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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TODD KURTIN, an individual, Plaintiff, v. KRE, LLC, a Delaware limited liability company; RANCHO ETIWANDA 685, LLC, a Delaware limited liability company; SUNCAL OF NORTHERN CALIFORNIA, LLC, a Delaware limited liability company; BRUCE ELIEFF, an individual, Defendants.	)	Civil Action No. 730-N

MEMORANDUM OPINION

Submitted: March 4, 2005
Decided: May 16, 2005

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PARSONS, Vice Chancellor.

Before the Court is a motion to dismiss or stay this action in favor of an earlier-filed case in Orange County, California. The parties' dispute stems from the administration and ownership of a family of companies engaged in land development in California and founded in 1994 by plaintiff, Todd Kurtin, and defendant Bruce Elieff. In 1998 Kurtin notified Elieff of his intention to cease new development activities. The parties expected to unwind their business relationship thereafter as the projects then in development were completed and liquidated.

On June 23, 2003, following fruitless negotiation of a buyout package, Kurtin filed suit in California against Elieff and a number of Elieff-only entities seeking various forms of relief, including disgorgement of profits paid to the defendants in that action and an accounting (the "Orange County Action"). On March 26, 2004, Elieff filed a Cross-Complaint in the Orange County Action against Kurtin and various Kurtin-only entities, seeking damages, an accounting of all jointly-owned and Kurtin-owned entities, and a reapportioning of the ownership interests in the jointly-owned entities. On October 6, 2004, Kurtin filed this action against Elieff and four entities jointly-owned by Kurtin and Elieff, seeking distributions from the four entities and related damages (the "Delaware Action").

Defendants have moved to dismiss or stay this action in favor of the Orange County Action on the grounds that it was first-filed or, alternatively, under the doctrine of *forum non conveniens*. For the reasons stated in this memorandum opinion, I conclude that the Orange County Action was first-filed and that this case should be stayed pending resolution of that action.

I. FACTS[1]

In 1994, Kurtin and Elieff co-founded CWC, Inc., a California corporation doing business as SunCal Companies ("SunCal"). SunCal currently oversees approximately 40,000 residential lots in various stages of development and is the largest privately owned, master-planned community developer in the western United States. SunCal operates through numerous single purpose entities established in Delaware and California.

On September 14, 1998, Kurtin notified Elieff that he would no longer participate in future acquisitions with SunCal. He explained that he planned to continue to be involved in certain projects that were already underway and that he would only be involved in management issues that pertained to the existing projects. In addition, Kurtin requested that Elieff utilize corporations that Kurtin had no ownership interest in for future transactions. Finally, Kurtin advised that any funds of CWC used for costs related to future projects should be charged against Elieff's capital account.

A. The Delaware Action

Kurtin filed this action in Delaware on October 6, 2004. In addition to Elieff, the Complaint names the following Delaware limited liability companies as defendants: KRE, LLC; Rancho Etiwanda 685, LLC; SCNC, LLC; and SunCal of Northern California, LLC (collectively the "Defendant LLCs"). Kurtin and Elieff own each of the

[1] All facts are taken from the pleadings in the Orange County and Delaware Actions and the affidavit of Thomas P. Davis ("Davis Aff."), attached to Defendants' Opening Brief ("DOB").

Defendant LLCs equally. Kurtin alleges that the Defendant LLCs are required by their respective operating agreements to make quarterly or immediate distributions and that Elieff has prevented the entities from doing so. Kurtin alleges that (1) Elieff and the Defendant LLCs have breached the operating agreements, (2) Elieff has breached an implied covenant of good faith and fair dealing attendant to the operating agreements, and (3) defendants are liable for "money had and received."

B. The Earlier-Filed California Actions

In early 2003, the parties attempted to negotiate a buyout of Kurtin's remaining interest in SunCal. After no agreement was reached, Kurtin filed suit in Orange County on June 23, 2003. The named defendants in the original Complaint included Elieff, SunCal and 11 Delaware and California entities separately-owned by Elieff. The gravamen of the Complaint is a claim that Elieff diverted assets and resources away from the jointly-owned entities to Elieff-only entities.

On December 10, 2003, Kurtin filed a First Amended Complaint in the Orange County Action against Elieff and 22 California and Delaware entities. The new pleading included, among others, claims for breach of contract, breach of fiduciary duty, an accounting, and imposition of a constructive trust. More recently, on November 24, 2004, Kurtin filed a Second Amended Complaint, removing two entities as defendants and adding 17 others, bringing the total number of defendant entities to 37. All 37 entities named along with Elieff as defendants in the Second Amended Complaint are separately-owned Elieff entities. Although the Second Amended Complaint pleaded

certain causes of action with more specificity, the claims in the Orange County Action remained essentially unchanged.

On March 26, 2004, Elieff filed a Cross-Complaint in the Orange County Action against Kurtin and various Kurtin-only entities. The pleading included, among others, claims for breach of fiduciary duty, conversion, embezzlement, constructive fraud, and an accounting as to all jointly-owned and Kurtin-owned entities. Elieff alleges that Kurtin failed to devote the necessary time, effort and financial resources to develop 20 specifically named projects co-owned by the parties (the "Projects"). Each of the Defendant LLCs in this case is listed as being involved with at least one of the Projects.[2]

Elieff's Cross-Complaint alleges that, since the spring or early summer of 2003, Kurtin has "abandoned his responsibilities on all of the co-owned Projects,"[3] and "refused to cooperate in the financing of the various Projects."[4] In connection with his claims, Elieff requests an adjustment of the relative ownership interests in the Projects based on evaluation of Kurtin's interest at the time of his abandonment of SunCal and the value added by Elieff's efforts and guarantees. The Cross-Complaint also seeks a "judicial declaration that Project funds should not be distributed until the accountings are

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2 Cross-Complaint at ¶ 10.

3 *Id*. at ¶ 14a.

4 *Id.* at ¶ 14c.

accomplished and a finding that there are excess funds available to distribute after full consideration of the liabilities and contingent liabilities of the Project entities . . . ."[5]

The parties to the Orange County Action have taken extensive discovery, including numerous depositions and the production of hundreds of thousands of documents. At last report, a twenty day trial was scheduled to begin July 18, 2005. The Orange County Court has heard and ruled on various motions, including a Kurtin's Motion to Appoint a Provisional Member of Deadlocked LLCs ("Motion to Appoint"). In that motion, Kurtin sought to have a provisional member appointed to oversee four LLCs — the same four LLCs that comprise the Defendant LLCs in this Action. Kurtin and Elieff disagreed about whether the Defendant LLCs, each owned equally by the two co-founders, should pay the regular distributions called for in their operating agreements. On September 3, 2004, the Court denied Kurtin's motion, explaining:

> Assuming *arguendo*, that *Section 226* of Delaware's General Corporation Law applies here, there has been no showing that the LLCs are suffering or that irreparable injury may occur by the lack of distributions. Additionally, Opposing Party [Elieff] is correct in its argument that this entire litigation is about deciding how the joint assets of the Parties will be liquidated and distributed between them. Allowing significant distributions of any sums, at this point in time, might well thwart the appropriate outcome.[6]

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5 *Id.* at prayers for relief ¶ 12.

6 Minute Order, Sept. 3, 2004 (Ex. A to the Affidavit of Thomas P. Davis ("Second Davis Aff."), attached to Defendants' Reply Brief ("DRB")).

The Delaware Action now before this Court seeks the same relief the Court denied in the Orange County Action, albeit through different means.[7]

C. The Parties' Contentions

Elieff argues that this Court should dismiss or stay this case in favor of the Orange County Action. He contends that the Orange County Action will provide "a global resolution of claims" in that it will determine the ownership interests and profits due each party. Elieff contends that this action is merely an attempt to remove assets from four of the more profitable jointly-owned entities before a determination by the Orange County Court of his claim to reduce Kurtin's ownership interest in the those entities. Elieff seeks to dismiss or stay this case under *McWane* because the Orange County Action is first-filed, both actions arise from a common nucleus of operative facts and the claims and parties are substantially and functionally the same. Alternatively, Elieff requests a dismissal or stay under the doctrine of *forum non conveniens*.

Kurtin contends that *McWane* does not apply and that neither dismissal nor stay is appropriate under a *forum non conveniens* analysis. Kurtin asserts that *McWane* is

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[7] In addition to the Orange County Action, the parties are engaged in another action in the California courts (the "Los Angeles County Action"). A copy of the Los Angeles County complaint appears as Ex. I to the Davis Aff. In the Los Angeles County Action, Thomas Morgan, III brought suit against Kurtin, Elieff, KRE, LLC, SunCal/Dayton Canyon, LLC and SunCal/West Hills, LLC. The case settled after trial and the parties agreed to split any profits from the three named entities 35% to Morgan and 65% to Kurtin and Elieff. Thereafter, on May 24, 2004, during the pendency of the Orange County Action, Kurtin sought immediate distributions from SunCal/Dayton Canyon and SunCal/West Hills by filing an "Application for Ex Parte Relief Enforcing Settlement Agreement . . . ." The Los Angeles County Court denied the motion.

inapplicable because the parties in the two cases are not functionally identical and there is no overlap among the jointly-owned entities named in this action and the separately-owned Elieff entities named in the Orange County Action. He also contends that the issues in the two actions are not identical; whereas this case purportedly involves simple breach of contract claims stemming from unpaid distributions, the Orange County Action involves misappropriation of partnership assets and seeks disgorgement of "ill-gotten" gains. In addition, Kurtin argues that the accounting of all SunCal entities requested in the Orange County Action is far different from the "examination of the financial records" required in this case.

II. ANALYSIS

A. Legal Framework

The granting of a stay is not a matter of right, but rests within the sound discretion of the trial court.[8] The threshold issue when determining whether to stay a Delaware action in favor of a related case is which action is first-filed. If the Delaware action is first-filed, "our courts will uphold a plaintiff's choice of forum except in the rare case where that choice imposes overwhelming hardship on the defendant."[9] In determining whether an action constitutes that "rare case," the courts apply the familiar *forum non conveniens* analysis, which in Delaware implicates the *Cryo-Maid* factors.[10] If the

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8 *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996).

9 *United Phosphorus, Ltd. v. Micro-Flo, LLC*, 808 A.2d 761, 764 (Del. 2001).

10 *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum*, 777 A.2d 774, 778 (Del. 2001) (citing *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del.

foreign action is first-filed, however, principles of fairness, comity, judicial economy and the possibility of inconsistent results generally favor the granting of a stay.[11] Where a party alleges that there is an earlier foreign action, *McWane* provides the appropriate analysis, holding that the discretion to grant a stay should be exercised freely where (1) there is a prior pending action, (2) that involves the same parties and issues, and (3) the other court is capable of doing prompt and complete justice.[12]

As a general rule, litigation should proceed in the forum in which it is first-filed, and a party should not be permitted to defeat its adversary's choice of forum by commencing litigation involving the same cause of action in another jurisdiction of its own choosing.[13] The first-filed analysis, however, is not applied mechanically.[14] For example, this court has treated cases where the parties engaged in a race to the courthouse

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Ch. 1964)). The *forum non conveniens* factors identified in *Cryo-Maid* and its progeny are: (1) the applicability of Delaware law in the action; (2) the relative ease of access of proof; (3) the availability of compulsory process for witnesses; (4) the pendency of similar actions in other jurisdictions; (5) the possibility of a need to view the premises; and (6) all other practical considerations which would serve to make the trial easy, expeditious and less expensive. *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 552 (Del. Ch. 1999).

11 *Adirondack*, 1996 WL 684376, at *6.

12 *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970). In situations where the case does not fit neatly into either the *Cryo-Maid* or the *McWane* analysis, our Courts have applied a balancing test weighing "the case's attributes of a first-filed action with the same parties and issues" against "the case's attributes supporting a denial of a stay on the basis of a forum non conveniens analysis." *Davis Ins. Group, Inc. v. Insurance Assoc., Inc.*, 1998 WL 892623, at *2 (Del. Ch. Dec. 3, 1998).

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

14 *Dura Pharm., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 928 (Del. Ch. 1998).

as contemporaneously filed.[15] In other situations, parties have argued that changes to the first-filed case — effected by amendments to the complaint or partial or complete dismissal — have stripped the action of its first-filed status. In those instances Delaware courts have compared the substance of the original case to that of the case as later composed. Where the modified case bears little resemblance to the original case, the courts have treated the modified case as a new action and denied it the benefit of the original filing date.[16] Where the substance of the original case remains unchanged, however, the courts have viewed the filing of intervening suits in other jurisdictions as forum shopping and have maintained the case's first-filed status.[17]

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15 *See, e.g.*, *IBP, Inc. v. Tyson Foods, Inc. (In re IBP, Inc. S'holders Litig.)*, 2001 WL 406292, at *5–6, 8 (Del. Ch. Apr. 18, 2001); *HFTP Inv., LLC v. ARIAD Pharm., Inc.*, 752 A.2d 115, 121 (Del. Ch. 1999); *Texas Instruments, Inc. v. Cyrix Corp.*, 1994 WL 96983, at *5–6 (Del. Ch. Mar. 22, 1994).

16 *See Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1995 WL 632030, at *3 (Del. Ch. Oct. 19, 1995) (finding Delaware action to be first-filed because earlier filed Pennsylvania action did not include the Delaware claims until amendment after filing of the Delaware action); *In re Delta & Pine Land Co. S'holders Litig.*, 2000 WL 1010584, at *3–4 (Del. Ch. July 17, 2000) (staying original plaintiff's cross-claim in deference to a foreign filed action after holding that the cross-claim did not relate back to the original case).

17 *See United Phosphorus*, 808 A.2d at 765 (finding a later filed Delaware state action to be the "continuation of the viable claims" of a dismissed Delaware Federal action and thus to relate back for first-filing analysis); *see also Corwin v. Silverman*, 1999 WL 499456, at *4–5 & n.13 (Del. Ch. June 30, 1999) (holding that neither amended pleadings that did not assert broader claims, nor later joinder of parties, would alter a case's first-filed status).

Under *McWane*, a key consideration is whether the first-filed action involves "the same parties and the same issues" as the competing action.[18] Consistent with the *McWane* doctrine generally, the "same parties, same issues" analysis focuses on substance over form. The parties and issues need not be identical. Instead, the cases examine whether the ultimate legal issues to be litigated will be determined in the first-filed action, and thus, require only a showing of "[s]ubstantial or functional identity" of the parties and issues.[19]

For example, where a named party owns and controls an unnamed party, they have been deemed "substantially identical" for a first-filed analysis.[20] In addition, this court has found parties to be the "same" under *McWane* where related entities are involved, but not named, in both actions.[21] Our courts also have held the parties in competing actions to be "substantially identical" where differences in the parties involved can be remedied by joinder.[22]

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18 *McWane*, 263 A.2d at 283. *See also* 1 Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 5-1[c] (2004).

19 *See AT&T Corp. v. Prime Security Distrib., Inc.*, 1996 WL 633300, at *2 (Del. Ch. Oct. 24, 1996). *See also E.I. du Pont de Nemours & Co. v. Cigna Prop. & Cas. Co.*, 1992 WL 171427, at *5 (Del. Ch. July 20, 1992); *FWM Corp. v. VKK Corp.*, 1992 WL 87327, at *1 (Del. Ch. Apr. 27, 1992).

20 *See Macklowe v. Planet Hollywood, Inc.*, 1994 WL 586835, at *3 (Del. Ch. Oct. 4, 1994).

21 *FWM*, 1992 WL 87327, at *1 (granting a motion to stay after noting the excluded party's de facto involvement in the first-filed action).

22 *See Macklowe*, 1994 WL 586835, at *3; *Corwin*, 1999 WL 499456, at *4 & n.13.

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."[23] In applying this prong, Delaware courts have found federal securities claims to be sufficiently similar to state claims[24] and contract claims to be "in substance and effect" the same as statutory and fiduciary duty claims.[25]

The final factor of the *McWane* analysis is whether the foreign court is "capable of doing prompt and complete justice . . . ."[26] Courts have questioned the foreign court's ability to render prompt and complete justice where a trial was to be delayed pending a judicial election,[27] where the suit involved contract claims governed by a forum selection clause mandating adjudication in Delaware,[28] and where the Delaware action involved a summary proceeding under the Delaware General Corporation Law.[29]

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23 *See Dura Pharm.*, 713 A.2d at 930; *Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *4 (Del. Ch. Apr. 12, 1994).

24 *Schnell*, 1994 WL 148276, at *4.

25 *AT&T*, 1996 WL 633300, at *2.

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

27 *Joyce v. Cuccia*, 1996 WL 422339, at *5 (Del. Ch. July 24, 1996).

28 *See In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *8–9 ("In that sense, then, it was IBP that first-filed in a court that could do complete justice over the parties' dispute").

29 *See Oralco, Inc. v. Bradley*, 1992 WL 332106, at *4 (Del. Ch. Nov. 4, 1992) (involving a proceeding under 8 *Del. C.* § 225).

B. Application of the *McWane* Analysis

This case is somewhat unusual in that Kurtin is the plaintiff in both the Orange County and Delaware actions. Kurtin filed the Orange County Action in June 2003, more than 15 months before the Delaware action. In addition, Elieff filed his Cross-Complaint in the Orange County action well before Kurtin filed suit in Delaware. Kurtin amended his Complaint in the Orange County Action twice, once before and once after he filed the Delaware action. No party has asserted, however, that the current Complaint, as amended, should not relate back to the original filing date for purposes of *McWane*. Thus, the Orange County Action will be deemed first-filed if it meets the *McWane* factors.

1. Same parties

Elieff contends that both actions involve the same parties because the Orange County Action requests "an accounting of all entities set up pursuant to Plaintiff [Kurtin] and Elieff's Partnership."[30] Moreover, Elieff argues that Kurtin's own Motion to Appoint in the Orange County Action effectively made the Defendant LLCs subjects of that action. Alternatively, Elieff contends that the parties are substantially identical for first-filed purposes, because Kurtin, the plaintiff in both actions, could join or otherwise add the Defendant LLCs to the Orange County Action in the future.

Kurtin denies that the two actions contain the "same parties" because none of the entities overlap. Kurtin urges the Court to apply a much narrower interpretation of "same

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[30] Second Amended Compl., submitted as Ex. A at argument on March 4, 2005.

parties" than Elieff. He argues that the parties must be "functionally identical," which he defines as being in a parent/subsidiary or predecessor/successor relationship with any missing party.[31]

None of the Defendant LLCs are parents, subsidiaries, predecessors or successors of the entities sued in the Orange County Action. Delaware courts, however, have not interpreted the substantial or functional identity requirement as narrowly as Kurtin would. Instead, the "same parties" requirement has been met by "related entities,"[32] somewhat overlapping parties,[33] and persons in privity with the parties.[34]

A particularly analogous case is *Adirondack GP, Inc. v. Am. Power Corp*.[35] In *Adirondack*, the dispute stemmed from a limited partnership, AFR, that included two general partners and two limited partners. Financial trouble spawned a dispute over the parties' rights and obligations under a funding agreement between the general partners. API, one of the limited partners, then filed a derivative action in Pennsylvania on behalf of the partnership and against AMHI, the parent of Adirondack, a general partner, and Recycle, the other limited partner. Several weeks later, Adirondack filed an action in Delaware to enforce the partnership agreement against API and APC, the other general

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31 Plaintiff's Answering Brief ("PAB") at 10.

32 *Adirondack*, 1996 WL 684376, at *6.

33 *Harbor Fin. Partners*, 1996 WL 74728, at *4 (Del. Ch. Feb. 16, 1996).

34 *AT&T*, 1996 WL 633300, at *3 (finding substantial or functional identity when the cases "involve the same parties *or persons in privity with them*") (emphasis in original).

35 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996).

partner. API and APC moved to stay the Delaware action under *McWane*. The court granted the stay, explaining that the parties were substantially the same under *McWane* because "[i]n essence, AFR is controlled by two groups of closely related entities, each of which is represented in the two actions."[36]

Similarly, the parties in the Orange County and Delaware actions are closely related entities. Kurtin and Elieff are the primary parties in both cases. In the Orange County Action, the named defendants include numerous Elieff-owned entities, while in this action, the Defendant LLCs are jointly-owned entities. Moreover, in both cases, all of the named entities are controlled by one or both of the primary parties, Kurtin and Elieff. Thus, under *Adirondack* I find no functional difference between the parties in this action and the Orange County Action.[37]

In addition, all of the Defendant LLCs in the Delaware Action are also involved in the Orange County Action. There, Kurtin seeks "an accounting of <u>all</u> entities set up pursuant to Plaintiff [Kurtin] and Elieff's Partnership."[38] There is no dispute that the Defendant LLCs were established pursuant to the parties' business partnership and the complaint itself emphasizes that "<u>all</u>" such entities are at issue in the Orange County Action. Elieff's Cross-Complaint seeks similar relief and expressly mentions the Defendant LLCs as holding investments in many of the Projects at issue. Thus, the

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36 *Id.*

37 *See also AT&T*, 1996 WL 633300, at *3.

38 Second Amended Compl. at ¶ 127 (emphasis in original).

Defendant LLCs are unquestionably involved in both actions, even though they are not named as parties in the Orange County Action.

This conclusion is buttressed by the statements made by the Orange County Court in denying Kurtin's motion to appoint a provisional member of the Defendant LLCs. In opposing Kurtin's motion, Elieff questioned the Court's jurisdiction to appoint a member of the Defendant LLCs because they were not named parties.[39] Conversely, Kurtin argued that the Defendant LLCs were before the Court as instrumentalities of the joint venture between Kurtin and Elieff.[40] The Court denied the motion, explaining: "this entire litigation is about deciding how the joint assets of the Parties will be liquidated and distributed between them. Allowing significant distributions of any sums, at this point in time, might well thwart the appropriate outcome."[41] In denying Kurtin's Motion to Appoint on its merits, the Orange County Court implicitly agreed with Kurtin that the Defendant LLCs were sufficiently before the Court to appoint provisional members under Delaware law. Consistent with that conclusion, I find that the omission of the Defendant

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39 Elieff's Opposition to the Motion to Appoint ("Elieff's Opposition") at 5 (Ex. G to the Davis Aff.). Kurtin now contends that Elieff should be estopped from arguing that California is the more appropriate forum for this dispute because it previously argued to the Court in Orange County that it did not have jurisdiction over the Defendant LLCs. For estoppel purposes, however, it is not the parties' argument, but rather the court's treatment of it that is dispositive. *See In re Silver Leaf, LLC*, 2004 WL 1517127, at *2 (Del. Ch. June 29, 2004). In the Orange County Action, the Court denied Kurtin's request on the merits, implicitly rejecting Elieff's jurisdictional argument.

40 Kurtin's Reply to the Motion to Appoint at 6 (Ex. B to the Second Davis Aff.).

41 Minute Order, Sept. 3, 2004.

LLCs as named parties in the Orange County Action is "more a matter of form than substance."[42]

2. Same issues

When comparing two actions to determine whether the cases involve substantially the same issues, the primary analysis is whether the issues arise out of a "common nucleus of operative facts."[43] Elieff argues that both cases stem from exactly the same nucleus of operative facts and that, to the extent the Orange County Action involves different issues, the issues before this Court are only a subset of the plenary issues presented there. On the other hand, Kurtin characterizes this action as being for breach of the Defendant LLCs' operating agreements, while the Orange County Action is for misappropriation of partnership assets by Elieff. Kurtin also argues that the Orange County Action's broad accounting claim differs from the narrow "examination of the financial records" sought in this action. According to Kurtin, "no overlap exists between the issues in the two actions."[44]

I disagree and find the issues in the two actions to be substantially the same under *McWane*. The ultimate issues in this case are likely to be conclusively determined in the Orange County Action; indeed, the Orange County Court has expressly stated its

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[42] *FWM*, 1992 WL 87327, at *1. Another important factor weighing in favor of finding the parties substantially the same is the fact that Kurtin is the plaintiff in both actions and appears to have the ability to add the Defendant LLCs as parties to the Orange County Action. Kurtin already has amended the Orange County complaint twice to include new parties.

[43] *See Dura Pharm.*, 713 A.2d at 930; *Schnell*, 1994 WL 148276, at *4.

[44] PAB at 12.

intention to do so.[45] Both actions arise from a common nucleus of operative facts that includes the operating agreements of the Defendant LLCs and related entities, the financial performance of those entities and the various actions of Kurtin and Elieff. Although Kurtin attempts to distinguish the types of claims involved in the two actions and the accountings sought in each, the Court cannot ignore the bigger picture and the clear, practical interrelationships between the actions.

The Orange County Court has described that case as "deciding how the joint assets of the Parties will be liquidated and distributed between them."[46] To recover his share of the partnership assets, including damages and losses allegedly caused by the Elieff-owned entities, Kurtin has sought an expansive accounting of all entities set up pursuant to the partnership (including the Defendant LLCs) and by Elieff separately. By way of a Cross-Complaint in the Orange County Action, Elieff seeks essentially the same relief, although he contends that the accounting will show that Kurtin owes Elieff a large sum of money. Elieff also seeks a reduction of Kurtin's interest in the jointly owned entities, including the Defendant LLCs, based on his alleged wrongdoing.

In the Delaware Action, Kurtin claims a right to distributions from four of the many jointly-owned entities, the Defendant LLCs, under their respective LLC Agreements. Not surprisingly, the Defendant LLCs are among the more profitable of the jointly-owned entities. In opposing a stay, Kurtin asks this Court to focus solely on those

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45 Minute Order, Sept. 3, 2004.

46 *Id.*

LLC Agreements and to ignore Elieff's earlier filed Cross-Complaint seeking, among other things, to reduce Kurtin's interest in the Defendant LLCs.[47] In my opinion, the distributions Kurtin seeks under the LLC Agreements are inextricably intertwined with the matters at issue in the first-filed Orange County Action. Thus, this action is only a subset of the Orange County Action, making the two actions substantially the same under *McWane*.[48]

Moreover, Kurtin's filing of this action after an analogous motion was denied by the Orange County Court is a transparent attempt to relitigate that issue in a new forum. Delaware courts have long discouraged forum shopping.[49] Consistent with that principle, I do not believe that equity or fairness would be served by allowing Kurtin to proceed in this Court in the hope of obtaining a more favorable result.

3. Court capable of prompt and complete justice

Elieff argues that the Orange County Court, which has handled the broader Orange County Action for nearly two years, is capable of prompt and complete justice and should

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47 Elieff's Cross-Complaint further requests that the Orange County Court conduct an accounting as to all the disputed matters *before* any distributions are made from the jointly-owned entities.

48 The fact that the Orange County Action involves broader issues does not, as Kurtin argues, weigh in favor of allowing this case to proceed. *See AT&T*, 1996 WL 633300, at *3. Rather, principles of efficiency, comity, and the possibility of inconsistent results weigh in favor of staying this action to allow the broader action to proceed unhindered.

49 *See, e.g.*, *In re Walt Disney Co.*, 1997 WL 118402, at *2–4 (Del. Ch. Mar. 13, 1997); *NRG Barriers, Inc. v. Jelin*, 1996 WL 377014, at *6 (Del. Ch. July 1, 1996); *Zimmerman v. Home Shopping Network, Inc.*, 1989 WL 102488, at *7 (Del. Ch. Sept. 1, 1989).

be allowed to proceed. Kurtin does not dispute the Orange County Court's ability to resolve its claims but contends that this Court can provide a speedier disposition of the specific claims he asserts regarding the Defendant LLCs.

I am confident that the Orange County Court can provide Kurtin prompt and complete justice. The Court has devoted significant attention to the Orange County Action and has scheduled a twenty day trial to begin on July 18, 2005. Kurtin argues that this date is likely to be postponed because of additional discovery necessitated by his Second Amended Complaint's addition of a number of new parties. If it occurs at all, however, such delay would be attributable to Kurtin's own actions and would not warrant conducting a concurrent action in another forum.

In sum, the Orange County Action deserves the deference generally accorded a first-filed action because the parties and issues in the two cases are substantially the same and the Orange County Court is capable of providing prompt and complete justice.[50] In this circumstance, factors such as comity, judicial economy and the possibility of inconsistent results generally favors the granting of a stay. The decision to stay, however, remains within the sound discretion of this Court.

In this case important factors favor granting a stay. First and most importantly, the Orange County Action has been underway for nearly two years and the judge there has expressed concern that any distributions from the joint entities may well upset the final outcome. In addition, potential witnesses are all located in California. In fact, the only

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[50] Because I conclude this action should be stayed under *McWane*, I need not address the parties' *forum non conveniens* arguments.

considerations favoring Delaware are the applicability of Delaware law and our interest in the governance of Delaware entities. The import of those considerations here is marginal, however, because Kurtin's narrowly focused Delaware Action does not raise any complex or novel issue of Delaware law. Thus, the circumstances of this case fall far short of creating the "rare case" where a Delaware court will refuse to stay a later-filed Delaware case.[51]

III. CONCLUSION

For the foregoing reasons, the Court grants defendants' motion to stay. This action will be stayed pending resolution of the Orange County Action or further order of this Court.

IT IS SO ORDERED.

[51] *In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *7 (quoting *Azurix Corp. v. Synagro Tech., Inc.*, 2000 WL 193117, at *4 (Del. Ch. Feb. 3, 2000)).