IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Walter E. Ryan, Jr., in the right of and the benefit of MAXIM INTEGRATED PRODUCTS, INC.,	
Plaintiff,	
v.	Civil Action No. 2213-N
JOHN F. GIFFORD, JAMES R. BERGMAN, B. KIPLING HAGOPIAN, A.R. FRANK WAZZAN, ERIC P. KARROS, M.D. SAMPELS,	
Defendants,	
and	
MAXIM INTEGRATED PRODUCTS, INC.,	
Nominal Defendant.	

INDIVIDUAL DEFENDANTS' REPLY BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY

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PRELIMINARY STATEMENT

Plaintiff's opposition to the Individual Defendants' motion to dismiss is meritless. In their motion, Defendants presented a detailed analysis demonstrating plaintiff's demand allegations were facially insufficient and his breach of fiduciary duty and unjust enrichment claims were legally deficient. Plaintiff devotes less than a page of his brief to responding to these arguments. Plaintiff opposes all these arguments on the basis of a single case, *Sanders v. Wang*, 1999 WL 1044880, at *1 (Del. Ch.) (Ex. 1 hereto), which is completely inapposite (the Court was called upon to interpret the terms of a stock ownership plan) and was expressly limited to its own unique facts in subsequent opinions.

Plaintiff's assertion that he has standing in this lawsuit despite Rule 23.1 and Section 327 of the DGCL (both of which require stock ownership at the time of the transactions at issue) fails. Plaintiff admits that he did not own Maxim stock during the period of 7 of the 9 transactions at issue. Plaintiff contends, however, the Court should not apply the standing rule in a "wooden" fashion because the rule "has not been satisfactorily defined by the Courts." Answering Brief in Opposition ("Opp.") at 13. In fact, it *has* been so defined. In *Saito v. McCall*, 2004 WL 3029876, at *4 (Del. Ch.) (Ex. 2 hereto), the Court ruled that plaintiffs who acquired stock in a company by virtue of a merger lacked standing to challenge pre-merger conduct of the company. Plaintiff here acquired Maxim stock by virtue of a merger and seeks to challenge pre-merger conduct.

Plaintiff's arguments to circumvent the statute of limitations are equally infirm. Plaintiff claims that the statute does not apply to one who personally profited from alleged wrongdoing, but plaintiff concedes that he alleges only Gifford, and none of the other five defendants, personally profited. He also falls back on the "discovery rule" and "fraudulent concealment" exceptions, but concedes his complaint is purely based on a Merrill Lynch report analyzing public domain information that he could have discovered and which was not concealed.

Plaintiff's primary argument in opposition to Defendants' motion to stay is that the Court should ignore the controlling legal standard of *McWane Cast Iron Pipe Corp. v. McDowell-*

Wellman Eng'g Co., 263 A.2d 281 (Del. 1970). Plaintiff's arguments for ignoring *McWane* include the immaterial assertion that only two of the four federal actions in California (which have all been consolidated) were filed before this Delaware action. Plaintiff ignores the fact that there are more actions pending in California, and it ignores the fact that the earlier-filed federal actions include the claims asserted here as well as federal securities claims that cannot be adjudicated here. Plaintiff invites the Court to ignore *McWane* and apply the *forum non conveniens* factors instead, but its brief in this regard is a boilerplate recitation of cases that hardly mentions how the facts in *this case* warrant litigating in Delaware. Moreover, plaintiff relies on *forum non conveniens* case law in which there was not already another action pending elsewhere to misstate the burden and the standard. *Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *3 (Del. Ch.) (Ex. 3 hereto) ("If such a prior filed action is pending, our case law mandates the liberal exercise of a stay.").

Plaintiff advances no justification for this action to proceed and it should be dismissed or stayed.

ARGUMENT

I. DISMISSAL IS APPROPRIATE.

A. Plaintiff Does not Address the Substance of Defendants' Motion to Dismiss For Failure to State a Claim and His Demand Futility Arguments Fail.

Plaintiff's opposition devotes less than one-page to addressing the demand futility, failure to state a claim, and alleged unjust enrichment issues pending before the Court. Opp. at 8. In making these sweeping arguments in less than a single page, plaintiff relies on just one inapposite case, makes no attempt to distinguish the cases cited in Defendants' motion, and does not cite to any allegation in the complaint to support the opposition.

Plaintiff cites to a single case to oppose Defendants' arguments concerning demand futility and failure to state a claim, *Sanders*, 1999 WL 1044880, at *1. *Sanders* is inapposite, and has been limited to its facts in subsequent opinions.[1] In *Sanders*, the Court considered the appropriateness of the number of shares issued to certain executives under a stock ownership plan. *Id.* at *13. The Court did not engage in an analysis of the demand futility doctrine, and merely ruled "that the facts alleged raise a reasonable doubt that the share transaction resulted from a valid exercise of business judgment." *Id.* at *5. Plaintiff does not explain why *Sanders* applies to the demand futility, breach of fiduciary duty, or unjust enrichment issues before the Court.

B. Plaintiff's Attempt to Avoid the Statute of Limitations Fails.

Plaintiff advances three arguments to try to avoid the statute of limitations, all of which are unavailing. First, plaintiff asserts that Gifford should not gain the benefit of the statute of limitations because he personally profited from the allegedly backdated stock options. Opp. at 9. Plaintiff's pleading is devoid of any allegation that Gifford ever exercised a backdated stock option or sold any stock, so this argument fails. In any event, the argument applies only to Gifford, so plaintiff's claim against Defendants Bergman, Hagopian, Wazzan, Karros, and Sampels fails.

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[1] *Landy v. D'Alessandro*, 316 F. Supp. 2d 49, 65-66 (D. Mass. 2004) (noting that *Sanders* involved an obvious and clear violation of authority, and, "[s]uch a clear violation does not exist here, however."); *Reiss v. Financial Performance Corp.*, 279 A.D. 13, 21 (N.Y. Sup. Ct. App. 2000) ("What becomes evident is that *Sanders* was addressing itself only to a situation where the contract explicitly contains to stock splits in one section but omits such a reference in another. . . .Thus, *Sanders* is of little, if any, analytical utility in the determining the appeal before this Court."); Joseph Bachelder, *Sanders v. Wang, Why Drafting Is Important*, Aug. 30, 2003 N.Y.L.J. 3 ("The court's decision in *Sanders v. Wang* is at least debatable. . .The reasoning of the court in *Sanders v. Wang* would compel the company to have kept the additional available shares for grant at 4 million notwithstanding a 'reverse split.' That would not seem to make sense."). Given these judicial pronouncement, plaintiff's reliance on *Sanders* is misplaced.

Second, plaintiff relies on the "discovery rule," but as Defendants explained in their motion, "This statute, unlike [other Delaware statutes of limitations], is not a 'discovery statute,' and the limitations period begins to run from the time the cause of action accrues. . . This is so 'even if the plaintiff is ignorant of the cause of action.'" *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 450 (Del. 2000) (internal citations omitted).

Finally, plaintiff's "fraudulent concealment" argument fails in light of plaintiff's own allegations. Plaintiff's complaint is expressly based on a Merrill Lynch report that exclusively analyzed public disclosures and public historical stock prices. Cmpl., Ex. A. Plaintiff's attempt now to disavow the public nature of the data in the report is remarkable: "In essence, defendants' contention is that shareholders of a Delaware corporation have an obligation to invest the time and expense necessary to investigate directors' conduct on an ongoing basis. Such a contention falls on its own weight." Opp. at 10.[2] Plaintiff cannot rely on the discovery rule by asserting it would have taken too much time and effort to pay attention to public data. By the same token, he cannot claim "fraudulent concealment" when nothing was concealed. In the final analysis, plaintiff's reliance on the discovery rule and the doctrine of fraudulent concealment does not make any sense when he exclusively grounds his claims on an analysis of publicly-disclosed information.

C. Plaintiff's Standing Arguments Fail.

Delaware law eviscerates plaintiff's standing to bring this action for most of the transactions at issue here. *See* 8 *Del. C.* § 327 (plaintiff must have been stockholder "at the time of the transaction of which such stockholder complains or that such stockholder's stock thereafter devolved upon such stockholder by operation of law."); *see also* Rule 23-1. Plaintiff concedes that he did not acquire Maxim stock until April 2001—after 7 of the 9 transactions at issue. As a result, plaintiff relies exclusively on the exception in Section 327 (*i.e.*, that the stock "devolved

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[2] Plaintiff does not articulate what the "expense" is to which he refers.

upon" him "by operation of law") and requests that the Court choose not to apply the law in a "wooden" fashion.

Saito, 2004 WL 3029876, at *4 (a case that plaintiff buries in a footnote), is dispositive. In *Saito*, McKesson merged with HBOC. Two plaintiffs who were HBOC stockholders sought to sue derivatively and their first claim alleged pre-merger breach of fiduciary duties against McKesson Directors. The Court dismissed this claim: "Even if I were to accept plaintiffs' allegations as true, this conduct occurred *before* plaintiffs owned stock in McKesson. Both Madajcyk and Dalman became McKesson stockholders when they exchanged their HBOC stock in the stock-for-stock merger with McKesson." *Id.* (emphasis added).

Plaintiff's complaint suffers from the same standing problem. Plaintiff alleges that he did not become a shareholder of Maxim until April 2001 when his shares of Dallas Semiconductor "were converted to Maxim shares upon Maxim's acquisitions [sic] of Dallas Semiconductor on April 11, 2001." Cmpl. ¶ 4.

In an attempt to gain standing, plaintiff principally relies on *Helfand v. Gambee*, 136 A.2d 558 (Del. Ch. 1957), but that case does not help plaintiff's cause. In *Helfand*, plaintiff was a stockholder of Twentieth Century Fox Film Corporation beginning in 1941. In 1952, Twentieth Century Fox was required to reorganize and spin-off its movie theatre business and its movie production business to satisfy an antirust consent decree. Whereas plaintiff had previously owned one share of stock of Twentieth Century Fox, as of September 29, 1952 (the date of the reorganization), plaintiff held one share of stock in the theatre business, National Theatre, Inc. and one share in the movie production business. She sought to sue derivatively on behalf of National Theatre, Inc. and a wholly-owned subsidiary for events that had occurred prior to September 29, 2002. The defendants asserted that because plaintiff attended the stockholders meeting and voted in favor of the reorganization, the stock did not "devolve upon her by operation of law." *Id.* at 561.

Helfand does not apply. *Helfand* concerned a situation where defendants argued that the plaintiff lost standing by virtue of a reorganization; plaintiff here is arguing that he obtained

"retroactive" standing by virtue of a merger. Moreover, in *Helfand*, the Court noted that the reorganization arose from antitrust action by the government. *Id.* In addition, the plaintiff had had a stockholder relationship with related predecessor corporations since 1941. Here, plaintiff did not become a Maxim shareholder by virtue of government action, nor can he allege that he had any relationship with Maxim whatsoever until the April 2001 merger.[3] Plaintiff's suggestion that the Court not apply the standing statute in a "wooden" fashion is an invitation to ignore the law, and should be rejected. Plaintiff cannot allege that Maxim was even a blip on plaintiff's radar screen until the merger. He lacks standing.

II. PLAINTIFF'S INVITATION TO IGNORE THE *MCWANE* DOCTRINE SHOULD BE REJECTED.

If the Court does not dismiss the action, a stay is warranted. Plaintiff argues that the Court should not stay the action by suggesting that the Court should ignore the relevant standard. This Court has repeatedly held that "justice is ill served when litigation proceeds contemporaneously in a number of courts." *Basner v. Gillette Co* , 1987 WL 12898, at *2 (Del. Ch.) (Ex. 4 hereto). As a result, the Supreme Court of Delaware held in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970) that, as a general rule, litigation should be confined to the jurisdiction in which it is first filed. *Id.* at 283. The litigation should be confined to California.

Plaintiff's lead argument for ignoring the *McWane* doctrine is that Delaware courts do not necessarily afford "decisive weight" to the priority of filing. He fails, however, to point to any unique allegation present here that justifies *not* affording decisive weight to the priority of filing. Plaintiff principally relies on *Biondi v. Scrushy*, 820 A.2d 1148, 1159 (Del. Ch. 2003), a case that denied a motion to stay where an earlier action had been filed in Alabama state court. In

[3] Another case that plaintiff cites, *Schreiber v. Carney*, 447 A.2d 17 (Del. Ch. 1982) is also inapplicable. In *Schreiber*, like in *Helfand*, the plaintiff's standing was attacked as being lost by virtue of a merger. The plaintiff did not claim he acquired standing by virtue of the merger. *Id.* at 21.

Scrushy, however, the court explained, "[t]his does not mean that the question of first-filed status is irrelevant." *Id.* Under *Scrushy*'s facts, the first-filed Alabama complaint was "thinly-pled" and barely overlapped with the comprehensive complaint that had been filed in Delaware. *Id.* at 1160 ("Read charitably, the original Tucker Complaint pled but one of the claims, as to only one of the transactions, addressed in the Delaware Complaint. Even that one claim was pled cursorily. . .").

The opposite situation exists here. Plaintiff's Delaware complaint here is a paradigm of thin pleading. Moreover, by virtue of the fact that there are four federal actions (which have been consolidated) and those four consolidated federal actions assert federal claims (as well as more claims), their scope is broader and subsumes the scope of plaintiff's complaint here.

Plaintiff next argues that only two of the four California federal court complaints were filed before this Delaware action.[4] Plaintiff does not explain why this filing sequence is relevant or why it militates against a stay. Moreover, the two earlier-filed actions were filed weeks before this Delaware action, so plaintiff cannot suggest that he was involved in a race to the courthouse against the California plaintiffs.

In light of plaintiff's sweeping suggestion that *McWane* should be ignored, he does not dispute Defendants' presentation of the *McWane* factors nor does he oppose Defendants' arguments that such factors favor a stay. As a result, plaintiff does not address Defendants' analysis that (1) the federal consolidated actions were first-filed, (2) the federal court is capable of doing complete justice, (3) the federal actions contain similar issues of fact and law as this action, (4) the federal actions cover a broader timeframe, (5) the federal actions contain the same claims as this action, plus additional federal claims, and (6) the federal actions and this Delaware action involve substantially the same parties. *McWane* should be followed here and this action should be dismissed or stayed.

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[4] Maxim has also been sued derivatively in California state court.

III. PLAINTIFF'S *FORUM NON CONVENIENS* ARGUMENTS FAIL.

Plaintiff requests that this Court ignore *McWane*, only apply the *forum non conveniens* doctrine, and reach the conclusion that this action should not be stayed because Defendants have not demonstrated "overwhelming hardship" under that doctrine. Plaintiff's opposition brief on this subject is unpersuasive because it relies on *forum non conveniens* case law where there was no similar action pending elsewhere. Where another action is pending elsewhere, Delaware courts exercise liberal discretion in imposing stays under the *forum non conveniens* doctrine. *Schnell*, 1994 WL 148276, at *3 ("The burden of proof always rests on the movant, but the degree of that burden will vary, depending upon whether '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 . . .' [citations omitted]. . .If such a prior filed action is pending, our case law mandates the liberal exercise of discretion in favor of a stay.").

Moreover, plaintiff makes little effort to apply the *forum non conveniens* factors to the allegations in this case. For example, even if the heightened "overwhelming hardship" standard did apply, plaintiff ignores that such overwhelming hardship is established by the fact there are other actions pending elsewhere and those actions have been consolidated. *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 556 (Del. Ch. 1999) ("Most importantly, in consolidating the federal actions, the federal courts have already implicitly held that it would constitute significant, if not overwhelming, hardship and inconvenience to require defendants to defend against various actions in various venues – all of which allege the same principal facts and claims.").

A. Plaintiff Does Not Dispute that Another Similar Action is Pending in California.

Plaintiff does not dispute that the California federal actions are pending nor does he dispute that the federal actions were filed first. Opp. at 23-24. This factor weighs heavily in favor of a stay. *Schnell*, 1994 WL 148276, at *3; *see also Friedman*, 752 A.2d at 555 ("[c]ourts are more likely to dismiss a cause of action based on [forum non conveniens] if other

jurisdictions are hearing a similar case, because it would be a waste of judicial resources to prosecute the same action multiple times") (citation omitted).[5]

B. Plaintiff's Argument Regarding "Viewing the Premises" is a Red Herring.

Plaintiff notes that there is no need "for a view of the premises" so the action can proceed in Delaware. Opp. at 21. This is a case involving securities law issues, not a car accident or real estate dispute. As a result, the "view the premises" factor is immaterial to the analysis here.

C. The Federal Forum Offers Greater Ease Of Access To Proof.

California offers greater access to the proof. Plaintiff does not dispute that Maxim maintains its headquarters in California, retains documents in California and that California is where the majority of its officers reside. Moreover, plaintiff does not dispute that he is a resident of Illinois, not Delaware. He fails to explain any connection he has to this state.

Plaintiff instead relies on *Berger v. Intelident Solutions, Inc.*, 2006 WL 1132079 (Del.) (Ex. 5 hereto) for the proposition that there is "high standard as to this factor." Opp. at 19. In *Berger*, there was no action pending elsewhere, much less an action pending in federal court elsewhere. Moreover, *Berger* hurts, not helps, plaintiff's arguments because in that recent case, the Supreme Court of Delaware stressed the overriding importance of the "pendency or non-pendency of an action elsewhere" factor in the *forum non conveniens analysis*. *Id.* at *2-3.

Plaintiff's opposition offers no reason why Delaware would afford any greater access to proof, arguing that, "[t]his is not the correct inquiry." Given that *forum non conveniens* is a

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[5] Plaintiff suggests that *Friedman* should not apply because this case is more "procedurally advanced" than the federal consolidated action. Opp., p. 24. This assertion is incorrect; the only activity that has happened here is motion to dismiss practice. After Defendants filed their motion, they were met with silence from plaintiff until plaintiff finally reached out to suggest a briefing schedule months later.

doctrine concerned with practical considerations and the efficient administration of litigation, plaintiff is wrong: where the proof resides is of critical importance.[6]

D. Plaintiff Does Not Adequately Address Defendants' Argument that the Federal Forum Allows For More Expansive Compulsory Process.

Plaintiff argues that the compulsory process factor does not weight in favor of a stay because Defendants have not identified all of the particular witnesses or explained why their testimony could not be presented by deposition.[7] Plaintiff ignores that the earlier-filed actions are federal actions providing for nationwide service of process. As a result, whoever the relevant witnesses end up being in this litigation, and wherever they may reside, the federal forum provides for more expansive service than Delaware service of process. Plaintiff does not address this assertion, instead pointing out that Delaware courts routinely obtain documents and testimony through the commission process. Opp. at 21. Plaintiff misses the point: the federal system does not require the commission process, so there is a substantial improvement in subjecting witnesses to process. *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763, 769 (Del. Super. Ct. 1995) (citation omitted) (forum non conveniens factors includes "if another forum would provide a substantial improvement as to the number of witnesses who would be subject to compulsory process.").

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[6] Plaintiff proffers an argument about personal jurisdiction as well. Opp. at p. 20. Given that this is not a personal jurisdiction motion, plaintiff's argument is irrelevant.

[7] Plaintiff cites to *Monsanto v. Aetna Cas. & Sur. Co.*, 559 A.2d 1301 (Del. Super. Ct. 1988), an insurance declaratory judgment case in which the Court commented, "The Court agrees with Monsanto that the issues involved may not require factual discovery." *Id.* at 1307. *Monsanto* does not help plaintiff's position.

E. Practical Considerations Of Judicial Economy And Fundamental Fairness Favor A Stay Of The State Action.

Plaintiff completely ignores the practical considerations that would make the trial or resolution of this case easier, more expeditious, and less expensive if it proceeds in California. It is axiomatic that allowing this action to duplicate and compete with the federal action would be expensive, strain the individual defendants' resources, Maxim's resources, and the Court's resources. There is simply no legitimate basis to burden defendants or the courts with the significant costs of litigating the same claims in multiple jurisdictions. *See FWM v. VKK Corp.*, 1992 WL 87327, at *2 (Del. Ch.) (Ex. 6 hereto) (issuing stay where, as here, defendants would otherwise "be fighting the same battle on two fronts when, ultimately, the decision of only one of the courts will matter").[8]

F. The Federal Court is Capable of Applying Delaware Law.

As Defendants predicted in their moving papers, plaintiff relies heavily on the fact that Delaware law may need to be applied. What plaintiff ignores, however is that "the application of Delaware law is not conclusive in a *forum non conveniens* analysis." *Chambers*, 1993 WL 179335, at *3 (citation omitted). Plaintiff asserts that a novel issue of Delaware law is presented because of "the options backdating scandal has only recently surfaced" and, for example, Defendants' standing argument under Section 327 (concerning plaintiff's failure to own Maxim stock during most of the transactions at issue) should be addressed by a Delaware court. There is nothing novel about plaintiff's lack of standing under Section 327 and, of course, the California

[8] *See also In re Chambers Dev. Co., Inc. S'holders Litig.*, 1993 WL 179335, at *7 ("Requiring the defendants to also defend this action and engage in parallel discovery here would be grossly inefficient as well as inconvenient.") (Ex. 7 hereto).

courts are more than capable of deciding the option questions, which may or may not present "novel" questions of Delaware law.[9]

G. Plaintiff Fails to Rebut Defendants' Argument that the Result In California May Render The Delaware Actions Moot.

Defendants argued in their motion to dismiss or stay that the result of the federal action may render this action moot. Plaintiff's rejoinder to this argument is confined to a footnote, in which he asserts that the record offers no reason for this assumption as Defendants will likely be moving to dismiss the consolidated federal complaint in California. Opp. at 24 n.10. Plaintiff's argument misses the point. If the federal court grants the motion to dismiss on, *e.g.*, demand futility grounds, that ruling would be directly relevant to this action. *In the Matter of Application of Advanced Drivers Educ. Prods. & Training, Inc.*, 1996 WL 487940 (Del. Ch.) (Ex. 8 hereto); *see also Pence v. National Beef Packing Co.*, 1976 WL 1703 (Del. Ch.) (Ex. 9 hereto) (staying Delaware action in favor of federal proceeding that might moot Delaware action). Accordingly, this action should be stayed.

[9] Plaintiff does not address Defendants' argument that policy considerations indicate that this Court should defer to the federal court for a decision on what are essentially "repackaged" claims under the federal securities laws.

CONCLUSION

Plaintiff's opposition provides no reason why this action should proceed. The individual defendants respectfully request, therefore, that the action should be dismissed or stayed.

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CERTIFICATE OF SERVICE

I, Peter J. Walsh, Jr., hereby certify that on October 20, 2006, a copy of the within INDIVIDUAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY was served electronically via eFile on the following counsel of record:

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