**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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| A.R. THANE RITCHIE, an individual, RITCHIE RISK-LINKED STRATEGIES, LLC, a Delaware Limited Liability Company, RITCHIE PARTNERS, LLC, a Delaware Limited Liability Company, and RITCHIE CAPITAL MANAGEMENT, LLC, a Delaware Limited Liability Company, | ) | |
| Plaintiffs, | ) | |
| | ) | C.A. No. N17C-05-598 MMJ CCLD |
| v. | ) | |
| HUIZENGA MANAGERS FUND, LLC, a Delaware Limited Liability Company, | ) | |
| Defendant. | ) | |

Submitted: November 7, 2017
Decided: December 21, 2017

**OPINION**

John S. Vishneski III, Esq., Paul Walker-Bright, Esq., Kurt F. Gwynne, Esq., Brian M. Rostocki, Esq., Benjamin P. Chapple, Esq., Myron T. Steele, Esq., John A. Sensing, Esq. (Argued), Ryan C. Cicoski, Esq., Attorneys for Plaintiffs

Steven L. Caponi, Esq., K&L Gates, LLP, Gary W. Garner, Esq., Christopher J. Barber, Esq. (Argued), Williams Montgomery & John Ltd., Attorneys for Defendant

**JOHNSTON, J.**

## FACTUAL AND PROCEDURAL CONTEXT

This is an indemnification case. The underlying Illinois suit arises from a dispute over the sale of securities. The parties in the instant case and the underlying case have exchanged positions. The Plaintiffs in this case ("Ritchie") were the defendants in the Illinois action. The Defendant in this case ("Huizenga") was the plaintiff in the Illinois action.

Huizenga is a hedge fund. Ritchie made two sales of securities to Huizenga through a Subscription Agreement. In 2007, Huizenga brought suit against Ritchie in the Cook County Circuit Court in Illinois, alleging violations of the Delaware Securities Act ("DSA"). After a twenty-six-day trial, the court entered judgment in favor of Huizenga in regard to one of the two sales. On appeal, the Illinois Court of Appeals affirmed that judgment and granted Huizenga's cross-appeal for recovery of the other sale as well. Accordingly, the trial court entered a second judgment. On November 9, 2017, Ritchie filed a notice of appeal of the second judgment. In addition to this appeal, a determination of prejudgment interest and attorneys' fees remains pending before the Illinois Court.

Ritchie now brings this Delaware action for declaratory judgment, asserting that under the Subscription Agreement, Huizenga has an obligation to indemnify Ritchie for the losses it incurred in the underlying suit, seeking a set off of the entire Illinois judgment. In response, Huizenga has filed this Motion to Dismiss or Stay.

Ritchie has filed a Motion to Strike portions of Huizenga's reply brief in support of its Motion to Dismiss or Stay.

## STANDARD OF REVIEW

Rule 12(b)(3) governs a motion to dismiss or stay on the basis of improper venue. In *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*,[1] the Delaware Supreme Court prescribed a three-part test Delaware courts must consider when deciding whether to stay or dismiss an action: "(1) is there a prior action pending elsewhere; (2) in a court capable of doing prompt and complete justice; (3) involving the same parties and the same issues?"[2] If those three factors are satisfied, "*McWane* and its progeny establish a strong preference for the litigation of a dispute in the forum in which the first action was filed."[3] "[T]hese concepts are impelled by considerations of comity and the necessities of an orderly and efficient administration of justice."[4]

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[5] The Court must accept as true all non-

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[1] 263 A.2d 281 (Del. 1970).
[2] *LG Electronics, Inc. v. Interdigital Communications, Inc.*, 114 A.3d 1246, 1252 (Del. 2015) (citing *McWane*)).
[3] *Id.* (internal quotations omitted).
[4] *McWane*, 263 A.2d at 283.
[5] *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).

conclusory, well-plead allegations.[6] Every reasonable factual inference will be drawn in favor of the non-moving party.[7] If the claimant may recover under that standard of review, the Court must deny the motion to dismiss.[8]

## **ANALYSIS**

*The Case Must Be Stayed Under* McWane

The action in Illinois filed in 2007 is a prior action involving the same parties. Ritchie argues the prior action is "effectively resolved," urging the Court not to consider: a remaining writ of certiorari to the United States Supreme Court; and the determination of attorneys' fees and prejudgment interest, significant enough to warrant pending status under *McWane*. However, on November 9, 2017,[9] Ritchie filed Notices of Appeal challenging the entry of the second judgment. That judgment is therefore not final.[10] Ritchie is free to make its indemnification argument on appeal, raising the possibility of conflicting rulings between this Court and the Illinois Court—one of "the precise problems *McWane* strives to eliminate."[11] The action remains pending for *McWane* purposes.

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[6] *Id.*
[7] *Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del.2005)).
[8] *Spence*, 396 A.2d at 968.
[9] Two days after oral argument on this pending motion.
[10] *See Walsh v. Union Oil Co. of California*, 268 N.E.2d 706, 712 (stating that a judgment becomes final after the denial of appeal).
[11] *Choice Hotels Intern., Inc. v. Columbus-Hunt Park DR. BNK Investors, LLC*, 2009 WL 3335332, at *8 (Del. Ch.).

The pending prior action is also before a court with the capacity to hear it. As a court of general jurisdiction,[12] the Circuit Court of Cook County, Illinois is capable of "doing prompt and complete justice."[13] This Court will not substantively examine Ritchie's argument that the Illinois court has ignored Delaware precedent and is therefore incapable of offering complete justice. "[T]he full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based."[14] Even assuming the Illinois court incorrectly applied Delaware law, the United States Constitution requires this Court to honor the Illinois court's holding. Moreover, allowing this claim for indemnification to proceed in the forum in which the underlying action has been litigated for ten years allows for prompt justice, in line with "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."[15]

Neither party disputes that both actions involve the same parties. However, the parties dispute whether both actions involve the same issues. "*McWane* does 'not require that the parties and issues in both actions be identical. Substantial or

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[12] Ill. Const., art. 6, § 9.
[13] *McWane*, 263 A.2d at 283.
[14] *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016).
[15] *See Fuisz v. Biovail Techs., Ltd.*, 2000 WL 1277369, at *1 (Del. Ch.).

functional identity is sufficient.'"[16] To determine whether issues are sufficiently identical for *McWane* purposes, courts ask whether "the events underlying all the claims arose out of a common nucleus of operative facts."[17]

Though the parties have swapped sides of the "v," the events underlying this action are substantially identical to the pending action. Ritchie is seeking relief based on the contract that facilitated the sales involved in the Illinois action. Both cases arise out of the same sales of securities between the same parties. Therefore, both actions involve the same issues under *McWane*.

Ritchie argues that the issues in this case and the pending case are not functionally identical because Ritchie could not have brought its indemnification claim until there was a final judgment on the prior claim. This position is logically inconsistent. Ritchie is presently bringing this claim for indemnification while the judgment in the other action is not yet final. Setting that aside, Ritchie's argument fails because neither Illinois procedure nor Delaware substantive law bar parties from bringing indemnification claims prior to a final judgment.

Indemnification is a permissive counterclaim in Illinois. "Illinois law allows the third-party indemnity claim to be filed before it accrues, in order to promote

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[16] *LG Electronics, Inc. v. InterDigital communications, Inc.*, 98 A.3d 135, 146 (Del. Ch.) (quoting *AT&T Corp. v. Prime Security Distribs., Inc.*, 1996 WL 633300, at *2 (Del. Ch.)).
[17] *Kennedy v. Barboza*, 2016 WL 6276903, at *5 (Del. Super.).

settlement of all claims in one action."[18]

Ritchie argues that the same is not true under Delaware substantive law and contends that *LaPoint v. AmerisourceBergen Corp.*[19] and *Huff v. Longview Energy Company*[20] support its position. These cases are distinguishable. Statutory language controlled the indemnification rights of *Huff* and the unique procedural posture of this case makes *LaPoint* inapplicable.

In *LaPoint*, the Delaware Supreme Court addressed when a claim for indemnification is barred under the doctrine of *res judicata*, which uses the same "common nucleus of operative facts" test as *McWane*.[21] The Court found that the final adjudication in the underlying breach of contract action provided a "new substantive basis upon which [the prevailing party] could claim relief" and held that the indemnification claim was not part of a single transaction.[22]

In the underlying case here, however, Ritchie was not the prevailing party. Ritchie alleges the judgment against it "proves" that Huizenga made false representations and warranties, thereby entitling Ritchie to indemnification. But the Illinois court did not hold that Huizenga made false representation and warranties. It held that Ritchie violated the DSA. The ruling *against* Ritchie hardly "provided

[18] *Anixter Bros., Inc. v. Central Steel & Wire Co.*, 463 N.E.2d 913, 917–18 (Ill. App. Ct. 1984).
[19] 970 A.2d 185 (Del. 2009).
[20] 2013 WL 4084077 (Del. Ch.).
[21] *LaPoint*, 970 A.2d at 193.
[22] *Id.* at 195.

the necessary predicate for the new substantive basis upon which the plaintiffs brought their indemnification claim," as the ruling did for the plaintiffs in *LaPoint*.[23] Unlike *LaPoint*, after the final adjudication of the underlying action, Ritchie is in the same position as it was at the at the outset of the Illinois action: to prevail on an indemnification claim it still must prove Huizenga's breach. The judgment granted Ritchie no new basis for relief. Ritchie cannot argue that it could only bring its indemnification claim after that judgment.

Ritchie also argues that *Huff* demonstrates that Delaware law forbids bringing an indemnification claim before a final judgment on the underlying claim. *Huff*'s holding is narrower than that. In *Huff*, the Court dismissed a claim for indemnification as unripe because the underlying proceeding was not yet final.[24] The plaintiff in *Huff* brought the indemnification under 8 *Del. C.* § 145(c), which specifically provides for indemnification after the party seeking indemnification "*has been* successful" on the merits.[25] That statutory language requires a final judgment before an indemnification claim. In this case, the Subscription Agreement's language is the basis of the indemnification claim. The Court finds the *Huff* holding not controlling in the context of a contractual indemnification claim. The Court's comment in *Huff* that "indemnification claims do not typically ripen

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[23] *Id.*
[24] *Huff*, 2013 WL 4084077, at *2.
[25] 8 *Del. C.* § 145(c) (emphasis added).

until after the merits of an action have been decided, and all appeals have been resolved" is an observation of what is "typical," not a statement of an inflexible rule.[26]

It appears indemnification could have been brought in the Illinois action as a matter of Illinois procedure and would not have been prohibited by Delaware substantive law. As a practical matter, the indemnification sought by Ritchie is a pending contractual setoff that should have been brought in the prior pending case.

The Court holds that there is a prior action, pending before a court capable of doing prompt and complete justice, between the same parties, and involving the same issues. Therefore, the case must be stayed until the prior action is final. At that point, the Court can rule on Huizenga's argument that the case should be dismissed under Rule 12(b)(6).

*Ritchie's Motion to Strike is Moot*

Ritchie has filed a motion to strike a portion of Huizenga's reply brief that addresses a waiver argument. Because the Court has stayed this action under *McWane* without reaching the waiver argument, the Motion to Strike is moot. For the sake of completeness, the Court notes that the Motion to Strike amounted to an impermissible sur-reply.

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[26] *Huff,* 2013 WL 4084077, at *2.

## CONCLUSION

Huizenga's Motion to Dismiss or Stay is hereby **GRANTED IN PART**. The Court finds there is a prior action pending before a court capable of doing prompt and complete justice between the same parties involving the same issues. This case is stayed until the prior action is final. Huizenga's request for dismissal under Rule 12(b)(6) is moot.

Ritchie's Rule 12(f) Motion to Strike Portions of defendant's Reply Brief in Support of its Motion to Dismiss or Stay is moot.

**IT IS SO ORDERED.**

The Honorable Mary M. Johnston