IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LANDESBANK BADEN-WURTTEMBERG,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 7933-VCG*
WALTON SEATTLE MEZZ HOLDINGS VI-B, L.L.C and CT INVESTMENT MANAGEMENT CO., LLC, solely in its capacity as Special Servicer under the Amended and Restated Participation and Servicing Agreement, dated October 23, 2007,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: February 11, 2013
Date Decided: April 1, 2013

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GLASSCOCK, Vice Chancellor

I. SUMMARY

This matter involves complicated contractual relationships among lenders whose loans are directly or indirectly secured by real property in the State of Washington. The question presented here, however, is relatively simple. A "Special Servicer" appointed to manage the underlying mortgage loans on behalf of the lenders sought appointment of a receiver over the secured property in a Washington State court. Several lenders appeared to object to the appointment of the receiver, including the Plaintiff here. The Washington court appointed the receiver over the lenders' objections, crafting a detailed order accommodating their concerns and retaining jurisdiction and oversight of the receiver (the "Receiver"). The Plaintiff here, however, elected to forgo one argument available before the Washington court in opposing the appointment of the Receiver: that the Special Servicer was contractually bound to act only under the direction of the Plaintiff here, along with similarly situated lenders. Instead, the Plaintiff split off this issue, and has brought it here in the form of a request for a declaration of its rights under the contracts. The question addressed in this Opinion is whether that issue, as a matter of comity and efficiency, belongs before the Washington State court in the first-filed action, rather than in this Court.

The loans which form the subject matter of both actions include a mortgage loan and several mezzanine loans. A number of agreements provide for various

rights and responsibilities of the parties. Pertinently, creditor (and Defendant in this action) Walton Seattle Mezz Holdings VI-G, LLC ("Walton") is designated the "Controlling Holder," giving it the power to appoint and direct a "Special Servicer" over the loans. The Special Servicer has the duty and power to service and manage the mortgage loan in the event of a default by the borrower. Walton appointed CTIMCO as Special Servicer.

The mortgage loan is in default, conferring—according to Walton—management authority over the mortgage loan on CTIMCO. Pursuant to that control, and at Walton's direction, CTIMCO brought suit in Washington State court, seeking appointment of a general receiver to take possession of and manage the mortgaged property (the "Washington Action"). Creditor Landesbank Baden-Wurttemberg ("LBBW"), the Plaintiff here, along with other lenders, appeared in the Washington Action to oppose the appointment of the Receiver. Ultimately, the Washington court appointed the Receiver and retained jurisdiction. The Court enjoined the parties there, including LBBW, from "[s]eeking to enforce any claim, right, or interest against the property or undertaking any self help remedies or taking any action whatsoever to interfere in any way with the receiver and its fulfillment of its duties under" the Washington court's order.

Subsequently, LBBW brought this suit, seeking a declaratory judgment that Walton, because of conflicts of interest, is and has been contractually unable to

serve as Controlling Holder, and that the B-1 Participation (which includes LBBW) is in fact the Controlling Holder. LBBW also seeks to enjoin CTIMCO from acting upon Walton's direction. Because this could, and appropriately should, have been raised in the Washington Action as a defense against Walton/CTIMCO's seeking the appointment of a receiver, because there remains no barrier to LBBW litigating the issue in that matter, and because the result LBBW seeks here is likely to conflict with the injunction entered by the Washington court, this action shall be stayed in favor of the first filed Washington Action.

* * *

This opinion addresses the Defendants' Motion to Dismiss the Complaint on procedural grounds. The Defendants moved to dismiss the Complaint based on a first-filed case in Washington, failure to join indispensible parties under Rule 12(b)(7), and failure to state a claim under Rule 12(b)(6). Following a Motion for Summary Judgment filed by the Plaintiff that relates to the same substantive issues as the Rule 12(b)(6) Motion, I bifurcated my analysis to dispense with the procedural grounds for dismissal first. This is my analysis as to whether this case should be stayed or dismissed in favor of the prior-filed case in Washington. Because of my decision, I need not reach the issue of the Plaintiff's alleged failure to join indispensible parties.

II. BACKGROUND FACTS

A. Parties

Plaintiff LBBW is a foreign banking corporation organized under the laws of the Federal Republic of Germany.[1] Defendants Walton and CTIMCO are Delaware limited liability companies.[2]

B. The Loans

The original loans at the heart of this dispute were issued by Column Financial, Inc. (the "Original Lender") in April 2007 in the amount of $900 million, and consisted of a $742,388,000 mortgage loan (the "Mortgage Loan") and three $53,028,000 mezzanine loans, which are junior to the Mortgage Loan and unsecured. These loans were issued to the Mortgage Loan Borrowers and their affiliates to enable the acquisition of various office buildings. Additional mezzanine loans were created in 2007, and the principal balances were restructured among the Original Loans and the additional mezzanine loans (together, the "Loans"). The Loans were securitized, and LBBW and Walton each purchased some of the securities.

The structure of the Loans, along with the identities and relationships of their holders, is quite complicated and is described in the Complaint as follows:

[1] Compl. ¶ 19.
[2] *Id.* ¶¶ 20-21.

> (i) the Mortgage Loan, with an outstanding principal balance of approximately $466,304,567.62, held by Mortgage Lender, subject to the B-1 Participation and B-2 Participation; (ii) a mezzanine loan ("First Mezzanine Loan"), with an outstanding principal balance of approximately $230,944,444.81, which is junior to the Mortgage Loan and is held by Walton Mezzanine One; (iii) a mezzanine loan (the "Second Mezzanine Loan"), with an outstanding principal balance of approximately $49,863,379.16, which Second Mezzanine Loan is junior to the First Mezzanine Loan and is held by Walton Mezzanine Two; (iv) a mezzanine loan (the "Third Mezzanine Loan," and together with the First Mezzanine Loan and the Second Mezzanine Loan the "Mezzanine Loans"), with an outstanding principal balance of approximately $49,807,743.25, which Third Mezzanine Loan is junior to the Second Mezzanine Loan and is held by Walton Mezzanine Three; and (v) two additional mezzanine loans each in the approximate amount of $49,807,743.25, which mezzanine loans are junior to the Third Mezzanine Loan, but are not held by Walton Defendants and not directly relevant to this action.[3]

Thus, the priority for repayment of these loans would be, in descending order, first to the Mortgage Loan, then to the First Mezzanine Loan, then to the Second Mezzanine Loan, and so on.

C. The Participation Agreement

The Loans are governed by several agreements including a mortgage loan agreement, participation and servicing agreement, a pooling and servicing agreement, mezzanine loan agreements, mezzanine pledge and security agreements, and an intercreditor agreement. The Mortgage Loan is governed by the Amended and Restated Participation and Servicing Agreement (the

[3] *Id.* ¶ 23.

"Participation Agreement"). Under the Participation Agreement, there is a senior participant (the A Holder) and two junior participants (the B-1 and B-2 Holders).[4]

The Participation Agreement identifies the B-1 Holder as Dekabank Deutsche Girozentrale ("DekaBank"). At some point after the Participation Agreement was created, Plaintiff LBBW acquired a portion of the outstanding B-1 participation interests. However, the Plaintiff holds only a minority position in the B-1 Participation, and the Plaintiff has not alleged any basis under which it is authorized to act on behalf of the B-1 Participation, as a whole, nor on behalf of the other B-1 Holders. In April 2011, Defendant Walton acquired all of the outstanding interests in the B-2 Participation, with a principal value of $30 million.[5]

The servicing and management of the Mortgage Loan is ordinarily the responsibility of the Master Servicer (an entity appointed by the Participation A Holder) on behalf of all holders of the Participations. In an event of default by the Mortgage Loan Borrower, however, the "Controlling Holder" has the right to select a Special Servicer to assume responsibility over the Mortgage Loan. Under the Participation Agreement, the B-2 Holder is the designated "Controlling Holder;" therefore, Walton, as the B-2 Holder, is the Controlling Holder, absent some contractual reason to exclude Walton. As Controlling Holder, Walton has

[4] Participation Ag. §§ 2, 3.
[5] Compl. ¶ 8.

enumerated rights under the Participation Agreement, including rights to approve or disapprove of certain actions following an event of default. Expressly stated in the Participation Agreement is the Controlling Holder's right to "take or refrain from taking actions that favor the interests of the Controlling Holder or its Affiliates over the other Holders." The Participation Agreement also states the "no Controlling Holder shall be liable by reason of its having acted or refrained from acting solely in its interest or in the interest of its Affiliates."

An Event of Default occurred in April 2012. Therefore, Walton, as Controlling Holder, has the right to select the Special Servicer, the entity that will oversee the Loans, unless Walton is disqualified from serving as the Controlling Holder. Walton had designated CTIMCO as Special Servicer on October 12, 2011. LBBW alleges that the relationship between Walton and the Mezzanine Borrowers disqualifies Walton from acting as Controlling Holder, and that the B-1 Participation, and not Walton, has the authority to direct the actions of, or replace, CTIMCO. This is the basis for the claims in the Delaware Action.

D. A Brief Overview of the Substantive Claims

Some related entities of Walton own the Mezzanine Loans ("the Mezzanine Loan Borrowers").[6] The exact ownership structure of the relationships between the Mezzanine Loan Borrowers and the Mortgage Loan Borrowers—or rather the

[6] Walton and the Mezzanine Loan Borrowers share the same parent entity.

characterization of the relationships—is contested between the parties. Suffice it to say, LBBW views the Mezzanine Loan Borrowers as affiliated entities of the Mortgage Loan Borrowers under the loan agreements. In contrast, Walton argues that these relationships are more akin to debtor-creditor or borrower-lender relationships. This distinction will be relevant to a substantive determination of whether Walton should be disqualified from acting as the Controlling Holder. If Walton is not the Controlling Holder, actions taken by Walton in the past as the Controlling Holder may be invalid. Furthermore, if the B-1 Participation is now the Controlling Holder, the B-1 Participants have the right to seek the removal or replacement of the Receiver. Because this Opinion addresses only the procedural grounds to dismiss the Complaint, I need not go into further detail here.

E. The Appointment of the Special Servicer

Under the Participation Agreement, in the event that there is an occurrence of a default or the imminent risk of default, the Master Servicer of the Loans is required to transfer servicing of the Mortgage Loan to a Special Servicer. The Controlling Holder has the authority to replace any Special Servicer, with or without cause, and to appoint a successor. Walton exercised this right on October 12, 2011, before any default or imminent risk of default had arisen, by appointing Defendant CTIMCO as Special Servicer to the Mortgage Loan.

Around December 23, 2011, the Master Servicer determined that there was an imminent risk of default occurring under the Mortgage Loan that was likely to continue unremedied for sixty or more days. Consequently, the servicing of the Mortgage Loan was transferred to CTIMCO, as Special Servicer, around the same time.

In April 2012, the Mortgage Loan Borrowers defaulted on the Loans. At that point, LBBW theorizes that the Walton Mezzanine Borrowers became the effective owners of the Mortgage Loan Borrowers, since the Walton Mezzanine Borrowers held a security interest in 100% of the equity of the Mortgage Loan Borrowers. Because Walton is owned by the same parent entity as the Walton Mezzanine Borrowers, this relationship arguably renders Walton disqualified from serving as the Controlling Holder under the Participation Agreement. If so, there will presumably be a new Controlling Holder, with the right to replace the Special Servicer and petition to remove the Receiver. According to LBBW, the B-1 Participants (which includes LBBW) should be found to be the Controlling Holder, on account of Walton's disqualification.

LBBW was purportedly aware of these facts before the Washington Action, based on a representation made at oral argument by the Defendant's counsel. Specifically, Defendant's counsel said that "the B-1s raised this issue of lack of controlling holder status in correspondence before that receiver action was ever

initiated."[7] However, LBBW filed no action, at that point, for a declaratory judgment that the B-1 Participants are now the Controlling Holders.

F. The Washington Action

In June 2012, CTIMCO filed an action in a Washington state court seeking the appointment of a general receiver to take possession of and manage the mortgaged property (the "Washington Action").[8] CTIMCO argued that a receiver was necessary to manage the property in light of the collateral's declining value and occupancy levels. Thus, CTIMCO's goal in seeking the appointment of a receiver was to preserve and grow the value of the collateral for all creditors. LBBW had notice of the Washington Action before the petition was filed in that case.[9] CTIMCO was required to have the Controlling Holder's consent before filing the Washington Action under the Participation Agreement.[10]

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[7] Oral Arg. Tr. 51, Jan. 4, 2013.

[8] Gaul Aff. Ex. F. The Court may take judicial notice of publicly available judicial filings in a related action pending in another jurisdiction. *See Nelson v. Emerson*, 2008 WL 1961150, at *2 n.2 (Del. Ch. May 6, 2008).

[9] Oral Arg. Tr. 41.

[10] The parties dispute whether CTIMCO needed the approval of the Controlling Holder to bring the Washington Action. Walton alleges that CTIMCO needed the Controlling Holder's approval to bring the receivership action under section 19(a) of the Participation Agreement, and that Walton gave such approval. Oral Arg. Tr. 8, Feb. 4, 2013; Participation Ag. § 19(a). Indeed, section 19(b)(xvi) of the Participation Agreement expressly says that the Controlling Holder shall be consulted regarding: "following an Event of Default, any exercise of remedies, including the acceleration of the Mortgage Loan or initiation of any proceedings, judicial or otherwise, under the Mortgage Loan Documents." Participation Ag. § 19(b)(xvi). The Plaintiff has alluded to the fact that CTIMCO also held emergency powers under section 19(c) of the Participation Agreement, under which CTIMCO could have petitioned the court for a receiver even if it were unable to obtain authority from the Controlling Holder to do so. Oral Arg. Tr. 40 ("The special servicer has certain powers, including the power to take emergency action as long

The Plaintiffs filed an objection in the Washington Action opposing Walton's involvement in the receivership.[11] The Plaintiffs were joined by the other holders of the B-1 Participation, DekaBank and Deutsche Genossenschafts-Hypothekenbnk AB ("DGH", collectively with LBBW and DekaBank, the "B-1 Participants"). The B-1 Participants were not named parties in the Washington Action, as the sole issue in that action (thus far) is whether the appointment of the Receiver was appropriate and whether the Receiver is correctly carrying out its duties. The B-1 Participants argued in their objection that Walton was seeking to use its status as the Controlling Holder for its own benefit, to the detriment of other participants. Specifically, the B-1 Participants speculated that "Walton intends to pursue a scheme to manipulate the terms of the Loan so the value of the Participants' interest is decreased for the benefit of Walton Street."[12] It appears that this speculation has some foundation in Walton's public disclosures. In one of

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as it's consistent with special servicer principles, principles of proper servicing."); Participation Ag. § 19(c). However, a review of section 19(c) reveals that the parties intended for the Controlling Holder to have the final consent necessary, and the Special Servicer has the authority to act without consent only in limited circumstances. *See id.* As a result, for the purposes of this Motion, I assume that the Controlling Holder's consent was required to bring the receivership action. This point is tangentially relevant because LBBW argues that CTIMCO is, and has been, subject to the B-1 Participation's authority since the event of default. Under that argument, CTIMCO should have needed the B-1 Participation's consent before seeking the Receiver. However, the B-1 Participants never argued, in the Washington Action, that its consent was required for CTIMCO to pursue the receivership. This discrepancy highlights that LBBW should have made this argument in the Washington Action, but failed to do so.

[11] The B-1 Participants specifically opposed Walton's control of or connection to the general receiver. *See* Gaul Aff. Ex. G, at 1 ("[The B-1 Participants] do not object to the appointment of a custodial receiver for the mortgaged properties identified in the petition of CT Investment Management Co. LLC.").

[12] Gaul Aff. Ex. G, at 1.

the Walton entities' offering materials, the entity disclosed its intent to "restructure the debt through the controlling B2 Note."[13]

The B-1 Participants objected to the proposed receiver, Talon Portfolio Services LLC ("Talon"), on the ground that Talon's main employee overseeing the receivership has close ties to Walton.[14] The B-1 Participants even alleged that this employee was effectively an agent of Walton.[15] Therefore the interests of this employee, Pollard, were alleged to be adverse to the interests of the B-1 Participants.[16] Finally, the B-1 Participants objected to the broad powers conferred on the Receiver: "Section 8 . . . and Section 18 . . . arguably allow the receiver to modify existing loan documents and make other modifications to the Loan that may be adverse to the Participants."[17] To remedy this perceived defect, the B-1 Participants proposed language be added to the order which prevented the Receiver from modifying the loan documents in any way without court approval. At no point in its objection did the B-1 Participants suggest that CTIMCO lacked the authority or standing to ask for a general receiver. Nor did the B-1 Participants argue that their approval was necessary for this action and that such approval was not granted.

[13] *Id.* (quoting Exhibit A to the Objection).
[14] *Id.* at 3.
[15] *Id.*
[16] *Id.*
[17] *Id.*

On July 2, 2012, the Washington court granted the Plaintiff's request for a general receiver over the B-1 Participants' objections. In doing so, the Washington Court expressly noted that "Pursuant to the Participation and Surviving Agreements . . ., [CTIMCO] has the authority to initiate these proceedings and seek the appointment of a Receiver and Special Servicer is authorized to act on behalf of Plaintiff and Lender."[18] The court then approved of Talon as the general receiver, noting that Talon was competent and "not interested in this action."[19]

The Washington court's Order implementing the Receiver is lengthy and detailed. The court retained exclusive jurisdiction over the underlying real property,[20] and specified that, subject to the Loan Documents, the Receiver's actions "shall not be subject to the approval or control of any of the parties to this matter, but shall be subject only to the Court's direction in the fulfillment of the Receiver's duties."[21]

Most importantly, the Washington court devoted several sections of the Order to "Actions Stayed." These sections apply to "all third parties, including . . . lessors, lessees, customers, principals, investors, suppliers, and or creditors and their officers, agents, servants, employees, and attorneys, who have actual or

[18] Gaul Aff. Ex. H, at 2.
[19] *Id.* at 3.
[20] *Id.*
[21] *Id.* at 4.

constructive knowledge of [the] Order."[22] LBBW is undoubtedly included in that stay. Thus, the stay expressly enjoins LBBW from "[s]eeking to enforce any claim, right, or interest against the Property or undertaking any 'self-help' remedies or taking any action whatsoever to interfere in any way with the Receiver and its fulfillment of its duties under [the] Order."[23]

Finally, the court hand-wrote the following section of the Order:

> The Receiver shall not, without further order of the Court, enter into any modification of the Loan Documents, including without limitation, requesting or accepting any waiver of the Loan Documents or sell any of the mortgaged property. Any order of the Court required under this paragraph H shall not be entered without providing not less than 30 days prior written notice to all persons appearing in this receivership, which notice will include copies of the proposed modification, waiver or sale.[24]

This section mirrors the language that the B-1 Participants suggested that the court include in the Order. Thus, the retention by the Washington court of direct control over certain actions of the Receiver appears to have been an effort to allay the B-1 Participants' concerns that Walton may use its influence over the Receiver to restructure the Loans.

G. LBBW Files the Complaint in this Action

LBBW filed the Complaint in this Action on October 5, 2012. Although DekaBank and DGH had joined LBBW in objecting to the Washington Action,

[22] *Id.* at 21.
[23] *Id.* at 22.
[24] *Id.* at 26.

neither of those parties has decided to join LBBW in this action.[25] In the Complaint, LBBW requests a declaratory judgment that "Walton Participant is disqualified from serving as Controlling Holder under the Participation Agreement; and . . . Walton Participant is disqualified from acting as Directing Participant or Directing Holder under the Servicing Agreement."[26] Second, LBBW requests an injunction barring Walton Participant from acting as the Controlling Holder or as a Directing Participant or Directing Holder under the Participation and Servicing Agreements.[27] Specifically, LBBW seeks to enjoin Walton from (1) taking any action as Controlling Holder, Directing Participant or Directing Holder; (2) directing or instructing CTIMCO, as Special Servicer; or (3) appointing, directing or instructing any other person as Special Servicer or Master Servicer. Finally, LBBW seeks to enjoin CTIMCO from acting upon any direction, instruction or consent of Walton or otherwise without the consent of the B-1 Participants.[28]

III. ANALYSIS

A growing phenomenon, particularly in the area of corporate law, is the proliferation of suits involving common operative facts proceeding simultaneously

[25] It is unclear if the other B-1 Participants were offered the opportunity to join this suit, and refused, or if LBBW instituted this action without notifying those parties. Regardless, the other B-1 Participants have not attempted to intervene in this action.
[26] Compl. ¶ 110.
[27] Compl. ¶¶ 113-14.
[28] Compl. ¶ 115. At oral argument, the Plaintiff clarified that it was acting on behalf of all three of the B-1 Participants and no longer sought an injunction requiring CTIMCO to answer to LBBW individually.

in multiple jurisdictions. This Court has expressed Delaware's strong interest in adjudicating matters brought before the Court involving the internal affairs of its corporate citizens, as opposed to deferring to earlier-filed actions in jurisdictions that have *in personam* jurisdiction over the defendants but otherwise may have little interest in applying (or creating) Delaware law to govern a Delaware entity. However, where a first-filed action exists not involving Delaware law or the internal governance of a Delaware entity, this Court must carefully consider whether principles of comity and economy dictate deference to the court overseeing the first-filed action, particularly, as here, where that court has enjoined the now-Delaware plaintiff from taking actions that would impinge upon the operation of an order (crafted in part to accommodate that party) that that court has put in place.

Under our Supreme Court's holding in *McWane*, an action that is substantially or functionally identical to an earlier suit may be stayed or dismissed.[29] This Court's discretion "should be exercised freely in favor of the stay when 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," and "as a general rule, litigation should be confined to the forum in which it is first commenced, and . . . a defendant should not be permitted to defeat the plaintiff's

[29] *Chadwick v. Metro Corp.*, 856 A.2d 1066, 2004 WL 1874652, at *2 (Del. 2004)(ORDER).

choice of forum in a pending suit by commencing litigation involving the same cause of action in another jurisdiction of its own choosing." [30] This rule is premised on considerations of comity and the necessities of an orderly and efficient administration of justice.[31] I examine this matter in light of the *McWane* factors below.

A. Prior Filed in a Court Capable of Doing Prompt and Complete Justice

CTIMCO filed the Washington Action in June 2012 before LBBW filed the Complaint here in October 2012. Therefore, the Washington Action was the prior-filed action. The suit in Washington is ongoing, and the court there retained jurisdiction. I have no doubts that the Washington court is capable of ruling on LBBW's objections to Walton's status as the Controlling Holder.[32]

The Plaintiff argues that the Washington court "did not have [personal] jurisdiction to hear disputes between foreign-based participants over who can act as Controlling Holder under agreements governed by New York law."[33] Given the B-1 Participants' objection filed in Washington, and taking into account Walton's willingness to be joined in the Washington Action, the jurisdictional argument is not persuasive to me. The only potential defect seems to be in joining the other B-

[30] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).
[31] *Id.*
[32] The Washington court addressed the Washington Action within just two weeks of CTIMCO's filing. Defs.' Op. Br. 25.
[33] Pl.'s Ans. Br. 29.

1 Participants, each of whom is a foreign entity. Yet there is no evidence that Delaware has jurisdiction over DekaBank and DGH, either. LBBW has argued that this Court would be able to adjudicate this dispute without DekaBank and DGH. Likewise, if Washington does not have jurisdiction over DekaBank and DGH for some reason, the Washington court could decide the dispute without those parties present to the same extent as can I. Furthermore, Walton's repeated concessions that it could be joined to the Washington Action[34] assure me that LBBW, CTIMCO, and Walton would all be present in the Washington Action.

In the Washington Action, LBBW specifically discussed its reasons for objecting to the receivership: LBBW's fear that Walton will exercise its influence over CTIMCO and its designated receiver to restructure the Loan to the detriment of LBBW. LBBW chose not to raise the issue it seeks to litigate here in that Washington Action, although presumably it would have been dispositive in Washington: that Walton's direction to CTIMCO to proceed with the Washington Action was a nullity because Walton is contractually disqualified from acting as Controlling Holder. To the extent that LBBW is concerned that that argument is now precluded, due to LBBW's failure to act, that issue is a matter for the court before which the action has been proceeding, the Washington court. That concern

[34] Def.'s Op. Br. 23.

may merit a stay rather than a dismissal, but cannot form the basis for a decision that the Washington court is unable to provide the relief sought here.

B. The Same Parties

For parties to be the "same" under *McWane*, it is sufficient that related entities are involved, but not named, in both actions.[35] Parties in competing actions are also "substantially identical" where differences in the parties involved can be remedied by joinder.[36]

The named parties to the Washington Action are CTIMCO (the Special Servicer) and various LLCs that own the real property collateral securing the Loans.[37] CTIMCO has brought the Washington Action as trustee on behalf of the security holders. Neither Walton nor LBBW is a named party to that action. In the Delaware Action, the parties are LBBW, Walton, and CTIMCO. Therefore, facially, it appears that these two distinct causes of action do not overlap. However, taking into account LBBW's objection filed in the Washington Action,[38] the only party absent from the Washington action—and present here—is Walton. Walton concedes that it could be joined in the Washington Action, which would

[35] *Kurtin v. KRE, LL*, 2005 WL 1200188, at *4 (Del. Ch. May 16, 2005).
[36] *Id.*
[37] *See* Gaul Aff. Ex. F, at 1-2.
[38] *See Kaufman v. Kumar*, 2007 WL 1765617, at *7 (Del. Ch. Oct. 14, 2009)(dismissing case under *McWane* because the plaintiff, although not a named party in the prior-filed case, filed a motion for relief from judgment in the prior-filed action).

remedy this difference in the parties.[39] Likewise, DekaBank and DGH objected to the receivership, so those parties might also be subject to jurisdiction in Washington.

C. The Same Issues.

"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.'"[40] Where the Delaware action's issues consist of a sub-set of the issues in the prior-filed action, Delaware courts will find the actions to be substantially the same.[41] The Supreme Court has instructed Delaware courts to "balance the lack of complete identity of parties and issues against the possibility of conflicting rulings which could come forth if both actions were allowed to proceed simultaneously."[42] Therefore, I must consider whether allowing both actions to proceed "in tandem would either risk conflicting rulings or foster an unseemly race to judgment in each forum."[43]

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[39] *See* Def.'s Op. Br. 23; *Kurtin*, 2005 WL 1200188, at *4 (finding that *McWane* was satisfied when "differences in the parties involved can be remedied by joinder").
[40] *Kurtin*, 2005 WL 1200188, at *4.
[41] *See Kurtin*, 2005 WL 1200188, at *6-7 ("Thus, this action is only a subset of the Orange County Action, making the two actions substantially the same under *McWane*.").
[42] *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1048 n.17 (Del. 2010).
[43] *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park DR. BNK Investors, L.L.C.*, 2009 WL 3335332, at *7 (Del. Ch. Oct. 15, 2009)(quoting *Xpress Mgmt. v. Hot Wings Int'l, Inc.*, 2007 WL 1660741, at *5 (Del. Ch. 2007)).

1. Common Nucleus of Operative Facts and Likelihood of Inconsistent Judgments.

The issues in this action are a subset of the issues that were raised, or should have been raised, in the Washington Action. Though, once again, the actions facially involve different issues—in that the Washington Action is a receivership action and the Delaware Action is for declaratory and injunctive relief—the claims in this action arise under the same nucleus of operative fact as the claims in the Washington Action. That is, CTIMCO, operating as the Special Servicer appointed by the Controlling Holder under the Participation Agreement, petitioned the Washington Court for a receiver. LBBW objected to this appointment, not because a receivership was inappropriate, but because Walton was involved. Whether Walton had the authority to appoint and direct CTIMCO as the Special Servicer is relevant to whether CTIMCO has the authority to direct the Receiver. The issue in this action, in effect, is an objection to the receivership that LBBW should have brought in the Washington Action, but failed to assert. That is, if LBBW did not want a receiver appointed that was connected to Walton, LBBW should have raised the defense that it, and not Walton, had the right to appoint and direct the Special Servicer, including the right to control whether the Special Servicer would seek to appoint a particular receiver, or any receiver.

That defense was not raised. Although LBBW already knew of the facts on which it now bases its argument that Walton should no longer be the Controlling

Holder, and although LBBW had notice of the Washington Action before the petition was filed,[44] LBBW did not argue in the Washington Action that CTIMCO lacked the authority or standing to ask for a general receiver. Nor did LBBW argue that CTIMCO was required to ask for the B-1 Participants' consent to bring the receivership action, in lieu of Walton, since the B-1 Participants are now—they argue—the Controlling Holders. Furthermore, although the B-1 Participants alleged that Pollard (the Receiver's agent) had connections to Walton, the B-1 Participants never alleged that Walton was excluded from acting as the Controlling Holder. The Washington court did not reach the issue of *whether* CTIMCO had been validly appointed the Special Servicer. When the Washington court expressly found that CTIMCO had the authority to request a receiver on behalf of the Lenders, it did so without the benefit of the argument that that authority was contractually deficient. Instead, LBBW split off that issue, and seeks to litigate it here.

If I consider what *should have been raised* in Washington, and indeed, what LBBW *can still raise*, it becomes apparent that the issues in this case arise out of the same nucleus of operative fact.[45] The Washington Action was premised on

[44] Oral Arg. Tr. 41.

[45] The *McWane* Court's cautions against conflicting rulings are particularly relevant here. The Washington court has already made rulings in the Washington Action, by finding that CTIMCO had authority to seek relief by appointing the Receiver. If the Washington case were now closed, instead of dormant, I would now be applying collateral estoppel principles to decide whether to dismiss this action. Instead, the Washington court expressly retained "exclusive jurisdiction"

CTIMCO's authority, under the Loan documents, to seek the appointment of a general receiver. The Plaintiff argues that CTIMCO was a validly appointed Special Servicer until a default occurred in April 2012. At that point, Walton arguably lost the right to direct CTIMCO. Nevertheless, Walton—and not the B-1 Participants—consented to CTIMCO's decision to pursue a receivership. At this point, if the B-1 Participants believed that *they*—and not Walton—were the new Controlling Holders, they should have attempted to direct CTIMCO not to seek a general receiver, or to choose another receiver, and should have pointed out the issue for the benefit of the Washington court.

The Plaintiff argues that it is not attempting to disturb the Washington Action, but rather to obtain a declaration of the contractual rights of the Loan Participants. Furthermore, the Plaintiff argues that, because the Washington legislature intended for the receivership action to be a stream-lined procedure, the Washington Action was not the correct forum for litigating whether CTIMCO had the authority to request a receiver.[46] While there is no indication in the record that the Washington court is not a court of general jurisdiction competent to consider this matter, this argument informs my decision to stay, rather than dismiss, as

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over the receivership and the real property securing the Loans. Therefore, the Washington court has not only made rulings, which a ruling in this Court could potentially upset, but it has also manifested its intent to retain jurisdiction over the matter, and indeed enjoin actions interfering with its supervision of the Receiver. In light of these facts, I consider not only what has been brought in Washington, but also what should have been brought there.

[46] *See* Pl.'s Ans. Br. 26.

explained below. However, it is apparent that the issue here was necessarily before the Washington court; the court's ruling was based on the finding that CTIMCO had the authority to seek a receiver.

The Defendants have argued that both actions relate to a "battle . . . over how the parties to the transaction should handle the defaulted loans, and who should be making those decisions."[47] The Plaintiff argues that "no such battle has been joined," and that I should not read this limited issue in the context of the Washington Action.[48] However, I am unwilling to read a limited contractual issue in isolation without considering the broader interrelationship of the actions.[49] Therefore, I find that the issues in this case are substantially the same as the issues in the Washington Action, particularly because LBBW is attempting to assert an issue here, as a declaratory judgment action, which should have been asserted in opposition to the relief sought in the Washington Action.

The Washington Action is ongoing. If LBBW wants to disturb that ruling, it will have to raise the issue of CTIMCO's authority with the Washington court.[50] A declaration from this Court of the contractual rights of the Loan Participants could,

[47] Defs.' Op. Br. 24.
[48] Pl.'s Ans. Br. 31.
[49] *See Kurtin*, 2005 WL 1200188, at *7 ("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.").
[50] The Plaintiff has acknowledged that any order to replace the Receiver, an order which has not been requested here, would have to come from the Washington court. Pl.'s Ans. Br. 28.

under these circumstances, result in inconsistent judgments.[51] Based on the relief sought, a likely incentive for this Delaware Action was to obtain a collateral judgment that could later be brought to Washington to compel some sort of change in the receivership. The Plaintiff has acknowledged that it could petition the Washington court to remove or substitute the Receiver.

2. Considerations of Comity, Forum-Shopping, and Delaware's Interest in Hearing this Case.

Delaware has no particular interest in this case. While the Defendants, CTIMCO and Walton, are Delaware entities, the real property collateral secured by the Loans is in Washington. The Receiver is in Washington. The court order enjoining LBBW from interfering with the Receiver was entered in Washington. DekaBank and DGH have filed an objection in Washington. Walton concedes that it could be joined in the Washington Action. The relevant Loan agreements are governed by New York law, which is neutral to both Delaware and Washington. Delaware simply has no unique interest in this case sufficient to justify taking the case out of the hands of the Washington court.

The suit in Washington is ongoing, and the court there retained jurisdiction. As the Plaintiff pointed out in its Answering Brief, the creditors have broad rights to challenge the Receiver:

[51] If LBBW petitions the Washington court and the court there finds these issues to be waived or precluded for any reason, it is not Delaware's place to subvert Washington's right to make that determination.

> Under the receivership statute, "any creditor" can move the Washington Court to remove or replace the receiver for "good cause." Any "Party in interest" can move the Washington Court "to discharge the receiver and terminate the court's administration of the property over which the receiver was appointed."[52]

This seems to be the course that LBBW should take if it seeks to replace the Receiver with one of its own choosing, or to direct the Receiver. If the court in Washington finds that LBBW waived the right to assert this course of action, or that LBBW is enjoined from seeking such self-help at this time, that is the prerogative of the Washington court. Comity suggests that I not usurp that function. Consequently, I find that this action should be stayed under *McWane*.

Although the Defendants have moved to dismiss, rather than stay, under *McWane*, I have the discretion to order a stay under these circumstances.[53] Given the Plaintiff's allegations that the streamlined nature of the receivership action may cause the Washington court to refrain from ruling on these issues, I have decided to order a stay and retain jurisdiction, so that this matter may proceed in Delaware if the Washington court refrains from acting on this matter. Because I have decided to stay this action, I need not address at this point whether this case should be dismissed for the failure to join indispensible parties.

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[52] Pl.'s Ans. Br. 27 (citations omitted).

[53] This Court has the discretion to award a stay instead of a dismissal, particularly where there is some reason for retaining jurisdiction. *See, e.g., Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 931 (Del. Ch. 1998) ("Because it is possible that Dura will move to dismiss the Alabama Action on one or more grounds, this action will be stayed, rather than dismissed, at this time.").

IV. CONCLUSION

For the reasons above, I find that the Defendants' Motion to Dismiss in favor of the Washington Action should be DENIED. Instead, I hold that this action should be stayed in favor of the prior-filed Washington Action. A form of Order accompanies my decision.