IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MELVIN J. BRENNER, Plaintiff, v. W. STEVE ALBRECHT, BETSY S. ATKINS, PAT WOOD III, THOMAS R. MCDANIEL, THOMAS H. WERNER, T.J. RODGERS, UWE-ERNST BUFE, DENNIS ARRIOLA, and EMMANUEL HERNANDEZ, Defendants, -and- SUNPOWER CORPORATION, a Delaware Corporation, Nominal Defendant.	)	C.A. No. 6514-VCP

MEMORANDUM OPINION

Date Submitted: October 28, 2011
Date Decided: January 27, 2012

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PARSONS, Vice Chancellor.

This is a shareholder derivative action brought in the name of SunPower Corp. ("SunPower" or the "Company"). The plaintiff claims that the directors and certain officers of SunPower breached their fiduciary duties by failing to implement or to monitor an effective internal control system, which caused the Company to misstate, and then to restate, its financial statements for 2008 and 2009. That restatement also led to related actions in federal court accusing the Company and its directors and senior management of violating federal securities laws (the "Securities Class Action"). In this derivative action, the plaintiff seeks indemnification for whatever losses the Company ultimately incurs from the Securities Class Action and recovery of other damages directly caused by the restatement itself.

The defendants have moved to stay the derivative action pending resolution of the Securities Class Action. They contend that prosecution of the plaintiff's claims would prejudice their defense of the Securities Class Action and that the relief the plaintiff seeks is contingent on the outcome of that Action. The plaintiff responds that his claims are fundamentally different than, and thus will not prejudice the Company's defense of, the claims asserted in the Securities Class Action. Additionally, he alleges that the Company already has incurred damages of at least $8 million and argues that this noncontingent portion of his claim should not be delayed. For the reasons stated in this Memorandum Opinion, I find that practical considerations make simultaneous prosecution of both cases unduly complicated, inefficient, and unnecessary. Therefore, I grant the defendants' motion to stay this derivative action for the time being.

I. BACKGROUND

A. The Parties

Plaintiff, Martin J. Brenner, brings this shareholder derivative action under Court of Chancery Rule 23.1 on behalf of SunPower. Brenner alleges that he purchased SunPower Class A shares on November 8, 2007 and has at all times since been a continuous holder of SunPower shares.[1]

Nominal Defendant, SunPower, is a Delaware corporation headquartered in San Jose, California. Its stock publicly trades on the NASDAQ Global Select Market under the ticker symbol "SPWR." Founded in 1985, SunPower designs and manufactures solar energy cells and panels and provides related products and services in the solar energy market. Though incorporated and headquartered in the United States, the Company's manufacturing operations and a majority of its employees are based in the Philippines. SunPower is also a defendant in the Securities Class Action.

In addition to SunPower, Defendants in this derivative action are its: CEO and director, Thomas H. Werner; former and current CFO's, Emmanuel Hernandez and Dennis Arriola, respectively; current directors and Audit Committee members W. Steve Albrecht, Betsy S. Atkins, Pat Wood III, and Thomas McDaniel; and former directors Uwe-Ernst Bufe and T.J. Rodgers (collectively, the "Individual Defendants"). Each of the Individual Defendants also is a defendant in the Securities Class Action.

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[1] Compl. ¶ 13.

B. Facts[2] & Procedural History

1. The Restatement

In November 2009, SunPower publicly disclosed that its Audit Committee was investigating "unsubstantiated accounting entries" that had originated in the Company's Philippines manufacturing operations earlier that year. On March 18, 2010, the Audit Committee issued a press release announcing that accounting errors had been made and the Company needed to restate its financial results for the first three quarters of 2009 and the entire 2008 fiscal year. Specifically, the Audit Committee determined that Philippines-based personnel deliberately understated actual expenses to conform to internal expense projections, which caused the Company to understate its cost of goods sold. The Audit Committee further concluded that these accounting issues were confined to Philippines-based accounting functions and that senior management was not aware of them. It also reported that management had concluded that Philippines-based "control deficiencies constituted material weaknesses in the company's internal control over financial reporting."[3] The following day, March 19, 2010, the Company filed its annual Form 10-K with the SEC, including restated financial statements for each of its fiscal years 2008 and 2009 and the first three quarters of 2009.

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[2] Unless otherwise indicated, the following facts are drawn from the allegations made in Brenner's Verified Shareholder Derivative Complaint (the "Complaint") and are not contested for purposes of this motion to stay.

[3] Compl. ¶ 44 (quoting the Audit Committee's March 18, 2010 press release).

2. The Securities Class Action

On November 18, 2009, after SunPower announced the internal investigation but before its results, a securities class action complaint was filed in the United States District Court for the Northern District of California against SunPower and certain of its directors and officers. Two additional securities class actions were filed shortly thereafter, and all three actions were consolidated as the Securities Class Action, styled *In re SunPower Securities Litigation*, Case No. CV 09-5473-RS. Among other allegations, the consolidated complaint in the Securities Class Action accused the Company, Werner, Hernandez, and Arriola of violating SEC Rule 10b-5 promulgated under the Exchange Act of 1934, which proscribes making "any untrue statement of a material fact . . . in connection with the purchase or sale any security."[4]

On March 1, 2011, District Judge Richard Seeborg issued an opinion dismissing the Securities Class Action in its entirety, with leave to amend.[5] As to the Rule 10b-5 claim in particular, the District Court held that the consolidated complaint failed to plead allegations sufficient to give rise to the requisite inference of scienter on the part of SunPower, Werner, Hernandez, or Arriola.[6] On April 18, 2011, the Securities Class Action plaintiffs filed a First Amended Complaint ("FAC"), which SunPower and the

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[4] 17 C.F.R. § 240.10b-5. That complaint asserts additional claims under section 20(a) of the Exchange Act and sections 11 and 15 of the Securities Act of 1933 against SunPower, the Individual Defendants, certain other Company insiders, and several underwriters of the Company's securities.

[5] *See Plichta v. SunPower Corp.*, 790 F. Supp. 2d 1012 (N.D. Cal. 2011).

[6] *Id.* at 1021.

Individual Defendants again moved to dismiss. This time, however, the District Court denied the portion of the motion directed to the Rule 10b-5 claim, ruling in a December 19, 2011 Order that the FAC raises "a cogent and compelling inference that SunPower's officers were aware of the accounting manipulation" sufficient to satisfy the element of scienter at the pleading stage.[7] Accordingly, the Securities Class Action now is moving forward in federal court.[8]

3. This Derivative Action

Between December 2009 and March 2010, five derivative actions naming SunPower as a nominal defendant were filed in state and federal courts in California (collectively, the "California Derivative Actions"). Each of those cases seeks indemnification against the Individual Defendants for any expenses the Company incurs in the Securities Class Action. Furthermore, the plaintiffs in all five of the California Derivative Actions agreed to stay those proceedings pending, at the earliest, resolution of the motion to dismiss the Securities Class Action. Accordingly, as of December 19, 2011, at least, none of those plaintiffs had taken any discovery or otherwise received access to confidential Company documents.

This derivative action, however, has taken a different path. Brenner first exercised his right under 8 *Del. C.* § 220 to inspect the Company's books and records and, only

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7 *In re SunPower Secs. Litig.*, No. CV 09-5473-RS, at 7-8 (N.D. Cal. Dec. 19, 2011) (ORDER).

8 Letter from Danielle Gibbs, Esq. to V.C. Parsons, Docket Item No. 28, at 1 (Dec. 21, 2011).

thereafter, filed this action on May 23, 2011. Like the California Derivative Actions, Brenner's Complaint claims that the Individual Defendants breached their fiduciary duties in connection with the accounting errors and financial restatement and, on that basis, seeks indemnification for any expenses and damages the Company incurs as a result of the Securities Class Action. Unlike the plaintiffs in the other pending cases, however, Brenner has had access to confidential Company documents obtained through his section 220 demand.[9] Brenner contends that confidential Company information enabled him to plead with greater particularity why a pre-suit litigation demand, otherwise required under Rule 23.1, is excused in this case.[10] In addition, Brenner's Complaint alleges, for example, that the investigation and resulting restatements caused the Company to incur millions of dollars of otherwise unnecessary expenses even before the filing of the Securities Class Action.

On July 5, 2011, Defendants moved: (1) to stay or dismiss this derivative action in favor of the Securities Class Action; or, in the alternative, (2) to dismiss this derivative action for failure to comply with the demand requirement or to state a claim under Rules 23.1 and 12(b)(6), respectively. The parties later stipulated, however, to confine their briefing and argument initially to the motion to stay and to address Defendants' motions

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[9] For that reason, Brenner filed his Complaint under seal pursuant to Court of Chancery Rule 5(g).

[10] *See* Pl.'s Ans. Br. 8.

to dismiss only if a stay is not granted. This Memorandum Opinion constitutes the Court's ruling on the motion to stay.

C. Parties' Contentions

Defendants urge the Court to stay this case for two reasons. First, Defendants aver that Brenner's allegations of breach of duty by the Individual Defendants overlap in large part with the facts the plaintiffs in the Securities Class Action must show to succeed on their claim that SunPower itself is liable for securities fraud. Consequently, proceeding with this derivative action may prejudice the Company's defense of the Securities Class Action. According to Defendants, "[i]t would not appear that SunPower's best interests are served by arguing that the Company's own executive management and directors knowingly or recklessly caused the company to issue false financial statements to investors in the midst of a securities class action against the Company."[11] Second, Defendants argue that the relief Brenner seeks is largely contingent on the outcome of the Securities Class Action. Relying heavily on *Brudno v. Wise*,[12] they assert that "[i]t makes no sense to litigate the [noncontingent] portion of Plaintiff's claim now, only [to] do it all over again . . . at the conclusion of the Securities Class Action."[13]

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11 Defs.' Op. Br. 11.

12 2003 WL 1874750 (Del. Ch. Apr. 1, 2003).

13 Defs.' Reply Br. 3.

In response, Brenner characterizes his derivative claims as "fundamentally different" than those made in the Securities Class Action.[14] In that regard, Brenner emphasizes that the Securities Class Action alleges an intentional scheme to defraud, whereas he claims that the Individual Defendants failed to exercise meaningful oversight over the Company's financial reporting. Furthermore, Brenner asserts that "Defendants overstate the risk to SunPower of allowing the derivative action to proceed," especially because his Complaint was filed under seal and he has agreed not to disclose any of the confidential Company information he possesses.[15] Regarding the contingent nature of the relief he seeks, Brenner stresses that at least his claim for $8 million in damages already incurred is ripe for adjudication regardless of the outcome of the Securities Class Action. That fact, he maintains, is sufficient to distinguish his Complaint from the mere "placeholder indemnity action" at issue in *Brudno*.[16]

II. ANALYSIS

The authority to grant a stay is "incident to the inherent power of a court to exercise its discretion to control the disposition of actions on its docket in order to promote economies of time and effort for the court, litigants, and counsel."[17] That

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14 Pl.'s Ans. Br. 10-11.

15 *Id.* at 17.

16 *Brudno*, 2003 WL 1874750, at *1.

17 *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1123 (Del. Ch. 1985); *see also In re TGM Enters., L.L.C.*, 2008 WL 4261035, at *1 (Del. Ch. Sept. 12, 2008) (citing *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (Del. 1964)).

authority, moreover, is "subject only to statutory and rule constraints and the requirement to exercise . . . discretion rationally."[18] Among the relevant factors for a court to consider when deciding whether to grant a stay are "'practical considerations' [that] make it unduly complicated, inefficient, and unnecessary for [the action before it] to proceed ahead or apace of" a related litigation pending elsewhere.[19] In this case, the practical considerations Defendants have identified in support of their motion to stay outweigh the prejudice Plaintiff will suffer if the motion is granted. Therefore, I conclude that a stay is in order.

A. Practical Considerations Identified by Defendants

Defendants identify two practical considerations that would render simultaneous prosecution of this action and the Securities Class Action unduly complicated, inefficient, or unnecessary: (1) this action risks prejudicing the Company's defense of the Securities Class Action; and (2) the relief requested here depends primarily on the outcome of the Securities Class Action. I address each of these considerations in turn.

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[18] *Brudno*, 2003 WL 1874750, at *4.

[19] *Id.*; *see also Cryo-Maid*, 198 A.2d at 684 (including "practical problems that would make the trial of the case easy, expeditious and inexpensive" among the factors relevant to a stay analysis on grounds of *forum non conveniens*). Additionally, I note that a rational exercise of discretion for purposes of a stay may include consideration of the practical consequences that would arise were two actions to proceed concurrently even without needing to apply the first-filed rule under *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970), and its progeny. *See Brudno*, 2003 WL 1874750, at *4.

1. Defense of the Securities Class Action

A derivative suit such as this is brought "on behalf of the corporation for harm done to the corporation," and any recovery must go to the corporation.[20] Hence, "the derivative suit is one of several tools that stockholders may use to further the *corporation's* best interests."[21] Purporting to act in SunPower's best interests, Brenner brings this derivative action to redress breaches of fiduciary duty by its board and senior management for failing to implement and monitor an effective internal control system, which failure caused accounting errors to go unnoticed and potentially exposed the Company to private antifraud liability. To succeed on this so-called *Caremark* claim—*i.e.*, a claim of a "sustained or systematic failure . . . to exercise oversight"[22]—Brenner must show either: "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[23] Stated differently, Brenner must show that Defendants "had knowledge of the alleged wrongdoing or

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[20] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004) (citing *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351 (Del. 1988)).

[21] *King v. VeriFone Hldgs., Inc.*, 994 A.2d 354, 362 (Del. Ch. 2010) (emphasis added) (citing *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984)), *rev'd on other grounds*, 12 A.3d 1140 (Del. 2011).

[22] *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

[23] *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (emphasis omitted).

ignored a 'red flag' regarding it or that the board exhibited a sustained or systematic failure to exercise oversight."[24]

By comparison, the plaintiffs in the Securities Class Action assert that the Company, Werner, Hernandez, and Arriola violated Rule 10b-5 when the Company misstated its financial results. In that action, Judge Seeborg recently ruled that "there is no real question that the accounting entries were deliberately falsified and the only issue is whether SunPower and its officers were aware of the problem."[25] That is, the plaintiffs' claim turns on the element of scienter, which may be satisfied by evidence of conscious misconduct or deliberate recklessness.[26] In the Ninth Circuit, "[r]ecklessness is a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care . . . ."[27] To that end, the FAC alleges that Werner, Hernandez, and Arriola "*were aware, or deliberately disregarded*, that the false and misleading statements were being issued regarding the Company"[28] and recklessly disregarded literal "red flags" indicating cost overages

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24 *Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *7 (Del. Ch. Feb. 22, 2006) (footnote omitted).

25 *In re SunPower Secs. Litig.*, No. C 09-5473, at 7 (N.D. Cal. Dec. 19, 2011) (ORDER).

26 *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 388-89 (9th Cir. 2002) (quoting *In re Silicon Graphics Inc. Secs. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999)).

27 *Id.* at 389 (citation and internal quotation marks omitted).

28 McCormick Aff. Ex. 2 ¶ 39 (emphasis added); *see also id.* ¶¶ 81-98, 128-30, 221-46 (alleging particularized facts of scienter).

inconsistent with the erroneous financial reports issued by the Company.[29] Additionally, as to SunPower itself, the Securities Class Action plaintiffs successfully opposed Defendants' motion to dismiss by arguing, in part, that

> an inference of scienter as to a corporate defendant [may be shown by]: (1) scienter as to the company's individual executives or directors; or (2) "facts indicating that the company's named officers are directly responsible for . . . day-to-day operations and that the subject-matter of the alleged misleading statement is, by its nature, the type of transaction of which it would be hard to believe senior officials were unaware."[30]

Thus, although this derivative action and the Securities Class Action involve distinct claims, those claims are not as different as Brenner contends. The plaintiffs in both actions accuse SunPower's directors and officers of "knowledge of the alleged wrongdoing or [having] ignored a 'red flag' regarding it"[31] and of engaging in conscious misconduct or deliberate recklessness constituting "an extreme departure from the standards of ordinary care . . . ."[32] Furthermore, Brenner himself acknowledges in his derivative Complaint that "SunPower is alleged to be liable [in the Securities Class

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29 *Id.* ¶ 91 ("If [costs] were not on target with [internal projections], it would come up as a 'red flag'—literally a red-colored indication on the spreadsheets that were circulated to SunPower executives. The 'dashboard' reports would be red if the Company was not on target to plan. During the Class Period, C[onfidential] W[itness] 6 routinely saw red dashboards.").

30 McCormick Aff. Ex. 4 at 15 (alteration in original) (quoting *Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc.*, 2010 WL 4581242, at *22 (D. Ariz. Nov. 4, 2010) (internal quotation marks omitted)).

31 *Alden*, 2006 WL 456786, at *7.

32 *DSAM Global Value Fund*, 288 F.3d at 389.

Action] *by virtue of the same facts or circumstances as are alleged herein* to give rise to defendants' liability to SunPower."[33]

Brenner, however, makes these arguments *on behalf of* the corporation while the Securities Class Action plaintiffs make them *against* SunPower. Like any co-defendant, SunPower could pursue a litigation strategy of either cross-claiming that its directors and officers are the primary wrongdoers who should indemnify it, as is asserted in this derivative action, or collaborating with its directors and officers and denying that any wrongdoing occurred, as SunPower is doing in the Securities Class Action. Either litigation strategy would appear to be reasonable, but it is not practical for two actors—Brenner and SunPower's board—to pursue divergent strategies in two simultaneous actions on behalf of the same entity.

That consequence renders simultaneous prosecution of both actions unduly complicated, inefficient, and unnecessary. Prosecution of Brenner's derivative action would involve taking actions designed to refute the merits of the Company's defense of the Securities Class Action, and vice versa. The Individual Defendants are likely witnesses in both cases, but Brenner must attempt to undermine their credibility while the Company presumably will attempt to rely on their veracity. The potential for such conflicts, rather than the possibility that Company information might be disclosed notwithstanding the Court's confidentiality order, creates a significant risk that prosecution of Brenner's case will prejudice SunPower. For example, party admissions

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[33] Compl. ¶ 114 (emphasis added).

and adverse judicial rulings in this action might estop the Company from advancing contrary assertions on its own behalf in the Securities Class Action. Even if the plaintiffs in the Securities Class Action never learned about such admissions or rulings, there would remain a risk of inconsistent rulings between this Court and the District Court. In contrast, staying this action for the immediate future would minimize these risks of prejudice to SunPower's defense of the Securities Class Action.

2. Contingent Nature of the Requested Relief

Brenner's Complaint seeks to recover SunPower's damages from the Individual Defendants' breach of fiduciary duty and indemnification for any liability the Company might face from the Securities Class Action. With the benefit of information obtained through his prior § 220 demand, Brenner alleges that the Company already has incurred damages of "approximately $8 million in accounting, tax, legal and consulting costs due to the restatement and related investigation."[34] Thus, although "claims for indemnity are regarded as not ripe until the liability for which indemnification is sought is determined,"[35] at least some portion of Brenner's derivative claims is ripe for adjudication now. Nevertheless, if Brenner ultimately succeeds on the merits, the full extent of damages will not be known until the Securities Class Action is resolved, *i.e.*, the costs to defend it and the amount of any settlement or judgment. In that regard, two

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[34] Compl. ¶ 11.

[35] *Brudno v. Wise*, 2003 WL 1874750, at *4 n.9 (Del. Ch. Apr. 1, 2003) (citing *Dana Corp. v. LTV Corp.*, 668 A.2d 752, 755-56 (Del. Ch.), *aff'd*, 670 A.2d 1337 (Del. 1995) (TABLE)).

additional facts are relevant. First, the District Court now has denied SunPower's motion to dismiss the securities fraud claim under Rule 10b-5,[36] and second, Brenner himself alleges that the Securities Class Action exposes the Company to "potentially massive uninsured liability" and related expenses.[37]

In these circumstances, the wisdom as a practical matter of treating indemnification claims as unripe until the liability for which indemnification is sought is determined is plain. That is, because the derivative claims "cannot be adjudicated in full (or even in large measure) until the [Securities Class] Action is tried[,] . . . the sensible ordering of events is for the [Securities Class] Action to proceed first."[38] The ripeness doctrine, in part, also protects defendants who otherwise "may find themselves unable to

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36 *See* Stanford Law Sch. Secs. Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings—2011 Year in Review* 18 & Apps. 1-2 (2012) (observing that only approximately 8% of federal securities class actions filed between 1996 and 2011 proceeded to or beyond a summary judgment motion and that over 80% of actions that survived a motion to dismiss settled), *available at* http://securities.stanford.edu/clearinghouse_research/2011_YIR/Cornerstone_Research_Filings_2011_YIR.pdf.

37 Compl. ¶ 11.

38 *Brudno*, 2003 WL 1874750, at *4-5. Brenner's attempt to distinguish away *Brudno* because the court described the derivative action there at issue as "a placeholder indemnity action" for another federal securities action misses the mark. *Id.* at *1. The *Brudno* Court stated expressly that the derivative complaint "*does* seek certain other relief" than the federal securities action. *Id.* at *3 (emphasis added). Yet, the opinion states repeatedly that the two actions were similar "to a great extent," *id.*, that "the primary thrust of the [derivative] complaint" was indemnification, *id.* at *3, and that "whether or not the derivative claims are, in some measure, ripe enough for current assertion, they cannot be adjudicated *in full*." *Id.* at *4 (emphasis added). Thus, the reasoning in *Brudno* is directly applicable in this case as well.

litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts."[39] Defendants deserve to know, for example, the extent of their prospective exposure when making strategic decisions during the course of litigation such as how vigorously to defend an action and, relatedly, how much to spend on defense. Such practical concerns are especially important where, as Brenner alleges here, the Company "is largely self insured so that expenses, settlements or damages in excess of $5 million in these actions will not be recoverable under the primary coverage insurance policies."[40] In sum, even though the relief Brenner seeks is only partially contingent on the outcome of the Securities Class Action, "it is difficult to fault the idea that the primary liability case [*i.e.*, the Securities Class Action] should go forward before the case seeking indemnity, when the indemnity case's outcome necessarily depends on the outcome of the [Securities Class Action]."[41]

B. Prejudice to Plaintiff if a Stay is Granted

There are at least two ways in which Brenner could be harmed by the issuance of a stay. First, as already noted, Brenner has asserted a claim that, at least in part, is ripe for adjudication now, and granting a stay would delay any recovery on that claim. Second, the passage of time inevitably impairs the discovery process, especially as to the memories of witnesses. On balance, however, neither of these burdens outweighs the

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39 *Dana Corp.*, 668 A.2d at 755 (quoting 13A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3532.1 (2d ed.)).

40 Compl. ¶ 101 (internal quotations omitted).

41 *Brudno*, 2003 WL 1874750, at *4.

practical considerations in favor of granting a stay for the time being. As to delaying any recovery, the relief Brenner seeks in this derivative action is primarily monetary. Therefore, prejudgment interest can redress any harm caused by a delay. Regarding the discovery process, the same practical consideration of overlapping allegations that renders simultaneous prosecution of both cases unduly complicated, inefficient, and unnecessary also mitigates the risk of delaying discovery here. Because the two actions are somewhat related, the Securities Class Action plaintiffs "have a strong incentive to develop evidence that will be useful to the plaintiffs in [both actions]."[42]

Additionally, "[a]s with any stay ruling, the court should remain flexible and open to revisiting the situation as events develop."[43] For example, "[i]t is conceivable . . . that if the [Securities Class] Action drags out for too long that the derivative plaintiff[] might have a legitimate justification to argue for some discovery specifically directed at [any Defendants who] are not a direct target of the [Securities Class Action] plaintiffs."[44] Other considerations also might warrant permitting this action to proceed apace with the Securities Class Action sometime in the future. Absent an extraordinary and unforeseeable event, however, I would not expect that to occur before the earlier of the final dismissal of the Securities Class Action or the end of this calendar year. Thus, the Court's willingness to reconsider the propriety of a stay from time to time will serve to

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42 *Id.* at *5 n.11.

43 *Id.* at *5.

44 *Id.* at *5 n.11.

redress promptly any excessive and unexpected burden that such a stay ultimately might cause.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, Defendants' motion to stay is granted. Therefore, these proceedings shall be stayed indefinitely, but Plaintiff may seek to lift the stay: (1) upon the earlier of the final dismissal of the Securities Class Action or December 31, 2012; or (2) at any time for good cause shown based upon some extraordinary and unforeseen development.

IT IS SO ORDERED.