IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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| STEPHEN M. BERGER, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No. 1527-N |
| | ) | |
| INTELIDENT SOLUTIONS, INC., and DIASTI FAMILY LIMITED PARTNERSHIP, | ) | |
| | ) | |
| Defendants. | ) | |

***MEMORANDUM OPINION AND ORDER***

**Submitted: November 21, 2005**
**Decided: November 30, 2005**

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LAMB, Vice Chancellor.

The plaintiff, a minority stockholder in a Florida corporation, filed suit for breach of fiduciary duty in connection with a freeze-out merger. The sole defendants are a Nevada limited partnership that is the ultimate controlling entity of the Florida corporation and a Delaware corporation it formed to serve as an intermediate holding company in connection with the merger. The defendants moved to dismiss the complaint on grounds of forum non conveniens, arguing, *inter alia*, that all of the potential witnesses and pertinent documents are located in Florida and that the case predominantly deals with novel issues of Florida law that should be resolved by the Florida courts. This court concludes that the record demonstrates, with particularity, that this is one of those rare cases where the defendants would be subject to overwhelming hardship if required to litigate in Delaware. Therefore, dismissal is warranted on the ground of forum non conveniens in order that the litigation may proceed in Florida.

## I.

### A. The Parties

Coast Dental Services, Inc. is a Florida corporation that provides dental practice management services to an affiliated group of 106 dental centers located in Florida, Georgia, Virginia, and Tennessee.[1] On or about April 7, 2004, Coast

[1] Compl. ¶ 2. The affiliated group of 106 dental centers in Florida, Georgia, Virginia, and Tennessee are collectively referred to as Coast P.A. The entities comprising Coast P.A. are all owned by Adam Diasti. Coast P.A. provides dental services to patients and employs dentists and dental hygienists. Coast Dental handles office staff, dental supplies and lab fees, occupancy,

Dental deregistered and became a private company.[2] Thereafter, the company's stock traded sporadically in the pink sheets.

Prior to the July 11, 2005 cash-out merger at issue in this case, one of the defendants in this action, the Diasti Family Limited Partnership ("DFLP"), was the majority stockholder of Coast Dental, owning approximately 67% of its outstanding shares of common stock.[3] DFLP is a Nevada limited partnership controlled by Coast Dental's board chairman, Terek Diasti, Coast Dental's president and director, Adam Diasti, and Coast Dental's director, Tim Diasti.[4]

The other defendant, Intelident Solutions, Inc., is a Delaware corporation formed by DFLP to effectuate the merger.[5] Intelident, in turn, formed a wholly owned Florida corporation named Intelident Merger Corp. to function as the acquisition vehicle to merge into Coast Dental. Coast Dental survived the merger as a wholly owned subsidiary of Intelident Solutions.[6] DFLP remains the majority stockholder of Intelident. As a result of the transaction, 13 members of Coast Dental's management obtained minority ownership positions in Intelident.

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advertising, acquisition of property and equipment, leasing and improvement of facilities, and related administrative costs for Coast P.A. Coast Dental's revenue consists primarily of fees paid by Coast P.A.

[2] Compl. ¶ 3.

[3] Compl. ¶ 4.

[4] *Id.*

[5] Compl. ¶ 5.

[6] Compl. ¶ 6.

The plaintiff, Stephen M. Berger, is a former minority stockholder of Coast Dental who was cashed out in the merger.[7] Berger's complaint names only Intelident Solutions and DFLP as defendants. Berger's counsel conceded at oral argument that he did not assert claims against any of the directors of Coast Dental because this court lacks personal jurisdiction over them. Jurisdiction is alleged to exist over DFLP, a Nevada limited partnership, solely as a result of its action in forming Intelident Solutions in Delaware.

B. The Freeze-Out Merger

In April of 2005, DFLP, along with certain members of Coast Dental's management, proposed to cash-out the company's minority stockholders for $6 per share.[8] The company formed a Special Committee consisting of two purportedly independent directors, Peter M. Sontag and Richard T. Welch, to evaluate this proposal.[9] The Special Committee retained legal counsel and Capitalink L.C. as its financial advisor. Capitalink performed a preliminary analysis and concluded that the proposed $6 per share was not a fair price.[10] DFLP bargained with the Special Committee and increased its bid price to $9.25 per share. Capitalink issued a

[7] The court notes that this plaintiff has two other lawsuits pending in the Court of Chancery. *See Stephen M. Berger v. John C. Loring, et al.*, Del. Ch., C.A. No. 1798-N and *Stephen M. Berger v. HB Fairview Holdings LLC*, Del. Ch., C.A. No. 997-N.
[8] Compl. ¶ 5.
[9] Compl. ¶ 7.
[10] *Id.*

fairness opinion at this price, and the Special Committee and the board of directors approved the merger.

On Thursday, June 30, 2005, the company mailed out a disclosure statement discussing the details of the transaction. The stockholder meeting to vote for the transaction was noticed for Monday, July 11, 2005. Therefore, due to the July 4 holiday, the stockholders had only five business days to receive and review the material and decide whether to vote for the transaction or seek an appraisal remedy.[11] Allegedly, the Special Committee members approved this unfair schedule because they were offered the chance to continue as directors of the acquiring company.[12] At the stockholder meeting, DFLP voted its shares in favor of the transaction, and the minority stockholders were cashed out at $9.25 per share.[13]

The plaintiff filed this individual and purported class action on July 29, 2005, against DFLP and Intelident Solutions. The complaint alleges that DFLP breached its fiduciary duties in connection with the freeze-out merger. Specifically, the plaintiff claims that the merger was unfairly timed so as to "keep minority shareholders in the dark as long as possible and to prevent anyone else from having time to make a better offer."[14] According to the complaint, the merger

[11] Compl. ¶ 13.
[12] *Id*.
[13] *Id.*
[14] *Id.*

was the product of unfair dealing which led to an inadequate merger price. Allegedly, the $9.25 per share price was approximately half of Coast Dental's book value.[15] In addition, the complaint alleges that the disclosure document omitted and misstated material facts about the transaction.[16] Ultimately, the plaintiff seeks damages of the difference between the $9.25 per share merger price and the fair value of the company.

On September 22, 2005, the defendants filed a motion to dismiss the complaint based on, *inter alia*, forum non conveniens. The defendants claim that Florida is the more appropriate forum to adjudicate this case, arguing, among other things, that this action is controlled by Florida law and that the only nexus this case has with Delaware is that Intelident, the intermediate holding company, is incorporated in Delaware. Both parties submitted briefs on this motion, and oral argument was held on November 21, 2005.

[15] Compl. ¶ 21.

[16] Compl. ¶¶ 4-16. For example, the plaintiff alleges that the disclosure document "repeatedly touts the $9.25 freeze-out price as being a large premium to Coast Dental's recent stock price," but omits that the company's stock had a very minimal trading volume. In addition, it is alleged that the proxy statement failed to disclose the company's projections, causing stockholders to be unable to make a fair and reasonable assessment of the $9.25 per share merger price. Lastly, the plaintiff alleges that the proxy statement was materially incomplete in its disclosure relating to Capitalink's comparable company and comparable acquisition valuation analysis.

## II.

The Delaware Supreme Court has held that to prevail under the forum non conveniens doctrine a defendant must meet a heavy burden of showing that the traditional forum non conveniens factors weigh so severely against suit in Delaware that the defendant will face overwhelming hardship if the suit proceeds in this forum.[17] This onerous burden is justified by the fact that the dismissal results in the defeat of the plaintiff's choice of forum.[18]

The defendants here can meet this exacting standard by convincing the court that this is one of the rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in Delaware is so severe as to manifest undue hardship and inconvenience.[19] While the overwhelming

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[17] *See Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 267 (Del. 2001); *Ison v. E.I. duPont de Nemours & Co.*, 729 A.2d 832, 837-38 (Del. 1999); *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997); *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship*, 669 A.2d 104, 108 (Del. 1994); *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 37 (Del. 1991); *Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444, 447 (Del. 1965).

[18] *Chrysler First*, 669 A.2d at 107 (explaining that the plaintiff's choice of forum should rarely be disturbed); *Mar-Land Indus. Contrs., Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 778 (Del. 2001) (holding that "a plaintiff seeking to litigate in Delaware is afforded the presumption that its choice of forum is proper.").

[19] *Ison*, 729 A.2d at 842; *Candlewood Timber Group v. Forestal Santa Barbara SRL*, 2004 Del. LEXIS 458, at *25 (Del. Oct. 4, 2004) (stating that the heavy burden of establishing "overwhelming hardship and inconvenience" will be met "only in a rare case"); *United Phosphorous, Ltd. v. Micro-Flo, L.L.C.*, 2002 Del. LEXIS 450, at *10 (Del. July 24, 2002) (noting that a party seeking to avoid litigation in Delaware bears a "heavy burden of establishing overwhelming hardship").

hardship standard is difficult for a defendant to overcome, "it is not preclusive"[20] and "can be satisfied in an appropriate case."[21]

In evaluating whether or not the defendants have met their burden, Delaware courts employ an analysis predicated upon the six so-called "*Cryo-Maid*" factors, which are (1) the applicability of Delaware law; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the possibility of a need to view the premises; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical considerations that would make trial of the case easy, expeditious, and inexpensive.[22] In *Chrysler First*, the Delaware Supreme Court explained that these factors:

> provide the framework for an analysis of hardship and inconvenience. They do not, of themselves, establish anything. Thus, it does not matter whether only one of the *Cryo-Maid* factors favors [the] defendant or all of them do. The issue is whether any or all of the *Cryo-Maid* factors establish that [the] defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware.[23]

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[20] *Ison*, 729 A.2d at 842; *Warburg*, 774 A.2d at 267-268.

[21] DONALD J. WOLFE, JR. AND MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 5-2 at 5-27 (2005) *citing Trinity Inv. Trust, L.L.C. v. Morgan Guar. Trust Co.*, Del. Super. Ct., C.A. No. 01C-03-005 (Sept. 28, 2001), Mem. Op. at 14 (finding that the defendants met their burden of proving "one of those rare cases in which the complaint should be dismissed" on forum non conveniens grounds); *IM2 Merch. & Mfg., Inc. v. Tirex Corp.*, 2000 Del. Ch. LEXIS 156 (Del. Ch. Nov. 2, 2000) (holding that forum non conveniens factors balanced overwhelmingly in favor of dismissal).

[22] *Taylor*, 689 A.2d at 1198-1199. All but the fifth factor listed above were set forth in the *Cryo-Maid* decision, *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964), *overruled on other grounds, Pepsico, Inc. v. Pepsi-Cola Bottling Co*., 261 A.2d 520 (Del. 1969). The fifth factor originated in *Parvin v. Kaufmann*, 236 A.2d 425, 427 (Del. 1967).

[23] 669 A.2d at 108.

The application of this forum non conveniens standard is one of sound discretion for the trial court, to be determined "in light of all the facts and circumstances and in the interest of the expeditious and economic administration of justice."[24] However, the trial court is not permitted to dismiss the case simply on a finding that the alternative forum is a more appropriate location for the dispute to be heard.[25] Rather, the trial court must decide whether or not the defendants show with particularity that one or more of the *Cryo-Maid* factors impose an overwhelming hardship on the defendants.[26]

A. The Applicability Of Delaware Law

The first of the forum non conveniens factors deals with "whether the controversy is dependent upon the application of Delaware law which the courts of this state more properly should decide than those of another jurisdiction."[27] Here, it is undisputed that this case involves no substantive issues of Delaware law. Rather, since Coast Dental is incorporated in Florida, the internal affairs doctrine prescribes that Florida law governs the

[24] *Cryo-Maid*, 198 A.2d at 685; *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 37 (Del. 1991) (holding that a motion to stay or dismiss on the ground of forum non conveniens is addressed to the sound discretion of the trial court).
[25] *Ison*, 729 A.2d at 838 (holding that it was error to predicate dismissal on a finding that another court would be a more appropriate forum).
[26] *Mar-Land*, 777 A.2d at 778; *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 994 (Del. 2004).
[27] *Cryo-Maid*, 198 A.2d at 684.

corporate law claims asserted in this action.[28] While this court often applies the law of other jurisdictions, the central legal issues in dispute in this case present novel questions of statutory interpretation under Florida law that are best decided by the Florida courts.[29]

The defendants argue that under Florida law the statutory appraisal process is the exclusive remedy for the plaintiff's claims. Specifically, the defendants contend that Section 607.1302(4) of the Florida appraisal statute bars the plaintiff's breach of fiduciary duty claims. The Florida statue provides:

> A shareholder entitled to appraisal rights under this chapter may not challenge a completed corporate action for which appraisal rights are available unless such corporate action:
>
> (a) Was not effectuated in accordance with the applicable provisions of this section or the corporation's articles of incorporation, bylaws, or board of directors' resolution authorizing the corporate action; or
>
> (b) Was procured as a result of fraud or material misrepresentation.[30]

The defendants maintain that Coast Dental complied with Florida law and offered appraisal rights to any stockholder who dissented from the merger. They interpret Section 607.1302(4) to provide that Berger and other stockholders who failed to

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[28] *Vantagepoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1112 (Del. 2005) (holding that "only one state should have the authority to regulate a corporation's internal affairs—the state of incorporation.").

[29] *Tuckman v. Aerosonic Corp.*, 1982 Del. Ch. LEXIS 452, at *22 (Del. Ch. May 20, 1982) (applying Florida law to a breach of fiduciary duty claim).

[30] Fla. Stat. § 607.1302(4) (2005).

dissent from the transaction may only maintain an action against the defendants if either they properly allege that the merger was not effectuated in compliance with Florida statutory law, or the merger was procured as a result of fraud or material misrepresentation. The defendants argue that the plaintiff has failed to properly allege either of these factors, and thus the complaint should be dismissed for failure to state a claim under Florida law.

The plaintiff argues, in response, that the defendants misread this statutory provision, contending that the statute's plain language only limits "challenges to corporate action" and does not purport to bar remedies against fiduciaries for breach of fiduciary duties.[31] Berger claims that, although he is not seeking to unwind the merger or otherwise "challenge" the merger, he is entitled to bring a suit for monetary damages against the controlling stockholder for breach of fiduciary duty in connection with the transaction. The plaintiff bases this interpretation on the official comment to Section 13.02(d) of the Revised Model Business Corporation Act, which he claims the Florida statute was modeled after.[32]

The court finds that both arguments present plausible interpretations of Section 607.1302(4). As the parties agree, however, there are no Florida cases construing the statute this court can turn to for guidance. Therefore, the decision

[31] *Id.*

[32] 3 MODEL BUS. CORP. ACT § 13.02 cmt 5 at 13-27 (2002) ("Since section 13.02(d) is concerned with challenges only to the corporate action, it does not address remedies, if any, that stockholders may have against directors or other persons as a result of the corporate action.").

for this court—whether appraisal is the exclusive remedy for a breach of fiduciary duty claim made in connection with a freeze-out transaction—involves a novel and substantial issue of Florida corporate law that is best resolved by the Florida courts.[33] For this reason, the court concludes that this *Cryo-Maid* factor weighs heavily in favor of dismissing the case here to allow for litigation in Florida, given Florida's strong interest in interpreting and applying novel and important issues of its own corporate law. In this regard, the court notes that Berger chose to be governed by Florida law when he purchased stock in a company incorporated in Florida.[34]

B. The Relative Ease Of Access To Proof

The second *Cryo-Maid* factor, the relative ease of access to proof, requires the court to evaluate the proximity of potential witnesses, documents, and other evidence in relation to the Delaware forum.[35] Coast Dental is a Florida corporation, its corporate offices are located in Florida, and the members of its Special Committee, Sontag and Welch, as well as its officers and other directors, are all residents of Florida.[36] Coast Dental does not conduct any business in

[33] *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763, 769 (Del. Super. Ct. 1995) (suggesting that a Delaware court might defer to a court of another state when "cutting edge or unsettled issues of law" from that state are involved).
[34] The court recognizes and does not mean to suggest that it may dismiss the case "merely because an issue of foreign law is presented." *Taylor*, 715 A.2d at 842.
[35] *Texas Instruments v. Cyrix Corp.*, 1994 Del. Ch. LEXIS 31, at *13-14 (Del. Ch. Mar. 22, 1994).
[36] Merrick Aff. ¶¶ 4-5, 7. The other members of the board of directors that approved the transaction, Millard and Woody, are residents of Georgia.

Delaware.[37] Several of the company's law firms and financial advisors, including the Capitalink analysts who prepared the fairness opinion involved in the transaction, reside in Florida.[38] Moreover, DFLP is a Nevada entity whose partners are principally Florida residents.[39] Thus, presumably all of the relevant evidence in this case, including the company's books, records, and witnesses related to the transaction in issue, is in Florida.[40]

The only connection between Delaware and the present lawsuit is that Intelident, the company created solely to act as a holding company in the merger, is incorporated in Delaware. This is a particularly weak connection. First, this case primarily concerns the actions taken by Florida fiduciaries in Florida. The fact that Intelident is incorporated in Delaware has no significance to this dispute. Second, Intelident maintains its principal executive offices in Florida, and thus it is reasonable to assume that the relevant evidence regarding the merger is in Florida.[41] Accordingly, the court finds that the defendants have demonstrated with particularity that specific witnesses and pertinent documents are located in Florida, potentially causing them considerable hardship if forced to litigate in Delaware. Therefore, this factor weighs in favor of dismissal.

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[37] *Id*.
[38] *Id.* at 8.
[39] *Id.* at 6.
[40] *Id.* at 11.
[41] *Id.* at 3.

C. The Availability Of Compulsory Process For Witnesses

As discussed above, the defendants correctly argue that most of the witnesses likely to be called to testify at trial reside in Florida and none of them live or work in Delaware.[42] Those witnesses would be subject to compulsory process in Florida, but would not be subject to compulsory process in Delaware. Thus, it is clear that it would be more convenient to obtain the trial testimony of potential witnesses in Florida. Therefore, the compulsory process factor also weighs in favor of dismissing this action.

D. The Possibility Of A Need To View The Premises

This factor is not relevant to this dispute since there is no indication that the inspection of Coast Dental's premises will be necessary.[43]

E. The Pendency Or Non-Pendency Of An Action Elsewhere

There is no litigation pending elsewhere among the parties to this action. Therefore, "there is no risk of overlapping proceedings that would result in imposing the burdens of duplication on the defendants."[44] However, since this case is at an early stage in the litigation and no discovery has been undertaken, the plaintiff will not be unduly burdened by having to refile his suit in Florida.[45]

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[42] *Id.* at 11.
[43] *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 554 (Del. Ch. 1999) (holding that this factor is not applicable to the suit and is therefore is given no weight).
[44] *IM2*, 2000 Del. Ch. LEXIS 156, at *40.
[45] *Id.*

F. Other Practical Considerations

The final forum non conveniens factor involves evaluating any other consideration that would serve to "make the trial of the case easy, expeditious and inexpensive."[46] The court notes that, due to the remoteness of this venue from the real center of the dispute, the complaint asserts only a fragment of the possible claims arising out of the challenged merger. Most strikingly, Berger's complaint foregoes asserting claims against Coast Dental's directors, including the members of the Special Committee, over whom this court is unable to assert personal jurisdiction. In effect, by bringing this action in Delaware, the plaintiff has closed off the possibility of a single complete adjudication of all the claims arising out of this transaction. In contrast, if the plaintiff refiles in Florida, he will be able to bring all related claims in the same forum.

**III.**

The court finds that the defendants have met the exacting standard applied in assessing forum non conveniens motions by demonstrating that one or more of the *Cryo-Maid* factors weigh heavily in favor of dismissal.[47] The defendants have demonstrated that this is one of those rare cases where they would be subjected to overwhelming hardship and inconvenience if required to litigate in Delaware. In

[46] *Cryo-Maid*, 198 A.2d at 684.
[47] *Chrysler First*, 669 A.2d at 108 (explaining that it does not matter if only one of the *Cryo-Maid* factors establishes that the defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware).

particular, the court finds that this controversy raises important issues of unsettled Florida law, which can only be answered authoritatively by a Florida court. Additionally, the fact that all of the evidence and witnesses are located in Florida and the fact that the only connection to Delaware is that the holding company created to transact the merger is incorporated here weigh heavily in favor of litigating the dispute in Florida.

Therefore, for the reasons stated herein, the defendants' motion to dismiss on the ground of forum non conveniens is GRANTED. IT IS SO ORDERED.