COURT OF CHANCERY
OF THE
STATE OF DELAWARE

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: June 6, 2007
Decided: June 8, 2007

Etta R. Wolfe, Esquire
Smith, Katzenstein & Furlow LLP
P.O. Box 410
Wilmington, DE 19899

Robert K. Payson, Esquire
Potter Anderson & Corroon LLP
P.O. Box 951
Wilmington, DE 19899

Kurt M. Heyman, Esquire
Proctor Heyman LLP
1116 West Street
Wilmington, DE 19801

Danielle Gibbs, Esquire
Young, Conaway, Stargatt & Taylor
P.O. Box 391
Wilmington, DE 19899

Arthur G. Connolly, III, Esquire
Connolly, Bove, Lodge & Hutz
P.O. Box 2207
Wilmington, DE 19899

Peter C. Hughes, Esquire
Dilworth Paxson, LLP
P.O. Box 1031
Wilmington, DE 19899

Philip Trainer, Jr., Esquire
Ashby & Geddes
P.O. Box 1150
Wilmington, DE 19899

Gerald M. O'Rourke, Esquire
Womble Carlyle Sandridge & Rice
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801

Kevin M. Coen, Esquire
Morris, Nichols, Arsht & Tunnell
P.O. Box 1347
Wilmington, DE 19899

RE: Muriel Kaufman v. Sanjay Kumar, et al. and CA, Inc.
C.A. No. 2418-VCL

Dear Counsel:

The court has reviewed the parties' submissions relating to the motion to dismiss or stay filed by the special litigation committee of the board of directors of nominal defendant CA, Inc. (the "SLC"). At the conclusion of the oral argument held on June 6, 2007, the court intimated that dismissal of the above-referenced action is appropriate given the circumstances present here and the operation of the first-filed comity doctrine embodied in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*.[1] This letter serves to briefly restate the relevant facts of this case and the legal basis for the court's decision.

On June 29, 2004, a number of derivative plaintiffs filed suit in the United States District Court for the Eastern District of New York against numerous current and former CA officers, directors, and employees, based on a criminal scheme perpetrated by management of the nominal defendant.[2] In addition to alleging breaches of fiduciary duty premised on the defendants' engagement in, or failure to detect, widespread accounting fraud at the company, the plaintiffs in the New York

[1] 283 A.2d 281 (Del. 1970).
[2] The New York suit is captioned *In re Computer Assocs. Int'l Deriv. Litig.*, 04-CV-2697-TCP (E.D.N.Y. filed June 29, 2004). The scheme, commonly known as the "35-Day Month," was fraudulently designed to accelerate income recognition at the company in order to inflate the stock price and to meet Wall Street analysts' predictions as to the company's performance. As a result of this conduct, CA was forced to restate $2.2 billion in revenues. The cover-up by those complicit in the fraud was described by the U.S. Attorney's Office as "the most brazen and most comprehensive obstruction that we've witnessed in recent history."

action accused several of the defendants of improperly approving a global settlement of early litigation in December 2003.[3] In the months immediately following the settlement, four former CA executives were charged with, and pleaded guilty to, securities fraud and obstruction of justice charges. Since April 2004, four additional former executives have pleaded guilty to criminal charges.

In the fall of 2004, the plaintiffs in the New York action filed separate motions for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). The motions seek to vacate the release found in the settlement. Oddly, although Kaufman is not a plaintiff in the New York action, she filed her own separate Rule 60(b) motion before Judge Platt. CA thereafter established the SLC and appointed William McCracken and Renato Zambonini as the committee's members in order to control and determine the company's response to the New York action.

As is well-known throughout the business community, Sanjay Kumar and Stephen Richards, two of CA's most senior former officers, were federally indicted

---

[3] The settled lawsuits, which alleged knowing and intentional breaches of fiduciary duty arising from misrepresentation of CA's financial and operational condition, were filed on August 21, 2003, and were adjudicated before Judge Thomas Platt in the same New York federal court where the 2004 derivative litigation is now pending. In exchange for (among other things) 5.7 million shares of common stock being issued to the CA stockholders, the settlement granted all then-current and former officers and directors of CA a release from civil liability to the company.

on September 22, 2004. Because Judge Platt either stayed or greatly limited the scope of discovery in New York following these indictments, the SLC's ability to adequately investigate the derivative claims and the Rule 60(b) motions was greatly restricted for a 17-month period. However, after Kumar and Richards pleaded guilty in April 2006, the SLC has been able to conduct an unfettered investigation into the wrongdoing at CA, and has recently filed a comprehensive 386-page report in the New York case.

On September 14, 2004, nearly three months after the New York action was filed, Kaufman initiated a books and records action under 8 *Del. C.* § 220 in this court. CA ultimately produced over 250,000 pages of documents to Kaufman, who then filed a derivative complaint in Delaware on September 13, 2006–more than two years after the current New York action commenced. In her complaint, Kaufman asserts strikingly similar causes of action for waste, breach of fiduciary duty, and common law indemnification or contribution against most of the same defendants who are now litigants in New York. Counsel for the SLC requested that Kaufman voluntarily withdraw her complaint in Delaware and re-file it in New York so that all derivative claims which arose from the same nucleus of operative facts could be adjudicated in one forum. Kaufman declined the invitation.

The SLC contends that the pending case is a perfect candidate under *McWane* for this court to exercise its judicial discretion to dismiss or stay Kaufman's complaint in favor of the New York action. In support of its motion, the SLC notes that the New York case was filed over two years before Kaufman's derivative suit, involves substantially similar parties and issues, and is pending in a court capable of rendering prompt and complete justice.

In opposition, Kaufman advances two arguments. First, she claims that Judge Platt is not capable of rendering prompt and complete justice because the New York action has "not progressed" during the time the SLC was completing its investigation. Second, she contends that this case involves an important, and yet undecided, issue of Delaware law: the responsibility of outside directors in approving a global class/derivative settlement of claims against management where the corporation pays all the consideration and neither the individual defendants nor their insurance carriers contribute any consideration to the settlement.

Under the *McWane* doctrine, a Delaware court enjoys the discretion to dismiss or stay a lawsuit when "(1) a first-filed prior pending action exists in another jurisdiction, (2) that action involves similar parties and issues, and (3) the court in the other jurisdiction is capable of rendering prompt and complete

justice."[4] The policies of judicial economy and the avoidance of conflicting judgments constitute the pillars of this comity principle.[5]

The first of the *McWane* factors–whether or not a prior-filed action is pending in another jurisdiction–is indisputably met here. The New York action was filed two years before Kaufman's derivative complaint. Even if Kaufman's section 220 complaint could be considered the relevant lawsuit here (and it is most assuredly not),[6] that case was filed nearly three months after the New York action began. Therefore, the New York action has first-filed status under *McWane*.

With regard to identity of parties and issues, a proper application of *McWane* typically inquires whether the parties are "substantially identical" and whether the issues involve a "common nucleus of operative facts."[7] These inquiries allow the court to decide whether allowing the cases to progress in tandem would either risk conflicting rulings or foster "an unseemly race to judgment" in either forum.[8]

---

[4] *Enodis Corp. v. Amana Co., L.P.*, 2007 WL 1242193, at *2 (Del. Ch. Apr. 26, 2007) (citing *McWane*, 263 A.2d at 283).
[5] *Id.*
[6] *See, e.g.*, *Kaufman v. Computer Assocs. Int'l, Inc.*, 2005 WL 3470589, at *3 (Del. Ch. Dec. 13, 2005) (noting that "[f]undamentally, the right to proceed under section 220 to inspect books and records exists independent of any claim the stockholder might ultimately choose to bring").
[7] *Xpress Mgmt., Inc. v. Hot Wings Int'l, Inc.*, C.A. No. 2856-VCL, slip op. at 10-11 (Del. Ch. May 30, 2007) (citing *Dura Pharms., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 930 (Del. Ch. 1998) and *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *3 (Del. Super. Apr. 25, 1989)).
[8] *Id.*

Kaufman does not dispute that one of the key issues in the present case–namely, whether a prior release given by the company to certain of the defendants precludes the derivative claims asserted in both actions–must be (and already is) being litigated in the Eastern District of New York. Indeed, Kaufman herself is litigating this issue in the form of her Rule 60(b) motion before Judge Platt. Instead of explaining why she filed her concededly duplicative case in Delaware or why she declined to prosecute her claims in New York, Kaufman instead argues that this court "could render" a prompt and complete decision on this substantive and important piece of the larger New York litigation. This argument not only runs afoul of the very comity considerations which vitalize the *McWane* doctrine, it ignores well-reasoned decisions of this court which teach that when the allegations in a complaint are essentially a subset of a larger group of prior-pending claims in another jurisdiction, complete and orderly justice is ordinarily more probable to ensue in the foreign court.[9] The second *McWane* consideration, then, is clearly satisfied here.[10]

---

[9] *See, e.g.*, *Corwin v. Silverman*, 1999 WL 499456, at *4 (Del. Ch. June 30, 1999) (noting that the issues in a prior-filed action were broader than those in Delaware, and "[t]hus, the [earlier] action does not threaten the possibility that less-than-complete justice will ensue. In fact, just the opposite is likely true.").

[10] During oral argument on the SLC's motion to stay Kaufman's section 220 action in 2005, the court essentially noted the vast similarity of parties and issues in any prospective derivative complaint that Kaufman might ultimately file. *See* Suppl. Decl. of David Hennes, Ex. 6 at 22-27:7-10 (noting that the point of Kaufman's section 220 suit "is to see whether there is enough information to support filing the very complaint I am saying if it were filed I would probably stay").

Finally, the court is convinced that Judge Platt is wholly capable of delivering a prompt and judicious resolution to the disputes surrounding the fraud perpetrated at CA. Not only does Judge Platt have an intimate familiarity with the parties and the issues since first becoming involved in this matter in 2003, but the New York federal court has a particularly strong interest in seeing the Rule 60(b) motions there proceed in an orderly fashion. In addition, Kaufman's contention that the New York action is bogged down ignores the overarching history of the collapse of the house of cards surreptitiously erected by CA's former management. The SLC's investigation, and thus the New York action, could not press forward in 2005 and early 2006 because of the criminal prosecution of Richards and Kumar. The court is not persuaded that the singularly unusual procedural constraints imposed by parallel proceedings can, in any way, be extrapolated to impugn the capacity of the New York court to adjudicate the case before it expeditiously.

To the extent that Kaufman fears that Judge Platt will improperly apply Delaware law, the court is inclined to provide the same retort that Chancellor Chandler did when faced with a similar argument in *Corwin v. Silverman*. There, the court observed:

> Federal courts have proven their ability to apply and even extend Delaware law in appropriate ways. . . . Plaintiffs offer no reason that might otherwise give cause for concern. In any event, to the extent that this case implicates novel, delicate, or unsettled issues of

> Delaware law . . . our sister state courts and the federal courts have the option of certifying questions of law to the Delaware Supreme Court.[11]

For the foregoing reasons, the SLC's motion to dismiss is GRANTED, with prejudice to the named plaintiff Muriel Kaufman. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

---

[11] *Corwin*, 1999 WL 499456, at *6 (citing *Riblet Products Corp. v. Nagy*, 683 A.2d 37 (Del. 1996); *United States v. Anderson*, 669 A.2d 73 (Del. 1995); *Waltuch v. Conticommodity Servs. Inc.*, 88 F.3d 87 (2d Cir. 1996); *Black & Decker Corp. v. Am. Standard, Inc.*, 682 F.Supp. 772 (D. Del. 1988)). *See also* DEL. CONST. art. IV, § 11(8) ("The Supreme Court shall have jurisdiction . . . to hear and determine questions of law certified to it by . . . a United States District Court . . . ."). *But see In re Topps Co. S'holders Litig.*, __ A.2d __, 2007 WL 1491451 (Del. Ch. May 9, 2007) (noting that the Court of Chancery has a great deal of discretion in retaining and litigating derivative and class cases involving highly important and nuanced concepts of Delaware corporate law).