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

| | | |
|---|---|---|
| SAGARRA INVERSIONES, S.L., | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | C.A. No. 6179-VCN |
| | : | |
| CEMENTOS PORTLAND VALDERRIVAS, S.A., et al., | : | |
| | : | |
| Defendants. | : | |
| | : | |
| UNILAND ACQUISITION CORPORATION, | : | |
| | : | |
| Nominal Defendant. | : | |

# MEMORANDUM OPINION

Date Submitted: April 26, 2011
Date Decided: August 5, 2011

Arthur L. Dent, Esquire and Scott B. Czerwonka, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, and John R. Fornaciari, Esquire, Robert M. Disch, Esquire, and Jeremy M. Keim, Esquire of Baker & Hostetler LLP, Washington, D.C., Attorneys for Plaintiff.

Paul J. Lockwood, Esquire and Rachel J. Barnett, Esquire of Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware, and Jay B. Kasner, Esquire and Jeremy A. Berman, Esquire of Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York, Attorneys for Defendants.

NOBLE, Vice Chancellor

## I. INTRODUCTION

As described in the Court's July 7, 2011 letter opinion,[1] this action arises out of the sale of Giant Cement Holding, Inc. ("Giant") by Defendant Cementos Portland Valderrivas ("CPV") to Defendant Corporación Uniland S.A. ("Uniland S.A."). Plaintiff Sagarra Inversiones, S.L. ("Sagarra") challenges that transaction on the basis of CPV's self-dealing because of its position as the majority shareholder on both sides of the transaction. For that reason, Sagarra seeks, through this lawsuit, (1) to prevent the payment of any additional funds under the stock purchase agreement governing that transaction (the "SPA"), and (2) to rescind the SPA. Now before the Court is the Defendants' motion to dismiss or to stay.

## II. BACKGROUND[2]

### A. *The Parties*

Sagarra, a minority shareholder of Uniland S.A., is an entity organized under the laws of Spain with its principal place of business in Barcelona. It purports to bring this action individually and derivatively on behalf of Nominal Defendant Uniland Acquisition Corp. ("Uniland Delaware"), a Delaware corporation formed on December 28, 2010 for the purpose of effectuating the Giant transaction.

---

[1] *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 2011 WL 3273266 (Del. Ch. July 7, 2011) (the "Letter Opinion"). There, the Court denied the Plaintiff's renewed request for interim injunctive relief. *Id.* at *3.

[2] The factual background is based on allegations in the Verified Direct and Derivative Complaint (the "Complaint" or "Compl.").

Uniland S.A., an entity formed under the laws of Spain, acquires and operates cement, concrete and aggregate plants in Spain and Tunisia. Uniland Delaware is a wholly owned subsidiary of Uniland International B.V. ("Uniland B.V.")—a Dutch holding company—which itself is wholly owned by Uniland S.A.

CPV, an entity formed under the laws of Spain, is the majority shareholder of Uniland S.A. It had held a majority interest in Giant until that entity merged with Uniland Delaware. CPV also commands a majority stake in three of the four entities that appoint directors to the Uniland S.A. board of directors—Defendants Participaciones Estella 6, S.L.U., Compañia Auxiliar De Bombeo De Hormigón S.A.U., and Horminal S.L.U.,[3] which are all Spanish corporations.

Uniland Delaware's directors—Jaime Úrculo Bareño and Borja Arbesú Lobo—are also named as defendants in the Complaint.[4]

B. *Factual Background and Procedural History*

Familiarity with the factual background set forth in the Letter Opinion is assumed. The crux of Sagarra's allegations is simply summarized. CPV—by virtue of its controlling stake in both Giant and Uniland S.A.—forced through the

[3] The directors designated to serve on the Uniland S.A. board on behalf of these entities are, respectively, Defendants José Manuel Revuelta Lapique, Antonio Crous Millet, and José Luis Gómez Crúz—all residents of Madrid, Spain. The only other director on the Uniland S.A. board—Pedro Navarro—was appointed by Sagarra's parent company, CRH plc. For convenience, the Court will refer to the Plaintiff and its related entities as "Sagarra" only.

[4] James C. Siokos, Esq., the incorporator of Uniland Delaware, was included as a defendant in the Complaint; however, Sagarra agreed voluntarily to dismiss him without prejudice from this action. *See Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, C.A. No. 6179-VCN (Del. Ch. Mar. 3, 2011) (ORDER) (Trans. ID No. 36245803).

approximately $279 million acquisition of Giant by Uniland S.A. at an inflated acquisition price. Because the merger consideration—which is subject to post-closing adjustments—is to be paid in four equal installments, Sagarra seeks to prevent the payment of any additional funds. In addition, it ultimately seeks rescission of the SPA.

Both CPV and Giant are financially distressed companies. CPV has encountered difficulties in satisfying the covenants in its financing agreements. Giant—a cement and concrete producer headquartered in South Carolina—has substantial outstanding debt, has experienced net losses in past years, and has failed to comply with its financial covenants. Because of these ongoing financial struggles, CPV began to solicit interest in 2009 in the sale of Giant at a price of $270 million. Around that same time, Uniland B.V. sold its stake in certain South American entities, which resulted in proceeds of approximately $188 million. Sagarra alleges that CPV then sought to sell Giant to Uniland S.A. as a means of obtaining these proceeds for itself, while simultaneously disposing of its interest in Giant.

Around September 2010, CPV first proposed a sale of Giant to Uniland S.A. for a purchase price of approximately $278 million. Sagarra, through its board representative, opposed that proposal. Sagarra and CPV later agreed that an independent valuation of Giant should be completed before a Giant-Uniland S.A.

transaction would be considered. Accordingly, UBS was retained by Uniland S.A. in October 2010 to conduct that valuation. Only days later, CPV ordered UBS to cease its efforts because PriceWaterhouseCoopers had already produced a valuation report in March 2010 that, according to CPV, had properly valued Giant at $700 million. That report was not acceptable to Sagarra, mainly because it was created based on CPV's instructions but, also, because of what Sagarra perceived to be material shortcomings in the analysis. Thus, Sagarra again expressed its lack of interest in moving forward with a Giant-Uniland S.A. transaction.

In December 2010, CPV retreated from its mandate that UBS not complete its valuation. Indeed, UBS issued a draft report on December 15th, after which it received separate confidential comments from CPV and Sagarra. Thereafter, on December 22nd, UBS submitted its final valuation report, which, according to Sagarra, recommended a range of $66 million to $151 million as an appropriate purchase price for Giant. It is on that basis that Sagarra contends that the $279 million price paid by Uniland S.A. for Giant is inflated by somewhere between $128 million and $213 million; more importantly, that purportedly inflated purchase price benefited only CPV, at the expense of Uniland S.A. and Sagarra.

After UBS issued its final valuation of Giant, CPV—which by then had terminated discussions with Sagarra—used its majority stake in Uniland S.A. to consummate the Giant acquisition. Uniland Delaware was formed to effectuate the

merger. The transaction was approved—over the objections of Sagarra's board representative—by the three CPV directors on the Uniland S.A. board. Thereafter, Uniland Delaware's directors—acting consistently with the resolutions adopted by the Uniland S.A. board—executed the SPA.

Sagarra (and its affiliates) first commenced proceedings to challenge the Giant transaction in Spain; around January 28, 2011, they filed an action in the Spanish Commercial Court and initiated a Spanish arbitration proceeding. Subsequently, Sagarra filed this action on February 9, 2011. The Complaint alleges four counts. Counts I-III—which raise multiple derivative claims on behalf of Uniland Delaware and claims based on Sagarra's interest "as the ultimate minority shareholder of Uniland Delaware"[5]—allege breaches of fiduciary duty and aiding and abetting those breaches. Count IV also raises fiduciary duty claims; however, those claims are asserted under Spanish law.

## III. CONTENTIONS

The Defendants contend that dismissal of the Complaint is appropriate under Court of Chancery Rules 12(b)(1) through 12(b)(7) for lack of personal jurisdiction, invalid service, lack of subject matter jurisdiction, improper venue (under *McWane* and based on *forum non conveniens*), and failure to state a claim

[5] Compl. ¶ 63.

upon which relief may be granted.[6] Moreover, they argue that dismissal is proper under Court of Chancery Rule 23.1 for lack of standing and for failure to comply with the derivative suit requirements of Spanish and Delaware law. Alternatively, the Defendants have moved to stay this action in favor of the earlier-filed proceedings commenced by Sagarra and its affiliates in Spain.

Sagarra, in opposing the motion, argues that the Defendants' asserted grounds for dismissal do not apply to these multiple derivative claims brought solely on behalf of Uniland Delaware. *McWane* is inapplicable, according to Sagarra, because the Spanish claims will not (and cannot) address the injunctive and rescissionary relief sought in this action. Moreover, Sagarra argues that the Defendants' *forum non conveniens* assertions must fail because the *Cryo-Maid* factors have not been satisfied.[7] Delaware law, according to Sagarra, governs questions of standing and demand futility and, as a result, the Defendants' arguments to the contrary are without merit.

---

[6] Uniland Delaware and its directors do not join the other defendants in moving for dismissal based on lack of personal jurisdiction and invalid service.

[7] *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964), *overruled on other grounds by Pepsico*, *Inc. v. Pepsi-Cola Bottling Co.*, 261 A.2d 520 (Del. 1969). Under the *Cryo-Maid* framework—as supplemented by *Parvin v. Kaufmann*, 236 A.2d 425, 427 (Del. 1967)—the Court must consider six factors in determining whether the *forum non conveniens* doctrine should be applied. *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1046 n.10 (Del. 2010). "Those factors are: (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of the view of the premises, if appropriate; (4) whether or not the controversy is dependent upon the application of Delaware law; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive." *Id.*

## IV. ANALYSIS

### A. *Counts I & II*

In Count I of the Complaint, Sagarra asserts a multiple derivative claim on behalf of Uniland Delaware based on purported breaches of the duty of loyalty by the directors of that entity. Count II—also styled as multiple derivative claims on behalf of Uniland Delaware—alleges that a number of other defendants, including CPV, aided and abetted that supposed breach of the duty of loyalty by the Uniland Delaware directors.

In a multiple derivative action, the claims that the plaintiff seeks to pursue belong to a subsidiary positioned somewhere down the corporate structure;[8] here, the claims asserted in Counts I and II belong to Uniland Delaware—a wholly owned, indirect subsidiary of Uniland S.A. (a Spanish entity). Sagarra (also a Spanish entity) is a shareholder of Uniland S.A. only. Further complicating the corporate structure in this instance is an intermediate subsidiary of Uniland S.A.—Uniland B.V., a Dutch company—which wholly owns Uniland Delaware.

Under Delaware law, "if an action is derivative, the plaintiffs are then required to comply with the requirements of Court of Chancery Rule 23.1, that the stockholder: (a) retain ownership of the shares throughout the litigation; (b) make

[8] *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1199 (Del. Ch. 2010).

presuit demand on the board; and (c) obtain court approval of any settlement."[9] Moreover, Delaware courts recognize that "the right of a stockholder to prosecute a derivative suit is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused because the directors are incapable of making an impartial decision regarding such litigation."[10] It is Delaware's policy that "[t]he issue of whether a derivative plaintiff should be permitted to press a cause of action on behalf of a corporation is, in key respects, a . . . matter about the allocation of authority between the corporation's board and its stockholders and other constituencies."[11]

Although Sagarra correctly contends that Delaware has an important interest in holding accountable individuals responsible for the operation of Delaware corporations—and, if the allegations here are true, it raises some troubling issues related to the Giant transaction and the operation of Uniland Delaware—the threshold question that the Court must confront is whether Sagarra has standing to bring these multiple derivative claims on behalf of Uniland Delaware. Because

---

[9] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004); *see also Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984) (internal citation omitted) ("By its very nature the derivative action impinges on the managerial freedom of directors. Hence, the demand requirement of Chancery Rule 23.1 exists at the threshold, first to [e]nsure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits.").

[10] *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993).

[11] *Lewis v. Ward*, 2003 WL 22461894, at *2 (Del. Ch. Oct. 29, 2003).

"[t]he internal affairs doctrine applies to the right of a stockholder to pursue a derivative action[,]"[12] a review of that doctrine and its applicability here is warranted.

The internal affairs doctrine recognizes that "only one state should have the authority to regulate a corporation's internal affairs."[13] For that reason, it is understood under the doctrine "that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs."[14] Our Supreme Court has observed that internal corporate affairs include "those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[15] The internal affairs doctrine is rooted, in part, in the "stockholders' right to know to what standards of accountability they may hold those managing the corporation's business and affairs"[16] and, of similar importance, a right of the directors and officers of a corporation "to know what law will be applied to their actions."[17]

Consistent with the above examination of the internal affairs doctrine, *Hamilton Partners* teaches that "in a double derivative action involving a wholly owned subsidiary, a stockholder plaintiff only must plead demand futility (or

---

[12] *Kostolany v. Davis*, 1995 WL 662683, at *2 (Del. Ch. Nov. 7, 1995).
[13] *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005).
[14] *Id.* at 1113.
[15] *McDermott Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987).
[16] *Newcastle Partners, L.P. v. Vesta Ins. Group, Inc.*, 887 A.2d 975, 982 (Del. Ch. 2005) (internal quotations omitted).
[17] *McDermott Inc.*, 531 A.2d at 216.

otherwise satisfy Rule 23.1) at the parent level."[18] Thus, where "the parent entity is not a Delaware corporation, then under the internal affairs doctrine, the law of the state of incorporation determines the showing that a plaintiff must make" to satisfy the Court that the plaintiff has standing to bring a multiple derivative action.[19] For that reason, because Sagarra only owns shares in Uniland S.A., a corporation organized under the laws of Spain, the Court must consider whether Sagarra has standing to bring a derivative claim under Spanish law.[20]

A review of the parties' affidavits regarding Spanish law reveals that the earlier-filed proceedings in Spain are not derivative actions,[21] but that it would appear that Sagarra could have pursued a derivative action of some kind against

---

[18] *Hamilton Partners*, 11 A.3d at 1207 (citing *Lambrecht v. O'Neal*, 3 A.3d 277, 282 (Del. 2010)).

[19] *Id.* Thus, because the parent corporation was incorporated in New York, the Court considered whether the plaintiff in *Hamilton Partners* had satisfied the derivative suit requirements under New York law. *Id.* at 1207-08.

[20] *See id.* at 1206-07; *Kostolany*, 1995 WL 662683, at *2-*4 (noting that "Delaware does have a strong interest in protecting minority stockholders of Delaware corporations" while rejecting the plaintiff's argument that Delaware law should apply to its shareholder claims because "plaintiff is a stockholder of the Dutch parent [company], not of the Delaware subsidiaries"); *Levine v. Milton*, 219 A.2d 145, 147 (Del. Ch. 1966) (dismissing a derivative suit purportedly brought on behalf of a corporation organized under the laws of Panama because Panama law does not recognize such actions and observing "that the right of a stockholder to bring a derivative action is a question of substantive law to be determined by the law of the state or country of incorporation"), *disagreed with on other grounds by Hamilton Partners*, 11 A.3d at 1199-1200.

[21] Transmittal Aff. of Scott B. Czerwonka, Esq., Ex. 2 (English Translation of Aff. of Francisco Peláez) ("Peláez Aff.") ¶ 14 (emphasis in original) (observing that the "[e]xisting Spanish Claims are NOT derivative actions and therefore no demand on Uniland S.A. was required to file" the Spanish action).

Uniland S.A.'s directors under Spanish law.[22] To bring a derivative suit under Spanish law, Sagarra would have first had to request that Uniland S.A.'s board of directors call a shareholder meeting to consider whether to pursue the derivative claims. Had the Uniland S.A. board refused, Sagarra could have then brought an action asserting those derivative claims. Otherwise, had a meeting been held, it would appear that Sagarra still could have pursued the derivative claims after a certain period of time, regardless of the outcome of the shareholders' meeting.[23]

Sagarra concedes that neither it nor its affiliates made a demand on the Uniland S.A. board.[24] Thus, no request was made for a shareholder meeting to consider the directors' actions relating to the Giant transaction. That decision was

---

[22] *Id.* ¶ 17 ("Sagarra or [its affiliates] are entitled to a derivative action in Spain against Uniland S.A. directors under Art. 239 [of the *Ley de Sociedades de Capital*] seeking liability for damages from such directors . . . .").

[23] Transmittal Aff. of Rachel J. Barnett, Esq., Ex. 3 (Aff. of Fernando Gómez) ¶ 6 ("Spanish Corporate law only provides for some specific instances of derivative actions that third parties—shareholders among them—may undertake concerning matters belonging to the corporation and on behalf of the latter. . . . [T]he only [provision] directly affecting lawsuits and shareholders, is the provision in art. 239 of the Capital Companies Act or *Ley de Sociedades de Capital*, . . . [which] refers to the admissibility, when certain requirements . . . are met, of lawsuits filed by shareholders representing at least 5% of share capital of the corporation, to seek compensation—for the corporation—from directors who are liable for harm caused to the corporation in breach of their duties as directors. . . . The provision reads (in my own translation): '1. The shareholders representing at least five per cent of share capital may request the call of a shareholders' meeting to decide on filing a lawsuit seeking liability (from the directors). 2. They (the shareholders representing at least five per cent of share capital) may also jointly file the lawsuit defending the interests of the corporation when the directors do no call the shareholders' meeting for such purpose, when the corporation does not file the lawsuit in a month's time from the date in which the resolution was passed by the shareholders' meeting, or when the resolution was against seeking liability (from the directors).'"). According to the Complaint, "Sagarra has owned 10% of the stock of Uniland S.A. during all relevant periods." Compl. ¶ 1.

[24] Compl. ¶ 51.

justified, according to Sagarra, because any demand would have been futile based on CPV's control of the Uniland S.A. board.[25] Although the Uniland S.A. board was undoubtedly conflicted because of CPV's dominance and control, Sagarra failed to exhaust its intra-corporate remedies under Spanish law. Had it requested that a shareholder meeting be called, and had that request been refused, it would have been entitled to pursue a derivative claim in Spain against Uniland S.A.'s directors. Accordingly, the Court must conclude that, even though Spanish law recognizes some kind of derivative suit, Sagarra lacked standing under Spanish law to bring a claim of that sort.

Thus, to the extent the Complaint asserts a multiple derivative action on behalf of Uniland Delaware, it must be dismissed under these circumstances because Sagarra does not have standing to raise those claims based on the Court's review of Spanish law.[26] That result is consistent with earlier rulings of Delaware courts, as discussed *supra*, and the parties' expectation that, under the internal affairs doctrine, Spanish law would apply to Sagarra's rights as a minority shareholder in Uniland S.A., a Spanish corporation.[27] Indeed, because Sagarra and

---

[25] *Id.*

[26] It may also be worth noting that it appears "that Dutch law does not recognize a stockholder's right to pursue a derivative action on behalf of a corporation." *Kostolany*, 1995 WL 662683, at *3-*4. Accordingly, based on the Court's reasoning above, Sagarra would be precluded from bringing a derivative suit under Dutch law based on the role of Uniland B.V., an intermediate subsidiary of Uniland S.A. that wholly owns Uniland Delaware.

[27] This action implicates the internal affairs of a Spanish corporation and its relationship with a Spanish shareholder. Although a Delaware entity may be involved in the corporate structure, the

its affiliates commenced legal proceedings in Spain to challenge the Giant transaction before filing in Delaware, that provides some indication that it can adequately pursue claims challenging the Giant transaction in Spanish courts. For these reasons, Counts I and II—which assert multiple derivative claims on behalf of Uniland Delaware—are dismissed.

B. *Count III*

Count III asserts claims against CPV for breach of fiduciary duty under Delaware law and alleges that CPV's actions caused harm to Uniland S.A., Uniland Delaware, and Sagarra in its capacity as "the minority shareholder of Uniland S.A. and as the ultimate minority shareholder of Uniland Delaware."[28]

Sagarra contends that Count III asserts both direct and derivative claims against CPV under Delaware law because CPV, as the majority shareholder, owed certain duties to Sagarra as the minority shareholder. It asserts that CPV's self-dealing violated that duty and caused financial injury to Sagarra that differs from that suffered by Uniland S.A. and Uniland Delaware.

To determine whether a claim is direct or derivative, the Court must look beyond "[t]he manner in which a plaintiff labels its claim and the form of words

---

Court is mindful of the important interest of affording comity to foreign business law governing the internal affairs of a foreign corporation. If Delaware courts "expect that other sovereigns will respect our state's overriding interest in the interpretation and enforcement of our entity laws, we must show reciprocal respect." *Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 451-52 (Del. Ch. 2007).

[28] Compl. ¶ 63.

used in the complaint."[29] Instead, as directed by *Tooley*,[30] the Court "must look exclusively to (1) who suffered the alleged harm and (2) who would receive the benefit of any recovery or other remedy."[31]

The duty of loyalty mandates "that a 'controlling' shareholder not act, or cause its representatives to act, in such a manner as to deal unfairly with the minority shareholders."[32] Assuming the allegations to be true, CPV caused Uniland S.A. and its subsidiaries to enter into a transaction for Giant at an inflated purchase price; thus, the consummation of the merger strengthened CPV's financials by (1) disposing of its interest in the financially distressed Giant, and (2) shifting cash from Uniland S.A. to CPV. The suggestion then is that the harm was suffered by Uniland S.A. because it was forced to pay an inflated price for its newly acquired subsidiary. Even assuming that Sagarra has (or will) suffer a direct

---

[29] *Hartsel v. Vanguard Group, Inc.*, 2011 WL 2421003, at *16 (Del. Ch. June 15, 2011).
[30] 845 A.2d 1031.
[31] *Hartsel*, 2011 WL 2421003, at *16. Although the *Tooley* formulation provides a two-part analysis for determining whether an asserted claim is direct or derivative, there are some limited exceptions where the same facts may support both direct and derivative claims. *See, e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 99-100 (Del. 2006). The *Gentile* framework does not appear to have any application to the claims asserted in Count III. However, if the Court is incorrect in that determination and the claims asserted are direct, Count III should still be dismissed (or at least stayed in favor of the Spanish proceedings) based on the Court's application of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281 (Del. 1970), to Count IV in Part IV.C. That is because Count III raises claims based on Sagarra's relationship, as a minority shareholder of Uniland S.A., with CPV, the controlling shareholder of that entity. The interests in that dispute relate solely to Spanish entities and, as a result, the Court should defer to the Spanish courts on a claim of that kind. Although that count discusses Uniland Delaware, the substance of Sagarra's claims against CPV implicates its activities at Uniland S.A.: particularly, its influence over the Uniland S.A. board.
[32] *Oliver v. Boston Univ.*, 2006 WL 1064169, at *18 (Del. Ch. Apr. 14, 2006).

injury by having to support Uniland S.A. financially as a result of the Giant transaction, any remedy resulting from the purported overpayment would accrue to Uniland S.A. and its subsidiaries because Sagarra seeks rescission of the SPA.

Thus, despite Sagarra's arguments to the contrary, the Court must conclude that Count III is a derivative claim under the *Tooley* two-part analysis. Accordingly, the Court's determination with respect to Sagarra's lack of standing as to Counts I and II is equally applicable to Count III. For that reason, it too must be dismissed.

C. *Count IV*

Count IV is similar to Count III in that it asserts claims against CPV for breach of fiduciary duty; however, Count IV asserts those claims under Spanish law. Although the Court analyzed Counts I through III on the basis of Sagarra's standing under Spanish law to assert those derivative claims, Count IV must be considered under the well-established doctrine of *McWane*[33] and its progeny.

The decision of whether to stay or to dismiss a Delaware action in favor of a foreign action is a matter of discretion for the Court.[34] Because earlier-filed proceedings were commenced by Sagarra in Spain, the Court considers the application of "the *McWane* doctrine, which favors granting a stay 'when there is a

[33] 263 A.2d 281.
[34] *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park DR. BNK Investors, L.L.C.*, 2009 WL 3335332, at *3 (Del. Ch. Oct. 15, 2009).

prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues.'"[35]

In applying the *McWane* factors, the Court must consider the following: (1) is there an earlier-filed action pending in another jurisdiction related to the Delaware action; (2) does that other action involve the same parties and the same issues; and (3) is the foreign court capable of doing prompt and complete justice.[36]

First, there is no doubt that Sagarra commenced earlier-filed proceedings in Spain. Both an action in the Spanish Commercial Court and an arbitration proceeding were begun on January 28, 2011 by Sagarra and its affiliates, but this action was not filed until February 9, 2011.

Second, the parties and the issues appear to be substantially or functionally identical, as required by *McWane*. Under *McWane*, "the 'same parties, same issues' analysis focuses on substance over form."[37] For that reason, the Court must "examine whether the ultimate legal issues to be litigated will be determined in the first-filed action, and thus, [it] require[s] only a showing of '[s]ubstantial or functional identity' of the parties and issues."[38] Although the Court recognizes that the only defendant to Sagarra's action in the Spanish Commercial Court is

[35] *Id.* (quoting *McWane*, 263 A.2d at 283).
[36] *Id.* at *5.
[37] *Kurtin v. KRE, LLC*, 2005 WL 1200188, at *4 (Del. Ch. May 16, 2005).
[38] *Id.* (quoting *AT & T Corp. v. Prime Sec. Distribs., Inc.*, 1996 WL 633300, at *2 (Del. Ch. Oct. 24, 1996)).

Uniland S.A.,[39] under the circumstances, that is sufficient since it is the parent entity—which wholly owns (directly or indirectly) all of the other entities of concern in this action.[40] It was Uniland S.A.'s board that ultimately initiated the process leading to consummation of the Giant transaction. Because the Spanish proceedings challenge that decision at the Uniland S.A. level, those proceedings and the Delaware action undoubtedly arise from a common nucleus of operative facts.[41] Accordingly, although the Court is mindful that the parties and issues are not identical, it is satisfied that, in putting substance over form, the first-filed Spanish proceedings involve functionally the same parties and issues.

Finally, because this action is brought by a Spanish entity that is a shareholder in a Spanish corporation, there is little doubt that the Spanish courts are best suited to resolve the issues raised by Sagarra. This Court has already denied Sagarra's renewed request for interim injunctive relief. There is no indication that, despite the financial distress of CPV and Giant, time is critically of

---

[39] *See* Transmittal Aff. of Paul J. Lockwood, Esq. ("Lockwood Aff."), Ex. 5 (English Translation of Sagarra's Complaint filed in Barcelona Commercial Court); *see also* Peláez Aff. ¶ 16 ("Under [Spanish] law, Uniland S.A. is the sole defendant possible in the Existing Spanish Claims . . . ."); Pl.'s Mot. for Leave to File a Sur-Reply Aff. regarding Spanish Law and the Spanish Proceeding, Ex. A (Rebuttal Aff. of Francisco Peláez) ¶ 9 (observing that any ruling in the earlier-filed Spanish proceedings would not bind the subsidiaries of Uniland S.A.).

[40] *Kurtin*, 2005 WL 1200188, at *4 (citation omitted) ("[W]here a named party owns and controls an unnamed party, they have been deemed 'substantially identical' for a first-filed analysis. In addition, this court has found parties to be the 'same' under *McWane* where related entities are involved, but not named, in both actions.").

[41] *Id.* ("When comparing the similarity of issues in two actions under *McWane*, the primary question is whether the issues arise out of a 'common nucleus of operative facts.'") (quoting *Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 930 (Del. Ch. 1998)).

the essence in resolving these claims. Accordingly, although Sagarra takes issue with the time it will take to secure a resolution of the Spanish proceedings, it is not for this Court to question the efficiency of the Spanish Commercial Court. Even if it does not resolve disputes as quickly as Sagarra might like, there is no indication that the Spanish Commercial Court is incapable of providing timely and complete justice based on Sagarra's challenge to the Giant transaction.[42]

Thus, all of the *McWane* factors are satisfied. Sagarra first challenged the Giant transaction in its earlier-filed proceedings in Spain before asserting similar claims in Delaware. There is little support for why duplicative actions that could result in conflicting rulings should be permitted in this instance. Because Count IV raises fiduciary duty claims under Spanish law, the better course of action is for the Court to exercise its discretion and dismiss Count IV.

---

[42] Sagarra also contends that because the Spanish proceedings "are extremely limited and, at best, can only provide a declaration that the two specific resolutions of Uniland S.A. [related to the SPA and the Giant Transaction] are void[,]" it cannot achieve complete relief in Spain. Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss or Stay at 13 (citing Peláez Aff. ¶¶ 11, 18-24). What Sagarra ignores, however, is that, if it ultimately prevails on the merits of its current claim, the Spanish Court appears to be capable of providing something akin to rescissionary relief. That is because a declaration of that sort will "create duties on the [Uniland S.A.] Directors to reasonably and lawfully give full effect to the declared invalidity . . . ." Lockwood Aff., Ex.1 (Second Aff. of Fernando Gómez) ¶ 4. Moreover, that ruling of invalidity would "be binding and effective for all shareholders of the corporation, even if they were not parties to the litigation that produced the decision." *Id.* ¶ 9. For that reason, the directors of Uniland S.A. "would be under the duty to take all reasonably available actions to eliminate the effects and consequences of the resolution for the corporation, as the resolution [would have] been deemed ineffective by the [Spanish court's] decision. . . . Such duties may sought to be enforced by all shareholders using the civil and other remedies that are available to enforce the general duties of Directors *vis-à-vis* the corporation and third parties." *Id.* ¶ 10.

## V. CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss the Complaint is granted. An implementing order will be entered.