

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHOICE HOTELS INTERNATIONAL, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 4353-VCP  
 )  
 COLUMBUS-HUNT PARK DR. BNK )  
 INVESTORS, L.L.C. and SAM KLEIN, )  
 )  
 Defendants. )

**MEMORANDUM OPINION**

Submitted: September 4, 2009

Decided: October 15, 2009

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**PARSONS, Vice Chancellor.**

This action involves a borrower and related guarantors who pledged the interest they own in a Delaware limited liability company (“LLC”), which owns a piece of property in Ohio, as security for loans made by a hotel conglomerate.<sup>1</sup> The borrower allegedly defaulted on the loans, and the hotel conglomerate purported to exercise its right under a related pledge agreement to change, by written consent, the manager of the LLC. The hotel conglomerate now seeks a determination of the rightful manager of the LLC that controls the property in Ohio. In separate suits, the hotel conglomerate and the borrower (and its related entities) sued each other in Maryland based on several loans and notes, including those at issue here. Then, five weeks later, the hotel conglomerate brought this action in Delaware on the narrower issue of determining the rightful manager of the LLC. The borrower now seeks to stay this action in favor of the actions in Maryland. For the reasons stated in this Memorandum Opinion, I conclude that in these specific circumstances the first-filed rule applies and principles of comity and promoting the efficient administration of justice require that this Delaware action be stayed, but not dismissed.

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<sup>1</sup> Defendants dispute whether the transactions were loans as opposed to some other type of investment and whether the documents memorializing the promises to pay back the loans are really “notes.” Defs.’ Opening Br. (“DOB”) at 4. Like Defendants, however, I will refer to them as loans and notes for convenience.

## **I. BACKGROUND**

### **A. The Parties**

Plaintiff, Choice Hotels International, Inc. (“Choice”), is a Delaware corporation with its principal place of business in Silver Spring, Maryland. It is in the business of franchising hotels.<sup>2</sup>

Defendant Columbus-Hunt Park DR. BNK Investors, LLC (“Columbus” or the “Company”) is a Delaware limited liability company with its principal place of business in New York, New York. Columbus is a wholly-owned subsidiary of 20 East 46<sup>th</sup> St. Associates, LLC (“East 46<sup>th</sup>”), which is, in turn, wholly owned by Defendant Sam Klein. Klein is also the sole manager of Columbus.<sup>3</sup>

### **B. Facts**

Columbus is a single-purpose entity with one asset—a 140,314 square foot building on 9.935 acres in Columbus, Ohio (the “Property”). The entire Property is leased to the Huntington National Bank (“Huntington”) pursuant to a twenty-two year lease agreement, with one ten-year and four five-year renewal options. Huntington currently pays annual rent of \$106,162.75. According to an affidavit from Joseph Lipari, an attorney at Roberts & Holland LLP familiar with Klein’s business dealings, “all rent payments are made directly to the lender [Legg Mason Real Estate Services, Inc.] and the

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<sup>2</sup> Choice’s hotel franchises include Comfort Inn®, Comfort Suites®, Quality Inn®, Sleep Inn®, Clarion®, Econo Lodge®, and Rodeway Inn®.

<sup>3</sup> Klein also controls PLC Partners LLC (“PLC”), which is not a party to this lawsuit, but is involved in certain related transactions.

rent is structured so that it is equal to the monthly mortgage payment with no residual positive cash flow.”<sup>4</sup> Klein apparently retains the Property for tax and other business purposes, even though no rental or other income from Columbus flows to Klein or any entities owned by him.<sup>5</sup>

On January 22, 2007, Choice and PLC entered into a Master Development Agreement (the “MDA”), later amended and restated on April 10, 2008, pursuant to which PLC agreed to enter into franchise agreements with Choice to develop and operate Cambria Suites hotels in Boston and New York.<sup>6</sup> In exchange for money Choice lent PLC, Choice received four promissory notes: (i) an April 6, 2007 note for \$1,000,000; (ii) a June 28, 2007 note for \$1,637,500; (iii) a September 7, 2007 note for \$1,000,000 (collectively the “2007 Notes”); and (iv) a July 31, 2008 note for \$2,500,000 (the “2008 Note”). The 2007 Notes were due on December 31, 2008, while the 2008 Note was due September 30, 2008.<sup>7</sup>

As security for the 2008 Note, Choice, Klein, and East 46<sup>th</sup> entered into a Pledge and Security Agreement (the “PSA”), whereby Klein and East 46<sup>th</sup> pledged “the

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<sup>4</sup> DRM Ex. A, Affidavit of Joseph Lipari, Esq. (“Lipari Aff.”), ¶ 7. “DRM” stands for Defendants’ reply memorandum in support of its motion to dismiss or stay. “PAB” refers to Plaintiff’s answering brief.

<sup>5</sup> See Lipari Aff. ¶ 10. The Lipari Affidavit asserts that Klein has a powerful incentive not to take any action that would affect the lease or the ownership of Columbus or the Property, because he obtained it as an Internal Revenue Code Section 1031 tax-deferred exchange.

<sup>6</sup> Compl. ¶ 11.

<sup>7</sup> Compl. ¶¶ 12-14.

membership interests currently [or subsequently] owned by each Pledgor in the applicable Pledged Entity.”<sup>8</sup> The Pledged Entity consists of both East 46<sup>th</sup> and Columbus.<sup>9</sup>

On October 1, 2008, Choice entered into a Forbearance Agreement with PLC, which Klein and East 46<sup>th</sup> also signed.<sup>10</sup> In the Forbearance Agreement the parties stipulated that under the 2008 Note, PSA, and accompanying Guaranty, the debtor, defined as PLC, is indebted to Choice in the amount of \$2.5 million plus interest, costs, and expenses (the “Defaulted Indebtedness”).<sup>11</sup> Additionally, the parties stipulated that the Defaulted Indebtedness is “fully enforceable and is not subject to any defense or counterclaim, or any claim of setoff or recoupment” and PLC represented that “because of its financial condition, at this time it is unable to pay the full amount of the Defaulted Indebtedness.”<sup>12</sup>

As part of the Forbearance Agreement, the parties also acknowledged that “an event of default (the “*Existing Default*”) has occurred and is continuing” under the 2008 Note.<sup>13</sup> Further, the parties acknowledged that Choice then had the right to “exercise all

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<sup>8</sup> Compl. ¶ 16; *see also* Affidavit of Brian C. Ralston (“Ralston Aff.”) Ex. 5, the PSA.

<sup>9</sup> PSA § 1(a).

<sup>10</sup> Ralston Aff. Ex. 4, the Forbearance Agreement.

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2.

such rights and remedies against the Borrower, each of the individual and corporate loan guarantors, and/or the collateral pledged and made available to the Lender under the PSA.”<sup>14</sup> Choice agreed, however, to “forbear from exercising its remedies with respect [to] the Existing Default” until either December 31, 2008 or the occurrence of certain other termination events.<sup>15</sup> Likewise, the parties agreed to amend the PSA so that “the membership interests pledged thereunder will additionally secure loans and obligations arising under each of the loans represented by” the 2007 Notes, along with two additional notes: one, dated March 21, 2007, for \$1 million and the other, dated December 27, 2007, for \$2,812,500.<sup>16</sup>

On January 6, 2009, Choice filed a complaint in the Circuit Court of Montgomery County, Maryland (the “Maryland Circuit Court”) against Klein, Columbus, and other entities with which Klein is associated (“Choice’s Maryland Complaint”).<sup>17</sup> In that Complaint, Choice alleges, among other things, that Klein and Columbus breached guarantees made to Choice in connection with the loans made by Choice for the MDA-related development.<sup>18</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See* Ralston Aff. Ex. 2. The six other defendants are: PLC; 75 Schermerhorn LLC; 325 West 33<sup>rd</sup> Partners LLC; East 46<sup>th</sup>; PLC Partners Holdings LLC; and LJA Group 9 LLC.

<sup>18</sup> *See* Ralston Aff. Ex. 2 ¶¶ 51-55.

On January 9, 2009, Klein, PLC, Columbus, and other entities, allegedly without knowledge of Choice’s Maryland Complaint, filed a complaint against Choice in the Maryland Circuit Court (“Klein’s Initial Maryland Complaint”).<sup>19</sup> Klein’s Initial Maryland Complaint contains only two counts: one for unjust enrichment and the other for promissory estoppel.

On or about February 9, 2009, Choice notified Klein, East 46<sup>th</sup>, and Columbus that, pursuant to its remedies under the PSA, Choice had, by written consent, removed Klein as Columbus’s manager and designated Choice as the sole manager.<sup>20</sup> In addition, Choice “registered its interest in the Company in Choice’s name.”<sup>21</sup> Believing it was the sole member, Choice also directed that all money payable to East 46<sup>th</sup> be paid to Choice and amended Columbus’s LLC agreement to evidence the admission of Choice as the sole member and to remove East 46<sup>th</sup> as a member and Klein as the manager of the

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<sup>19</sup> See *id.* Ex. 6, Klein’s Initial Maryland Complaint.

<sup>20</sup> The portions of the PSA specifying Choice’s remedies following an Event of Default state in relevant part:

Each Pledgor hereby grants to lender the right to exercise . . .  
(a) all voting, consent, managerial and other rights relating to  
the Pledged Interests . . . and (b) the right to exercise such  
Pledgor’s rights . . . pertaining to any of the Pledged Interests.

Lender shall have the right . . . to become, or to designate its  
nominee, designee, agent or assignee to become, a member,  
officer or director . . . of any Pledged Entity, in substitution of  
any existing person or entity serving in such capacity.

PSA §§ 7(f), (i).

<sup>21</sup> Compl. ¶ 28.

Company. Klein and East 46<sup>th</sup> have refused to acknowledge Choice as the sole member or manager of Columbus.

On February 19, 2009, the dueling Maryland actions were consolidated (the “Maryland Action”) and assigned to Maryland case management Track IV over Choice’s objection. On or about March 4, Klein, PLC, Columbus, and other entities filed an Amended Complaint against Choice (“Klein’s Amended Maryland Complaint”).<sup>22</sup> The Amended Complaint contains fifteen counts, including one in which Columbus seeks a declaratory judgment that Choice’s attempt to substitute itself as sole manager of Columbus is invalid.<sup>23</sup> Klein’s Amended Maryland Complaint also seeks a declaratory judgment that Choice obtained the MDA by fraud, and, therefore, the notes and guarantees, the PSA, and the Forbearance Agreement are of no force or effect.<sup>24</sup>

### **C. Procedural History**

On February 10, 2009, Choice commenced this action in Delaware (the “Delaware Action”). On March 4, the same day they filed Klein’s Amended Maryland Complaint, Columbus and Klein moved to stay or dismiss the Delaware Action in favor of the Maryland Action. The parties briefed the motion, and I heard argument on it. In July, however, the parties advised that they were close to a settlement and jointly requested a

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<sup>22</sup> See Ralston Aff. Ex. 9, Klein’s Amended Maryland Complaint.

<sup>23</sup> *Id.* ¶¶ 131-34.

<sup>24</sup> *Id.* ¶¶ 124-27.

stay of the Delaware Action pending completion of their negotiations. By early September those negotiations had stalled and the stay was lifted.

In the Maryland Action, the Court has scheduled a two week jury trial for May 3 through 14, 2010.<sup>25</sup>

#### **D. Parties' Contentions**

In the Delaware Action, Choice seeks a determination pursuant to 6 *Del. C.* § 18-110 that Choice validly removed Klein and replaced him with itself as the sole manager of Columbus. Columbus and Klein argue that this action is subsumed within the earlier-filed Maryland Action and, accordingly, the Delaware Action should be stayed. Columbus and Klein also contend that at least one of the relevant agreements contains a forum selection clause that provides for Maryland as the exclusive forum for handling all of the closely interrelated issues raised in the Delaware Action and the Maryland Action.

Choice makes three primary arguments against the entry of a stay in favor of the Maryland Action. First, Choice contends that the statutory policy behind a § 18-110 summary action supersedes application of a conventional *McWane* analysis.<sup>26</sup> Second, Choice argues that, even if the summary nature of the § 18-110 action does not supersede such analysis, the Maryland Action is not first-filed, so the *McWane* doctrine does not

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<sup>25</sup> See *PLC Partners, LLC v. Choice Hotels Int'l Inc.*, Md. Circuit Ct. for Montgomery Cty., Civil No. 306989 (Apr. 10, 2000 Tr. at 28-29).

<sup>26</sup> See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970) (holding that, subject to certain conditions, preference may be given to a first-filed action).

apply. Choice further contends that, even if the *McWane* doctrine did apply, Columbus and Klein have not shown that the test has been satisfied. Finally, relying on statements made during an earlier case in the Delaware Court of Chancery involving Klein, Choice argues that Klein is “untrustworthy,” and that the Court, therefore, should disregard Klein’s statements and actions.<sup>27</sup>

## II. ANALYSIS

### A. Standard

The granting of a motion to stay or dismiss a Delaware action in favor of a foreign action is not a matter of right, but rests within the sound discretion of the court.<sup>28</sup> If the

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<sup>27</sup> To support its claim that Klein is “untrustworthy,” Choice points to comments made by Vice Chancellor Strine in a previous case where Klein was found to have violated a *status quo* order. *See FHC Danbury, LLC v. LJA (Danbury), LLC*, C.A. No. 2855-VCS (July 20, 2007 Tr. at 29) (“[I]t’s clear to me here that [Klein] can’t be trusted. I can’t trust someone who’s violated my order, and I’m not going to leave him as a fiduciary.”). Choice asserts that, under the maxim *falsus in uno, falsus in omnibus*, because Klein testified or acted falsely as to a material matter in a prior proceeding, this Court should disregard entirely his contentions and statements in this action. *See PAB* at 31 n.19 (citing *Mermelstein v. Lewes Citizens Senior Ctr.*, 2002 WL 31667520, at \*4 (Del. Super. Oct. 29, 2002)).

In fact, Choice devoted nearly one third of its answering brief—at least nine pages—and hundreds of pages of supporting exhibits solely to an *ad hominem* attack on Klein. This obvious tactic, though highlighting Klein’s past misdeeds, does little to inform me about the merits of *this* action and the current procedural dispute. As Defendants contend, Klein’s prior conduct “cannot be used by [Choice] . . . to reject as [false], material representations” made on Klein’s behalf in this action because Choice has failed to aver specific facts relevant to this action that support drawing such an inference from Klein’s past conduct. DRM at 2 n.1.

<sup>28</sup> *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)).

parties agree to litigate a matter elsewhere via a forum selection clause providing exclusive jurisdiction to another court, Delaware courts generally honor their freedom to contract in this respect.<sup>29</sup> In the absence of an exclusive forum selection clause, however, the court looks to which action is first-filed. When there is an earlier-filed action pending in a foreign jurisdiction, Delaware courts generally apply the *McWane* doctrine, which favors granting a stay “when 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.”<sup>30</sup> On the other hand, when a Delaware action is considered first-filed or when multiple actions are contemporaneously filed, this court examines a motion to stay “under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other.”<sup>31</sup>

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<sup>29</sup> *Green Isle Partners, Ltd., S.E. v. Ritz-Carlton Hotel Co.*, 2000 WL 1788655, at \*2 (Del. Ch. Nov. 29, 2000) (citing *Elf Atochem N.A., Inc. v. Jaffari*, 727 A.2d 286, 294 (Del. 1999)).

<sup>30</sup> *See McWane*, 263 A.2d at 283.

<sup>31</sup> *Rapoport v. Litig. Trust of MDIP, Inc.*, 2005 WL 3277911, at \*2 (Del. Ch. Nov. 23, 2005) (internal quotation marks and citations omitted). The *forum non conveniens* factors include the following: (1) the applicability of Delaware law, (2) the relative ease of access to proof, (3) the availability of compulsory process for witnesses, (4) the pendency or nonpendency of a similar action or actions in another jurisdiction, (5) the possibility of a need to view the premises, and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive. *See Bear Stearns*, 2008 WL 959992, at \*5 (citing *Ryan v. Gifford*, 918 A.2d 341, 351 (Del. Ch. 2007)). As the Delaware Supreme Court has instructed, courts should be reluctant to grant motions to stay on *forum non conveniens* grounds. *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 135 (Del. 2006).

Even when the non-Delaware action is first-filed, however, summary proceedings, such as actions under 8 *Del. C.* § 225 or 6 *Del. C.* § 18-110, require analysis beyond a straightforward application of *McWane*.<sup>32</sup> Such scrutiny has given rise to a line of cases weighing the need for swift and expeditious resolution of § 225 and § 18-110 actions and similar summary proceedings against the *McWane* policies of comity and promoting the efficient administration of justice.<sup>33</sup> Whether and how that line of cases applies in this instance is discussed *infra* Part II.C.

### **B. Is There a Binding Forum Selection Clause?**

Before turning to the *McWane* analysis, however, I first address Defendants' claim that Delaware courts have no jurisdiction to hear this case because the MDA, under which this action allegedly arises, contains an exclusive forum selection clause.<sup>34</sup> Typically, forum selection clauses naming an exclusive location for litigation are prima

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<sup>32</sup> See *Carvel v. Andreas Holdings Corp.*, 698 A.2d 375, 378 (Del. Ch. 1995).

<sup>33</sup> See, e.g., *Xpress Mgmt. v. Hot Wings Int'l, Inc.*, 2007 WL 1660741, at \*5 (Del. Ch. May 30, 2007); *Atkins v. Hiram*, 1993 WL 287617, at \*3 (Del. Ch. July 26, 1993) (“In determining whether an action filed under 8 *Del. C.* § 225 should be stayed in favor of an earlier-filed action in another forum, this Court should consider whether the other court is capable of rendering *prompt* justice and whether the other proceeding is ‘going forward on an expedited basis.’”) (citing *Oralco, Inc. v. Bradley*, 1992 WL 332106, at \*4 (Del. Ch. Nov. 4, 1992); *Pulver v. Stafford Holding, Co.*, 1987 WL 9368, at \*2-3 (Del. Ch. Apr. 2, 1987); *Kirkland v. Int'l Cmty. Corp.*, 1984 WL 8231 (Del. Ch. Apr. 2, 1987)).

<sup>34</sup> See DOB at 3, 6, 8. Defendants do not argue that any such clause exists in the PSA or other relevant documents.

facie valid and enforceable, unless the clause is shown by the resisting party to be unreasonable under the circumstances.<sup>35</sup>

In this case, Columbus and Klein claim that “any legal action arising from the MDA must be filed exclusively in Maryland,” because the forum selection clause in the MDA so provides.<sup>36</sup> Section 14.2 of the MDA, upon which Defendants base this claim, reads in part: “The parties agree to submit to the jurisdiction of the state or federal courts located in the state of Maryland with respect to all matters arising from this MDA.”<sup>37</sup> Contrary to Columbus and Klein’s assertion, however, the language of Section 14.2 does not make Maryland an *exclusive* forum. Instead, by its plain meaning, Section 14.2 merely reflects the parties’ mutual consent to personal jurisdiction in Maryland. Nothing in Section 14.2 requires the parties to litigate only in Maryland. Thus, Klein and Columbus’s reliance on the forum selection clause in the MDA, as requiring that the Delaware Action be dismissed or stayed in favor of the Maryland Action, is misplaced. I turn next to Choice’s arguments against staying this proceeding in favor of the Maryland Action.

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<sup>35</sup> *Aveta, Inc. v. Colon*, 942 A.2d 603, 607 n.7 (Del. Ch. Jan. 15, 2008) (citing *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at \*3 (Del. Super. Jan. 16, 2007)).

<sup>36</sup> DOB at 8.

<sup>37</sup> Ralston Aff. Ex. 1, the MDA.

**C. Does the Summary Nature of the Delaware Action Supersede  
*McWane* or *Forum Non Conveniens*?**

Choice's main contention against staying the present action is that the nature of a 6 *Del. C.* § 18-110 action requires this Court to give precedence to the summary Delaware Action. Section 18-110 is the limited liability company analog to 8 *Del. C.* § 225 relating to corporations.<sup>38</sup> Much like Section 225, Section 18-110 provides:

Upon application of any member or manager, the Court of Chancery may hear and determine the validity of any admission, election, appointment, removal or resignation of a manager of a limited liability company, and the right of any person to become or continue to be a manager of a limited liability company, and, in case the right to serve as a manager is claimed by more than 1 person, may determine the person or persons entitled to serve as managers; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the limited liability company relating to the issue.<sup>39</sup>

The purpose of the statute is “to expeditiously resolve uncertainty” within the business entity.<sup>40</sup> Consequently, in cases where rapid resolution of a corporate governance dispute

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<sup>38</sup> The parties acknowledge, at least tacitly, that cases interpreting 8 *Del. C.* § 225 may be used to interpret 6 *Del. C.* § 18-110. Indeed, these companion provisions have been read together by this court in the past. *See Pharmalytica Servs., LLC v. Agno Pharms., LLC*, 2008 WL 2721742, at \*3 (Del. Ch. July 9, 2008); *but cf. Elf Atochem N.A., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) (“We hold that, because the policy of the [Limited Liability Company] Act is to give the maximum effect to the principle of freedom of contract and to the enforceability of LLC agreements, the parties may contract to avoid the applicability of Section[] 18-110(a) . . .”).

<sup>39</sup> 6 *Del. C.* § 18-110(a).

<sup>40</sup> *Xpress Mgmt.*, 2007 WL 1660741, at \*5.

is needed and a non-Delaware court is not in a position to provide expedited adjudication and prompt justice, the courts typically will deny a motion to stay the § 225 or § 18-110 action in Delaware because the policies underlying those sections take precedence over the policies underlying *McWane*.<sup>41</sup>

In *Carvel v. Andreas Holdings Corp.*, however, this court expressly rejected the proposition that “the policies underlying § 225 will *always* ‘trump,’ *i.e.* will invariably compel, the denial of a stay in every circumstance.”<sup>42</sup> In *Carvel*, one of the parties filed an action to remove a governance controversy from New York to Delaware.<sup>43</sup> The court held, however, that because the New York court had the corporate issue before it, was in a position to decide that issue promptly, and would be applying New York law, the policies underlying § 225 were not implicated.<sup>44</sup> Likewise, in *Xpress Management v. Hot Wings International, Inc.*, this court acknowledged that, when faced with a request to stay a summary action, the court balances the *McWane* policies of comity and promoting the efficient administration of justice against the policies underlying the summary nature of the Delaware action.<sup>45</sup>

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<sup>41</sup> See, e.g., *Atkins*, 1993 WL 287617, at \*2-3; *Oralco, Inc.*, 1992 WL 332106, at \*4; *Pulver*, 1987 WL 9368, at \*2-3.

<sup>42</sup> 698 A.2d 375, 378 (Del. Ch. 1995) (emphasis added).

<sup>43</sup> *Id.*

<sup>44</sup> The court noted in *Carvel* that the policies underlying a § 225 action include (1) the need for prompt judicial resolution of corporate governance disputes and (2) the desire to promote uniform construction of Delaware corporate law. *Id.* at 379.

<sup>45</sup> 2007 WL 1660741, at \*5 (citing *Carvel*, 698 A.2d at 378); see also *supra* note 44.

In fact, this court consistently looks at all the attendant circumstances when faced with a motion to stay or dismiss a statutory cause of action arising out of one of our business entity statutes, including actions to determine the management of a business entity, in favor of a foreign-filed action. As Vice Chancellor, later Justice, Duffy wrote:

I recognize that the Court of Chancery has statutory responsibilities under § 225 and that it generally supervises the internal affairs of a Delaware corporation. And it is important in the administration of our corporation law that there be a uniformity of construction. But I am not persuaded that these considerations mandate the Court to decide any controversy submitted under the corporation law statute no matter what actions may be pending between the parties in other jurisdictions. I think that we still have an obligation to look at all of the attendant circumstances and make a decision which includes a consideration of the orderly and efficient administration of justice as we see it in light of the binding case law.<sup>46</sup>

Thus, although the summary nature of a § 18-110 proceeding is relevant in determining whether to stay or dismiss a Delaware action in favor of a foreign-filed action, it is not dispositive.<sup>47</sup>

#### **D. Application of the *McWane* Factors**

Under *McWane*, Defendants' motion to stay the Delaware Action in favor of the Maryland Action depends on the court's resolution of the following three questions:

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<sup>46</sup> *Japan Lease Int'l Corp. v. Lyons Container Servs., Inc.*, 1973 WL 461, at \*2 (Del. Ch. May 8, 1973).

<sup>47</sup> Choice categorically, but mistakenly, asserted in its answering brief that "Defendants cannot cite a single summary proceeding that has been stayed by a Delaware court in favor of a first-filed, non-summary action in a foreign court." PAB at 19; see DRM at 12-17 (discussing cases that disprove that assertion).

First, is there a prior action pending elsewhere related to the action in Delaware; second, does the suit pending elsewhere involve the same parties and the same issues; and finally, is the foreign court capable of doing prompt and complete justice.<sup>48</sup> If the answer to each of these questions is yes, then this Court generally will stay the Delaware action.

**1. Is the Maryland Action first-filed?**

The applicability of *McWane* initially demands a determination of whether the Maryland Action was first-filed. Though there is often room for debate on this issue,<sup>49</sup> this case is not especially close. On January 6, 2009, Choice filed its complaint in the Maryland Circuit Court. Three days later, on January 9, Klein, PLC, Columbus, and other related entities filed Klein's Initial Maryland Complaint. Choice did not file its Delaware Action until February 10, over a month later. Choice has not cited any case law suggesting that a month-long lag in filing dates in similar circumstances constitutes simultaneous filing.

Choice does argue, however, that the Maryland Action should not be deemed first-filed because Klein's Initial Maryland Complaint asserted only two counts against an incomplete set of parties and neither of those two counts specifically involved the dispute

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<sup>48</sup> See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

<sup>49</sup> See, e.g., *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at \*15 (Del. Ch. July 14, 2008) (citing *In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at \*7 (Del. Ch. May 20, 1993)).

over the rightful manager of Columbus that is the subject of the action here.<sup>50</sup> According to Choice, Klein’s Initial Maryland Complaint could not have asserted any claim as to the specific action at issue in this litigation, and, thus, the additional counts in Klein’s Amended Maryland Complaint should not relate back to the January 9 filing date. That is, this § 18-110 action concerns Choice’s attempt to elect its own manager and remove Klein, which did not occur until after Columbus and Klein filed Klein’s Initial Maryland Complaint. Choice also denigrates Klein’s Amended Complaint as merely a tactical ploy, emphasizing that it was filed the same day that Klein and Columbus filed the instant motion to dismiss or stay.

In these circumstances, *i.e.*, where an otherwise first-filed case has been amended or altered, Delaware courts will “compare[] the substance of the original case to that of the case as later composed.”<sup>51</sup> When the modified action bears little or no resemblance to the original, it may be treated as a new action, thus eliminating claims to first-filed status based on the filing date of the original action.<sup>52</sup> Conversely, where the “substance of the

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<sup>50</sup> Klein’s Amended Maryland Complaint does seek a declaratory judgment that Choice’s actions with respect to voting in its own manager are invalid. The Amended Complaint, however, was not filed until March 4, 2009.

<sup>51</sup> *McQuaide, Inc. v. McQuaide*, 2005 WL 1288523, at \*4 (Del. Ch. May 24, 2005) (citations omitted).

<sup>52</sup> *See Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1995 WL 632030, at \*3 (Del. Ch. Oct. 19, 1995) (finding Delaware action first-filed because, though the original Pennsylvania action was filed earlier, it did not include claims comparable to those in Delaware until an amendment was filed after the filing of the Delaware action); *In re Delta & Pine Land Co. S’holders Litig.*, 2000 WL 1010584, at \*3-4

original case remains unchanged,” the court will treat the modified action as if filed on the original date.<sup>53</sup>

Here, there is some room for debate about whether the substance of Klein’s Initial Maryland Complaint remained unchanged in light of the Amended Complaint. This is especially true given that Columbus and Klein filed their Amended Complaint, which included the declaratory judgment count involving the key issue in the Delaware Action, so close to seeking a stay here. Nevertheless, the concern that Klein and Columbus are forum shopping is diminished by the fact that Choice filed the first Complaint in Maryland and asserted claims that are closely interrelated to those in this action. Moreover, the argument that the disputed managerial election occurred after the filing of Klein’s Initial Maryland Complaint has little force because the possibility of having an election arose out of the business dealings between Choice, Columbus, and Klein that began at least as early as when the PSA was signed.

In determining whether the Amended Complaint should relate back, this Court must examine the extent to which Klein’s Amended Maryland Complaint and the consolidated Maryland Action arise from a common nucleus of operative facts.<sup>54</sup> That is,

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(Del. Ch. July 17, 2000) (“I see no reason to treat Monsanto’s cross-claim seeking affirmative relief as relating back to the filing date of the shareholder complaint.”).

<sup>53</sup> *McQuaide, Inc.*, 2005 WL 1288523, at \*4 (citing *United Phosphorus, Ltd. v. Micro-Flo, LLC*, 808 A.2d 761, 765 (Del. 2001); *Corwin v. Silverman*, 1999 WL 499456, at \*4-5 & n.13 (Del. Ch. June 30, 1999)).

<sup>54</sup> The “common nucleus of operative fact” inquiry under *McWane* typically arises when asking whether the actions involve the same parties and the same issues.

even though the Amended Complaint may contain additional claims to those found in the initial complaints in the consolidated action, if all claims rely on and arise from the same factual foundation, the Amended Complaint should be considered filed as of the date of Klein's Initial Maryland Complaint. In this case, Choice and Klein have been engaged in a continuous course of business since February 2006.<sup>55</sup> Over their years of interaction, the parties have entered numerous contracts and agreements relating to Klein's efforts to develop and operate Cambria Suites hotels.<sup>56</sup> Choice's attempt to elect its own manager and remove Klein relied on rights allegedly granted in certain of those agreements. As a result, it appears that the parties' continuous course of conduct, which is the common nucleus of facts from which both Klein's Initial and Amended Maryland Complaint and the other claims in the consolidated Maryland Action arose, was and is before the Maryland Circuit Court. In fact, by virtue of Choice's Maryland Complaint, in early January 2009 the Maryland Court had in issue the PSA, the 2007 and 2008 Notes, the Forbearance Agreement, the MDA, and other documents and facts necessary to adjudicate the claims raised in Klein's Amended Maryland Complaint. Thus, I hold that

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*See, e.g., EuroCapital Advisors, LLC v. Colburn*, 2008 WL 401352, at \*2 (Del. Ch. Feb. 14, 2008); *McQuaide*, 2005 WL 1288523, at \*4; *Dura Pharm., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 930 (Del. Ch. 1998). The inquiry also aids the court, however, when comparing the substance of an original action against that of a modified action for purposes of determining whether the action, as modified, can be considered first-filed.

<sup>55</sup> *See* Klein's Am. Md. Compl. ¶ 16.

<sup>56</sup> *See supra* note 6.

the Amended Complaint effectively relates back to the original complaints in the Maryland Action and, therefore, deem the Maryland Action first-filed.

I turn next to the remaining *McWane* questions and other relevant considerations.

## **2. Do both actions involve the same parties?**

Choice argues that the Maryland Action “does not involve identical parties but is rather a much broader group of parties.”<sup>57</sup> In any *McWane* analysis, however, the parties and issues in the competing litigations rarely will be exactly identical.<sup>58</sup> The court must, therefore, “balance the lack of complete identity of parties [and issues] against the possibility of conflicting rulings which could come forth if both actions were allowed to proceed simultaneously.”<sup>59</sup> Rather than insisting that the parties in both actions be identical, this court only requires substantial or functional identity.<sup>60</sup> Choice accurately contends that the Maryland Action includes more parties than the Delaware Action, but what is important for purposes of the pending motion is that all of the parties in the Delaware Action are included in the Maryland Action. Thus, to the extent the issues in the Delaware and Maryland Actions overlap, the parties are, at least, functionally identical.

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<sup>57</sup> PAB at 28.

<sup>58</sup> *See Xpress Mgmt. v. Hot Wings Int’l, Inc.*, 2007 WL 1660741, at \*4 (Del. Ch. 2007).

<sup>59</sup> *Id.* (quoting *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at \*3 (Del. Super. Apr. 25, 1989)).

<sup>60</sup> *Davis Int’l, LLC v. New Start Gp. Corp.*, 2005 WL 2899683, at \*2 (Del. Ch. Oct. 27, 2005) (citing numerous cases).

### 3. Do both actions involve the same issues?

Choice also argues that the issues are not identical. As with the “same parties” requirement, though, this court does not require identical issues but only functionally similar issues arising out of a “common nucleus of operative fact.”<sup>61</sup> As part of this inquiry, the court must determine whether allowing both actions to proceed “in tandem would either risk conflicting rulings or foster an unseemly race to judgment in each forum.”<sup>62</sup> For the same reasons expressed *supra* Part II.D.1 as to the first-filed status of the Maryland Action, I hold that the issues here are substantially similar to those in the Maryland Action and arise out of a common nucleus of operative facts. Nevertheless, even though the issues are similar enough to satisfy this *McWane* prong, due to the summary nature of the Delaware proceeding under Section 18-110, my inquiry does not end there. Instead, the differences between the Delaware Action and the Maryland Action require closer inspection.

In these specific circumstances, a key question is whether this Court can divide the underlying issues so as to decide Choice’s § 18-110 claim without reaching the merits of the panoply of other claims and defenses raised by Columbus and Klein, as well as Choice, in the Maryland Action. If it cannot, hearing the § 18-110 claim will create a significant risk of inconsistent judgments and an unseemly race to judgment—the precise

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<sup>61</sup> *Id.*

<sup>62</sup> *See Xpress Mgmt.*, 2007 WL 1660741, at \*5 (citations and internal quotation marks omitted).

problems *McWane* strives to eliminate.<sup>63</sup> This concern is amplified by the fact that Choice, the Plaintiff in Delaware, also chose to file what amounts to a plenary action in Maryland.

Choice contends that this Court easily can separate the issues involved in the two actions because the narrow issues involved in the Delaware Action rely solely on the PSA for resolution, whereas the Maryland Action is significantly broader.<sup>64</sup> Klein counters that, while the Section 18-110 action relies largely on the PSA, that document was entered into specifically to “assist” him with “development obligations” under the MDA.<sup>65</sup> According to Klein the key issue in both the Maryland and Delaware Actions is whether the MDA and, by association, the other documents related to it were the product of fraud. Such a determination is important, Klein asserts, because the MDA is inextricably intertwined with the PSA, the 2007 Notes, the 2008 Note, and the Forbearance Agreement, some of which are at issue in the Delaware Action.<sup>66</sup>

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<sup>63</sup> See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng’g Co.*, 263 A.2d 281, 283 (Del. 1970).

<sup>64</sup> See PAB at 25, 28.

<sup>65</sup> See DOB at 14.

<sup>66</sup> Klein describes the MDA as the document “from which all relationships among the parties, all monies exchanged among the parties, and all agreements among the parties arise.” See DRM at 3.

In the Maryland Action, Choice also explicitly and repeatedly recognizes the interrelated nature of the agreements, including the MDA, the promissory notes, and the guarantees pertaining to the development of the Cambria Suites hotels. See Choice Md. Compl. ¶ 1 (“This lawsuit arises out of a series of inter-related agreements . . . .”); Ralston Aff. Ex. 7, Choice Consent Motion to Consolidate

At this preliminary stage, I cannot dismiss Klein’s argument.<sup>67</sup> If I refuse to stay the Delaware Action, it seems quite possible that overlapping litigation will proceed on two fronts. While the Maryland Action is broader, many of the same issues raised there would, of necessity, be played out here as well, including, most importantly, Klein’s fraud claims. Even if I attempted to focus the analysis only on the PSA and the most closely-related additional agreements, limiting the number of those agreements would be difficult based on the interrelated nature of the documents. Thus, preparation of this case for trial likely would require discovery on many of Klein’s defenses.

To controvert this, Choice contends that Klein’s MDA fraud claims are irrelevant to the Delaware Action because the PSA “specifically waives defenses to its remedies based on challenges to the agreements at issue in the Maryland Action.”<sup>68</sup> The

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Civil Actions (noting that “both civil actions [in Maryland] involve a common subject matter, namely the obligations that have arisen from a series of inter-related agreements between the parties.”).

<sup>67</sup> I am not convinced, however, that all of the documents are interrelated to the extent claimed by Klein and Choice. Making that determination would require a fact intensive review of the documents and dealings of the parties which is neither necessary nor appropriate at this stage of this proceeding.

<sup>68</sup> *See* PAB at 25, 28. The relevant waiver section of the PSA provides:

Each Pledgor hereby consents and agrees to each of the following and agrees that each Pledgor’s obligations hereunder shall not be released, diminished, impaired, reduced or adversely affected in any way by any of the following, and further waives any common law, equitable, statutory or other rights . . . which the Pledgor might have in connection with any of the following:

Forbearance Agreement includes a similar waiver provision.<sup>69</sup> Choice asserts that these waivers expressly bar Klein from raising any defenses against enforcement of the PSA, including those raised in the Maryland Action. Even if these waivers can be so construed, however, it is not clear under Delaware law, at least, that they would prevent Klein from raising an intentional fraud defense based on the facts alleged in the Maryland Action. In *ABRY Partners*, for example, this court examined a Stock Purchase Agreement entered into between two sophisticated private equity firms.<sup>70</sup> The Agreement purported to limit liability for any misrepresentation of fact contained within it to a contractually-defined amount of damages.<sup>71</sup> The court there held, however, that “when a seller intentionally misrepresents a fact embodied in a contract—that is, when a seller lies—public policy will not permit a contractual provision to limit the remedy of the buyer to a capped damage claim.”<sup>72</sup> Similar policy concerns could enable Klein to

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(c) *Invalidity, Illegality, Ultra Vires, Etc.* The invalidity, illegality or unenforceability of all or any part of the Obligations or of any other document or agreement executed in connection with the Obligations for any reason whatsoever

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PSA § 9(c).

<sup>69</sup> See Forbearance Agreement § 8 (“Debtor hereby acknowledges and stipulates that it has no claims or causes of action against Lender or its affiliates of any kind whatsoever.”).

<sup>70</sup> *Abry Partners V, L.P. v. F&W Acq. LLC*, 891 A.2d 1032 (Del. Ch. 2006).

<sup>71</sup> *Id.* at 1035.

<sup>72</sup> *Id.*

pursue his defense to the PSA based on his claim that the MDA and related agreements are the product of intentional fraud, notwithstanding the alleged waiver.

While I need not decide at this point the question of which law applies to each agreement,<sup>73</sup> neither Klein nor Choice has addressed how these issues would be handled under either New York or Maryland law. Therefore, to make any determination of whether the PSA entitles Choice to remove Klein as manager of Columbus, I very likely would be required to examine whether the MDA was entered as the result of intentional misrepresentations by Choice and the impact of such a circumstance on the validity and enforceability of the PSA.

Thus, given the complexity of the claims raised by Klein and Choice in Maryland and the interrelated nature of the documents giving rise to both actions, I doubt that this Court would be able to limit the scope of this § 18-110 action to something significantly narrower than the Maryland Action. Additionally, because the documents, claims, and issues underlying the Maryland Action are interrelated with those at issue in the Delaware Action, there is a significant risk that proceeding with the Delaware Action will unnecessarily waste time, effort, and expense or result in inconsistent and conflicting rulings. Consequently, the *McWane* policies of comity and the orderly and efficient administration of justice support granting a stay in this action.

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<sup>73</sup> The choice of law issues are, potentially, very relevant to the resolution of this contest. Klein contends that Maryland law applies to the MDA, the 2007 Notes, the 2008 Note, and the Forbearance Agreement and that New York law governs the PSA. *See* DOB at 5.

#### 4. Are the Maryland courts capable of rendering prompt and complete justice?

Under *McWane*, a first-filed action pending in another jurisdiction will justify staying an action in Delaware only where the foreign court is capable of doing prompt and complete justice.<sup>74</sup> As discussed *supra* Part II.C, a foreign court's capacity for expeditious resolution is particularly relevant when the Delaware action consists of a summary proceeding, such as the one presently before the Court.

In this case, however, Choice simply has not demonstrated that the Maryland Circuit Court is incapable of providing prompt and complete justice. A large portion of the briefing on Defendants' motion to stay concerned the parties' jockeying in Maryland for one litigation "Track" over another. Originally, Choice sought to have the consolidated Maryland Action heard on Track III, a track "reserved specifically for . . . simple case[s] with an anticipated trial duration of three (3) days or less and minimal discovery."<sup>75</sup> In contrast, Klein and Columbus sought to consolidate the actions on Track IV, which, unlike Track III, assigns a specific judge to hear the entire case.<sup>76</sup> In light of Choice's supposed desire for expediency, Klein and Columbus further proposed that both

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<sup>74</sup> See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

<sup>75</sup> DRM at 9. Given the complex nature of the consolidated Maryland Action, it is hard to fathom that, once the broad scope of Defendants' claims and defenses became clear, a reasonable observer—much less legal counsel with years of litigation experience—would anticipate that a trial to resolve the issues in the Maryland Action would last three days or less.

<sup>76</sup> *Id.* at 8-9.

sides jointly ask the Maryland Court to set the Maryland Action on Track V, the expedited Business and Technology Track.<sup>77</sup> Having the case assigned to Track V would enable the parties not only to litigate the case before a judge having significant familiarity with complex business matters, but also to seek relief on an expedited basis, if necessary.<sup>78</sup> Choice has resisted seeking to have the entire Maryland Action moved to Track V, preferring instead to move only the two counts of Klein’s Amended Maryland Complaint related to the PSA to that Track.<sup>79</sup>

Choice accuses Klein and Columbus of making calculated decisions to avoid prompt relief. Klein and Columbus allege the same about Choice. Whatever the truth is, both sides appear to have made tactical decisions to better their positions through leverage or otherwise. At this stage, however, Defendants’ position seems more reasonable. Defendants’ willingness to move the Maryland Action to Track IV, where it

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<sup>77</sup> See Defs.’ Letter to the Court, filed April 23, 2009. Established on January 1, 2003, the Maryland Special Business and Technology Case Management Program (“BTCMP”) is Maryland’s Business Court. Parties seeking resolution of a complex civil case involving business and technology issues can seek to have the case transferred to the BTCMP on the expedited Track V. See *Maryland Business and Technology Court Task Force Report* (“Md. Bus. Ct. Rpt.”), § VI(B)(5); see also Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147, 190-94 (Nov. 2004). There is no apparent reason why the parties could not have requested assignment of the Maryland Action to the BTCMP and Track V. See *id.*

<sup>78</sup> See Md. Bus. Ct. Rpt. §§ VI-VII. The record also suggests that a party could seek expedited relief in the form of a preliminary injunction, for example, in Maryland in a Track IV case. See DRM at 5-7 (citing Md. Rules § 15-505).

<sup>79</sup> See Defs.’ Letter to the Court, filed April 23, 2009; Pl.’s Letter to the Court, filed April 13, 2009.

will have a single judge assigned to the case from beginning to end should benefit all parties. In addition, Defendants' openness to seeking assignment of the case to Track V, the business court track, undermines Choice's charges of delay. The Maryland business court track may not be as quick as a summary proceeding under § 18-110, but it still appears capable of providing an efficient and reasonably prompt resolution of the business entity issues raised by Choice in Delaware. Thus, although the Delaware action is a summary proceeding, just as the courts in *Carver* and *Xpress Management*, the Maryland Circuit Court is in a position to provide expedited relief to the parties, if they seek it. Hence, I find this element of the *McWane* analysis is satisfied.<sup>80</sup>

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<sup>80</sup> As a final point, during oral argument, Choice argued that this Court should not stay the Delaware Action because Maryland lacks the equivalent of a Section 225 or 18-110 action and is, therefore, simply incapable of providing the type of relief Choice seeks here. Tr. at 25-28. In response, I noted that even if Maryland cannot grant Choice the specific relief it seeks under Section 18-110, Choice could return to Delaware if the Maryland Circuit Court grants the declaratory judgment relief it seeks relating to Columbus, and summarily obtain the Section 18-110 relief. In relevant part, I stated that:

[I]f somebody gives me a declaratory judgment, once you figure out that [the PSA] is or isn't valid and what it means, that's the ball game. It doesn't depend in the least on anything related to Delaware law other than you can, because of the equivalent of Section 225, bring that contract dispute before me because it involves who's going to be the -- the manager. But that's a contract issue. A lot of [the dispute is] governed by Maryland law, some of it by New York law, none of it by Delaware law.

*Id.* at 28.

**5. Does the balance of harms weigh in favor of Staying the Delaware Action?**

At this point, under a traditional *McWane* analysis, I would stay the Delaware Action in favor of the first-filed Maryland Action. As highlighted *supra* Part II.C, though, the summary nature of this action requires the court to engage in some further analysis, balancing the harms that would result if I chose to stay the present action or, conversely, allowed it to proceed. On that point, this case differs from situations in which a Delaware summary proceeding has taken precedence over a co-pending action in that, here, Choice has not shown that there is any imminent risk that Columbus will be paralyzed by virtue of any uncertainty as to who is the rightful manager. In fact, Klein has demonstrated just the opposite.

In *Oralco, Inc. v. Bradley*, Chancellor Chandler declined to stay a § 225 action in Delaware in the face of a much broader earlier-filed action in West Virginia.<sup>81</sup> Although the court there discussed several of the factors mentioned in this Memorandum Opinion, including the importance of preserving a plaintiff's choice of forum and the overlapping issues between the two actions, the "critical point" for the Chancellor was the "cloud upon Oralco's ability to conduct its business."<sup>82</sup> Because the uncertainty surrounding control of the company was interfering with financing arrangements with third parties and a pending business acquisition, the Chancellor determined that it was necessary to

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<sup>81</sup> 1992 WL 332106, at \*3-4 (Del. Ch. Nov. 4, 1992).

<sup>82</sup> *Id.* at \*3.

reach a prompt and final determination in the § 225 action as to the identity of the lawful director of Oralco.<sup>83</sup> Similarly, in *Kirkland v. International Community Corp.*, then-Vice Chancellor, now Justice, Berger declined to stay a § 225 action in Delaware in favor of earlier-filed proceedings in New York.<sup>84</sup> Just as in *Oralco*, Vice Chancellor Berger found that a stay of the Delaware § 225 action in favor of a nonexpedited proceeding in New York “may adversely affect third parties attempting to do business” with the company in question.<sup>85</sup>

In that sense, this case is somewhat unusual in that similar concerns over the immobilization of the business entity are not at play. Columbus is an entity with a single asset—the Property in Ohio, which is subject to a long-term lease to an unrelated third party. A tax attorney familiar with Klein’s business dealings has sworn that “all rent payments [for the Property] are made directly to the lender [Legg Mason Real Estate Services, Inc.] and the rent is structured so that it is equal to the monthly mortgage payment with no residual positive cash flow.”<sup>86</sup> Klein’s attorney further avers that “[a]ny transfer of the ownership of Columbus or its assets . . . would cause tremendous negative financial consequences for [Klein].”<sup>87</sup> Choice has not controverted the evidence that the

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<sup>83</sup> *Id.*

<sup>84</sup> 1984 WL 8222, at \*3 (Del. Ch. May 29, 1984).

<sup>85</sup> *Id.*

<sup>86</sup> Lipari Aff. ¶ 7.

<sup>87</sup> *Id.* ¶ 11.

Property is subject to a long-term lease and all rent goes directly to Legg Mason. Nor has Choice contended that Klein, as the manager of Columbus, has done or threatened to do anything outside the ordinary course of business or inimical to Choice's interest in Columbus. Thus, the only question is who should be at the helm of Columbus.<sup>88</sup> Choice has failed to respond with any persuasive evidence suggesting that this action involves the same types of operational concerns that existed in *Oralco* or *Kirkland*. For example, Choice has not explained how issuing a stay would immobilize Columbus such that its existence or ability to perform major business activities—in this case, to collect rent—would be impeded by any uncertainty surrounding the rightful manager of Columbus.

On the other side of the balance of hardships, Choice has not rebutted Klein's showing that, because of the Company's unique tax status, any transfer of ownership would result in immediate tax costs for Klein ranging from \$5-9 million.<sup>89</sup> Based on the uncontroverted affidavit of Klein's tax attorney, I find that Klein would suffer serious consequences if Choice obtains the relief it seeks here before the broader litigation is

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<sup>88</sup> I further note that the parties have stipulated to a status quo order in this action, thereby precluding Klein from taking any actions outside of the ordinary course of business until this action is resolved or until further order of the Court. In addition, Klein and Columbus have expressed a willingness to have a trustee serve as the manager of Columbus during the pendency of the Maryland Action. Tr. at 62. For its part, Choice would have this Court make an expedited, final determination as to its status as manager of Columbus. If Choice prevails in that regard, though, Klein and Columbus probably will ask the Maryland Court to consider whether to impose another status quo order. In the meantime, as discussed *supra* note 5, Defendants allegedly would suffer severe tax consequences.

<sup>89</sup> Lipari Aff. ¶ 10.

resolved in Maryland.<sup>90</sup> That is, Choice ultimately might not prevail on the larger set of claims in Maryland, and by granting it the relief it seeks here, it may be difficult or, at least, costly to unscramble the eggs. Choice, on the other hand, has not demonstrated that it will suffer a comparable harm if this action is stayed pending a resolution of the Maryland Action. Thus, because Columbus can be expected to maintain business as usual and Klein is very unlikely to take steps to alter the status or value of the Property during the pendency of the Maryland Action, the balance of hardships here weighs in favor of staying the Delaware Action.

#### **6. A final consideration**

Lastly, I note that this Court typically has proceeded with a healthy dose of skepticism in evaluating the forum claims of plaintiffs who, like Choice, file first elsewhere and then come to Delaware to seek potentially overlapping relief.<sup>91</sup> While

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<sup>90</sup> *See id.* ¶ 11 (“Any transfer of the ownership of Columbus or its asset would be directly against Sam Klein’s interests and would cause tremendous negative financial consequences for him.”).

<sup>91</sup> *See, e.g., Diedenhofen-Lennartz v. Ulrike Diedenhofen*, 931 A.2d 439, 447 (Del. Ch. 2007) (“[T]he voluntary choice of the plaintiffs in the Canadian Action not to pursue broader relief against Ulrike there does not aid them. The plaintiffs’ penchant for claim-splitting does not substitute for a demonstrated attempt to press all their related claims against Ulrike in their earlier-chosen forums.”); *Johnston v. Caremark RX, Inc.*, 2000 WL 354381, at \*2-3 (Del. Ch. Mar. 28, 2000) (granting stay of a summary advancement proceeding in Delaware in favor of an earlier action filed by the Delaware plaintiff in Alabama).

Here, Choice effectively seeks to table its first-filed action in Maryland to try its luck in Delaware. Certainly, if it had so chosen, Choice could have pursued its claims in Delaware in the first instance. *See supra* Part II.B (finding no binding forum selection clause in the MDA). But, just as Klein and Columbus would not

*McWane* largely anticipated situations in which defendants sought to defeat a plaintiff's choice of forum by filing a later action in a different court, the purpose of the first-filed rule is even broader. It seeks to protect the parties and the courts from (1) the wasteful duplication of time, effort, and expense, (2) the possibility of inconsistent and conflicting rulings and judgments, and (3) the likelihood of an "unseemly race" to trial and judgment.<sup>92</sup> These policies would be defeated just as easily by a single party filing two or more actions in diverse forums and thereby forcing the nonfiling party to expand its efforts significantly.

### III. CONCLUSION

For the reasons stated, I conclude that the first-filed rule applies in the circumstances of this case and that principles of comity and the promotion of the efficient administration of justice require that this Delaware Action be stayed, but not dismissed. Therefore, I grant Defendants' motion to stay this action pending further order of this Court. In so ruling, I assume that the Maryland Action will proceed on a reasonably prompt schedule toward final resolution and that no action will be taken to harm the value or status of Columbus in the interim. If either of those assumptions proves to be

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be permitted to defeat Choice's choice of forum by commencing a subsequent suit in a different state, so Choice should not be allowed to remedy apparent feelings of "litigator's remorse" by putting its Maryland claims on the back burner and litigating here, to Klein's detriment. See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

<sup>92</sup> See *McWane*, 263 A.2d at 283.

incorrect and prompt and effective relief is not available in Maryland, any party may seek appropriate relief from this ruling.

**IT IS SO ORDERED.**