IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION	)	CONSOLIDATED C.A. No. 15452

MEMORANDUM OPINION

Date Submitted: March 11, 1997
Date Decided: March 13, 1997

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CHANDLER, Vice Chancellor

Before the Court in this consolidated action is plaintiffs' motion to stay or for a voluntary dismissal without prejudice, pursuant to Chancery Court Rule 41(a)(2). The motion is contested by defendant, Walt Disney Company, and by several Disney directors, who are also defendants. Defendants ask the Court to reject plaintiffs' effort to stay or dismiss this action and to allow briefing to go forward on defendants' pending motion for judgment on the pleadings.

The heart of defendants' argument is that the reason for plaintiffs' requested stay or voluntary dismissal is purely tactical in nature. Defendants insist that plaintiffs' motion is a transparent attempt to avoid the risk of an adverse ruling on defendants' pending motion for judgment on the pleadings and to shift the focus of this litigation to a forum, California, that plaintiffs' counsel expect will apply Delaware's substantive corporation law less rigorously. In a similar vein, defendants contend that plaintiffs' counsel--the same counsel who filed identical lawsuits in California--filed the actions in this Court in an effort to monopolize the Delaware forum against other plaintiffs. Thus, defendants argue that plaintiffs' claims of breach of fiduciary duties by directors of a Delaware corporation should be resolved by this Court, where plaintiffs chose to file them.

Two stockholder derivative actions were filed in this Court on behalf of the Walt Disney Company, alleging that the director defendants breached their

fiduciary duties by approving compensation and severance arrangements with defendant Michael Ovitz, Disney's President. Plaintiffs filed their complaints in this Court in early January 1997. Three days earlier, the same counsel (Milberg Weiss Bershad Hynes & Lerach LLP) for plaintiffs here had filed an almost identical complaint on behalf of Richard and David Kaplan in the Superior Court of the State of California. Then, on January 28, 1997, Disney and the director defendants answered the complaints in this Court, moved for judgment on the pleadings, and filed an opening brief in support of the motion. The next day, January 29, Disney and the director defendants, who had been served with process in California, moved to stay the California lawsuits. The motion to stay the California litigation is scheduled to be heard tomorrow (Friday, March 14, 1997) in the California Superior Court. On February 11, 1997, almost two weeks after defendants' motion for judgment on the pleadings and supporting brief were filed in this Court, plaintiffs' counsel moved to stay or dismiss the Delaware litigation in deference to the California litigation.

The threshold question in these derivative actions is whether plaintiffs have alleged sufficient facts to excuse pre-suit demand. Delaware's substantive corporation law controls in connection with this fundamental question. *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 101-02 (1991). Defendants have

appeared and agreed to defend in Delaware. It is, therefore, appropriate that a Delaware court resolve the substantive question of Delaware law. Defendants filed a dispositive motion, specifically raising this threshold question.

All this seems simple and straightforward. Nevertheless, plaintiffs' counsel seek a stay or dismissal of the lawsuits they filed in Delaware because, they say, it is more efficient and convenient to litigate these claims in California. They contend that plaintiffs are entitled to a stay of these actions in favor of the first-filed *Kaplan* California action, citing *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g. Co.*, Del. Supr., 263 A.2d 281 (1970). Plaintiffs note that the lawsuits filed here were filed after the *Kaplan* California action and that the California Superior Court is capable of doing prompt and complete justice. They also note that several factors make litigating in California more convenient and efficient, including: 1) Disney's principal place of business is in Los Angeles County; 2) Disney has no assets and conducts little or no business in Delaware; 3) all the defendants have conducted business in California and are subject to the jurisdiction of the California courts; 4) all but one of the director defendants are domiciled in California; 5) a significant majority of the plaintiffs who have pursued derivative claims on behalf of Disney have done so in Los Angeles Superior Court; 6) the representative plaintiffs in the California actions represent the vast majority

of the shares of Disney stock owned by derivative plaintiffs; 7) virtually all of the witnesses and documents relevant to these actions are located in California; 8) Ovitz's employment agreement was executed in California; and 9) almost all of the events relevant to this litigation took place in California. In connection with the dismissal aspect of their application, plaintiffs contend that defendants will not suffer plain legal prejudice as a result of a dismissal because no preparations had begun for trial, plaintiffs have not delayed prosecution of the action, plaintiffs have an adequate explanation for seeking dismissal, and the pending motion by defendants can be heard just as easily in California. *See Draper v. Gardner Defined Plan Trust*, Del. Supr., 625 A.2d 859, 864 (1993).

This case is unusual. Typically, shareholder plaintiffs resist corporate defendants' efforts to disturb their choice of forum. In this instance, corporate defendants are defending plaintiffs' choice of their Delaware forum. Interestingly, plaintiffs' counsel filed derivative actions in Delaware even though the same counsel had filed identical complaints in the California courts only two or three days before filing in Delaware. Plaintiffs' counsel conceded at oral argument that all of the considerations regarding litigation convenience and efficiency were known to plaintiffs' counsel at the time of filing in Delaware and that nothing has changed since the date of filing that would affect the rationale for filing here.

It is undisputed that plaintiffs' counsel filed in this Court with full knowledge of the very considerations that they now say should prompt this Court to stay or dismiss these cases. Plaintiffs' counsel candidly admitted that the decision to file in Delaware was based on tactical considerations. The decision to seek a stay or dismissal is, in my view, also likely based on tactical considerations.

More important than counsel's tactical maneuvers, in my opinion, is the undeniable fact that the litigation here and in California raises threshold questions regarding compliance with Court of Chancery Rule 23.1, questions obviously controlled by Delaware's substantive corporation law. Such questions are more properly decided here rather than another jurisdiction, even though the other jurisdiction's courts are quite capable of applying Delaware law and of rendering prompt justice. Courts have an important interest in managing the litigation process so as to promote judicial efficiency, comity, and the fair administration of justice. However, in these circumstances I believe that Delaware is especially appropriate as a forum to resolve questions of Delaware law when a plaintiff has consciously and deliberately chosen this forum and when director defendants have willingly agreed to defend in this forum. The argument that a host of reasons make it more efficient and convenient to litigate in California rings particularly hollow in light of plaintiffs' calculated decision to file in Delaware after they filed

in California. In any event, "Delaware courts are accustomed to deciding controversies in which the parties are non-residents of Delaware and where none of the events occurred in Delaware." *Taylor v. LSI Logic Corp.*, Del. Supr., No. 302, 1996, Veasey, C.J. (Feb. 24, 1997) slip op. at 10. Furthermore, Disney and the director defendants have filed a potentially dispositive motion for judgment on the pleadings, a motion that squarely raises fundamental issues of Delaware law regarding plaintiffs' authority to assert derivative claims on Disney's behalf. Defendants filed their motion before plaintiffs requested a stay or dismissal of these cases. Plaintiffs' counsel did not warn defendants' counsel that the Delaware filing was for tactical reasons only, and that plaintiffs actually intended to litigate in California. Finally, Disney has represented that all of the participants in this controversy, who are under its direction, will be made available for these proceedings as necessary.

It is true, as plaintiffs point out, that little activity has occurred in these cases, except for defendants having filed an answer and opening brief in support of their motion for judgment on the pleadings. Yet this does not change the fact that plaintiffs wanted these cases to be heard in Delaware in spite of the convenience of the California forum and that defendants have agreed to appear and

to defend in Delaware. Considering all of these circumstances, I conclude that plaintiffs' motion to stay or dismiss these cases should be denied.

In short, I do not believe that equity or fairness is served by allowing plaintiffs' counsel to repudiate the jurisdiction in which they have deliberately chosen to litigate, a jurisdiction they selected while fully aware of the convenience and efficiency concerns that they now invoke as grounds for suspending operations on the Delaware front and moving to an alternative battle ground. One must wonder what theory of judicial efficiency or comity would promote a rule that encourages plaintiffs' counsel to file in multiple jurisdictions, force defendants to commit resources from coast to coast, and then allow plaintiffs' counsel, at their own whim, to move the lines of battle after they have already begun to form? Plaintiffs' counsel acknowledged at oral argument that Delaware's substantive law would likely control the threshold question of plaintiffs' ability to litigate their claims on Disney's behalf, questions that are raised directly in the defendants' pending motion for judgment on the pleadings. Counsel for Disney, moreover, has joined in the director defendants' position here, indicating that Disney agrees that Delaware is an appropriate forum despite the convenience factors urged by plaintiffs' counsel.

Ultimately, I also am not persuaded by plaintiffs' explanation of their need for a dismissal or stay of these cases. If inconvenience is the reason for litigating in California, no legitimate reason has been offered for why these cases were filed in Delaware in the first place. But having filed here, it now appears that plaintiffs seek to stay or dismiss the Delaware litigation in order to avoid an adverse result, a conclusion suggested by the timing of plaintiffs' motion (two weeks after defendants filed their motion for judgment on the pleadings). In addition, defendants have asserted defenses that they believe will be dispositive of these cases. Thus, I find that defendants will suffer prejudice if plaintiffs may dash in and out of a forum based on tactical considerations and an assessment that their case looks weak in light of the governing law in a particular jurisdiction.[1]

For all these reasons, I deny plaintiffs' motion to stay or to dismiss these cases.

IT IS SO ORDERED.

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[1]Defendants note that this Court's recent decision in *Zupnick v. Goizueta*, Del. Ch., C.A. No. 14874, Jacobs, V.C. (Jan. 21, 1997) bears directly on the core issues in this case regarding the presumption in favor of directors' judgment about executive compensation and the requirement of pre-suit demand in derivative litigation. *See Zupnick*, slip op. at 7 (absent fraud, judgment of directors regarding consideration for issuance of stock options "should be conclusive."). *Goizueta*, however, was based on long-established Delaware law. *See Beard v. Elster*, Del. Supr., 160 A.2d 731, 738 (1960).