IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT H. ROSEN and ROBERT H. ROSEN ON BEHALF OF SL TEXTILE CORP. SALARIED EMPLOYEES BENEFIT PLAN, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 4674-VCP
WIND RIVER SYSTEMS, INC., JOHN C. BOLGER, JERRY L. FIDDLER, NARENDRA K. GUPTA, GRANT M. INMAN, HARVEY C. JONES, KENNETH R. KLEIN, STANDISH H. O'GRADY, APC II ACQUISITION CORPORATION, and INTEL CORPORATION,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: June 23, 2009
Decided: June 26, 2009

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PARSONS, Vice Chancellor.

This putative class action involves an all-cash, all-shares tender offer (the "Proposed Transaction") for the common stock of Wind River Systems, Inc. ("Wind River") by an acquisition subsidiary of Intel Corporation ("Intel"), called APC II Acquisition Corporation ("APC II" or with Intel, "Intel"). Presently before me is Defendants' Motion to Dismiss or Stay in favor of several earlier-filed actions commenced in the Superior Court of the State of California, County of Alameda (the "California Actions").[1] For the reasons stated in this opinion, I decline to stay or dismiss this action in favor of the California Actions.

I. BACKGROUND

A. The Parties

Plaintiffs, Robert H. Rosen individually and on behalf of SL Textile Corp. Salaried Employees Benefit Plan (collectively "Rosen"), allegedly are now and continuously have been, "since prior to the wrongs complained of," beneficial shareholders of Defendant Wind River common stock.[2]

Wind River is a Delaware corporation with its principal offices in Alameda, California. Wind River engages in various lines of computing businesses, including software and operating system development. Wind River's common stock trades on NASDAQ under the ticker "WIND." As of March 20, 2009, Wind River had approximately 76,500,000 shares of publicly-held common stock outstanding.

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1 Defendants also opposed Plaintiffs' Motion for Expedited Proceedings.

2 Compl. ¶ 3.

Defendant Intel is a Delaware corporation with its principal offices in Santa Clara, California. Defendant APC II is a Delaware corporation, which is a wholly-owned subsidiary of Intel created for the sole purpose of effecting the transaction at issue.

Seven Wind River directors also are named as Defendants: John C. Bolger, Jerry L. Fiddler, Narendra K. Gupta, Grant Inman, Harvey C. Jones, Kenneth R. Klein, and Standish H. O'Grady (collectively, the "Individual Defendants"). Currently, Klein is the Chairman of the Board, CEO, and President of Wind River, and Jones is designated "Lead Independent Director."

B. Facts

On June 4, 2009, Wind River announced it had entered into an Agreement and Plan of Merger for the Proposed Transaction with Intel. The Proposed Transaction is structured as a tender offer, whereby Intel seeks to acquire all shares of Wind River for $11.50 in cash per share, which represents an approximate 45% premium to Wind River's unaffected market price. As with most negotiated tender offers, Intel obligated itself to effect a short-form merger, pursuant to 8 *Del. C.* § 253, if it acquires or controls at least 90% of the Wind River shares.[3] When the closing bell rang on June 4, Wind River common stock was trading at $11.76.

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[3] *See* Defs.' Opening Br. ("DOB") Ex. L, Wind River Systems, Inc., Solicitation/Recommendation Statement (Schedule 14D-9) (the "14D-9"), at 1 (June 11, 2009). In this connection, the Company has also granted Intel an irrevocable "Top-Up Option." *See id.* at Item 8(d). The Top-Up Option allows Intel to purchase a number of shares "equal to the lowest number of Company Shares that, when added to the number of Company Shares collectively owned by [Intel] at the time of exercise, shall constitute one Company Share more than 90%

On the very same day as the announcement of the Proposed Transaction, Mark Harvey filed a lawsuit (the "Harvey Action") in the Superior Court of the State of California, County of Alameda ("Alameda Superior Court") against Wind River, the Individual Defendants, and Does 1-25.[4] On June 5, 2009, Donald Smith filed a strikingly similar lawsuit (the "Smith Action") in Alameda Superior Court, which also named Intel as a defendant but not the twenty-five Does.[5]

On June 11, 2009, Wind River filed the 14D-9 and Intel filed its Schedule TO with the Securities and Exchange Commission (the "SEC").

On June 12, 2009, Bakhtiar Alam filed a lawsuit (the "Alam Action") in Alameda Superior Court challenging the Proposed Transaction.[6] The Alam Action claimed, among other things, a number of disclosure violations based on alleged omissions from and misleading statements in the 14D-9.[7] Also on June 12, KBC Asset Management NV

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of the then outstanding Company shares on a fully diluted basis." Wind River Systems, Inc., Report of Unscheduled Material Events or Corporate Changes (Form 8-K), Ex. 2.1 §§ 2.3, 2.1 (June 8, 2009) (conditioning closing on percentage of tendering holders). The Form 8-K was not submitted as part of the record in the Delaware Action, but I take judicial notice of it. *See* D.R.E. 201(b). For a detailed description of the operation of a Top-Up Option, see *In re Appraisal of Metromedia Int'l Group, Inc.*, 2009 WL 1110663, at *3 (Del. Ch. Apr. 16, 2009).

4 *Harvey v. Wind River Sys., Inc.*, No. RG09455952 (Cal. Super. Ct. June 4, 2009).

5 *Smith v. Klein*, No. RG09456212 (Cal. Super. Ct. June 5, 2009) (case number partially obscured).

6 *Alam v. Wind River Sys., Inc.*, No. RG09457551 (Cal. Super. Ct. June 12, 2009).

7 The Harvey and Smith Actions could not have included the claims for disclosure violations in the 14D-9, because those actions were filed before the 14D-9.

filed a lawsuit (the "KBC Action") in Alameda Superior Court.[8] Like the Alam Action, the claims in the KBC action included various alleged disclosure violations. On June 12, 2009, the Alameda Superior Court granted an order consolidating the Harvey Action and the Smith Action, and naming as lead counsel, Coughlin Stoia Geller Rudman & Robbins LLP ("California Lead Counsel"). On June 16, 2009, California Lead Counsel filed a Notice of Related Cases, identifying the Alam Action and the KBC Action as related to the earlier consolidated action. On June 16, 2009, California Lead Counsel served their first request for production of documents directed to two of the Individual Defendants, and sent subpoenas to Goldman, Sachs & Co. and Intel.

On the same day, June 16, Rosen filed this lawsuit individually and on behalf of the class of shareholders of Wind River (the "Rosen Action" or the "Delaware Action") in the Delaware Court of Chancery, challenging the Proposed Transaction. On June 17, Rosen filed a Motion for Preliminary Injunction and Motion for Expedited Proceedings.

On June 18, 2009, California Lead Counsel also noticed the deposition of Defendant Klein. In addition, on June 19, they filed a Consolidated Complaint for the Harvey and Smith Actions in California. The Consolidated Complaint also included disclosure violations based on Wind River's 14D-9.

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[8] *KBC Asset Mgmt. NV v. Wind River Sys., Inc.*, No. RG0945757 (Cal. Super. Ct. June 12, 2009).

C. Procedural History of the Instant Motions

On June 18, 2009, this Court suggested holding an argument on the Motion for Expedited Proceedings on Friday, June 19. Before that hearing took place, however, Wind River's counsel requested to postpone the hearing until Monday, June 22. I granted that request to allow the parties to submit briefing on Wind River's anticipated motion to dismiss or stay this action in favor of the California Actions. At 9:30 p.m. EDT, on June 19, Wind River filed its brief in support of its motion to dismiss or stay the Delaware Action and against Rosen's motion to expedite.[9] On Sunday, June 21, Rosen submitted his responsive papers.

On June 22, 2009, I held a telephone conference on the motions to expedite and to stay or dismiss. After hearing from counsel, I granted the motion to expedite on the basis of the apparent presence of certain colorable disclosure violations in the 14D-9 and the fact that the California Actions were proceeding on an expedited basis.[10] At the

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[9] Intel joined in Wind River's submissions.

[10] In their brief and at the June 22 conference, Defendants urged this Court to deny Rosen's motion to expedite, because the Rosen Complaint failed to articulate a colorable claim on the merits or irreparable injury as required by *Gianmargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994). I ruled at the conference that Rosen is entitled to expedited discovery and an opportunity to present a motion for preliminary injunction at a hearing I tentatively scheduled for July 7, 2009, unless this action were stayed or dismissed in favor of the California Actions. Defendants' main contention was that Rosen's allegations mainly consist of nitpicking the Goldman Sachs fairness opinion for omitted factual or financial data that would not be necessary or material for a shareholder in deciding whether to tender. While that argument ultimately may carry the day, the circumstances here counsel in favor of expedited discovery. Following this court's reasoning in *Ortsman v. Green*, there are colorable claims in paragraph 32

conference, Wind River's counsel represented that on June 11, 2009, discussions regarding scheduling were begun with the "research attorney" in the department of the Alameda Superior Court to which the California Actions are assigned. These discussions continued on June 15, 16, and 17. Defense counsel also represented that during those discussions with the research attorney, they learned that the Alameda Superior Court had scheduled a hearing for the preliminary injunction on July 8, 2009.

Because I granted the motion to expedite tentatively, but reserved decision on Defendants' motion to dismiss or stay, I scheduled a hearing on the preliminary injunction for July 7, 2009.[11] I did not do so to preempt the Alameda Superior Court's

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of Rosen's Complaint that Wind River should have disclosed more fully how Goldman Sachs had been compensated or would be compensated, especially since some portion of Goldman's compensation was contingent on providing a fairness opinion or upon the consummation of a deal. *See Ortsman v. Green*, 2007 WL 702475, at *1-2 (Del. Ch. Feb. 28, 2007); 14D-9 at 27 ("Wind River has agreed to pay Goldman Sachs a transaction fee of approximately $9.5 million, the principal portion of which is payable upon consummation of the transaction."). In addition, as Defendants' counsel conceded at the conference, colorable disclosure claims generally suffice to show a threat of irreparable harm in this context. *See also Ortsman*, 2007 WL 702475, at *2.

Moreover, the circumstances here are somewhat unusual in that Defendants appear to have agreed to expedite the California Actions. Defendants explained that they assented to expedition in California only because California Lead Counsel had threatened to bring an *ex parte* motion to expedite. While an *ex parte* motion may have been relevant to Defendants' decision, Defendants did not adequately explain why the threatened *ex parte* motion effectively would have precluded any challenge to expedition in California.

[11] A few hours after the conference, Wind River submitted a supplemental letter in response to a question I asked during the conference, regarding what constitutes contemporaneous or first-filed filings. Rosen responded with a letter of his own the following day. As previously noted, Wind River's opening brief is cited as

July 8 hearing, but rather because of a scheduling conflict I had on July 8, 2009. At the June 22 conference, I took the motion to stay or dismiss in favor of the California proceedings under advisement, but directed the parties to proceed as if the motion were denied, work in cooperation with Defendants and California Lead Counsel to coordinate discovery in the two sets of actions, and adhere as closely as possible to the schedule in the California Action.

D. Parties' Contentions

Defendants seek a stay or dismissal of this action in favor of the California Actions. Defendants argue that the California Actions are first-filed, and, therefore, under the well-known *McWane* test[12] should take precedence over Rosen's Delaware Action.

Rosen opposes a stay or dismissal of this action in favor of the California Actions. He argues that the California Actions were filed within the same general time period, and, therefore, should be deemed contemporaneously filed and not subject to the *McWane* test. Instead, based on the relatively short time period between the filing of the California Actions and the Delaware Action, Rosen urges this Court to apply a *forum non conveniens* analysis to Defendants' motion to dismiss or stay, and to deny that motion.

"DOB"; its supplemental letter will be referenced as "DLB." Also, Rosen's response to DOB is cited as "PRB" and its supplemental letter as "PLB."

[12] *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970).

II. ANALYSIS

A. Standard

The granting of a motion to stay or dismiss a Delaware Action in favor of a foreign action is not a matter of right, but rests within the sound discretion of the court.[13] When there is an earlier-filed action in a foreign jurisdiction, this court often applies the *McWane* doctrine, which counsels in favor of granting a 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."[14]

On the other hand, when a Delaware action is considered first-filed or when multiple actions are contemporaneously filed, this Court examines a motion to stay "under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other."[15] The *forum non conveniens* factors are as follows: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the pendency or nonpendency of a similar action or actions in another jurisdiction, (5) the possibility of a need to view the premises, and (6) all other practical considerations that would make the trial easy,

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13 *See In re Bear Stearns Cos. S'holder Litig.*, 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008) (citing *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996)).

14 *See McWane*, 263 A.2d at 283.

15 *Rapoport v. The Litig. Trust of MDIP, Inc.*, 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005) (internal quotation marks and citations omitted).

expeditious, and inexpensive.[16] As the Delaware Supreme Court has instructed, courts should be chary of granting motions to stay on *forum non conveniens* grounds.[17]

Additionally, as Chancellor Chandler recently noted, there is a "so-called debate" concerning the degree of hardship a party requesting relief on *forum non conveniens* grounds must demonstrate based on whether the party seeks a stay or dismissal.[18] This court "has clearly articulated the policy justification for requiring a showing of overwhelming hardship in order to dismiss on grounds of *forum non conveniens*," and, thus, when a motion to stay on *forum non conveniens* grounds would have the same ultimate effect as dismissal, the same overwhelming hardship burden should apply.[19] Because the focus of all the competing actions currently is on the plaintiffs' request for a preliminary injunction, a stay of this action arguably would have the same practical effect as a dismissal. Thus, a strong case exists for application of the overwhelming hardship standard here. In any event, this Court cannot perfunctorily apply *McWane* or *forum non conveniens* if either doctrine is to accomplish the purposes for which they were crafted by

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16 *In re Bear Stearns*, 2008 WL 959992, at *5 (citing *Ryan v. Gifford*, 918 A.2d 341, 351 (Del. Ch. 2007)). The fifth factor is not applicable here.

17 *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 135 (Del. 2006).

18 *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 117 n.16 (Del. Ch. 2009); *see also Brandin v. Deason*, 941 A.2d 1020, 1024 n.13 (Del. Ch. 2007) (comparing *HFTP Invs., LLP v. ARIAD Pharms., Inc.*, 752 A.2d 115, 121 (Del. Ch. 1999) with *Ryan*, 918 A.2d at 351); *Aveta, Inc. v. Delgado*, 942 A.2d 603, 608 n.12 (Del. Ch. 2008).

19 *In re Citigroup*, 964 A.2d at 117 n.16 (citing *In re Topps Co. S'holder Litig.*, 924 A.2d 951, 956-64 (Del. Ch. 2007)).

the Delaware Supreme Court. Rather, the Court always must consider judicial economy and principles of comity when applying either the *McWane* or *forum non conveniens* factors.[20]

B. Does *McWane* or *Forum Non Conveniens* Apply?

Predictably, Defendants argue the *McWane* doctrine should apply, and Plaintiffs urge the Court to employ a *forum non conveniens* analysis. Preliminarily, I note that this is a representative action, *i.e.*, a putative class action. As this court stated in *Ryan v. Gifford*:

> [T]his Court places less emphasis on the celerity of [a representative plaintiff] and grants less deference to the speedy plaintiff's choice of forum. [Therefore], this Court proceeds cautiously when faced with the question of whether to defer to a first filed suit, "examining more closely the relevant factors bearing on where the case should best proceed, using something akin to a *forum non conveniens* analysis."[21]

In *Bear Stearns*, this Court also held that "the same considerations [as articulated in *Ryan* with respect to a derivative plaintiff] apply in the case of class actions," and the "appropriate approach is [also] something akin to a *forum non conveniens* analysis."[22] A different result might obtain, however, if the delay in filing the later-filed action is shown

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[20] *See Carvel v. Andreas Holding Corp.*, 698 A.2d 375, 378 (Del. Ch. 1995). *Adirondack*, 1996 WL 684376, at *6 (citing *McWane*, 263 A.2d at 283).

[21] *Ryan*, 918 A.2d at 349 (Del. Ch. 2007) (citation omitted); *see also In re Citigroup*, 964 A.2d at 117 n.16 (explaining that the agency cost problem in representative actions requires a closer examination of the relevant *forum non conveniens* factors).

[22] *In re Bear Stearns*, 2008 WL 959992, at *6.

to be prejudicial.[23] Thus, prejudicial delay in filing by a Delaware plaintiff in relation to an earlier action elsewhere could negate the presumption that an analysis akin to *forum non conveniens* applies.[24]

Here, the first of the California Actions was filed the very same day the tender offer was announced, *i.e.*, June 4, 2009. Rosen did not file the Delaware Action until June 16, 2009, twelve calendar or eight business days later. In some circumstances, a delay of that length could be prejudicial, especially in cases involving a tender offer with a short fuse. In this case, however, Defendants have not shown that Rosen's filing delay caused the kind of prejudice that would trigger application of the *McWane* doctrine rather than *forum non conveniens*. No discovery was propounded in the California Actions until June 16, the day the Delaware Action was filed. Furthermore, although counsel for the parties to the California Action apparently contacted the research attorney in the Alameda Superior Court on June 11 and then on June 15, 16, and 17, regarding the establishment of a schedule for the preliminary injunction proceeding, this Court was set to entertain a similar request for a schedule in Delaware on June 19. That date was postponed to Monday, June 22, to enable Defendants to present their motion to dismiss or stay.

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[23] *See Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 929 n.1 (Del. Ch. 1995) ("Where one person seeking to act in a representative capacity chooses to litigate in Delaware and another in a different forum, there is little reason to accord decisive weight to the priority of filing, at least where no prejudicial delay has occurred.").

[24] *See In re Topps Co. S'holder Litig.*, 924 A.2d 951, 957 (Del. Ch. 2007) (holding complaints simultaneously filed "when there are trivial time differences").

Importantly, as of June 19, 2009, the California Actions were not materially ahead of the Delaware Action from a procedural or substantive standpoint. No judicial officer in the Alameda Superior Court, for example, had any occasion to become materially involved in the California Actions before June 22. Nor has any party before me suggested that there is insufficient time between June 22, when I tentatively scheduled a preliminary injunction for July 7, 2009, and that date to present their respective positions on that motion efficiently and effectively. Instead, the primary danger lies in a risk of wasteful and duplicative proceedings between the same parties and on the same issues on opposite sides of the country. As explained *infra*, however, that risk is minimal to nonexistent in the present controversy.

Indeed, even if *McWane* were to apply to representative suits where no significant prejudice has been shown, I doubt that *McWane* would apply on the facts of this case. First, the Complaint in the Harvey Action was filed the very same day as the tender offer was announced, presumably to establish a preferred position in any race to the courthouse. This court has long expressed the "public policy interest favoring the submission of thoughtful, well-researched complaints – rather than ones regurgitating the morning's financial press."[25] Also, the Harvey and Smith Complaints did not and could

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[25] *Biondi v. Scrushy*, 820 A.2d 1148, 1162 (Del. Ch. 2003) (in the context of a representative action, the court examined the fulsomeness of a foreign complaint compared to the Delaware complaint to determine whether the foreign action should be entitled to first-filed status or a favorable *forum non conveniens* ruling). A review of the eight-page (ten-page including the cover and signature pages) Harvey Complaint reveals that it contains generalized allegations, based on recent financial results and sanguine forward-looking statements in Wind River's Form

not have contained the same disclosure claims as the Delaware Action, because Wind River did not file its 14D-9 until a week after the Harvey and Smith Complaints were filed. Accordingly, it is debatable whether the Harvey Complaint, as it was initially filed, and the Delaware Action involve the same issues for purposes of a *McWane* analysis. Moreover, if one considers the June 12 Alam or KBC Complaints as earlier-filed and ignores their representative nature, the time difference between those filings and the June 16 filing of the Delaware Action is not the type of delay, given what occurred between June 12 and June 16, that would trigger an application of *McWane*.[26] Although equity disfavors those who slumber on their rights, the inverse is not always true—this Court should not necessarily reward the most fleet-of-foot in a sprint to the courthouse.[27]

10-K, that the price Intel is offering is unfair. Likewise, the Complaint alleges that the Wind River Board improperly modified the Wind River shareholder rights plan to allow for the Proposed Transaction, and that the Company has unnamed "other defensive measures" in place, which preclude other potential acquirers from bidding for Wind River's common stock. *See* DOB Ex. A.

[26] *See In re Citigroup*, 964 A.2d at 116 (finding actions contemporaneous when filed "only a few days apart"); *In re Bear Stearns*, 2008 WL 959992, at *3 (competing actions are contemporaneously filed when filed only "three days and seven days after the filing of the first New York cases"); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *15 (Del. Ch. July 14, 2008) (competing actions are contemporaneously filed when filed only "three business days apart").

[27] This does not rule out any potential reward for the representative plaintiff who is quickest on the draw. As this court previously held: "The fact that the court treats these actions as contemporaneously filed does not mean that the first time-stamp should lose all relevance. In close cases where the issue of convenience is in equipoise, it makes sense as a matter of comity to regard the first time-stamp factor as a tipping one in a *forum non conveniens* analysis." *In re IBP, Inc. S'holder Litig.*, 2001 WL 406292, at *8 n.19 (Del. Ch. Apr. 18, 2001).

Second, Defendants' argument that "[t]his Court has granted first-filed status to actions filed in other jurisdictions weeks (as opposed to days or hours) before litigation has commenced in Delaware" is not compelling. Defendants rely on four cases in support of their position.[28] Plaintiffs counter by distinguishing those cases and emphasizing the representative nature of the actions presently in issue.[29]

Each of the four cases cited by Defendants fits snugly into a true *McWane* situation, where a defendant in an earlier-filed action somewhere else files suit in Delaware against the plaintiff in the earlier-filed action to defeat the initial plaintiff's (the Delaware defendant's) choice of forum.[30] This point is perhaps easiest to see—literally—by looking at the case captions and the timing of the dueling actions. In *Xpress Management v. Hot Wings*, the court stated that "Hot Wing's March 23 action is currently

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[28] DOB at 7, 9, citing *Xpress Mgmt., Inc. v. Hot Wings Int'l*, 2007 WL 1660741, at *4 (Del. Ch. May 30, 2007) (finding that a Canadian action filed eleven days prior to a Delaware action "satisfies the first-filed prong" under *McWane*); *Lipman v. Nat'l Med. Waste, Inc.*, 1991 WL 275762, at *1-2 (Del. Ch. Dec. 11, 1991) (according first-filed status to a New York action filed approximately two weeks before similar litigation was filed in Delaware); *Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 928-29 (Del. Ch. 1998). DLB at 1, citing *Welbilt Corp. v. Trane Co.*, 2000 WL 1742053, at *3 (Del. Ch. Nov. 17, 2000) (finding that a Texas action filed nine days before a similar action was first-filed under *McWane*). Neither side relied upon or distinguished *In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at *7 (Del. Ch. May 20, 1993) (indicating that a Delaware action filed nearly two weeks after a foreign-filed action was "in the same general time period as the present action [so as] to be considered contemporaneous").

[29] *See* PLB at 2-4.

[30] *See McWane*, 263 A.2d at 283.

pending in Canada and predates Xpress's petition in this court by nearly two weeks."[31] In *Lipman v. National Medical*, the court noted that the "earlier New York action was filed by National."[32] In *Welbilt v. American Standard (d/b/a Trane)*, the court pointed out that "nine days after American Standard filed the Texas Action . . . Welbilt filed this [Delaware] action."[33] Finally, in *Dura Pharmaceuticals v. Scandipharm*, the Delaware court addressed "defendant's motion to dismiss or stay this action in favor of an action filed by it in . . . Alabama."[34]

In this case, neither Rosen nor any class member was defending an earlier-filed action by Wind River or Intel or any of the Individual Defendants in California. Rather, the earlier-filed California Actions were filed by plaintiffs purporting to represent the same class of individuals as Rosen. Accordingly, the concern that motivated the four decisions cited by Wind River—*i.e.*, that a defendant elsewhere might jockey for its own choice-of-forum by later filing in Delaware—is not present here. Thus, I do not consider those cases controlling in these circumstances. Instead, I find more helpful the particular concerns inherent in a representative action of this type and, consistent with the case law discussed *supra*, will apply something akin to a *forum non conveniens* analysis.

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31 *Xpress*, 2007 WL 1660741, at *4.

32 *Lipman*, 1991 WL 275762, at *1.

33 *Welbilt*, 2000 WL 1742053, at *1.

34 *Dura*, 713 A.2d at 926.

C. Applying *Forum Non Conveniens*

As explained *supra* Part II.A, five of the six *forum non conveniens* factors have some relevance to this dispute: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the pendency or nonpendency of a similar action or actions in another jurisdiction, and (5) all other practical considerations that would make the trial easy, expeditious, and inexpensive.[35]

The first factor strongly favors Delaware. Although this action may not involve, on its face, cutting-edge or terribly novel issues of Delaware corporate law, it does implicate important aspects of Delaware law in that it involves the application of fiduciary duty law to corporate officers and directors in the context of an $884 million tender offer. The second factor, relative ease of access to proof, tilts in favor of the California Actions. Nevertheless, as this court has stated before, "most corporate litigation in the Court of Chancery involves companies and documents located outside of Delaware," and this mere inconvenience, without more, does not warrant a stay or dismissal.[36] Similarly, the third factor, the lack of compulsory process in Delaware favors California, but Defendants have not pointed to anyone who is outside of this Court's jurisdiction who could not be reached via its commissions procedure.[37] The

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35 *In re Bear Stearns*, 2008 WL 959992, at *5.

36 *Ryan v. Gifford*, 918 A.2d 341, 351 (Del. Ch. 2007).

37 *Id.*

immediate issue is whether a preliminary injunction hearing should proceed here, in Delaware, or in California. Typically, such hearings are conducted on a paper record with few, if any, live witnesses. Moreover, because those witnesses often are aligned with one or more of the parties, they generally do not require compulsory process to obtain their appearance.[38] The fourth factor requires careful attention in that the California Actions involve essentially the same parties and raise similar issues. I will discuss that factor momentarily. The sixth factor, other practical considerations, might weigh in favor of California in some respects, but does not suggest that Defendants would suffer any serious hardship, if they were required to litigate this dispute in Delaware. Indeed, none of the relevant *forum non conveniens* factors severally or jointly, as applied to the facts and circumstances of this action, demonstrate the kind of hardship that would cause this Court to stay or dismiss the Delaware Action.

As explained *supra* Part II.A, however, principles of comity and judicial efficiency, both at this Court and our sister court in Alameda County, California, could tip the balance so significantly as to cause a stay of this action. In particular, this Court appreciates the importance, where possible, of avoiding situations where two courts of competent jurisdiction end up aligned on a collision course, which could result in conflicting judgments. The Court also generally eschews decisions that would require

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[38] *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136-37 (Del. 2006) ("[A]lthough it would be more convenient for Florida witnesses to give testimony in Florida, they could testify in Delaware by deposition or appear here voluntarily, if requested . . . .")

parties, such as Defendants here, to litigate nearly identical actions simultaneously in two distant forums. To this end, I contacted Judge Steven Brick of the Alameda Superior Court, who is handling the Consolidated California Action, to discuss how best to proceed. Given these specific circumstances, both Judge Brick and I agreed that only one of our two courts should hear a preliminary injunction motion regarding the Proposed Transaction. Neither Judge Brick nor I saw any need for two actions to proceed on different coasts, concerning the same transaction. Because the only currently pending motion to dismiss or stay is before me, we agreed that I should decide that motion first and determine whether or not this dispute should go forward here. Judge Brick further indicated that if I decided this case should move forward here, he would expect to stay the California Actions before him. Thus, the fourth *forum non conveniens* factor does not point to a likelihood of serious, let alone overwhelming, hardship to Defendants from litigating the Delaware Action.

Having determined that this action should proceed in Delaware and ascertained that, in that event, the California Actions probably would not continue, I do not perceive any material risk of inconsistent rulings or other conditions inimical to a proper sense of comity.

III. CONCLUSION

For the reasons expressed in this memorandum opinion, I deny Defendants' motion to stay or dismiss the Delaware Action in favor of the California Actions. I will hear Plaintiffs' motion for a preliminary injunction on July 7, 2009 at 10:00 a.m. EDT. To that end, the parties shall promptly submit an appropriate expedited scheduling order.

In addition, I invite the plaintiffs in the California Actions and California Lead Counsel and any of the other firms involved in the California Actions to participate in the Delaware Action.[39]

IT IS SO ORDERED.

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[39] I also would expect that any claims asserted in the California Actions but not included in the Delaware Action could proceed here, subject to this Court's rules, including allegations concerning the shareholder rights plan, as well as the underdeveloped theory upon which a shareholder could seek a remedy on the basis of the so-called "Top-Up Provision." *See* DOB Ex. K ¶¶ 35-38 (alleging wrongdoing without specifying whether the provisions on their own or in combination should be viewed under the general principles articulated in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988); or something else).