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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Matthew F. Lintner, Esquire
Potter Anderson & Corroon LLP
1313 N. Market Street
Wilmington, DE 19801

Seth A. Niederman, Esquire
Fox Rothschild LLP
919 N. Market Street, Suite 1300
Wilmington, DE 19801

Re: *Brookstone Partners Acquisition XVI, LLC v. Tanus*
C.A. No. 7533-VCN
Date Submitted: August 10, 2012

Dear Counsel:

Plaintiff Brookstone Partners Acquisition XVI, LLC ("Brookstone") has moved to expedite proceedings in this matter. Specifically, Brookstone requests a preliminary injunction hearing before October 15, 2012 and a trial in January 2013 on certain claims that it has asserted against Defendant Abraham Tanus and his affiliates. The Court denies Brookstone's motion to expedite because Brookstone unreasonably delayed in seeking expedition.

* * *

Brookstone is a member of Woodcrafters Home Products Holding, LLC ("Woodcrafters" or the "Company"). Companies allegedly controlled and owned by Tanus are also members of Woodcrafters. Woodcrafters is a Delaware limited liability company governed by a board of managers. Tanus is alleged, at all relevant times, to have been an officer and manager of Woodcrafters.[1] Tanus is also the Chief Executive Officer of Woodcrafters Home Products, LLC ("WHP"). Tanus's employment with WHP is governed by an executive employment agreement (the "Employment Agreement"). Brookstone alleges that Woodcrafters owns 100% of the equity interests of WHP and benefits from all of the obligations that Tanus owes to WHP.[2]

On May 1, 2012, Tanus and certain of his affiliates filed a complaint in the District Court for the 139th Judicial District of Hidalgo County, Texas (the "Texas Action") against, among others, Brookstone. In the Texas Action, Tanus seeks a declaratory judgment that he did not breach the Employment Agreement or

[1] First Amended and Supplemental Direct and Derivative Complaint (the "First Amended Complaint" or "First Am. Compl.") ¶ 7.
[2] *Id.* at ¶ 31.

Woodcrafters' Amended and Restated Limited Liability Company Agreement (the "LLC Agreement") when, in June 2011, one of his affiliates, TruStone Products LLC ("TruStone"), acquired Design Imaging, LLC ("Design Imaging").[3] Design Imaging has allegedly been one of Woodcrafters' most important suppliers for the last few years,[4] and a licensing agreement between Woodcrafters and Design Imaging (the "Licensing Agreement") is currently set to expire by its own terms on October 15, 2012.[5]

On May 15, 2012, Brookstone initiated this action, alleging that Tanus has engaged in several transactions that violate his fiduciary duties, the Employment Agreement, and/or the LLC Agreement.[6] On July 25, 2010, Brookstone, Tanus, and the other parties to the Texas Action participated in a teleconference with the Texas Court for the purpose of scheduling a trial date in that action. The Texas

[3] There is some uncertainty as to whether TruStone acquired Design Imaging outright or whether TruStone only acquired certain of Design Imaging's assets. There is also uncertainty as to whether Design Imaging continues to exist as a separate entity or whether it was merged with TruStone or one of its affiliates. For simplicity, the Court assumes that Design Imaging still exists. This assumption has no effect on the Court's reasoning.
[4] First Am. Compl. ¶ 63.
[5] *Id.* at ¶ 65.
[6] Brookstone asked the Texas Court to stay the Texas Action, but was unsuccessful in those efforts.

Court originally offered the parties a trial date in February 2013. One of Brookstone's attorneys, however, requested that the trial be postponed until June 2013, and the parties ultimately agreed to an April 2013 trial date. On August 3, 2012, Brookstone moved to expedite this action.

* * *

Although there is typically no duty to extend an agreement, like the Licensing Agreement, which expires by its own terms, Brookstone argues that this case is unique because Tanus acquired Design Imaging in breach of his fiduciary duties, the LLC Agreement, and the Employment Agreement. Moreover, Brookstone contends that Tanus is causing Design Imaging to refuse to extend the Licensing Agreement for the alleged purpose of causing the value of Woodcrafters to decrease. Brookstone has an option to sell Woodcrafters to a third party on or after February 28, 2013, but companies that are allegedly controlled by Tanus have a right of first refusal correlative to Brookstone's option. Thus, Brookstone contends that Tanus is causing Design Imaging to refuse to renew the Licensing Agreement so that the value of Woodcrafters will decrease, which will directly harm Woodcrafters and indirectly harm Brookstone because the value of its option

will decrease. Tanus, however, will apparently benefit from this strategy because, as Brookstone contends, it is interested in selling Woodcrafters and Tanus intends to cause the companies that possess the right of first refusal to exercise that right.

* * *

"A plaintiff may earn expedited proceedings when she 'has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.'"[7] The Court, however, may refuse to expedite a matter where the plaintiff's delay "imposes additional burdens on the [C]ourt and could prejudice the [C]ourt's ability to adjudicate the matter fairly."[8] "Once little more than a quotidian ministerial exercise to secure a date for presenting arguments on a

[7] *Icahn Partners LP v. Amylin Pharm., Inc.*, 2012 WL 1526814, at *3 (Del. Ch. Apr. 20, 2012) (quoting *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994)).

[8] *Oliver Press Partners v. Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005). *See also* DONALD J. WOLFE & MICHAEL A PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY ("CORPORATE AND COMMERCIAL PRACTICE") § 11.06[a] (2012) ("[I]t is unjust to allow recovery where a party is unable to offer a sufficient justification for an unreasonable and injurious delay.") (citations omitted).

motion for interlocutory relief, the scheduling conference has become an early and sometimes dispositive battleground on the merits of the application itself."[9]

On May 15, 2012, when Brookstone initiated this action by its direct and derivative complaint (the "Original Complaint"), it was substantially aware of the facts that it claims caused it to seek expedition on August 3, 2012. As Paragraph 66 of the Original Complaint states:

> The Company's Licensing Agreement with Design Imaging is set to expire on October 15, 2012. Tanus has caused Design Imaging to reject an offer to extend that contract, and the effect of such interference with the Company's supplier relationship will be disruptive to the Company's business. Upon information and belief, Tanus' threats and actions with respect to the Design Imaging contract is part of a scheme to devalue the Company so that he can acquire the Company at an artificially deflated price a few months later.

Brookstone argues that it thought Tanus was going to renew the Licensing Agreement up until the end of July 2012 when it sent Tanus a letter seeking an assurance that he would renew the agreement and he failed to respond. At oral argument, counsel for Brookstone suggested that Tanus gave Brookstone some sort of assurance in April 2012, but that assurance was not documented and it is not

[9] CORPORATE AND COMMERCIAL PRACTICE § 10.07[b].

even clear whether it was an assurance against termination or an assurance of renewal.[10] In any event, on the preliminary record currently before it, the Court is persuaded that at least by May 15, 2012, Brookstone was aware that, in order to benefit himself and harm Woodcrafters and Brookstone, Tanus might cause Design Imaging to fail to renew the Licensing Agreement. Thus, Brookstone was aware of the facts that caused it to move to expedite at least five months before October 15, 2012.

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[10] *See* Tr. of Oral Arg. on Pls.' Mot. to Expedite ("Tr.") at 16-17:

> Counsel for Brookstone: It was shortly after the meeting when tempers died down that he then, through, I believe, counsel, but I'm not 100 percent positive on that, but I believe it was his counsel said, "Look, we're not going to terminate any of these contracts."
>
> So we did, at that point, think that the threat had been severely minimized. No, we did not have a confirmation that he was going to renew the relationships, but once Mr. Tanus had time to cool off, he withdrew those threats.
>
> The Court: Tempers died down, and one of the things that followed as a result of tempers dying down was a lawsuit was filed.
>
> Counsel for Brookstone: That's true, Your Honor.
>
> The Court: You understand why I'm having trouble reconciling all this.
>
> Counsel for Brookstone: I do understand, Your Honor. I do. It's a difficult issue. Nevertheless -- we believe that there was delay. But it's our position, Your Honor, that the delay was reasonable at the time and that changed circumstances warrant expedition in this case.

Brookstone, however, let this action proceed on a normal basis from May 15, 2012 until August 3, 2012.

> That delay wasted nearly half of the time potentially available to prepare, hear and decide . . . [a preliminary injunction before October 15, 2012]. This extensive delay is unquestionably prejudicial to the defendants' ability to present their defense. Similarly, while this court (and counsel) can act quickly when circumstances warrant prompt action, the plaintiff['s] delay in filing undoubtedly imposes additional burdens on the court and could prejudice the court's ability to adjudicate the matter fairly.[11]

Brookstone's delay is prejudicial because it knew it was dealing with a finite amount of time. There is a specific date by which Brookstone needs (or wants) relief, and it was quickly approaching when this action was initiated. Every day Brookstone waited to expedite this action was another day that Tanus and the Court lost to prepare for a preliminary injunction. As the days pass, Tanus's counsel is able to take fewer and fewer depositions, the parameters of discovery decrease, and the time to prepare briefs dwindles. Moreover, the Court is left with little time to render a decision. When time exigencies cannot be avoided, everyone

[11] *Oliver Press*, 2005 WL 3441364, at *1. The Court in *Oliver Press* denied expedition on the basis of both prejudicial delay and lack of irreparable harm. Either basis standing alone would have been sufficient. Moreover, although Brookstone likely can show irreparable harm here, the delay that it has exhibited is much more significant than the delay exhibited by the plaintiff in *Oliver Press*—two-and-a-half months as opposed to twelve days.

involved must, and can, move quickly, but, when one of the parties creates the time exigency, it is not clear why everyone else should be forced to bear the burden.

Had Brookstone moved to expedite this action when it was initiated or shortly thereafter, the Court would be presented with a very different case. The First Amended Complaint does appear to allege adequately that Tanus engaged in some skullduggery when he took, or caused Design Imaging to take, actions for the purpose of harming Brookstone and/or Woodcrafters. But Brookstone's delay does not create the Court's emergency. If a plaintiff is aware that it needs (or wants) relief within months from when it initiates an action, that plaintiff must move for expedition with alacrity. It is not fair to the defendant or the Court for a plaintiff to initiate an action in May knowing that it wants relief by October, to allow the action to proceed normally for months, and then in August to request a hearing on a preliminary injunction in October and a trial in January.

* * *

Brookstone's actions in the Texas Action also militate against expediting this case. The Texas Action was filed two weeks before this action, and Tanus has filed a motion to dismiss or stay this action in favor of the Texas Action under the

doctrine laid out in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*[12] Tanus's motion is not currently before the Court, but the facts of this case inevitably cause Brookstone's motion to expedite to be viewed in the context of the *McWane* doctrine.

On July 25, 2010, there was a scheduling conference in the Texas Action, and the Texas Court originally offered the parties a trial date in February 2013. The Texas Action is narrower in scope than this action, and there has been no suggestion that the Texas Court knew of the importance of October 15, 2012 and February 28, 2013. Moreover, Brookstone has not even asserted counterclaims in the Texas Action, much less moved for expedition or a preliminary injunction. Had the Texas Court known of Brookstone's emergency, perhaps it could have heard Brookstone's claims in the time that Brookstone seeks. After all, without even knowing of Brookstone's issues, the Texas Court offered the parties a trial in February 2013, which is only one month after the trial date that Brookstone seeks

[12] 263 A.2d 281 (Del. 1970).

here and there has been no suggestion that the Texas Action could not be expanded to include all of the claims that Brookstone asserts in this action.[13]

Brookstone's own counsel, however, requested that the trial in the Texas Action be postponed until June 2013. Brookstone claims that the Texas Court started the July 25 scheduling conference by explaining that it had no availability for a trial in 2012. Therefore, according to Brookstone, it decided that it could not litigate its claims soon enough in Texas and decided to move for expedition here. Even if that is true, it does not explain why Brookstone requested that the trial be postponed until June. February is (obviously) closer to January than is June. What happened at the July 25 scheduling conference also does not explain Brookstone's delay in seeking expedition here. October 15, 2012 has been coming for a long time, and at least by May 15, 2012 Brookstone was aware of the importance that it now places on that date.

[13] *See* Tr. at 14 (Counsel for Brookstone: "[The Texas Action] could be expanded Your Honor, and had the Court in Texas had availability in 2012, I think there is a good possibility we wouldn't be here. There's a good possibility that if the Court had had availability that we would have then sought to advance all of our claims there.").

* * *

Brookstone, perhaps correctly, believes that it is the natural plaintiff in the disputes between it and Tanus, and thus, that it should get to choose where those disputes are litigated. Brookstone raises a legitimate issue as to whether Tanus's decision to file a declaratory judgment action in Texas should be viewed as impermissible forum shopping.[14] Had Brookstone moved for expedition when this case was filed (or shortly thereafter), this case might well be nearing a hearing on a preliminary injunction with a 2012 trial date in sight. But Brookstone let this action and the Texas Action, both of which were initiated in May 2012, proceed on a normal basis for months, knowing that it wanted relief before October 15, 2012.

[14] *See Rapoport v. Litig. Trust of MDIP Inc.*, 2005 WL 3277911, at *4 n.56 (Del. Ch. Nov. 23, 2005) ("Delaware courts engage in a more discerning analysis of the relevant *forum non conveniens* factors where the first-filed action seeks a declaratory judgment.") (citation and internal quotations omitted); *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *4 (Del. Super. Apr. 25, 1989) ("[U]se of a declaratory judgment action to anticipate and soften the impact of an imminent suit elsewhere for the purpose of gaining an affirmative judgment in a favorable forum requires a closer look at the deference historically accorded a prior filed action.").

"[E]quity aids the vigilant, not those who slumber on their rights."[15] Therefore, the Plaintiff's Motion to Expedite Proceedings is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[15] *Whittington v. Dragon Group, L.L.C.*, 991 A.2d 1, 8 (Del. 2009) (citations and internal quotation omitted). *See also Petroplast Petrofisa Plasticos S.A. v. Ameron Int'l Corp.*, 2012 WL 3090935, at *15 (Del. Ch. July 31, 2012) (finding, after trial, that claims were barred by laches).