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Case No. 3643-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE BEAR STEARNS COMPANIES, INC.	)	CONSOLIDATED
SHAREHOLDER LITIGATION	)	C.A. NO. 3643-VCP

MEMORANDUM OPINION

Submitted: March 31, 2008
Decided: April 9, 2008

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PARSONS, Vice Chancellor.

This is a consolidated stockholder class action brought by two Michigan pension funds challenging the proposed merger of Bear Stearns and JPMorgan. Certain other Bear Stearns stockholders filed similar suits in the New York Supreme Court a few days earlier. This matter is currently before me on Defendants' motion to stay or dismiss the Delaware action based on the earlier filed New York actions.

For analytical purposes, the Delaware and New York actions are essentially contemporaneously filed. In such circumstances, this Court conducts a balancing of relevant considerations akin to the *forum non conveniens* analysis, to determine whether the Delaware action should be stayed. The two most relevant factors in this instance are the pendency of a similar action in another jurisdiction and other practical considerations that, in the unique circumstances of this case, make the possibility of two competing actions proceeding on parallel tracks especially onerous. The plaintiffs in both forums seek expedited hearings on motions for preliminary injunction, and the New York court has scheduled such a hearing for May 8, 2008. Further, the situation at Bear Stearns that gave rise to the challenged merger was so dire that the Federal Reserve intervened at potentially great expense to U.S. taxpayers. As discussed in this memorandum opinion, I have decided in the exercise of my discretion and for reasons of comity and the orderly and efficient administration of justice, not to entertain a second preliminary injunction motion on an expedited basis and thereby risk creating uncertainty in a delicate matter of great national importance. I therefore grant Defendants' motion to stay.

I. FACTS[1]

A. The Parties

Plaintiff Police and Fire Retirement System of the City of Detroit owns, and at all relevant times owned, more than 13,000 shares of Bear Stearns common stock.

Plaintiff Wayne County Employees' Retirement System ("Wayne County") owns, and at all relevant times owned, approximately 5,500 shares of Bear Stearns common stock.[2]

Defendant The Bear Stearns Companies Inc. ("Bear Stearns") is a Delaware corporation. Bear Stearns is a holding company and, through its broker-dealer and international bank subsidiaries, is a leading investment, securities, and derivatives trading, clearance, and brokerage firm serving corporations, governments, and institutional and individual investors worldwide.

The individual Defendants comprise the board of directors of Bear Stearns.

Defendant JPMorgan Chase & Co. ("JPMorgan"), a Delaware corporation, is a leading global financial services firm with assets of $1.5 trillion and operations in more than fifty countries. The firm is a leader in investment banking, financial services for consumers, small business, and commercial banking, financial transaction processing, asset management, and private equity.

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[1] Unless otherwise indicated, the facts recited in this memorandum opinion are drawn from the allegations in the two complaints filed in this Court. *Police and Fire Ret. Sys. of the City of Detroit v. Bear Stearns Cos.*, C.A. No. 3638-VCP and *Wayne County Employees' Ret. Sys. v. Cayne*, C.A. No. 3643-VCP.

[2] *See* Pls.' Answering Br. ("PAB") at 11 n.17.

B. Bear Stearns' Liquidity Crisis

Because of rumors circulating throughout the financial community regarding Bear Stearns' financial condition, customers began withdrawing their funds from Bear Stearns and, toward the latter part of the week of March 10, 2008, Bear Stearns was faced with a liquidity crisis. In accordance with customary industry practice, Bear Stearns held a substantial portfolio of investment grade assets and financed its operations through short term (largely day-to-day) borrowings secured by those assets.[3] By March 13 and 14, counterparties to Bear Stearns declined to provide it short-term funding on customary terms.[4] This unwillingness to fund on a secured basis placed enormous stress on the liquidity of Bear Stearns. On Thursday, March 13, Bear Stearns' liquidity pool fell sharply; it continued to fall on Friday, March 14, and the market rumors became self-fulfilling.[5]

Amid these conditions, Bear Stearns found itself facing bankruptcy and the imminent threat of a disorderly wind-down.[6] According to Treasury Secretary Paulson, it is the job of regulators to address times of turmoil in the capital markets, such as the

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[3] *See* Aff. of John P. DiTomo ("DiTomo Aff.") Ex. F, Letter of SEC Chairman Christopher Cox to the Basel Committee in Support of New Guidance on Liquidity Management (Mar. 20, 2008), at 3.

[4] *Id.*

[5] *Id.*

[6] *See* DiTomo Aff. Ex. H, Remarks of Treasury Secretary, Henry M. Paulson, Jr., on Current Financial and Housing Markets at the U.S. Chamber of Commerce (Mar. 26, 2008).

recent reduced access to short-term funding and liquidity issues. To preserve the stability and orderliness of the financial markets, the Federal Reserve acted promptly to resolve the Bear Stearns situation.[7]

On Friday, March 14, 2008, the Federal Reserve and JPMorgan, with the support of the Department of the Treasury, agreed to provide emergency funding to Bear Stearns. Under the terms of the agreement, the Federal Reserve Bank of New York and JPMorgan agreed to provide an unspecified amount of secured funding to Bear Stearns for up to 28 days. Further, through its Discount Window, the Federal Reserve Bank of New York would provide a form of non-recourse financing to JPMorgan. Also, on March 14, the per share price of Bear Stearns common stock decreased from a close of $57.00 on March 13, to a close of $30.00, the largest one-day decrease in nearly two decades. Credit-ratings firms downgraded Bear Stearns to two or three levels above junk status. Banks and other counterparties stopped taking collateral on short-term lines of credit, even those secured by the highest quality mortgage bonds backed by Fannie Mae and Freddie Mac.

C. The Merger Agreements

On March 16, 2008, Bear Stearns and JPMorgan announced a merger (the "Merger Agreement"). Under the terms of the Merger Agreement, JPMorgan agreed to acquire Bear Stearns in a stock merger transaction, in which Bear Stearns stockholders would receive 0.05473 JPMorgan shares per Bear Stearns share, or approximately $2 (at announcement). In a related move, the Federal Reserve agreed to lend JPMorgan up to

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[7] *Id.*

$30 billion on a non-recourse basis secured by a pool of Bear Stearns' less liquid assets. Additionally, JPMorgan agreed to provide an immediate, broad guaranty of Bear Stearns' trading obligations.

The Merger Agreement and related agreements also contained deal protection measures including, among other things: a Section 203 waiver; an option for JPMorgan to purchase Bear Stearns' corporate headquarters building for $1.1 billion (the "Asset Option");[8] and an option for JPMorgan to purchase approximately 19.9% of Bear Stearns stock for $2 per share.

After the announcement of the Merger Agreement, Bear Stearns' prime brokerage customers continued moving their assets to other brokerages. This customer flight reportedly resulted from widespread concern and uncertainty over whether JPMorgan's proposed merger with Bear Stearns would be consummated, heightened by speculation that Bear Stearns stockholders would vote down the deal and take their chances if Bear Stearns were liquidated. Notwithstanding JPMorgan's guaranty — which was to stay in place for a substantial period even if the merger was voted down — customers feared that Bear Stearns would not survive and that, as a result, its business operations would be jeopardized and its customers would not have ready access to their securities.

On March 24, 2008, Bear Stearns and JPMorgan announced an amended merger agreement (the "Amended Merger Agreement") and related Share Exchange Agreement

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[8] Plaintiffs suggest the building's estimated value lies somewhere between $1.2 and $1.6 billion.

("SEA"). Among other things, the Amended Merger Agreement increased the merger consideration to 0.21753 JPMorgan shares per Bear Stearns share, or approximately $10. The Amended Merger Agreement also limited the guarantee by JPMorgan and the Federal Reserve. It carried forward some of the deal protection devices, such as the Section 203 waiver and the Asset Option.[9] Moreover, under the terms of the SEA, JPMorgan will exchange, for the same per-share consideration, 95 million newly issued, non-transferable shares of Bear Stearns common stock, or 39.5% of the outstanding common after giving effect to the issuance (the "JPMorgan Shares"). The share exchange was expected to be completed on April 8, 2008, before the record date for the Bear Stearns shareholder vote on the Amended Merger Agreement.

The merger remains subject to stockholder approval, which will require the preparation and dissemination of a proxy statement, followed by a vote of Bear Stearns' stockholders. Due to the need for SEC clearance of the proxy/registration statement to be issued in connection with the meeting, and applicable notice requirements, the parties do not anticipate a stockholder vote on the merger before May 14, 2008.

II. PROCEDURAL HISTORY

Between March 17 and 18, 2008, four separate stockholder class actions challenging the Bear Stearns-JPMorgan merger were filed in the New York Supreme

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[9] JPMorgan can now exercise the Asset Option even if Bear Stearns shareholders vote down the Amended Merger Agreement and 120 days elapse after the vote.

Court.[10] A fifth such action was filed on March 20.[11] Each of the five New York purported class actions allege that the proposed merger is at an inadequate price and was approved by the Bear Stearns directors in breach of their fiduciary duties.

On March 25, 2008, the New York Supreme Court held a scheduling conference at which the plaintiffs sought an expedited hearing on their request to preliminarily enjoin the issuance of the JPMorgan Shares, scheduled to occur on April 8.[12] Although Justice Herman Cahn, to whom the New York actions have been assigned, scheduled a hearing on plaintiffs' request for April 3, the plaintiffs later dropped their effort to block the April 8 stock issuance. Instead, the plaintiffs sought a schedule for discovery and briefing on a preliminary injunction motion to prevent the voting of the JPMorgan Shares at the mid-May stockholders meeting to approve the proposed merger.[13] Under a stipulated order agreed to by all parties, the New York court consolidated the New York actions (the "New York Action"), and established a schedule leading to a hearing on May 8 on the

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[10] DiTomo Aff. Exs. A – D. The four lawsuits are: *Yun v. Cayne, et al.*, Index No. 650078/08 (filed Mar. 18, 2008); *Kurtz v. Cayne, et al.*, Index No. 6900780/08 (filed Mar. 17, 2008); *David B. Shaev, IRA v. Cayne, et al.*, Index No. 600781/08 (filed Mar. 17, 2008); *Bobb v. Greenberg, et al.*, Index No. 600793/08 (filed Mar. 18, 2008).

[11] DiTomo Aff. Ex. E, *Louisiana Mun. Police Employees' Ret. Sys. v. The Bear Stearns Cos. Inc., et al.*, Index No. 600830/08 (filed Mar. 20, 2008).

[12] DiTomo Aff. ¶ 2; Transcript of Mar. 25, 2008 Conference in New York Supreme Court, filed in open court in this action on Mar. 31, 2008.

[13] *Id.*

plaintiffs' request to preliminarily enjoin the shareholder vote in connection with the merger.[14]

On March 20 and 24, 2008, three days and seven days after the filing of the first New York cases, the pension fund plaintiffs in Delaware filed their respective complaints in this Court. Both actions purport to be class actions on behalf of all Bear Stearns shareholders. Several days later, the Delaware Plaintiffs moved to consolidate those actions (collectively the "Delaware Action"), and having heard no opposition to that motion, I am granting it concurrently with this memorandum opinion.

The Delaware Action closely parallels the New York Action. The Delaware Plaintiffs challenged the Amended Merger Agreement and related transactions, and requested, among other relief, an order temporarily restraining the "Lock Up Stock Sale" of the JPMorgan Shares or, alternatively, the voting of those Shares.[15] On March 25, the Delaware Plaintiffs filed a joint application for a temporary restraining order against the anticipated April 8 "Lock Up Stock Sale," but later abandoned that application in favor of pursuing a preliminary injunction preventing JPMorgan from voting any of the shares acquired through that sale.

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[14] DiTomo Aff. Ex. G, *In re Bear Stearns Litig.*, Index No. 600780/08, Consolidation and Scheduling Order (N.Y. Sup. Ct. Mar. 26, 2008).

[15] Unlike any of the previous complaints, Wayne County's Delaware complaint challenged the Amended Merger Agreement, as opposed to the initial Merger Agreement. The New York plaintiffs, however, now have filed an Amended Complaint that also challenges the Amended Merger Agreement and related agreements. *See* Defs.' Reply Br. ("DRB") at 2 n.1.

On March 27, 2008, Defendants moved to dismiss or in the alternative stay the Delaware Action. After briefing, the Court heard argument on that motion on March 31. In their briefs and argument, Defendants focused most, if not all, of their attention on the motion to stay. Consequently, I address only the parties' arguments for and against a stay. This is the Court's ruling on Defendants' motion.

III. THE PARTIES' CONTENTIONS

The claims asserted in the New York and Delaware Actions are essentially the same. In each forum, the plaintiffs assert the merger consideration is too low and the merger process was unfair, such that the defendant directors breached their fiduciary duties by virtue of their involvement with the merger. Because Defendants in this action have moved to stay or dismiss it, they have not yet addressed the merits of Plaintiffs' claims.

Bear Stearns and JPMorgan seek to stay the Delaware Action, arguing that otherwise Defendants and the broader public interest uniquely implicated here will be subject to the risks, burdens, and uncertainties of two parallel, expedited proceedings brought on behalf of the same class asserting the same claims in different jurisdictions. Specifically, Bear Stearns and JPMorgan seek to stay the contemporaneously filed Delaware Action based on a balancing of the factors considered in a *forum non conveniens* analysis. They assert that under such a balancing approach, the following factors are paramount: New York is a more convenient forum; the New York court intends to proceed with a preliminary injunction hearing; the challenged merger and

related transactions involve unique facts and circumstances, not likely to be repeated; and the hardship and irrationality posed by dual preliminary injunction proceedings outweighs Delaware's interest in this dispute. Among the unusual factual circumstances of the challenged transaction, Defendants emphasize the perceived need for the merger in order to avert disorder in the financial markets and the material involvement of third parties based in New York, such as the Federal Reserve Bank of New York.

Plaintiffs respond that Delaware is the proper forum because this dispute involves numerous novel and substantial issues of Delaware law. Specifically, Plaintiffs contend the proposed transactions include perhaps the most extreme combination of deal protections approved by a board of directors of a public Delaware corporation ever considered by this Court. Additionally, Plaintiffs argue that this litigation should proceed here because Delaware has the authority to regulate the internal affairs of its corporations, and this Court is uniquely positioned as the regular arbiter of corporate law disputes to resolve the contested issues.

IV. ANALYSIS

The granting of a motion to stay is not a matter of right, but rather rests within the sound discretion of the court.[16] The court should inform its analysis with considerations of comity and the necessities of an orderly and efficient administration of justice.[17] In

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16 *See 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)).

17 *See Adirondack*, 1996 WL 684376, at *6 (citing *McWane*, 263 A.2d at 283).

assessing which of multiple actions challenging the same conduct should proceed, the Court of Chancery often applies the *McWane*[18] doctrine, also known as the first-filed rule. Under the first-filed rule, this Court freely exercises its broad discretion to grant 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."[19]

Where the multiple actions are contemporaneously filed, however, this Court evaluates a motion to stay "'under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other.'"[20] The *forum non conveniens* factors are:

> (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the pendency or non-pendency of a similar action or actions in another jurisdiction, (5) the possibility of a need to view the premises, and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.[21]

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

19 *McWane*, 263 A.2d at 283.

20 *Rapaport v. The Litig. Trust of MDIP Inc.*, 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005) (citing Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in Delaware Court of Chancery*, § 5-1[a] and *HFTP Invs., L.L.C. v. ARIAD Pharms., Inc.*, 752 A.2d 115, 122 (Del. Ch. 1999)).

21 *Ryan*, 918 A.2d at 351 (citing *In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at *2 (Del. Ch. May 20, 1993)). As the parties agree, the fifth factor is inapplicable here. *See* DRB at 5-6; PAB at 17 n.24.

Motions to stay litigation on grounds of *forum non conveniens* are granted only in the rare case.[22]

Here, because the first New York action and the first Delaware action were filed in the same general time frame, only three days apart, I consider them contemporaneous filings.[23] In fact, the parties themselves generally characterize the actions as contemporaneous. Therefore, the *forum non conveniens* framework is more applicable than the *McWane* doctrine. Additionally, even if I considered the New York Action first-filed, that has little significance in the present context, where all of the competing lawsuits are representative class action suits. For multiple representative cases, the appropriate approach is something akin to a *forum non conveniens* analysis. Indeed, this Court has recognized the unique challenges of the first-filed rule in the context of representative lawsuits. As Chancellor Chandler explained as to a derivative suit:

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22 *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 135 (Del. 2006). To succeed on a motion to stay litigation such as this on grounds of *forum non conveniens*, debate exists regarding whether a defendant must show "overwhelming hardship and inconvenience" or merely illustrate that the relevant factors preponderate in his favor. The debate has arisen in the context of whether success on a motion to stay the litigation rather than dismiss it pursuant to *forum non conveniens* requires the showing of "overwhelming hardship and inconvenience." *See Brandin v. Deason*, 941 A.2d 1020, 1024 n.13 (Del Ch. 2007) (comparing *HFTP*, 752 A.2d at 121, with *Ryan*, 918 A.2d at 351, cases which apply different standards in each context.). *See also Aveta, Inc. v. Delgado*, 942 A.2d 603, 608 n.12 (Del. Ch. 2008). Not surprisingly, Plaintiffs argue in favor of the "overwhelming hardship" standard, and Defendants argue against it. Because in this case Defendants meet the more stringent standard, I need not address this debate further.

23 This Court treats as simultaneous, complaints filed within the same general time frame. *In re Chambers Dev. Co.*, 1993 WL 179335, at *7.

> A shareholder plaintiff does not sue for his direct benefit. Instead, he alleges injury to and seeks redress on behalf of the corporation. Further, the board or any shareholder with standing may represent the injured party. Thus, this Court places less emphasis on the celerity of such plaintiffs and grants less deference to the speedy plaintiff's choice of forum. [Therefore], this Court proceeds cautiously when faced with the question of whether to defer to a first-filed derivative suit, "examin[ing] more closely the relevant factors bearing on where the case should best proceed, using something akin to a *forum non conveniens* analysis."[24]

The same considerations apply in the case of class actions.

Turning to the unusual circumstances of this case, the fourth and sixth *forum non conveniens* factors predominate in terms of importance -- *i.e.*, the pendency or non-pendency of a similar action or actions in another jurisdiction and all other practical considerations relevant to the orderly and efficient administration of justice. Before addressing those factors, however, I briefly discuss Plaintiffs' argument regarding the applicability of Delaware law.

Plaintiffs note that Bears Stearns was formed under the laws of Delaware and both the Amended Merger Agreement and the SEA provide that they shall be governed in accordance with the laws of Delaware and that any action arising out of or in connection with the agreements or transactions contemplated by them shall be brought in Delaware.

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[24] *Ryan*, 918 A.2d at 349 (quoting *Biondi v. Scrushy*, 820 A.2d 1148, 1159 (Del. Ch. 2003)); *see also In re The Topps Co. S'holders Litig.*, 924 A.2d 951, 956 (Del. Ch. 2007).

Further, Plaintiffs contend this litigation implicates both novel and important issues of Delaware corporate law.[25]

Defendants acknowledge the applicability of Delaware law, but dispute Plaintiffs' characterization of the issues presented here. They contend the applicable law cited by Plaintiffs involves settled principles articulated in cases decided a number of years ago. Defendants also emphasize that the facts of this case are unique.

Despite Plaintiffs' protestations to the contrary, the claims asserted in the Complaint only require the application of well-settled principles of Delaware law to evaluate the deal protections in the merger and the alleged breaches of fiduciary duty. There is no dispute that these principles will be applied by some court. Although the facts of the case are unusual, the uniqueness of facts does not transform settled law into new or novel legal issues. Moreover, several facts make it unlikely this extraordinary

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[25] According to Plaintiffs, this case:

> [R]aises new and substantial issues regarding the contextual requirements of directors' fiduciary duties and an unprecedented combination of preclusive and coercive defensive measures agreed to by the Bear Stearns' Board including the Lock Up Stock Sale designed to obstruct the voting franchise of the current Bear Stearns' shareholders in connection with the proposed merger with JP Morgan. . . . [and] present[] [them] with a merger *fait accompli* . . . .

PAB at 21-22 (citations omitted). Another issue is to what degree the Bear Stearns directors are "shielded from liability for entering into unfair lock-ups on the deal because of the alleged threat of insolvency or because the federal government may have insisted on these terms before it would support the bidder." *Id.* at 22-23. In support of their argument, Plaintiffs rely on *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988); *MM v. Liquid Audio*, 813 A.2d 1118 (Del. 2003); and *Schnell v. Chris-Craft Indus. Inc.*, 285 A.2d 437 (Del. 1971).

situation will recur or have wide application. Indeed, Christopher Cox, Chairman of the Securities and Exchange Commission, in reported testimony before a Congressional Committee characterized Bear Stearns' failure to obtain financing even though it had "high quality collateral" as "an unprecedented occurrence."[26] Thus, Delaware's interest in having this case heard in its courts is not quite as strong as in *Topps*[27] and *Ryan*,[28] in which this Court declined to stay Delaware actions involving novel issues having widespread application in favor of similar litigation in another state.[29]

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26 Stephen Labaton, *Rescue of Bear Stearns Under Scrutiny: Testimony About a Chief's Misunderstanding And Treasury's Push for a Low Purchase Price*, N.Y. TIMES, Apr. 4, 2008, at C5.

27 *In re The Topps Co. S'holders Litig.*, 924 A.2d 951 (Del. Ch. 2007).

28 *Ryan v. Gifford*, 918 A.2d 341 (Del. Ch. 2007).

29 In *Topps*, Vice Chancellor Strine found that the merger at issue was "part of a newly emerging wave of going private transactions involving private equity buyers who intend to retain current management." *Topps*, 924 A.2d at 954. The Court observed that "[t]his wave raises new and subtle issues of director responsibility that have only begun to be considered by our state courts," as well as interesting new questions of importance to transactional planners. Thus, the Court in *Topps* held Delaware had an important public policy interest in having its courts address such novel and emerging issues in the first instance.

Ryan also concerned novel issues of Delaware law in an emerging area. In *Ryan*, the allegations involved stock options backdating and raised fundamental issues the Delaware courts had not yet addressed. Similar issues have arisen in a number of recent Delaware cases involving misdated options. *See, e.g.*, *Conrad v. Blank*, 940 A.2d 28 (Del. Ch. 2007); *In re Tyson Foods, Inc.*, 2007 WL 2351071 (Del. Ch. Aug. 15, 2007) ("*Tyson II*"); *Brandin v. Deason*, 941 A.2d 1020 (Del. Ch. 2007); *Desimone v. Barrows*, 924 A.2d 908 (Del. Ch. 2007); *In re Tyson Foods, Inc.*, 919 A.2d 563 (Del. Ch. 2007) ("*Tyson I*").

That is not to say, however, that the issues of Delaware law presented by this dispute are not important; in fact, such issues ordinarily would be heard in this Court. Rather, I find the circumstances of this case to be *sui generis*. What is paramount is that this Court not contribute to a situation that might cause harm to a number of affected constituencies, including U.S. taxpayers and citizens, by creating the risk of greater uncertainty. In that sense, the key factors in determining whether to stay this litigation are the pendency of an identical action in another jurisdiction that is more procedurally advanced than Delaware (factor 4) and the other unique practical considerations (factor 6) of this case. I therefore turn to those factors.

In terms of the fourth *forum non conveniens* factor, the pendency of a similar action in another jurisdiction, there is a virtually identical action pending in New York, and it is proceeding on an expedited basis.[30] Indeed, the New York plaintiffs and defendants have agreed upon an expedited discovery and preliminary injunction briefing schedule. Discovery presumably has begun (document production was scheduled to begin March 31) and the New York court has scheduled a preliminarily injunction hearing on May 8.

Defendants contend that if the Delaware Action is not stayed, there is a real risk that both the New York and Delaware Actions will go forward on parallel, expedited

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[30] There is no dispute the Delaware and New York Actions arise from a common nucleus of operative facts.

tracks, creating unseemly and inefficient duplicative proceedings.[31] Duplicative proceedings are disfavored because they waste judicial and financial resources, and because the competing proceedings create the appearance of an unseemly race to decide with a potential for inconsistent rulings. Defendants further argue that in this extraordinary factual setting, the threat of harm is even greater. The hardship is allegedly magnified because duplicative and parallel preliminary injunction proceedings alone could undermine the market's perception of the Bear Stearns rescue plan and because the parties and third parties involved already are functioning in a pressure cooker, continuously monitoring the attempted rescue and the overall stability of the financial markets.[32]

Plaintiffs downplay the significance of the related case pending in New York in comparison to the important issues of Delaware law presented by this dispute. First, they

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[31] In *Topps*, Vice Chancellor Strine observed that because the New York court had not stayed its hand, "the possibility for an unseemly and inefficient duplication of effort" and the possibility of inconsistent results loomed. *Topps*, 924 A.2d at 960. The Vice Chancellor, however, predicted that the New York court would grant a stay in favor of Delaware. In fact, the same judge handling the pending New York Action found it appropriate under applicable New York law to proceed in New York with the *Topps* action. Nothing in the record before me suggests the New York Action will not go forward on the existing schedule.

[32] The Federal Reserve and JPMorgan worked together to rescue Bear Stearns and preserve the stability and orderliness of the financial markets. Timothy F. Geithner, the president of the Federal Reserve Bank of New York, reportedly testified before the Senate Banking Committee that a failure to save Bear Stearns would have led to "a greater probability of wide-spread insolvencies, severe and protracted damage to the financial system, and, ultimately, to the economy as a whole." *Labaton*, *supra* note 26, at C1.

argue that whatever potential harm defendants face from the prospect of litigation in two forums is of their own making.[33] In that regard, Plaintiffs imply Defendants colluded with the New York plaintiffs to position the New York Action ahead of this one by stipulating to a schedule immediately after being notified, on or about March 24, that the Delaware Plaintiffs were about to request a temporary injunction against the anticipated April 8 issuance of the JPMorgan Shares. Defendants deny any such collusion. Rather, they contend they were caught in a dispute among competing plaintiff stockholders and reacted in a forum neutral manner. In particular, Defendants point to the New York *Topps* case as supporting their conclusion that the New York court would proceed with an expedited proceeding challenging the Bear Stearns merger notwithstanding the filing of a similar stockholder suit in Delaware a couple of days later. Although Plaintiffs' skepticism of Defendants' tactical motives is understandable, it is not pertinent to my analysis.

Plaintiffs also argue the New York *Topps* case is distinguishable because it involved agreements with New York choice of law and choice of venue provisions, while the operative agreements in this dispute point to Delaware law and courts. A fair reading of *Topps*, however, does not suggest that this factual difference would cause the New York court to reach a different conclusion in this case. Consequently, I believe the May 8 preliminary injunction hearing in New York is likely to proceed whether or not this Court grants Defendants' motion to stay. An important factor, therefore, in deciding whether to

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33 *See* PAB at 13.

permit the Delaware Action to proceed in parallel with the New York Action is the risk of harm such competing litigations would create.

Regarding the sixth factor, all other practical considerations that would make the trial easy, expeditious, and inexpensive, this case raises practical considerations far beyond the typical concerns.[34] The practical considerations here include: two sets of plaintiffs in two fora; the risk that inconsistent rulings would negatively impact not only the parties involved, but also the U.S. financial markets and the national economy; and the involvement of unusual third party players, including, *inter alia*, the Federal Reserve Bank and the Department of the Treasury. Given these important and atypical practical considerations, this is the rare case where a stay may be appropriate.

Under a balancing of the relevant considerations in a *forum non conveniens* framework, the relatively unique circumstances of the Bear Stearns and JPMorgan merger and the dangers posed by multiple competing actions relating to that merger support a stay of the Delaware Action. As former Vice Chancellor, now Chief Justice Steele observed in the *Adirondack*[35] case, in deciding on a motion to stay: "Ultimately,

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[34] While significantly less important in the context of this case and unlikely to have been controlling in their own right, the second and third *forum non conveniens* factors, the relative ease of access to proof and the availability of compulsory process, confirm that New York, like Delaware, is an appropriate forum to hear this dispute. Therefore, a trial in New York would be no more inconvenient or disruptive to the parties and witnesses than a trial in Delaware, as prescribed in the parties' agreements.

[35] *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376 (Del. Ch. Nov. 13, 1996).

the exercise of the court's discretion will depend upon review of the relevant practical considerations keeping in mind the broader policies of comity between the states and their courts and the orderly and efficient administration of justice."[36] In this case, considering that the New York court has scheduled an expedited preliminary injunction hearing, the issues presented involve application of established precedents of Delaware corporate law to an unusual set of facts, which is unlikely to recur, and the persuasive practical reasons against embarking unnecessarily on a collision course with our sister court in New York in these extraordinary circumstances, I find Defendants have shown that failing to stay this action would result in overwhelming hardship. Accordingly, I will stay the Delaware Action.

V. CONCLUSION

For the reasons stated, Defendants' motion to stay the Delaware Action in favor of the New York Action is granted, at least until the preliminary injunction motion is resolved.

IT IS SO ORDERED.

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[36] *Id.* at *6.