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

JW ACQUISITIONS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1712-N
	)	
LLOYD SHULMAN and	)	
WEINSTEIN ENTERPRISES, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Submitted: September 18, 2006
Decided: October 25, 2006

Joel Friedlander, Esquire, John M. Seaman, Esquire, BOUCHARD MARGULES & FRIEDLANDER, P.A., Wilmington, Delaware; Matthew J. Sava, Esquire, SHAPIRO FORMAN ALLEN SAVA & McPHERSON LLP, New York, New York, *Attorneys for the Plaintiff.*

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LAMB, Vice Chancellor.

A New York limited liability company sues a Delaware corporation and its board chairman, pursuant to 6 *Del. C.* § 8-401 and section 158 of the Delaware General Corporation Law, seeking registration of a transfer to the LLC of shares of the corporation's stock, as well as recognition of its right to exercise the powers of a stockholder. According to the Uniform Commercial Code provision at issue, the LLC's entitlement to relief depends on whether the "transfer [was] in fact rightful."

That same issue was raised in an earlier filed New York state court action brought by the corporation and its board chairman against the LLC, alleging fraud in connection with the LLC's purchase of the shares in question. That action was later dismissed by the New York Supreme Court, whose decision was affirmed by the Appellate Division. The New York courts' decisions rest on the ground that Delaware is the proper venue for the New York complaint since it attacks the judgment of this court entered in a section 220 action filed by the persons who later sold shares of the corporation's stock to the LLC.

Despite the dismissal of their New York complaint, the defendants wish to avoid litigating the rightfulness of the transfer to the LLC in this statutory action. To that end, they have filed a motion for entry of judgment or, alternatively, to dismiss or to stay. The defendants' proposed final judgment provides for essentially all of the relief sought in the complaint. Moreover, the proposed order also provides that it should not constitute an adjudication of any issues or claims

raised in the dismissed New York case or in a related Delaware derivative complaint, including the rightfulness of the sale of shares to the LLC. Alternatively, the defendants move to stay or dismiss in favor of the previously filed (but since dismissed) New York action.

The plaintiff resists the motion, insisting that the issue of its rightful acquisition of the shares should be decided in this case, notwithstanding the potential collateral consequences to the defendants' ability to litigate those claims in another, plenary action. Thus, the question is whether a limited statutory action to compel registration of a stock transfer is an appropriate device by which to force a Delaware corporation and its privies to litigate complex issues involving the legality of an underlying stock purchase. After careful consideration, the court is satisfied that the interests of justice are best served by entering the defendants' proposed order disposing of the statutory action and leaving the adjudication of the defendants' fraud claims to another litigation.

I.

A. The Parties

The plaintiff, JW Acquisitions, LLC, is a New York limited liability company which paid $26 million for approximately 33% of the stock of Weinstein Enterprises, Inc. on June 28, 2004. The defendants are Weinstein Enterprises, Inc.,

a closely held Delaware corporation engaged in leasing commercial real estate, and Lloyd Shulman, Weinstein's president, chairman, and substantial stockholder.

B. The Facts

In 2002, the former minority stockholders of Weinstein, the George Orloff family, decided to sell most of their 34% interest in the company. Weinstein and the Orloffs executed a confidentiality agreement in May 2003 that provided the Orloffs with certain corporate information to facilitate the sale of their stock.

Following a disagreement over the breadth of the company's disclosure, the Orloffs initiated a section 220 proceeding in this court for the purpose of allowing potential third party buyers to examine Weinstein's financial information.[1] On March 8, 2004, this court entered a final order and judgment in the section 220 case. The final order provided that, in exchange for Weinstein's sensitive financial information, the Orloffs and all third party bidders would comply with certain confidentiality requirements. Additionally, the final order required that all signatories submit to personal jurisdiction before this court in any related future litigation. On March 24, 2004, JW Acquisitions contractually agreed to the terms of the final order. The Orloffs sold all but 1% of their stock to JW Acquisitions shortly thereafter.

[1] *Orloff v. Weinstein Enters., Inc.*, No. 186-N (Del. Ch. filed Jan. 28, 2004).

A rash of litigation followed the stock sale. On August 4, 2004, Weinstein filed suit in New York against JW Acquisitions and the Orloffs seeking rescission of the stock sale, an order compelling sale of the stock to Weinstein, and money damages.[2] Weinstein's New York complaint alleged fraud in the course of the section 220 action, as well as breaches of the May 2003 confidentiality agreement. The Orloffs and JW Acquisitions responded in November 2004 by filing a derivative action in this court against various members of the Shulman family. That complaint alleged breaches of fiduciary duty against the Shulmans and mismanagement of Weinstein's assets. In a memorandum opinion and order dated November 23, 2005, the court granted, in part, and denied, in part, the defendants' motion to dismiss.[3] Trial on the surviving claims is currently scheduled to begin on July 30, 2007.

On July 29, 2005, the Supreme Court of New York granted JW Acquisitions's and the Orloffs' motion to dismiss on the grounds of comity, concluding that the New York action amounted to a collateral attack of this court's final order in the section 220 action and should be brought here.[4] The First Department of the Appellate Division of New York affirmed.[5] Weinstein then

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[2] *Weinstein Enters., Inc. v. Orloff*, No. 602497/2004 (N.Y. Sup. Ct. filed Aug. 4, 2004).
[3] *Orloff v. Shulman*, 2005 WL 3272355 (Del. Ch. Nov. 23, 2005).
[4] *Weinstein Enters., Inc. v. Orloff*, No. 602497/2004 (N.Y. Sup. Ct. July 29, 2005).
[5] *Weinstein Enters., Inc. v. Orloff*, 30 A.D.3d 354, 354 (N.Y. App. Div. 2006).

moved for leave to appeal to the New York Court of Appeals. The First Department recently denied that motion.[6]

II.

In October 2005, JW Acquisitions filed this action seeking registration of the shares it purchased from the Orloffs, damages for breach of fiduciary duty based on an allegation that its representative was wrongfully excluded from a 2005 stockholder meeting, and a declaratory judgment that all actions taken at the stockholder meeting are null and void. The defendants now move for entry of judgment granting substantially all the relief sought against them in the complaint or, alternatively, to dismiss or stay the lawsuit.

Weinstein and Shulman first argue that their proposed order grants virtually all of the relief JW Acquisitions seeks. The defendants' order provides for registration of the stock purchased from the Orloffs and for the immediate convention of a stockholder meeting to elect directors. That order, however, also stipulates that its entry would not constitute "an adjudication of, or waiver of, or estoppel with respect to any issues or claims [raised in the Delaware derivative suit or the New York litigation], or in any subsequent and/or related action(s) raising the same issues or claims."[7] Alternatively, Weinstein and Shulman assert that the

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[6] *Weinstein Enters., Inc. v. Orloff*, No. 602497/04, M-4091 (N.Y. App. Div. Oct. 5, 2006).
[7] Defs.' Opening Br., Ex. A.

court should stay or dismiss this proceeding in favor of the New York litigation based upon the principles of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Corp*.[8]

JW Acquisitions responds that because a stock registration action is summary in nature and because the New York litigation attacks the section 220 final order, a proper application of *McWane* requires that this court deny the defendants' motion and proceed with this case on the merits. Additionally, the plaintiff requests that the court not enter the defendants' proposed order, arguing that to do so would constitute an impermissible predetermination of the res judicata effect of the court's own judgment.[9]

III.

Delaware courts have broad discretion to stay or dismiss an action filed in Delaware if "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."[10] A court should consider all the facts and circumstances when exercising its

[8] 263 A.2d 281 (Del. 1970).
[9] Notably, JW Acquisitions did not argue in its brief or at oral argument the defendants' proposed final judgment was otherwise inadequate. Instead, the plaintiff focused upon its right to have the stock recorded and a certificate issued in its name.
[10] *Id.* at 283.

discretion, as proper analysis requires "consideration[] of comity and the necessit[y] of an orderly and efficient administration of justice."[11]

Additionally, the court, after having focused on the specific nature of the dispute at hand, enjoys substantial discretion to enter an order awarding "such relief as justice and good conscience may require."[12] For when common law principles stand unable to provide full and fair relief, a court of equity must act to achieve the most judicious outcome given the facts of a particular case.[13]

IV.

The following discussion illustrates that the defendants have not met their burden of adequately demonstrating a "prior action pending elsewhere" under *McWane*. And even assuming *arguendo* that Weinstein and Shulman could show the existence of a "prior action," a properly conducted *McWane* analysis would still favor JW Acquisitions. Despite the inherent weaknesses of the defendants' *McWane* argument, the court is convinced that their proposed order of judgment is entirely appropriate given the unique set of facts presented here since it does grant substantially all of the relief which JW Acquisitions seeks. Further, the court

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[11] *Oralco, Inc. v. Bradley*, 1992 WL 332106, at *2 (Del. Ch. Nov. 4, 1992) (citing *McWane*, 263 A.2d at 282-83).
[12] *Lichens Co. v. Standard Comm. Tobacco Co.*, 40 A.2d 447, 452 (Del. 1944).
[13] *Id.*; *see also* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 12-1[a], at 12-2, 12-4 (2006).

believes it unwise to allow a cause of action purposefully designed to be litigated expeditiously to languish unnecessarily.

The court observes that the primary issue in dispute (whether the stock transfer from the Orloffs to JW Acquisitions was "rightful") may be litigated in the future by either party in a Delaware court. Weinstein might bring suit to challenge the propriety of the March 2004 order.[14] JW Acquisitions might bring a plenary action seeking a declaratory judgment that the stock transfer was "rightful."[15] Whoever its instigator, a future lawsuit, rather than the summary proceeding at bar, clears a more appropriate trail through which to adjudicate the remaining dispute between these litigants.

A. The Statutory Predicate For JW Acquisitions's Complaint

A pair of Delaware statutes provides the basis by which an aggrieved stockholder may petition a court for prompt adjudication of its right to have its stock registered on a corporation's records and a stock certificate issued in its name. Section 158 of the Delaware General Corporation Law provides that every "holder of stock represented by certificates shall be entitled to have a certificate signed by, or in the name of the corporation . . . representing the number of shares registered in certificate form."[16] Section 8-401(a) of Delaware's version of the

[14] Court of Chancery Rule 60(b) (2006).
[15] 10 *Del. C.* § 6501 *et seq.* (2006).
[16] 8 *Del. C.* § 158 (2006).

Uniform Commercial Code mandates that "[i]f a certificated security in registered form is presented to an issuer with a request to register transfer . . . the issuer shall register the transfer as requested if [seven showings are made]."[17]

Of utmost importance here is section 8-401(a)(7). That provision requires the petitioning stockholder to demonstrate that the stock's "transfer is in fact rightful."[18] The defendants premise their *McWane* argument on the possibility that a factual finding by the court on "rightful" transfer could result in conflicting judgments in New York and Delaware. While this potential conflict existed at the time the instant motion was filed, the dismissal of the New York action and the later affirmance of that dismissal have all but eliminated the threatened conflict.

B. The Defendants Can No Longer Demonstrate The Existence Of A "Prior Action"

Under *McWane*, the moving party must point to a "prior action pending elsewhere" for a court to exercise its discretion in favor of a dismissal or a stay.[19]

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[17] 6 *Del. C.* § 8-401(a) (2006).

[18] The party seeking registration must satisfy the court that: "(1) under the terms of the security the person seeking registration of transfer is eligible to have the security registered in its name; (2) the endorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person; (3) reasonable assurance is given that the endorsement or instruction is genuine and authorized (Section 8-402); (4) any applicable law relating to the collection of taxes has been complied with; (5) the transfer does not violate any restriction on transfer imposed by the issuer in accordance with Section 8-204; (6) a demand that the issuer not register transfer has not become effective under Section 8-403, or the issuer has complied with Section 8-403(b) but no legal process or indemnity bond is obtained as provided in Section 8-403(d); and (7) the transfer is in fact rightful or is to a protected purchaser." *Id.* The defendants do not vigorously dispute the plaintiff's satisfaction of the first six elements, but rather focus on the final showing.

[19] 263 A.2d at 283.

As the Delaware Supreme Court noted, litigation should generally "be confined to the forum in which it is first commenced, and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by commencing litigation involving the same cause of action in another jurisdiction of its own choosing."[20] There is little doubt that the New York action, while it was pending, was "first filed" for purposes of a *McWane* motion here. The only other contender is George Orloff's section 220 action, but that action involved different parties and different issues. Indeed, the crucial issue presented here and in New York–JW Acquisitions's rightful ownership of shares of Weinstein common stock–could never have been an issue in the section 220 action because no sale to JW Acquisitions had yet taken place.[21]

Nevertheless, there is no longer a valid reason to regard New York as a prior pending action, since it has been dismissed by the New York Supreme Court and that dismissal affirmed by the New York Appellate Division. Moreover, the Appellate Division has also denied Weinstein's motion for leave to appeal to the New York Court of Appeals. In the circumstances, all that remains of the New

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[20] *Id.*

[21] JW Acquisitions relies heavily upon *United Phosphorus v. Micro-Flo, LLC*, 808 A.2d 761 (Del. 2002), in an attempt to convince this court that the section 220 action should receive "first filed" treatment. In *United Phosphorus*, there was a first filed Delaware federal court action, a second filed Georgia action, and a third filed Delaware state court action. In deeming the Delaware state court action first filed under *McWane*, the court noted that the plaintiff "repeated the exact same state law claims . . . [as] in its original federal complaint." *Id.* at 765. Thus, *United Phosphorus* offers little support for JW Acquisitions's position.

York litigation, if Weinstein chooses to pursue it, is an ephemeral certiorari petition to the Court of Appeals. On the present facts, this court cannot stretch the "prior action pending elsewhere" concept so thin as to encompass the all but moribund New York case. Thus, the defendants have not satisfied the "prior action" requirement of *McWane* that is a necessary predicate to any decision to stay or dismiss this case.

C. Even If The New York Litigation Was A "Prior Action" Under *McWane*, A Stay Or Dismissal Would Not Be Warranted

Assuming *arguendo* that the defendants could show the New York litigation was a "prior action pending elsewhere," the court would still decline to stay or dismiss the present suit. *McWane* requires that the foreign court adjudicating the prior pending action prove capable of administering "prompt and complete justice."[22] Again, hypothetically regarding the New York case to be "first filed," a tension would exist between this court's duty to adjudicate quickly a stock registration action and "the general policy embedded in the *McWane* doctrine that all related claims should be heard in the court in which an action is first brought."[23]

Several guiding principles are salient in evaluating whether a foreign court is truly capable of rendering "prompt and complete justice," as envisioned by

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[22] *McWane*, 263 A.2d at 283.
[23] *See Fuisz v. Biovail Techs., Ltd.*, 2000 WL 1277369, at *1 (Del. Ch. Sept. 6, 2000) (discussing such a tension in the context of 10 *Del. C.* § 145(k)).

McWane, when a Delaware court is asked to stay a later filed stock registration case. First, although suits to register stock are not specifically codified as summary in nature, courts have consistently treated them as such.[24] Second, due to the narrow focus of stock registration proceedings, courts generally hesitate to allow parties either to stay these actions or to inject complicated issues that delay their resolution.[25] Both principles are consistent with the notion that putative stockholders are entitled to expeditious determination of their rights so as to promptly enjoy all the attendant benefits of stock ownership.

While the concept of "prompt and complete justice" is necessarily a fluid one and is dependent upon the circumstances of a particular case,[26] it is likely here that a stay of this action in favor of the New York case would not result in a prompt resolution of the question of JW Acquisitions's entitlement to recognition of the transfer of the Orloffs' shares. On the contrary, assuming for sake of argument that Weinstein succeeded in its efforts to overturn the judgment dismissing its complaint,[27] the resolution of that complex fraud case would likely span an extended period of time.

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[24] *See, e.g.*, *Bender v. Memory Metals, Inc.*, 514 A.2d 1109, 1112-13 (Del. Ch. 1986); WOLFE & PITTENGER, § 8-3[b], at 8-31 (2006).
[25] *CAPM Corp. Advisors AB v. Protegrity, Inc.*, 2001 WL 1360122, at *12 (Del. Ch. Oct. 30, 2001); *Bender*, 514 A.2d at 1113.
[26] *See Oralco*, 1992 WL 332106, at *2 (noting that "a court should exercise its discretion in light of all the facts and circumstances").
[27] Having lost on its motion for leave to appeal at the Appellate Division level, Weinstein's final hope in New York is a direct application to the Court of Appeals pursuant to N.Y. C.P.L.R. 5602(a) (2006).

Understandably, Delaware courts take note of the pendency of an appeal in the "first filed" action when examining whether a court in a foreign jurisdiction is in a position to render justice promptly and completely.[28] In the summary proceeding context, Delaware has a powerful interest in the orderly internal governance of its corporations which should not be defeated by continued uncertainty in a foreign forum.[29] The Court of Chancery stands able and prepared to adjudicate issues involving the registration and certification of stock in a prompt and fair manner. Were it necessary to the resolution of the case at bar, this court would proceed to trial in the instant action since an expeditious resolution of JW Acquisitions's legal status as a stockholder would clearly be in the best interests of the corporation and its stockholders. But when fairness and equity so require, the court may take appropriate steps to prevent the later filed Delaware litigation from precluding issues beyond those strictly necessary to provide relief under the statute.[30]

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[28] *See, e.g.*, *Harbor Ins. Co. v. Newmont Mining Corp.*, 564 A.2d 352, 355-56 (Del. Super. 1989) (discussing the prolonged period of time cases require to resolve on appeal).
[29] *Toronto-Dominion Bank v. Osceola Shoe Co., Inc.*, 1988 WL 62795, at *3 (Del. Ch. June 14, 1988).
[30] In the past, Delaware courts have observed that a litigant can take steps in the course of an *in rem* summary proceeding such as this one to protect itself from the effects of collateral estoppel in a separate proceeding *in personam*. The reservation of certain factual issues, as the defendants' order provides here, is an appropriate means of doing so. *Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *6 (Del. Ch. Aug. 25, 1997).

D. The Defendants' Order Provides A Just And Equitable Resolution Of The Present Suit

The facts and circumstances of this case convince the court that the defendants' proposed order, awarding JW Acquisitions substantially all the relief it seeks, provides a just and efficient outcome to this limited proceeding, while temperately preserving the possibility of a later litigation regarding the rightfulness of JW Acquisitions's ownership of Weinstein shares. There are several reasons why the court regards this as a just outcome.

First, as previously discussed, Delaware has a strong interest in quickly resolving limited proceedings such as this one. If this case were to proceed to trial, the defendants could be expected to interject the same issues into this case as are found in the dismissed New York litigation, unduly creating complexity and almost certainly delaying the outcome.

Second, a factual finding by this court on the issue of "rightful" transfer would create the possibility of issue preclusion in the future. In the New York action, Weinstein essentially claims that the stock sale from the Orloffs to JW Acquisitions was fraudulent and not rightful.[31] The "rightful" nature of the stock transfer under section 8-401(a)(7) of the Uniform Commercial Code is also an element of JW Acquisitions's case here. If the New York Court of Appeals were

[31] Pl.'s Reply Br. 7; Defs.' Opening Br. 9.

to overturn the judgments of the lower tribunals, an earlier adjudicated judgment in this case could have a binding effect in New York, thus frustrating Weinstein's choice of a New York forum to hear its fraud action.

Delaware courts have previously examined the collateral estoppel effect of factual determinations rendered in the course of a summary proceeding. In *Technicorp International II, Inc. v. Johnston*, the court considered whether earlier factual findings in a section 225 action could preclude the relitigation of certain issues in a later plenary proceeding. The court held that preclusion in a given case rested on "a particularized, fact-specific determination of whether policies of fair play and substantial justice warrant the application of collateral estoppel."[32] The defendants in the later plenary proceeding made appearances at the earlier summary proceeding, were not denied any procedural rights there, and possessed a strong incentive to litigate the prior action vigorously.[33] Thus, the *Technicorp* court held that the earlier factual determinations merited collateral estoppel effect.[34]

Here, Weinstein and Shulman have appeared. Further, they have a strong incentive to litigate if this action were to go forward since an unfavorable ruling by this court could stymie any potential for success in New York. Thus, were this

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[32] 1997 WL 538671, at *8.
[33] *Id.*
[34] *Id.*

court to decide the issue of "rightful transfer," a New York court might apply *Technicorp*'s logic and decide it is bound by this court's factual determinations.[35]

The proposed order appropriately removes the possibility of issue preclusion. It allows JW Acquisitions to register the contested shares, thereby securing the relief it seeks, and reserves a binding determination of issues related to Weinstein's fraud claim for future litigation, either in this court in a new action or in New York. As the court suggested in *Technicorp*, "[a] defendant who fears that particular issues may be important with respect to other claims or in other forums []can avoid actual litigation and determination by stipulating to issues advanced by the plaintiff or withholding his own issues."[36]

Despite JW Acquisitions's contrary argument, entry of the defendants' order would not constitute a predetermination by the court of the res judicata effect of its own judgment.[37] The order does not "determine" certain underlying issues at all.

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[35] *See, e.g.*, *Oldham v. McRoberts*, 21 A.D.2d 231, 235-36 (N.Y. App. Div. 1964) ("Defendant-appellant by his answer has pleaded the factual determinations necessarily made in the Pennsylvania action which resolved, against plaintiff therein, the very issues upon which it would have to succeed to obtain a judgment in the present action. The record of the prior action and the opinions rendered therein . . . conclusively establish that these issues were in fact decided in that litigation. Consequently, the affirmative defense of collateral estoppel bars a judgment for plaintiff.").

[36] 1997 WL 538671, at *6 (citing WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 4431 (1981)).

[37] *Cf. In re National Auto Credit, Inc. S'holders Litig.*, 2004 WL 1859825, at *3-*4 (Del. Ch. Aug. 3, 2004) (discussing the claim preclusive effect of a court's final judgment and noting that it is "well settled that the court adjudicating a dispute cannot predetermine the res judicata effect of its own judgment"). The present facts are inapposite to those in *National Auto*. In that case, the defendants requested that the court give res judicata effect to the non-final order of another court. Essentially, that court was asked to dismiss a suit on grounds of res judicata *before the*

Rather, it merely signals to any other reviewing court that the judgment in this case does not rest upon those particular factual issues reserved by the order and by this opinion.

V.

For the foregoing reasons, the defendants' motion to stay or dismiss is DENIED. IT IS SO ORDERED. Moreover, the defendants' motion for entry of judgment is GRANTED. It is the court's intention to enter a final order in the form attached as Exhibit A to the defendants' opening brief. Any objections the plaintiff may have to that form, other than matters addressed in this opinion, should be communicated by letter no later than November 1, 2006.

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order on which the defendants' claim preclusion argument was based had in fact been entered. That is simply not the case here. If JW Acquisitions's argument on this point is accepted, a court would never possess the adjudicative power to enter a final order expressly reserving certain contested issues, even in a case where all of the litigants voluntarily negotiated and agreed to such an order.