WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: August 22, 2006
Decided: October 10, 2006

Thad J. Bracegirdle
Reed Smith, LLP
1201 Market Street, Suite 1500
Wilmington, DE 19801-1163

Joseph A. Rosenthal
Jessica Zeldin
919 North Market Street, Suite 1401
Citizens Bank Building
Wilmington, DE 19899

Re: *Abbey v. Skokos & 3F Therapeutics, Inc.*
Civil Action No. 2207-N

Dear Counsel:

For the reasons set forth below, after carefully examining the arguments presented by counsel, I grant defendant's motion to stay this action in favor of plaintiff's prior-filed New York action.

I. BACKGROUND

This case involves alleged appraisal rights resulting from plaintiff Arthur N. Abbey's investment in defendant 3F Therapeutics, Inc. ("3F") through a limited partnership 3F Partners Limited Partnership II ("3F Partners"). Specifically, Abbey alleges that from February through March 2005, 3F's chairman, Theodore C. Skokos, made fraudulent representations about the then-current and future state of 3F and induced Abbey to invest $4 million in 3F. Once Abbey agreed to invest in 3F, Skokos suggested that Abbey invest by way of 3F Partners. According to the partnership agreement, 3F Partners was the record holder of all the company's series E preferred stock, and Abbey was a 66% owner of the partnership. Thus, Abbey's consent was required for any major actions. The same agreement also

listed 3F Management, an entity controlled by Skokos, as the general partner of 3F Partners.

According to Abbey, Skokos purposefully and fraudulently persuaded him to invest in 3F Partners, a sham entity, in an effort to infuse money into 3F, but prevent Abbey from interfering with potential mergers. By Abbey's account, this worked, because Skokos, through 3F Management, gave 3F Partners' irrevocable consent to a 3F merger with ATS Medical, Inc. ("ATS"); however, Skokos never consulted Abbey regarding the merger. As such, Abbey requests that this Court disregard the existence of 3F Partners, the record holder of 3F shares, and declare that Abbey is a stockholder of 3F with all accompanying rights.

Broadly, the dispute here is whether Skokos, as a 3F director, fraudulently induced Abbey to invest in a sham entity solely to deprive him of his appraisal rights such that equity would deem Abbey a record stockholder. Presently before me is defendant's motion to dismiss or stay the entire complaint for failure to state a claim upon which relief can be granted, for failure to join indispensable parties, and under long-standing principles of comity.

II. CONTENTIONS

Abbey seeks relief on three counts. First, Abbey requests that this Court, applying principles of reverse veil piercing, declare that Abbey is a record stockholder of 3F and is entitled to withhold consent to the merger and exercise any appraisal rights available to record holders should the merger be consummated. Second, Abbey requests a declaration and decree that Skokos, in his position as chairman of 3F's board, breached his fiduciary duties of loyalty and good faith by illegally and improperly granting 3F Partners' irrevocable consent to the merger. Last, Abbey asks this Court to find 3F liable for aiding and abetting Skokos' breach of fiduciary duties by knowingly participating in and accepting the benefits of Skokos' breach.

3F moves to dismiss this case on three grounds. First, the complaint fails to state a claim upon which relief can be granted. Only record stockholders have standing to pursue an appraisal action.[1] Further, because Abbey is not a 3F stockholder, Skokos owes no duty as a 3F director; thus, 3F could not possibly aid and abet in any breach in this capacity. Moreover, the company did not knowingly or otherwise participate in any of Skokos' alleged actions. Second, the complaint

[1] 8 *Del. C.* § 262(a).

fails to join two indispensable parties, 3F Partners and 3F Management. These parties have significant interests in the outcome of this decision because they stand to lose contractual rights arguably for which they bargained. Last, principles of comity require that this complaint be dismissed or stayed in favor of Abbey's prior-filed New York action.

III. MOTION TO STAY[2]

Considerations of comity and the necessities of judicial economy require that courts avoid the "wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts."[3] Thus, as a general rule, a Delaware court should exercise its discretion in favor of a stay and confine litigation to the forum of first filing where the original court is capable of rendering "prompt and complete justice" and both cases involve the same parties and the same issues.[4]

The facts before me demand a stay. First, there is no question that the New York action is first in time. Abbey filed a complaint and both parties completely briefed a motion to dismiss before Abbey filed this action on June 7, 2006. Second, all parties present in this case are likewise present in the New York action. Third, all of the issues in both the Delaware and New York actions arise from a "common nucleus of operative facts"—Abbey's allegations that Skokos fraudulently induced him to invest in a sham entity in order to deprive him of stockholders rights in the event of a merger.[5] Fourth, there exists no reason to suspect that the United States District Court of the Southern District of New York is incapable of rendering prompt and complete justice between the parties. It has jurisdiction over all parties and is capable of interpreting and applying the laws of Delaware where they may apply. Finally, Abbey expressly states that he does not

---

[2] Because I agree with defendant 3F's contention that long-standing principles of comity require that this action be stayed in favor of plaintiff Abbey's prior-filed New York action, I see no need to address defendant's motion to dismiss and will only address the motion to stay.

[3] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

[4] *Id.*

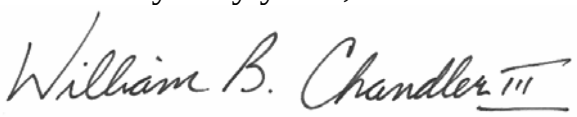
[5] *See, e.g., Teachers' Ret. Sys. of Louisiana v. Scrushy,* 2004 Del. Ch. LEXIS 18, at *33 n.15 (Mar. 4, 2004) (stating that "… all that is required is substantial identity of the claims and parties ….");*see also AT&T Corp. v. Prime Sec. Distribs., Inc.*, 1996 Del. Ch. LEXIS 134, at *6-9 (Oct. 24 1996) (" … it is not required that the parties and issues in both actions be identical.").

object to a stay of this action until the Federal District Court decides the motion to dismiss pending there.

As such, I grant defendant's motion to stay this action in favor of the New York action. Both parties shall promptly notify this Court of any resolution of the New York action, and I will determine the course that this action shall take at that time. This matter is stayed until further order of this Court.

IT IS SO ORDERED.

Very truly yours,



William B. Chandler III

WBCIII:trm