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Re: Citrin Holdings LLC, et al. v. Cullen 130 LLC
C.A. No. 2791-VCN
Date Submitted: July 18, 2007

Dear Counsel:

Plaintiff Citrin Holdings LLC ("Citrin Holdings") and Defendant Cullen 130 LLC ("Cullen") are the only members of three limited liability companies, Plaintiff Cargo Ventures LLC, Cargo Investors LLC, and Cargo Investors II LLC (collectively, the "Cargo Entities"). The relationship between Citrin Holdings and Cullen has broken down. In December 2007, Cullen filed an action in Texas (the "Texas Action") against Citrin Holdings. It alleged that Citrin Holdings had fraudulently induced it to give consents to certain financial arrangements with

Citrin Holdings-affiliated entities to the substantial detriment of Cullen. Although Cullen informed Citrin Holdings that it had brought the Texas Action, Citrin Holdings was not served until after it filed this action (the "Delaware Action") against Cullen. Citrin Holdings seeks a declaratory judgment to the effect that its efforts to dissolve the Cargo Entities on the same day it filed the Delaware action were proper, that Cullen is not entitled to an advancement of expenses incurred in pursuing the Texas Action, and that this Court would retain jurisdiction over any disputes arising out of the dissolutions. Before the Court is Cullen's Motion to Stay this action in favor of the earlier-filed Texas Action.[1] For the reasons set forth below, that motion will be granted.

* * *

The Cargo Entities purchase, develop, and manage real property for the purposes of freight forwarding and warehousing. In 2004, Citrin Holdings and Cullen entered into the operating agreement for one of the Cargo Entities, Cargo Ventures LLC, a New York liability company. Since then, they have established

[1] Also pending is Cullen's Motion for a More Definite Statement. Actually, it is not that simple. Cullen moved to dismiss or stay. That motion promised that its "grounds . . . [would] be set forth more fully in briefs . . ." Cullen's brief did not address dismissal; that portion of its motion will be treated as abandoned. Cullen's brief did ask for a more definite statement, the parties briefed that aspect, and the Court will accept that Cullen has a motion for a more definite statement before it.

the other two Cargo Entities, Cargo Investors LLC and Cargo Investors II LLC, both Delaware limited liability companies.[2]

Citrin Holdings controls the majority interest in each of the Cargo Entities, and Jacob Citrin ("Citrin"), its owner, serves as the sole manager of each of the Cargo Entities. The operating agreements for all of the Cargo Entities are substantially the same.

Near the end of 2006, Cullen concluded that Citrin Holdings was using its power to control the Cargo Entities for its own benefit. According to Cullen, Citrin Holdings was seeking to "squeeze it out" of its position in the Cargo Entities and was pursuing or usurping new business opportunities that rightfully should have been explored and developed through the Cargo Entities, which would have allowed Cullen to share in the profits anticipated from these opportunities.

In the Texas Action, Cullen seeks an accounting of the Cargo Entities and brings claims of fraud and misrepresentation against Citrin Holdings and Citrin. The fraud and misrepresentation allegations are tied to consents required from Cullen to authorize certain financial transactions with parties affiliated with Citrin Holdings. Other parties offered better terms than were presented by the Citrin

[2] Citrin Holdings and Cullen are both organized under the laws of Delaware.

Holdings-affiliated entities. The benefits that Cullen would receive from the proposed transaction allegedly were misrepresented in an effort to obtain its consent to the transactions. The misrepresentations included Cullen's anticipated share of the profits, its right to share in future transactions, and how the business relationship between Cullen and Citrin Holdings would be restructured. From the parties' discussions, Cullen learned that Citrin Holdings was contemplating the exercise of its majority position to dissolve Cargo Entities. The prospect of dissolution prompted the request for an accounting.

* * *

On March 13, 2007, Citrin Holdings acted to dissolve the Cargo Entities. On the same day, it (together with the Cargo Entities) filed the Delaware Action which seeks judicial confirmation that the dissolution efforts were effective; that Cullen has no interest in the Cargo Entities' separate assets; that Cullen has no right to seek an advancement of its expenses for the Texas Action (even though it has not asked for any such funding); and a declaration that this Court would retain jurisdiction over the other disputes that would likely (or inevitably) follow.

Although Citrin Holdings had learned from Cullen of the Texas Action shortly after its filing and had obtained a copy of the complaint within a month,[3] Cullen did not cause the complaint in the Texas Action to be served until March 22, 2007, some seven days after it was served with the complaint in the Delaware Action.[4] On May 4, 2007, Cullen amended the complaint in the Texas Action to allege breaches of fiduciary duty and majority oppression because of Citrin Holdings' actions to dissolve the Cargo Entities and the acquisition by entities formed and controlled by Citrin Holdings or its affiliates of properties that the Cargo Entities (with the assistance of Cullen) had been investigating.[5]

* * *

Cullen urges the Court to stay the Delaware Action in favor of the earlier-filed Texas Action. Citrin Holdings contends that Cullen's delay in serving the complaint in the Texas Action precludes it from being considered the "first-filed." Citrin Holdings characterizes the Delaware Action as addressing only post-

[3] *See* Affidavit of Thomas J. McCaffrey ¶¶ 4-7. Some negotiations did occur during the interim.
[4] Cullen gave directions for service on March 21, 2007; service was accomplished on March 22, 2007.
[5] For convenience, the complaint filed in the Texas Action in December 2006 will be referred to as the "Initial Complaint." The amended complaint, filed in the Texas Action in May 2007, will be referred to as the "Amended Complaint." The complaint in the Delaware Action will be referred to as the "Delaware Complaint."

dissolution issues while the Texas Action serves to resolve certain pre-dissolution fraud claims asserted by Cullen. Cullen, in contrast, maintains that the dissolution of the Cargo Entities constituted just another step along the continuum of Citrin Holdings' improper efforts to deny it the benefit of its status as a member. Thus, according to Cullen, both the Texas Action and the Delaware Action are simply different phases of the same, ongoing dispute; that, it argues, counsels in favor of resolution of the full panoply of disputes between Cullen and Citrin Holdings in Texas.

* * *

The Court has the discretion, to be "exercised freely," to stay an action "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[.]"[6]

1. Should the Texas Action be treated as "first-filed"?

The Texas Action was filed three months before the Delaware Action. A party, even though it has filed sooner than its adversary, may lose its "first-filed"

[6] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970). The Court's discretion is to be guided by "principles of comity and the effective administration of justice." *USX Corp. v. U.S. Denro Steels, Inc.*, 2001 WL 1269329, at *1 (Del. Ch. June 29, 2001). The case law acknowledges that stays are also granted in recognition of the plaintiff's right, as a general matter, to litigate in the proper forum of its choice. *See, e.g., Gen. Video Corp. v. Kertesz,* 2006 WL 2051023, at *3 (Del. Ch. July 19, 2006).

status if it "waited an egregiously long period before serving process, or the parties had taken substantial steps forward in the Delaware litigation."[7]

The period between the filing of the Texas Action and the initiation of efforts to serve its complaint on Citrin Holdings spans approximately three months. A delay of three months, coupled with the adverse party's knowledge of the lawsuit less than five days after its filing and possession of a copy of the complaint less than a month after its filing, cannot be considered as an "egregiously long period." In addition, nothing in the Delaware Action, other than docketing and service, had occurred before service of the complaint in the Texas Action was accomplished. In short, the Texas Action should be viewed as "first-filed."[8]

2. Are the issues and parties in the Texas Action and the Delaware Action substantially the same?

In order for the Court to exercise its discretion to stay in favor of a prior-filed action in a different forum, the issues and parties must be "substantially the

[7] *In re Advanced Drivers Educ. Prods. & Training, Inc.*, 1996 WL 487940, at *2 (Del. Ch. Aug. 16, 1996). *See Stepak v. Tracinda Corp*, 1989 WL 100884 (Del. Ch. Aug. 21, 1989) (moving party did not serve complaint until two years after filing it); *Joyce v. Cuccia*, 1996 WL 422339 (Del. Ch. Aug. 6, 1996) (the litigation in Delaware apparently was proceeding in due course and the earlier-filed Louisiana action had been placed in the "back pocket" as a litigation tactic).

[8] It is, however, fair to argue that the delay in service suggests less than a full commitment from Cullen to pursue energetically the Texas Action. Its delay in serving the complaint in the Texas Action is an appropriate consideration for the Court in the exercise of its discretion as to whether Cullen can demonstrate the appropriateness of a stay of the Delaware Action.

same."[9] The precise issues framed initially in the Texas Action bear little resemblance to the issues posed by the Delaware Complaint.[10] The Initial Complaint addresses fraud and misrepresentation during the joint effort of Citrin Holdings and Cullen to advance the Cargo Entities. The Initial Complaint does recite that Cullen anticipated that Citrin Holdings might exercise its majority control to dissolve the Cargo Entities, but it sought no relief with respect to any potential dissolution.

Cullen responds to these concerns with a two-pronged argument. First, it asserts that the dissolutions were a continuation of Citrin Holdings' initial conduct and, thus, depended upon a "common nucleus of operative facts."[11] Indeed, the Initial Complaint prophesied that dissolution was likely to result. Second, in a timely fashion after Citrin Holdings' dissolution effort, Cullen amended the Initial Complaint to add more squarely some of the issues framed by the Delaware Complaint.[12]

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[9] *See W.C. McQuaide, Inc. v. McQuaide*, 2005 WL 1288523, at *4 (Del. Ch. May 24, 2005).
[10] The Amended Complaint advances claims that are different from those of the Initial Complaint. That, however, was not the product of either oversight or tactical maneuvering by Cullen. Instead, it reflected intervening actions taken by Citrin Holdings.
[11] *See, e.g., Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *4 (Del. Ch. Apr. 12, 1994).
[12] The Amended Complaint does not consider the advancement claims asserted in the Delaware Action. Citrin Holdings, however, has failed to demonstrate that the advancement claims are

The dissolution of the Cargo Entities was the next step in the falling apart of the relationship between Cullen and Citrin Holdings. The Delaware Complaint acknowledges that Citrin Holdings considered the Initial Complaint in deciding to pursue dissolution.[13] More importantly, Cullen attributes both Citrin Holdings' pre-dissolution conduct and its post-dissolution conduct to the same nefarious objective: excluding Cullen from the fruits of the Cargo Entities' business. The pre-dissolution misrepresentations, according to Cullen, induced Cullen to allow Citrin Holdings' favored partners to participate in various opportunities. The purpose of the dissolution, again according to Cullen, was to allow Citrin Holdings to pursue similar business opportunities, rightfully belonging to the Cargo Entities and for the proper benefit of Cullen, with its favorite partners, to the exclusion of Cullen. Thus, Citrin Holdings' alleged underlying objective—whether before dissolution or as the result of dissolution—was the exclusion of Cullen from participating in the Cargo Entities' ventures. Although the issues precisely framed in the Initial Complaint are different from those asserted in the Delaware

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ripe; thus, although Delaware may be the appropriate forum for resolving any advancement dispute, if one should occur, that potential does not assist the Court in determining where the current disputes should be resolved.

[13] According to paragraph 11 of the Delaware Complaint, "In light of the filing of the Texas [Initial] Complaint, . . . Citrin Holdings has dissolved the Cargo Entities and is proceeding to wind up their affairs."

Complaint, both complaints arose from the same core conduct.[14] The issues in the two proceedings, accordingly, are substantially the same.[15]

3. Is the Texas court capable of doing prompt and complete justice?

Citrin Holdings argues that Cullen cannot demonstrate that the Texas court is capable of doing prompt and complete justice because (1) the advancement claims are not before the Texas court and Texas does not provide for summary adjudication of advancement claims; (2) Delaware has the most significant interest in the dissolution and winding up of the Delaware entities; (3) Delaware courts should decline to stay an action if the "case involves important questions of [Delaware] law in an emerging area";[16] and (4) Citrin Holdings and certain of its related entities are questioning the personal jurisdiction of the Texas court.

There is no dispute—nor could there be—about the capacity of the Texas court to adjudicate promptly and fully the various disputes ready for judicial consideration, including those that present questions of Delaware law. Citrin Holdings' reliance upon this Court's summary disposition of (and jurisdiction

[14] *See Gen. Video Corp.*, 2006 WL 2051023, at *4 ("[T]he legal and factual issues involved in the Texas action overlap with the issues in this case.").
[15] There is no real dispute as whether the parties are substantially the same. All parties in the Delaware Action are named as parties in the Texas Action.
[16] *In re Topps Co. S'holders Litig.*, 2007 WL 1491451, at *7 (Del. Ch. May 9, 2007).

over) advancement claims might be persuasive as to those claims if there were disputes about advancement.[17] The record, however, reveals none. In addition, Delaware courts, no doubt, are properly and significantly concerned about the appropriate dissolution and winding up of entities formed under Delaware law, but it does not follow that the courts of other states are not able or interested in addressing such matters. It may also be that there should be some reluctance to stay the Delaware action in favor of an action in another jurisdiction where novel and significant questions of Delaware law must be addressed. Citrin Holdings is correct in its assertion that Delaware law with respect to the dissolution and winding up of limited liability companies has not been fully developed. Citrin Holdings, however, has not identified any significant issue that can fairly be considered novel or of such importance that the Delaware courts should refrain from yielding the field. Finally, it may be that the personal jurisdiction challenge confronting Cullen in Texas will prevent the Texas court from being able to address fully the disputes among the parties. A mere challenge to personal jurisdiction, however, does not demonstrate that the Texas court will be unable to

[17] It is not uncommon for advancement matters to be resolved in this forum while the corresponding substantive disputes are litigated elsewhere.

perform the necessary function.[18] Accordingly, Cullen has demonstrated that the Texas court is capable of providing complete and prompt relief. Should personal jurisdiction be resolved adversely to Cullen, the question of a stay may be revisited.

* * *

Neither side can lay exclusive claim to the high ground. Both have engaged in conduct designed to secure the preferred forum. The Initial Complaint has little to do expressly with the disputes that may be directly associated with dissolution and winding up of the affairs of the Cargo Entities. There is, however, plausible linkage: Citrin Holdings elected, at least in part, to dissolve the Cargo Entities because of Cullen's challenge, through the Initial Complaint, to its conduct. Cullen's reference—one essentially irrelevant to the crux of the Initial Complaint—to the threat of dissolution may be little more than a transparent effort to throw a hook at possible future developments to land a favorable forum. Citrin Holdings, however, dissolved the Cargo Entities and immediately—it did not even wait one day—filed the Delaware Action, not seeking resolution of any existing dispute but, instead, asking the Court to bless conduct which at that point had not

[18] *See, e.g.*, *Welbilt Corp. v. Trane Co.*, 2000 WL 1742053, at *4 (Del. Ch. Nov. 17, 2000).

been challenged (possibly because Cullen did not even know of it then). Even more grasping was its effort to induce this Court to resolve Cullen's right to advancement in the Texas Action even though Cullen had neither threatened nor asserted any such claim. If that were not enough, Citrin Holdings speculates (in fairness, probably correctly) that there will be disputes—unidentified, of course—and then seeks to assure that they will be resolved by this Court. In pursuit of that objective, it asks the Court to commit to exercise its jurisdiction over disputes that do not yet exist. The use of a declaratory judgment proceeding nominally for purposes of seeking a determination of non-breach but actually designed to obtain an advantage in a venue tug-of-war has properly been criticized.[19]

* * *

In sum, the Texas Action is "first-filed." The parties and issues in the Texas Action are substantially the same as the parties and issues here. The Texas court is capable of providing prompt and complete justice. With these conclusions, some of which have been reached without compelling support, the question of a stay is for the exercise of the Court's discretion. Two considerations are especially

[19] *See, e.g.*, *In re Delta & Pine Land Co. S'holders Litig.*, 2000 WL 1010584, at *5 (Del. Ch. July 17, 2000) (noting "Delaware law's rather dim view" of such efforts).

significant. First, although a line could be drawn, one supposes, between (a) pre-dissolution conduct and (b) dissolution and post-dissolution conduct, any global resolution of the various disputes between Cullen and Citrin Holdings will necessarily involve both periods of their relationship. Discovery will overlap; the dissolution decision was influenced by pre-dissolution conduct; as a matter of judicial economy, one comprehensive proceeding can be expected to be more efficient. Second, the Delaware Complaint only sparsely, at best, crystallizes a ripe dispute for judicial determination. Reduced to its essentials, that complaint seeks a declaration of non-breach with respect to dissolution and a resolution of the right to advancement which has not been sought. There simply are no causes of action asserted in the Delaware Complaint that call out for judicial determination in Delaware.[20]

* * *

[20] As noted, although two of the three Cargo Entities were formed under Delaware law, no important or novel issue of Delaware law has been identified. In addition, as a matter of economy, litigation in Texas would be only marginally more burdensome for Citrin Holdings than in Delaware. Texas, of course, provides an easier forum from Cullen's perspective. Similarly, the availability of compulsory process would not likely differ materially between Delaware and Texas. In short, Citrin Holdings has not shown (or, indeed, claimed) that litigating in the Texas court would cause it any prejudice.

Accordingly, the Delaware Action will be stayed in favor of the Texas Action.[21] An implementing order will be entered.[22]

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[21] Cullen's apparent lack of demonstrated commitment to moving the litigation forward promptly in Texas during the three months following its filing weighs against this conclusion. A party waiting that long to effect service, even with its adversary's knowledge of the litigation and even with the pendency of some negotiations, runs the risk that with a different factual context (for example, if Citrin Holdings had presented more immediate and substantive claims in the Delaware Action), it might lose the opportunity to litigate in the forum of its choice.

[22] With the granting of Cullen's application for a stay, it is not necessary to consider its Motion for a More Definite Statement.