

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

October 31, 2013

John G. Harris, Esquire
Berger Harris
1201 North Orange Street, Third Floor
Wilmington, DE 19801

Rick S. Miller, Esquire
Ferry, Joseph & Pearce, P.A.
824 Market Street, Suite 1000
Wilmington, DE 19801

Re: *PECO Holdings Corp. v. Weil, et al.*
C.A. No. 8448-VCN
Date Submitted: July 31, 2013

Dear Counsel:

Defendants' motion to stay presents the Court with a factual situation that can be resolved through a *McWane* analysis, which calls for a stay of this action. Although the Plaintiff deploys a variety of arguments, the Court concludes that Defendants have convincingly argued that the *McWane* doctrine applies, and, therefore, it grants Defendants' motion to stay.

I. BACKGROUND

Plaintiff PECO Holdings Corp. (“PECO”) was formed in May 2005 to acquire Process Equipment Company of Tipp City (“Process Equipment”), a manufacturer of specialty machinery with operations in Tipp City, Ohio.¹ As of July 2011, Process Equipment apparently had debt obligations of \$9.7 million and began considering a course of action to extinguish its debt. One particular transaction was contemplated to retire this debt, but Defendant Robert Weil (“Weil”), Process Equipment’s Chief Executive Officer (“CEO”) and a member of the Board of Directors of PECO, refused to participate. Weil was soon thereafter terminated as CEO and removed from the Board.

Weil initially brought suit in a New York state court in August 2011 (the “New York Action”) in connection with his termination. In October 2011, Weil filed a lawsuit in an Ohio state court (the “Ohio Action”) alleging breaches of contract and fiduciary duty against Process Equipment, PECO, and at least one natural person associated with the entities.

¹ Pl.’s Verified Compl. ¶ 3 (“Compl.”). The Court takes all facts presented within this Background section from the Complaint unless otherwise noted.

On October 25, 2011, apparently as part of a transaction intended to retire Process Equipment's debt,² PECO merged through a short-form merger into a subsidiary of New PECO Holdings Corp., Inc., a Delaware corporation ("New PECO") pursuant to 8 *Del. C.* § 253. PECO was the surviving corporation, and it became a wholly-owned subsidiary of New PECO.

On December 9, 2011, Weil filed an amended complaint in the Ohio Action to include an additional plaintiff, a former manager of Process Equipment, Defendant James Zahora ("Zahora"). This amended complaint included challenges to the value Weil and Zahora received for certain PECO shares they owned pursuant to the short-form merger, as well as allegations related to Weil's termination.

As a result of discovery in the New York Action, it became clear that Weil intended to challenge the consideration he received in the short-form merger. Weil apparently later withdrew that challenge from the New York Action in February or March of 2013, but indicated that he intended to bring these claims elsewhere. PECO filed this action against Weil and Zahora (the "Defendants") in April 2013

² Defs.' Mem. in Supp. of Mot. to Stay Action at 2.

(the “Delaware Action”). PECO seeks a declaratory judgment from this Court that Defendants’ sole recourse for challenging the value received for shares as a result of the short-form merger is to pursue an appraisal action in the Delaware Court of Chancery.³

II. CONTENTIONS

The Defendants argue that the facts of this case fall within the bounds of a straightforward *McWane* analysis because the Ohio Action is first-filed, the issues and parties in the Ohio dispute and the Delaware dispute are the same, and the Ohio court is capable of providing prompt and complete justice. PECO did not argue that *McWane* factors favor it. Instead, it makes several arguments on the merits that the *McWane* doctrine is inapplicable. PECO also argues that it has energetically moved for summary judgment in prior actions involving Weil and that policies of judicial comity would not be violated if the Court declined to stay the Delaware Action.

³ Compl. ¶¶ 2; 43-48.

III. ANALYSIS

A Delaware court's grant of a stay in favor of a first-filed foreign action is not a matter of right, but is instead within the sound discretion of the court.⁴ Where parties agree through a forum selection clause to litigate in a particular jurisdiction, Delaware law generally honors such agreements.⁵ If the parties have not agreed upon a specified jurisdiction, Delaware courts follow the *McWane* doctrine which generally favors granting a stay in the Delaware proceeding in favor of the foreign action where "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."⁶

Even when the action in a foreign jurisdiction is first-filed, summary proceedings, such as an action under 8 *Del C.* § 225, require additional consideration beyond that provided for in *McWane*. In such cases, Delaware

⁴ 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)).

⁵ See *Ingres Corp. v CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010); *Green Isle P'rs, Ltd., S.E. v. Ritz-Carlton Hotel Co.*, 2000 WL 1788655, at *2 (Del. Ch. Nov. 29, 2000) (citing *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 294 (Del. 1999)).

⁶ *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

courts will weigh the need for swift and expeditious resolution of these summary proceedings against the *McWane* policies recommending comity and the efficient administration of justice.⁷

A. *Does the McWane Doctrine Favor a Stay?*

Because PECO declined to ground its memorandum of law in opposition to the motion to stay in the *McWane* doctrine, the Court will be brief in its analysis of *McWane*'s application to the present case and why the motion to stay will be granted.⁸

First, the Ohio Action is a first-filed foreign action in which Defendants allege breaches of contract and fiduciary duty. Discovery has commenced and a trial date has been set. PECO argues that it has not “delayed in raising the arguments set forth in its Motion for Summary Judgment.”⁹ Perhaps this argument was offered to deny or otherwise undermine the fact that the Ohio Action was first-

⁷ *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park DR. BNK Investors, L.L.C.*, 2009 WL 3335332, at *4 (Del. Ch. Oct. 15, 2009).

⁸ PECO offers certain arguments in that section of its memorandum entitled “[PECO] Did Not Delay in Raising this Issue” which may be directed to certain *McWane* factors. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Stay at 11-12. The Court will address PECO's arguments in the context of the particular *McWane* factors where it presumes those arguments would have been made had more focus been given to those factors.

⁹ *Id.* at 11.

filed. However, the test to determine whether an action is first-filed is not whether arguments contained within a motion for summary judgment are articulated often, energetically, or in multiple fora. Instead, the test is whether the same parties and issues are present before a court that is capable of providing prompt and complete justice. PECO's argument does not counter Defendants' arguments explaining how the first factor of *McWane* has been met.

Second, the parties necessary to resolve the dispute in the two actions appear to be parties in both the Delaware Action and the Ohio Action. No argument has been advanced by PECO which casts doubt on this factor.

Third, the issues appear to arise from a common nucleus of operative fact. Although PECO seeks a declaratory judgment that appraisal is the sole remedy under Delaware law available to Defendants, PECO has not adequately explained how its claims in the Delaware Action arise from a set of facts different from the facts of the claims related to the short-form merger that Defendants advanced in the Ohio Action. Both sets of claims arise from a common nucleus of operative fact: namely, the short-form merger.

PECO argues that a “stay is not justified here because the ruling and relief sought by [PECO] would in no way interfere with the Ohio case, nor . . . impose any special burden on the parties” and that it seeks only a “narrow ruling.”¹⁰ PECO is correct that Delaware courts may in some instances, such as proceedings under 8 *Del. C.* § 225 or cases involving novel and important issues of Delaware law, prioritize certain narrow issues. However, PECO has not convincingly articulated a reason why the Delaware Action should be prioritized now over the Ohio Action. If PECO is correct that some of Defendants’ claims in Ohio are precluded because the Ohio court may not perform a statutory appraisal under Delaware law, that court is fully capable of assessing the limits of its jurisdiction. The parties have had notice of the Ohio Action involving the short-form merger for two years. The Court declines to entertain PECO’s late attempt to move that litigation—or a significant part of it—to Delaware.

Finally, the Ohio court in all respects appears to be a court capable of rendering prompt and complete justice to PECO. Certainly PECO has not advanced arguments indicating otherwise. Although PECO has written several

¹⁰ *Id.* at 11-12.

letters to the Court stating that the Ohio judge would apparently “welcome” this Court’s guidance on issues of Delaware law,¹¹ the Court views such assertions as acknowledgements by the Ohio court of the principles of judicial comity—not as statements of an unwillingness or reluctance to apply Delaware law. PECO has not pointed out anything that would justify this Court’s treading where the Ohio court has been involved in resolving the parties’ dispute for over two years.

B. PECO’s Arguments on the Merits

PECO primarily focuses its opposition to the motion to stay on a variety of arguments on the merits instead of explaining to the Court why *McWane* favors denying the stay that Defendants request.¹² As noted, these arguments on the merits may be resolved in the Ohio Action.

¹¹ Pl.’s Letter dated August 21, 2013; *see also* Pl.’s Letter dated June 11, 2013.

¹² PECO argues that 8 *Del. C.* § 262 requires appraisal actions to be brought in the Delaware Court of Chancery, that § 262 must be strictly construed, that § 262 proceedings should be entitled to the same deference afforded to § 225 disputes under a *McWane* analysis, and that the Delaware Action should be treated as though a mandatory forum selection clause were present because § 262 should be strictly construed.

PECO Holdings Corp. v. Weil, et al.
C.A. No. 8448-VCN
October 31, 2013
Page 10

IV. CONCLUSION

For the foregoing reasons, the Defendants' motion to stay is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K