus, Pourzanjani, and Kupietzky to consider whether ODN should exercise its Right of First Offer with regard to the shares listed in Ng's First Offer Notice.

On September 18, 2009, Kupietzky was informed that Oak Hill had made another offer to purchase the shares listed in Ng's First Offer Notice, and that Ng intended to accept that offer. Over the next several weeks, the Disinterested Directors met telephonically on at least five separate occasions to evaluate the Sale. On September 22, 2009, "[t]he Disinterested Directors unanimously determined . . . that it was not in the best interests of ODN or its stockholders to make an offer for any of the shares referenced in Mr. Ng's September 3, 2009 First

Offer Notice . . . ."[3] On September 23, the Disinterested Directors presented the full Board with their determination.

At the request of Hsu, the Board met again on October 2, 2009. Hsu outlined his concerns with the Sale, and claimed that the Sale would be detrimental to ODN. The Board asked the Disinterested Directors to consider further whether the Sale would pose a threat to ODN, and, if so, whether there were any protective measures available to ODN that would be reasonable and proportionate to that threat. Also on October 2, Ng entered into an agreement with Oak Hill to undertake the Sale. Under the terms of the Sale, Oak Hill acquired 54.5% of ODN's outstanding common stock. Specifically, Ng sold 31,341,193 shares of ODN common stock to Oak Hill for $0.7657564 per share subject to Hsu's Co-Sale Right, and Oak Hill exercised its rights under the stock option agreement it entered into with Ng to acquire an additional 10,447,064 shares of ODN common stock for $0.7657654 per share.

On October 5, 12, and 16, 2009, the Disinterested Directors met telephonically to consider Hsu's concerns about the Sale, and on October 16, they concluded that the Sale did not present a threat to ODN. On October 21, 2009, FWH Holdings, LLC ("FWH"), a Delaware limited liability company managed by Hsu, submitted an offer to ODN (the "FWH Offer") to purchase all of the issued

[3] *Id.* at ¶ 40.

and outstanding shares and options of ODN common stock for $1.00 per share, or $1.50 per share after a six-month waiting period. The FWH Offer was purportedly backed by Ybrant Digital Limited ("Ybrant"), an entity that had previously expressed interest in a business combination with ODN. On October 22, 2009, Hsu sent a First Offer Notice to ODN, indicating his interest in selling the ODN stock he controlled to FWH. On that same day, Hsu provided notice to Ng and Oak Hill of his intent to exercise of his Co-Sale Right in connection with the Sale.

Also on October 22, 2009, Hsu initiated the First Delaware Action.[4] The First Delaware Complaint listed Ng and ODN as defendants and sought to enjoin the Sale. The First Delaware Complaint, consisting of one cause of action, alleged that Ng failed to deliver a First Offer Notice in connection with the Sale, and that even if Ng's September 3, 2009 First Offer Notice was deemed to relate to the Sale it was deficient because it failed to state how many shares were to be transferred in the Sale and to whom. Because of those deficiencies, Hsu argued that the Board was prevented from "fully complying with its duties to negotiate for a right of first offer,"[5] and had failed to recognize that the Sale constituted a change of control transaction.[6]

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[4] *See* Pls.' Answering Br. in Opp. to Def's Mot. to Dismiss or Stay ("Pls.' Answering Br."), Ex. A ("First Delaware Complaint").
[5] First Delaware Complaint ¶ 41.
[6] *Id.* at ¶¶ 18, 41.

On October 23, 2009, the Board met to discuss the FWH Offer. Hsu and his personal counsel were invited to the meeting, and they informed the Board that Ybrant, the backer of the FWH Offer, was only interested in a transaction in which it would acquire a majority of ODN's outstanding shares on a fully diluted basis. Because of Ng and Oak Hill's substantial holdings in ODN, the Board decided it would not devote serious time to the FWH Offer until it learned whether Oak Hill and/or Ng was interested in it. At the October 23 meeting, the Board also expressly adopted the position taken by the Disinterested Directors, that the Sale did not present a threat to ODN. On October 27, 2009, the Sale closed. On November 5, 2009, Hsu voluntarily dismissed the First Delaware Action with prejudice. The following day, Hsu exercised his Co-Sale Right in the Sale and sold 14,103,536 shares of ODN common stock to Oak Hill for $0.7657654 per share or approximately $10.8 million. On November 13, 2009, Hsu resigned from the Board.

In November 2009, and again in January and May 2010, Hsu requested documents from ODN relating to the Sale. ODN initially rejected Hsu's requests on the basis that Hsu had failed to comply with 8 *Del. C.* § 220, but in May 2010, ODN agreed to make certain documents available for Hsu's inspection. Over the next several months, Hsu refused to inspect those documents, contending that ODN had not provided all of the documents that he had requested. In January

2011, however, Hsu did inspect the documents provided by ODN. Moreover, throughout 2010 and into 2011, ODN's management "assisted Mr. Hsu's financial advisor in efforts by Mr. Hsu and his Trust to market and sell their ODN shares. . . ."[7]

On July 27, 2011, Hsu, and three other plaintiffs, Larry Paisley, Scott Beber, and Ron Sheridan, initiated the California Action.[8] Although most of the claims asserted in the California Action "arise out of the same set of operative facts and circumstances . . . as the claims . . . asserted in the . . . [First Delaware] Action . . . ,"[9] the California Action is broader than the First Delaware Action. The California Action involves four plaintiffs instead of just one, and those plaintiffs have asserted claims against Oak Hill, ODN, and the entire Board (except Hsu), as opposed to just ODN and Ng. Moreover, the California Complaint consists of three causes of action instead of just one.[10] The First Cause of Action alleges that Oak Hill and the Board breached their fiduciary duties to all of ODN's shareholders, including the California plaintiffs,

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[7] Second Delaware Complaint ¶ 66.
[8] *See* Pls.' Answering Br., Ex. B ("California Complaint").
[9] Second Delaware Complaint ¶ 70.
[10] The Court does recognize that the California Action is not that dissimilar from the First Delaware Action. Although the California Action involves more plaintiffs and more claims, the crux of the California Action appears, like the First Delaware Action, to be a dispute between Hsu, on the one hand, and ODN and Ng, on the other, about the terms of the Sale. Nevertheless, as described above, there are several distinctions between the two actions.

> by failing to exercise ODN's right of first offer to purchase the shares subject to the . . . [Sale], by failing to consider the proposed purchase of all common stock by FWH . . . and Ybrant, by refusing to allow FWH . . . and Ybrant to conduct due diligence for that proposed purchase, by refusing to seek or agree to a "standstill" agreement involving Oak Hill and Ng that would enable those steps to occur, and by refusing to pursue an auction process for the sale of the company in order to take other steps to ensure that the company and shareholders would receive maximum value through the change of control over ODN.[11]

The First Cause of Action also alleges that Oak Hill aided and abetted the Board's breach of its fiduciary duties. The Second Cause of Action, which is asserted on behalf of Hsu, alleges that ODN breached the Stockholders' Agreement for the same reasons that Oak Hill and the Board breached their fiduciary duties.[12] The Second Cause of Action also alleges that ODN breached an investor's agreement by denying Hsu access to ODN's books and records,[13] and that ODN's breaches of contract have interfered with Hsu's ability to market and sell his shares of ODN common stock to third parties.[14] The Third Cause of Action, which is asserted on behalf of Paisley, Beber, and Sheridan, alleges that ODN breached certain stock option agreements.

On August 17, 2011, three weeks after the California Action was filed, ODN, Oak Hill, and the Board (the "Delaware Plaintiffs") filed the Second

[11] California Complaint ¶ 109.
[12] *See supra* note 11 and accompanying text.
[13] California Complaint ¶ 114.
[14] *Id.* at ¶ 115.

Delaware Action against Hsu. The crux of the Second Delaware Complaint is that most of the claims Hsu asserts in the California Action either were asserted or should have been asserted in the First Delaware Action, and because that action was dismissed with prejudice most of the claims that Hsu asserts in the California Action are barred by either res judicata or collateral estoppel. Moreover, the Delaware Plaintiffs contend that Hsu's claims in the California Action "have no valid factual or legal basis."[15] The Second Delaware Complaint consists of five counts, seeking: (I) an injunction prohibiting Hsu from prosecuting the California Action; (II) a declaration that neither ODN, nor Oak Hill, nor Ng breached the Stockholders' Agreement in connection with the Sale; (III) a declaration that the Board did not breach its fiduciary duties in connection with the Sale; (IV) a declaration that, at the time of the Sale, Oak Hill did not owe fiduciary duties to ODN's stockholders, and even if it did, that Oak Hill did not breach those duties in connection with the Sale; and (V) a declaration that Oak Hill did not aid and abet any alleged breach of the Board's fiduciary duties.

## III. CONTENTIONS

Hsu has moved to dismiss or, alternatively, to stay the Second Delaware Action in favor of the California Action. Hsu first argues that this Court does not have subject matter jurisdiction over Count I of the Second Delaware Complaint,

[15] Second Delaware Complaint ¶¶ 85, 96, 114, 122.

which seeks to enjoin Hsu from prosecuting the California Action. Hsu contends that Count I is not based on an equitable right and that it does not involve a subject matter that has been committed to this Court's jurisdiction by statute. Therefore, Hsu argues that this Court can only exercise jurisdiction over Count I if, in that count, the Delaware Plaintiffs seek an equitable remedy. Although in Count I of the Second Delaware Complaint, the Delaware Plaintiffs seek an injunction, a remedy that Hsu admits is equitable, Hsu explains that a plaintiff is only entitled to an equitable remedy if she has no adequate remedy at law.[16] Hsu then contends that the Plaintiffs can raise the claims they assert in the Second Delaware Action as defenses in the California Action, and that that is an adequate remedy at law. Therefore, Hsu concludes that this Court does not have jurisdiction to grant the injunction the Delaware Plaintiffs seek in Count I of the Second Delaware Complaint.

Hsu also argues that regardless of whether the Court has jurisdiction over Count I, the entire Second Delaware Action should be stayed or dismissed under the reasoning of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*.[17] Hsu contends that dismissing or staying the Second Delaware Action would promote two laudable policy goals, namely, comity and avoiding piecemeal

[16] *See PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *3 (Del. Ch. Dec. 16, 2011) ("[T]his Court still possesses authority to provide an equitable remedy where there is no adequate remedy at law.") (citing 10 *Del. C.* § 342; *Wilmont Homes, Inc. v. Weiler*, 202 A.2d 576, 580 (Del. 1964)).
[17] 263 A.2d 281 (Del. 1970).

litigation. With regard to piecemeal litigation, Hsu argues that the California Action is broader than the Second Delaware Action, and that all of the claims raised in the Second Delaware Action can be addressed in the California Action, while all of the claims raised in the California Action cannot be addressed in the Second Delaware Action.

In opposing Hsu's motion to dismiss or stay, the Delaware Plaintiffs argue that this Court has subject matter jurisdiction over Count I of the Second Delaware Complaint. The Delaware Plaintiffs contend that Hsu's argument that this Court lacks subject matter jurisdiction over Count I of the Second Delaware Complaint is really an argument "that there can never be irreparable harm sufficient to enjoin the prosecution of litigation in another forum because a party in the other forum can simply raise the existence of litigation in Delaware as a defense."[18] The Delaware Plaintiffs then reject what they take to be Hsu's argument, stating that

> [i]f . . . [it] were the case [that a plaintiff could never show irreparable harm sufficient to enjoin the prosecution of litigation in another forum], then this Court could never enter an injunction in aid of its jurisdiction. It is well settled, however, that this Court has discretion to grant injunctive relief in aid of its jurisdiction and has done so to prevent "forum maneuvering" and to further judicial economy.[19]

[18] Pls.' Answering Br. at 19.
[19] *Id.* at 19-20.

The Delaware Plaintiffs also argue that *McWane* is inapplicable to the Second Delaware Action, and that staying or dismissing the Second Delaware Action would not promote comity or efficiency.

## IV. ANALYSIS

### A. *The Court has Jurisdiction over Count I*

This Court possesses the inherent power to issue an injunction in aid of its jurisdiction.[20] Although the Delaware Plaintiffs have failed to cite a case where this Court enjoined a party from pursuing a case that was "first-filed" in another forum, that does not mean that the Court does not have the ability to do so. Hsu correctly explains that in *Sinclair Canada Oil Co. v. Great Northern Oil Co.*,[21] "[t]his Court . . . found that an injunction . . . [was] not warranted where . . . the parties were not litigating in a pending Delaware proceeding when the Delaware plaintiffs filed the second action."[22] The Court in *Sinclair*, however, specifically noted that "[b]oth parties are Delaware corporations, and this Court's power to act [i]n personam upon Great Northern by directing it to proceed no further . . . is conceded."[23] The *Sinclair* Court then went on to discuss why it would not issue an injunction in the case before it, but the Court did not determine that it did not have the jurisdiction to issue an injunction. Rather, the Court considered whether to

[20] *Household Int'l, Inc. v. Eljer Indus., Inc.*, 1995 WL 405741, at *2-3 (Del. Ch. June 19, 1995).
[21] 233 A.2d 746 (Del. Ch. 1967).
[22] Def.'s Reply Br. in Supp of His Mot. to Dismiss or Stay ("Def.'s Reply Br.") at 24.
[23] 233 A.2d at 750 (citing *Cole v. Cunningham*, 133 U.S. 107, 120 (1889)).

issue an injunction and, as Hsu himself states, "found that an injunction . . . [was] not *warranted*."[24] This Court has the authority to issue an injunction in aid of its jurisdiction even when an action filed in Delaware is the last-filed of two or more similar actions filed in different jurisdictions. Therefore, the Court has subject matter jurisdiction over Count I of the Second Delaware Complaint. Hsu does not contend that the Court lacks jurisdiction over Counts II-V of the Second Delaware Complaint, and thus, the Court has jurisdiction over all of the counts alleged in that complaint.

B. *The Court will Stay the Second Delaware Action*

Although the Court has jurisdiction to decide all of the issues raised in the Second Delaware Complaint, the Court is not required to exercise that jurisdiction. "It is . . . well settled that this Court's discretion 'should be exercised freely in favor of . . . [a] stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues.'"[25] As discussed below, the Court holds that the California Action was filed before the Second Delaware Action, the California Superior Court is capable of providing prompt and complete justice, and there is a "substantial

[24] Def.'s Reply Br. at 24 (emphasis added).
[25] *Dura Pharm., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 928 (Del. Ch. 1998) (quoting *McWane*, 263 A.2d at 283).

identity" between the issues and parties in the California Action and the Second Delaware Action. Therefore, the Court will stay the Second Delaware Action.

1. The California Action was Filed Before the Second Delaware Action

The standard the Court uses to decide whether to issue a stay generally depends upon whether the action pending before the Court was filed before or after the action pending in another jurisdiction. Under *McWane* and its progeny, "[i]f 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.'"[26] "On the other hand, when a Delaware action is considered first-filed or when multiple actions are contemporaneously filed, this Court examines a motion to stay 'under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other.'"[27]

"The determination of which action was filed first is a question of fact determined by reference to the underlying procedural facts."[28] The Second Delaware Action was filed three weeks after the California Action. Nevertheless, the Delaware Plaintiffs argue that under the reasoning of *United Phosphorus, Ltd.*

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[26] *Rapoport v. Litig. Trust of MDIP Inc.*, 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005) (quoting *Kurtin v. KRE, LLC*, 2005 WL 1200188, at *3 (Del. Ch. May 16, 2005)) (other citation omitted).

[27] *Rosen v. Wind River Sys., Inc.*, 2009 WL 1856460, at *3 (Del. Ch. June 26, 2009) (citing *Rapoport*, 2005 WL 3277911, at *2).

[28] *Rapoport*, 2005 WL 3277911, at *2 (citing *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)).

*v. Micro-Flo, LLC*,[29] the Second Delaware Action should be considered to have been filed before the California Action because the Second Delaware Action is a continuation of the First Delaware Action.

In *United Phosphorus*, the plaintiffs ("UP") filed a complaint in the United States District Court for the District of Delaware on October 23, 1999, asserting one federal law claim, as well as several claims under Delaware law.[30] The defendants ("Micro-Flo") moved to dismiss that complaint on the basis that UP had failed to state a federal cause of action. "The District Court granted th[at] motion on September 29, 2000, and the Third Circuit Court of Appeals affirmed the District Court decision on November 6, 2001."[31] On January 23, 2000, while the appeal to the Third Circuit was pending, Micro-Flo filed a complaint in Georgia state court that involved issues and parties similar to those in the District Court action. On May 4, 2001, UP filed an action in the Delaware Superior Court that involved issues and parties similar to those in both the District Court action and the Georgia action. After the Third Circuit affirmed the dismissal of the District Court complaint, Micro-Flo moved to dismiss or stay the Superior Court action in favor of the Georgia action.[32] The Superior Court granted that motion, reasoning that the Georgia action was filed over a year before the Superior Court

[29] 808 A.2d 761 (Del. 2002).
[30] *Id.* at 763.
[31] *Id.*
[32] *Id.*

action.[33] The Delaware Supreme Court, however, reversed that decision. The Supreme Court held that the Superior Court action should be viewed as a continuation of the District Court action because "1) UP did not voluntarily abandon its first choice of forum, and 2) when forced to refile in State court, UP repeated the exact same state law claims as it raised in its original federal complaint."[34] Because the Superior Court action was a continuation of the District Court action, the Supreme Court held that the Superior Court action would be considered as having been filed at the time the District Court action was filed, which was well before the Georgia action was filed.

The facts in *United Phosphorous* differ materially from the facts here. Hsu, unlike UP, abandoned his first choice of forum. Moreover, the California Action is significantly broader than the First Delaware Action. The California Action involves more plaintiffs, more defendants, and more claims than the First Delaware Action. It is also important that the dispute between the parties in *United Phosphorous* was continually on-going. UP filed an action in District Court, and, while that action was working its way through the federal appellate process, UP and Micro-Flo filed competing state court actions. Hsu dismissed the First Delaware Action with prejudice two weeks after he filed it, and no defendant ever appeared in that action. More than twenty months later, Hsu and three other

[33] *Id.* at 763-64.
[34] *Id.* at 765.

plaintiffs initiated the California Action, and three weeks after that the Delaware Plaintiffs initiated the Second Delaware Action. Those procedural facts suggest that the Delaware Plaintiffs filed the Second Delaware Action in response to the filing of the California Action. Therefore, the Second Delaware Action is not a continuation of the First Delaware Action, and the Second Delaware Action will not be considered to have been filed before the California Action.

Even if the Second Delaware Action is not considered to be a continuation of the First Delaware Action, the Delaware Plaintiffs argue that the Second Delaware Action should be considered to have been filed contemporaneously with the California Action "because the [Second] Delaware Action was filed in the same general time frame as the California Action and because of the nearly equivalent procedural postures of both actions."[35] This Court often treats actions that are filed closely in time as contemporaneously filed.[36] However, "a second-filed, *reactive* Delaware action will [not typically] succeed in ousting a foreign plaintiff of its choice of forum simply by the speed with which it is filed."[37] As discussed above, the procedural facts of this case suggest that the Delaware Plaintiffs filed the Second Delaware Action in response to the filing of the

[35] Pls.' Answering Br. at 24.
[36] *See, e.g.*, *Rosen*, 2009 WL 1856460, at *5 ("[I]f one considers the June 12 Alam or KBC Complaints as earlier-filed and ignores their representative nature, the time difference between those filings and the June 16 filing of the Delaware Action is not the type of delay, given what occurred between June 12 and June 16, that would trigger an application of *McWane.*") (citations omitted).
[37] *Dura*, 713 A.2d at 929 (emphasis in original).

California Action. Thus, the Second Delaware Action and the California Action were not contemporaneously filed. The California Action was filed before the Second Delaware Action.

2. The California Superior Court is Capable of Providing Prompt and Complete Justice

The California Action includes all of the parties and issues that are in the Second Delaware Action, and "[t]his court presumes that the California Superior Court will afford . . . [the Delaware Plaintiffs] all of . . . [their] due process rights and give . . . [them] the opportunity fully and fairly to litigate a motion to dismiss the California [A]ction on grounds of *res judicata.*"[38] Moreover, the California Action involves parties and issues that are not properly before this Court, and if only one forum can address all of the claims arising out of a controversy, it will generally make sense to have the controversy litigated in that forum.[39]

Although "[t]his Court has noted that actions raising 'novel and substantial issues of Delaware corporate law' are best resolved in Delaware courts,"[40] this Court has also made it clear that "[i]n some cases, other courts are more than

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[38] *Examen, Inc. v. VanatagePoint Venture Partners 1996*, 2005 WL 1653959, at *2 (Del. Ch. July 7, 2005).

[39] *See El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 41 (Del. 1995) ("Not only is the Texas court perfectly capable of ruling upon El Paso's forum-based defense, it is also able to adjudicate the various legal claims concerning the validity of the Settlement Agreement, an issue that was not before the Court of Chancery.").

[40] *In re Chambers Dev. Co., Inc. S'holders Litig.*, 1993 WL 179335, at *3 (Del. Ch. May 20, 1993) (quoting *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*, 1985 WL 21129, at *2 (Del. Ch. Oct. 9, 1985)).

capable of interpreting Delaware corporate law."[41] The Delaware Plaintiffs argue that the Sale involves novel and important issues of Delaware law, but the Court fails to see what those issues are. The Second Delaware Complaint asserts garden variety issues—what is the preclusive effect of a dismissal with prejudice; what do certain contract provisions mean; did certain fiduciaries breach their duties in connection with the Sale? There is no reason to think that the California Superior Court is not fully capable of addressing those issues. Thus, the California Superior Court is capable of providing prompt and complete justice on the issues arising out of the Sale.

3. The California Action and the Second Delaware Action Involve Substantially the Same Parties and Issues

In order for the Court to issue a stay under *McWane*, "it is not necessary to establish that the parties and issues in both actions are identical. 'Substantial' identity suffices; the pragmatic focus is on whether the claims 'are closely related and arise out of the same common nucleus of operative facts.'"[42] As stated above, the Second Delaware Complaint seeks declarations that the Delaware Plaintiffs did not commit certain wrongs alleged in the California Complaint, and an injunction, preventing Hsu from prosecuting the California Action. Moreover, the California Action involves all of the parties and issues that are addressed in the Second

[41] *Id.*
[42] *EuroCapital Advisors, LLC v. Colburn*, 2008 WL 401352, at *2 (Del. Ch. Feb. 14, 2008) (quoting *Dura*, 713 A.2d at 930).

Delaware Action. Thus, there is a "substantial identity" between the parties and issues in the California Action and the Second Delaware Action.

## V. CONCLUSION

For the foregoing reasons, Hsu's motion to dismiss the Second Delaware Action is denied, but his motion to stay the Second Delaware Action is granted. The Second Delaware Action will be stayed instead of dismissed because the California Action is in its initial stages. Depending on what happens in the California Action, the Court might, upon appropriate application, move forward with the Second Delaware Action. For example, if Hsu fails to prosecute the California Action, or if the California Superior Court declines to exercise jurisdiction over the California Action, the Court would consider lifting the stay.

An implementing order will be entered.