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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DR. RICHARD FUISZ and)
JOHN R. FUISZ,)
)
Plaintiffs,)
)
v.) Civil Action No. 18004
)
BIOVAIL TECHNOLOGIES, LTD.,)
a Delaware corporation, f/k/a FUISZ)
TECHNOLOGIES, LTD., and)
BIOVAIL CORPORATION, an)
Ontario corporation, f/k/a BIOVAIL)
CORPORATION INTERNATIONAL,)
)
Defendants.)

2000 SEP 7 A 9:20

MEMORANDUM OPINION

Date Submitted: August 15, 2000
Date Decided: September 6, 2000

Cathy L. Reese, Esquire, Neal C. Belgam, Esquire, of BLANK ROME COMISKY & McCAULEY LLP, Willmington, Delaware; OF COUNSEL: Abbe David Lowell, Esquire, Marylin Jenkins Milner, Esquire, Lawrence S. Sher, Esquire, of MANATT, PHELPS & PHILLIPS, LLP, Washington, D . C . , Attorneys for Plaintiffs.

Richard D. Allen, Esquire, Bradley James Enna, Esquire, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; OF COUNSEL: Andrew J. Levander, Esquire, Shari L. Steinberg, Esquire, of SWIDLER BERLIN SHEREFF FRIEDMAN, LLP, New York, New York, Attorneys for Defendants.

LAMB, Vice Chancellor

I.

Defendants move to stay or dismiss this action for advancement of litigation expenses (brought pursuant to 8 *Del. C.* §145(k)) in favor of an earlier action in state courts of Virginia out of which the request for advancement of expenses arises. The motion is premised on the rule, most familiarly stated in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng 'g Corp.,* that where "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," the Delaware action should be stayed or dismissed.[1]

Section 145 (k) provides, in pertinent part, that in such a suit: "The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees). " This section of the law was enacted in 1994. According to the legislative commentary, "The provision is consistent with a number of other sections of the Delaware General Corporation Law that grant exclusive jurisdiction to the Court of Chancery. The amendment further provides for summary treatment of actions brought pursuant to Section

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[1] Del.Supr., 263 A.2d 281, 283 (1970). This is so because, as a general rule, "a defendant should not be permitted to defeat the plaintiff's choice of forum . by commencing litigation involving the same cause of action in another jurisdiction . . . . that these concepts are impelled by considerations of comity and the necessities of an orderly and efficient administration of justice." ***Id.*** (citations omitted).

145 seeking a determination as to whether a corporation is obligated to advance expenses prior to the final disposition of litigation."[2]

Claims brought in this court under Section 145(k) for advancement of expenses will frequently arise (as this one does) out of litigation in a foreign jurisdiction by the putative indemnitor against the person claiming entitlement to indemnification or advancement of expenses.[3] Thus, when such a foreign defendant brings suit in this court pursuant to the authority of Section 145(k), there is necessarily a tension between this court's duty to adjudicate summarily that claim and the general policy embedded in the *McWane* doctrine that all related claims should be heard in the court in which an action is first brought.

In resolving that tension, I conclude that, in all but the most exceptional circumstances, claims under Section 145(k) for advancement of expenses should not be stayed or dismissed in favor of the prior pending foreign litigation that give rise to them. Section 145(k) represents a determination by the General Assembly that persons claiming a right to the advancement of expenses (including attorneys' fees) under Delaware law should be entitled to have their claims adjudicated by this court in a summary fashion. Unless the person having such an entitlement first actively invokes the jurisdiction of a foreign tribunal and

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[2] Ch. 261. L. '94 Synopsis of Section 145(k).

[3] ***See, e.g., Fujisawa Pharmaceutical Co., Ltd. v. Kapoor,*** Del. Supr., 655 A.2d 307 (TABLE), 1995 WL 24906.

seeks an adjudication of that issue from it (or some other compelling circumstance amounting to a substantial conflict between the two jurisdictions exists), this court will not regard the foreign action as "first-filed" for purposes of *McWane*'s comity-based analysis.

II.

Plaintiffs are Dr. Richard Fuisz, the former President and CEO and founder of defendant Biovail Technologies, Ltd. ("Biovail" or the "Company"), and John R. Fuisz, his son, a. former outside director of the Company. Their claim for an entitlement to advancement of expenses is alleged to arise under both the provisions of the Company's Certificate of Incorporation and an Amended and Restated Agreement and Plan of Merger (the "Merger Agreement"), dated July 25, 1999, by which defendant Biovail Corporation International acquired Biovail Tech (formerly known as Fuisz Technologies, Ltd.). That transaction closed November 12, 1999.

This Fuiszes filed this action in response to the filing of a complaint in the Virginia state courts (the "Virginia Action") by Biovail Tech (the corporation formerly managed by them) against them and others, alleging "breaches of fiduciary duty, theft of corporate assets, fraud and other misconduct." The Virginia Action was commenced on February 1, 2000. On March 21, 2000, the Fuiszes answered the Virginia complaint and, in their Fifth Affirmative Defense, alleged that they are "entitled to indemnification by Plaintiff and/or its parent

Biovail International Corporation, and advancement from [them] . . . for all costs and expenses of the defense of this action (including attorneys' fees) pursuant to 8 Delaware Code Section 145 . . . " The Fuiszes did nothing to obtain any relief from the Virginia court on the basis of this defense.

On March 16, 2000, the Fuiszes instead wrote to Biovail Tech and requested the advancement of their litigation expenses (including attorneys' fees) in the Virginia Action. Defendants did not respond to this request, and on April 26, 2000, the Fuiszes brought this action. Thereafter, the Virginia plaintiffs amended their complaint. The Fuiszes answered, repeated their allegation of entitlement to advancement of expenses but specifically referred the Virginia court to the pendency of this action in which they seek to vindicate those rights.[4]

III.

Defendants' argument, reduced to its essentials, is that the Virginia Action should be accorded "first-filed" status because the Fuiszes "directly and explicitly raised indemnity and the advancement of defense costs" in it. They then rely on *Johnston v. Caremark RX, Inc.* ,[5] as support for their proposition

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[4] The Fuiszes also filed suit on March 26, 2000, in the United States District Court for the District of Delaware against Biovail Tech and Biovail Corp. alleging breaches of an option contract and a consulting contract that entered into in connection with the Merger Agreement and for fraud. The defendants have moved to dismiss and to stay discovery. The court denied the motion to stay and has the motion to dismiss under advisement.

[5] Del. Ch., C.A. No. 17607, Steele, V.C. (Mar. 28, 2000).

that this action should be stayed or dismissed in favor of the "first-filed" Virginia Action.

Plaintiffs dispute that they have raised the issues of indemnification or advancement of expenses in the Virginia Action, dispute that the parties or issues in the two actions are the same, and distinguish *Johnston.* They also rely on the fact that Count II of the complaint in this matter is against Biovail Corp. (a non-party to the Virginia Action), and arises under the Merger Agreement which contains a forum selection clause that, they say, requires litigation of that claim in this State.'

IV.

The Delaware Supreme Court considered a quite similar set of circumstances in *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor* and concluded that, for purposes of the *McWane* analysis, even though "related because they arise out of the same transaction," the issues raised by the complaint in a foreign enforcement action against a potential indemnitee were not the same as the issues raised by the potential indemnitee's later-filed Delaware complaint seeking advancement of expenses incurred on account of the foreign action.[7] Thus, it

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[6] Because I deny the motion for other reasons, I find it unnecessary to consider plaintiffs' argument relating to the Merger Agreement and the presence of Biovail Corp. as a party in this action but not the Virginia Action. I do note, however, that these are factors that weigh against the stay or dismissal of this action.

[7] *Fujisawa*, Del. Supr., 1995 WL 24906 at **2.

held that "[b]ecause the issues raised in the [two] actions are not the same, the doctrine of comity does not apply. *States Marine Lines v. Domingo,* Del. Supr., *269* A.2d *223, 225 (1970); McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g* Co., Del. Supr., 263 A.2d 281 (1970)."[8]

The *Fujisawa* court then considered the issue whether the trial court had abused its discretion by refusing to stay the action on the basis of *forum non conveniens.* Although the trial court had not conducted an in-depth review of the usual *forum non conveniens* factors, the Delaware Supreme Court had no difficulty concluding that no abuse of discretion had occurred, "especially because of the practical consideration that the discrete issue presented could be promptly resolved in the Delaware litigation."[9] Notably, *Fujisawa* was decided before the 1994 amendments, to the Delaware General Corporation Law and the adoption of Section 145(k). No doubt, the passage of Section 145(k) has elevated the "practical consideration" noted in *Fujisawa* to a matter of even greater importance, as that statute reflects a policy determination by the General Assembly that the Court of Chancery should be receptive to and accord expedited treatment to claims for advancement of expenses raised by putative corporate indemnitees.

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[8] ***Id.***
[9] ***Id.***

Defendants fail in their effort to distinguish *Fujisawa* on the ground that the Fuiszes have interjected the issues of indemnification and advancement into the Virginia Action. As the pleadings stand in that action, the Fuiszes have merely notified the Virginia court of their claim to indemnification and the right to advancement of costs and of the fact that they are pursuing their rights in that regard in this court. They did not initiate any proceeding in Virginia and have not sought a determination from the Virginia court of any issue presented in their complaint in this court.

Defendants get even less help from Vice Chancellor (now Justice) Steele's opinion in Johnston. That case involved what the Court described as "admittedly anomalous facts" and a scenario that the Court predicted "we shall not soon see the like of . . again. "[10] That anomaly arose from the fact that it was Johnston, the Delaware plaintiff, who first initiated proceedings in the foreign jurisdiction and the suit giving rise to his claim for advancement of expenses was filed in that same foreign jurisdiction *in response to his claim*. As the Court there said: "Johnston himself undeniably drew the parties into this controversy by electing arbitration in Alabama of all issues relating to his employment agreement and then put the discrete issue of advancement in issue in the Alabama

[10] ***Johnston v.*** *Caremark* RX, ***Inc.,*** Del. Ch., C.A. No. 17607, Steele, V.C. (Mar. 28, 2000), slip op. at 3, 8.

Circuit Court. "[11] Moreover, Johnston demanded arbitration in Alabama of the issue of advancement, which required the Alabama court to review the indemnification agreement and rule on the arbitrability of the issue.

Defendants' argument that Johnston is controlling rests entirely on the fact that the Fuiszes' answer to the complaint in the Virginia Action asserted a claim for indemnification and advancement of expenses as one of a number of affirmative defenses. Thus, they say, the Fuiszes, like the plaintiff in Johnston, have so interjected the issues of indemnification and advancement of expenses into the Virginia Action that I should regard that action as "first-filed" for purposes of the *McWane* anslysis.

The situations, however, are strikingly dissimilar. Unlike the plaintiff in *Johnston,* the Fuiszes did not choose Virginia as the forum and have made no effort to obtain any adjudication from the Virginia court of any of the issues presented here. On the contrary, in their answer to the amended complaint in the Virginia Action, they specifically note the existence of this litigation and their intention to seek a determination on those issues here. As a consequence, the Virginia court has had no occasion to address any of the issues presented here and, presumably, need never do so. For these reasons, I conclude that *Johnston* does not support defendants' position. Rather, the decision of the

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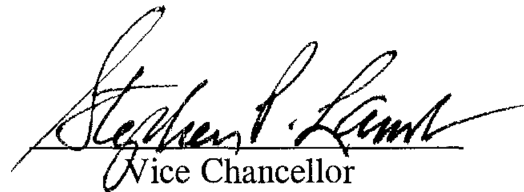
[11] ***Id.*** at ***9.***

Supreme Court in *Fujisawu* is controlling precedent and requires denial of the motion to stay or dismiss.

V.

I conclude that *Fujisawa* requires denial of the defendants' motion without further regard to the practical considerations that are routinely analyzed in connection with a motion to dismiss based on principles of forum *non conveniens*. Nevertheless, I note that those considerations do not weigh strongly in favor of either a stay or a dismissal of this action.[12]

For all of the foregoing reasons, defendants' motion to stay or dismiss shall be, and the same hereby is, denied. IT IS SO ORDERED.



Vice Chancellor

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[12] These may be summarized as follows: (1) Delaware law applies, favoring litigation here; (2) although most of the witnesses and documents are apparently located in Virginia, the burden and inconvenience of traveling to Delaware is minimal and this factor weighs only slightly in favor of litigating in Virginia; (3) other practical considerations, particularly the summary nature of the proceeding under Section 145(k) and the General Assembly's clear expression of policy favoring litigation of these claims in Delaware, weigh substantially in favor of retaining jurisdiction over the matter; (4) relatedly, there is no currently foreseeable prospect that the determination of the issues raised in this complaint in a summary fashion threatens to lead to inconsistent decision-making or conflict between the two courts.