

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

x
JOE B. INGRAM, Individually and On Behalf of All
Others Similarly Situated,

Plaintiff,

-against-

NETSMART TECHNOLOGIES, INC., JAMES L.
CONWAY, JOHN F. PHILLIPS, GERALD O. KOOP,
JOSEPH G. SICINSKI, FRANCIS J. CALCAGNO, JOHN
S.T. GALLAGHER, YACOV SHAMASH, INSIGHT
VENTURE PARTNERS, BESSEMER VENTURE
PARTNERS,

Defendants.

x

MOTION DATE: 1-29-07
SUBMITTED: 1-31-07
MOTION NO.: 002-MG
003-MG
004-MG; CASE DISP

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Upon the following papers numbered 1 to 53 read on these motions to dismiss; Notice of Motion and supporting papers 1-3; 4-5; 6-31; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 32-50; Replying Affidavits and supporting papers 51; Other 52-53; and after hearing counsel in support of and in opposition to the motions; it is

ORDERED that these motions by the defendants for an order pursuant to CPLR 327(a) and 3211(a)(4) dismissing the complaint are granted.

The defendant Netsmart Technologies, Inc. (“Netsmart”) is a Delaware Corporation whose corporate headquarters is located in Great River, New York. On November 18, 2006, Netsmart entered into an agreement and plan of merger (the “buyout”) pursuant to which two private equity firms, the defendants Insight Venture Partners (“Insight”) and Bessemer Venture Partners (“Bessemer”), would acquire Netsmart from its shareholders for \$16.50 per share. Netsmart’s Board of Directors approved the buyout upon the recommendation of a Special Committee comprised of independent directors, i.e., the defendants Joseph Sincinski, Francis Calcagno, John Gallagher, and Yacov Shamash. William Blair & Company (“Blair”) served as a financial advisor to Netsmart and the Special Committee. Blair delivered an opinion to the Special Committee that the buyout was fair to Netsmart’s shareholders. The buyout, which is valued at approximately \$115 million, is currently expected to close in March 2007 subject to, inter alia, majority shareholder approval.

On November 21, 2006, the Netsmart stockholders filed two purported class actions challenging the proposed buyout in the Delaware Chancery Court. Two more such actions were filed on December 1, 2006, and December 12, 2006, respectively. The plaintiff in the last action filed in Delaware, Leviticus Partners L.P., (“Leviticus”) owns 200,000 shares or 3% of Netsmart’s common stock. On December 11, 2006, the first three actions were consolidated. On December 14, 2006, Leviticus moved to consolidate the fourth action with the previously consolidated actions. However, on December 18, 2006, Leviticus sought to withdraw its motion for consolidation, to discontinue its Delaware action, and to commence an action in Suffolk County, New York. Leviticus’ request therefor was denied by the Chancery Court. On January 5, 2006, a consolidated amended complaint was filed in Delaware alleging that the individual defendants, the officers and directors of Netsmart, breached their fiduciary duty by failing to maximize shareholder value and by failing to make adequate disclosure to the shareholders. The consolidated amended complaint filed in Delaware also alleged that Insight and Bessemer aided and abetted the breaches of fiduciary duty committed by the individual defendants.

The plaintiff in this action, Joe Ingram, is an owner of Netsmart’s common stock. He commenced this purported class action challenging the proposed buyout by filing his complaint in Suffolk County on November 21, 2006, the same day that the first two complaints in the Delaware actions were filed. On January 10, 2007, Ingram filed an amended complaint, inter alia, adding Insight and Bessemer as defendants. Ingram’s amended complaint, like the consolidated amended complaint in the Delaware action, alleges that the individual defendants, the officers and directors of Netsmart, breached their fiduciary duty by failing to maximize shareholder value and by failing to make adequate disclosure to the shareholders. It also alleges that Insight and Bessemer aided and abetted the breaches of fiduciary duty committed by the individual defendants.

The defendants move to dismiss the New York action pursuant to CPLR 327 (a) and CPLR 3211(a)(4). The defendants argue that there are four pending actions in Delaware, Netsmart’s state of incorporation, between the same parties that assert substantially the same causes

of action and that seek the same relief. Accordingly, the defendants contend that Delaware is the more convenient forum. The plaintiff opposes the defendants' motions arguing that New York is the more appropriate forum for the adjudication of this action and that this action is not identical to the Delaware action.

In deciding a motion to dismiss based on the pendency of another action, the analysis is similar to that employed in entertaining a motion predicated on forum non conveniens. When another action is pending, a major concern, as a matter of comity, is to avoid the potential for conflicts that may result from rulings issued by courts of concurrent jurisdiction (*see*, **White Light Prods. v On The Scene Prods.**, 231 AD2d 90, 93). Thus, the primary concern in this situation is not which court has jurisdiction or even which court should hear the dispute. The question is which court should defer, as a matter of comity, to the other in order to avoid vexatious litigation and duplication of effort with the attendant risk of divergent rulings on similar issues (*Id.* at 96). In order to reach that issue, it is necessary that there be sufficient identity of both the parties and the causes of action asserted in the respective actions (*Id.* at 93).

With respect to the parties, the requirement is that there be substantial identity (*Id.* at 93-94). Although the individual plaintiffs in this action and in the Delaware action are not the same, all of the plaintiffs seek to act on behalf of Netsmart's shareholders and to bind them concerning the alleged breach-of-fiduciary-duty claims (*see*, **EZ Micro Technologies v Bernstein**, NYLJ, Dec. 23, 2002, at 25, col 5; *see also* **Lowinger v Reckson Assocs. Realty Corp.**, Sup Ct. Nassau County, Sept. 14, 2006, Bucaria, J., Index No. 012524/06). Moreover, all of the defendants in the New York action are defendants in the Delaware action. Although the Delaware action names some additional defendants, the presence of additional parties will not necessarily defeat a motion pursuant to CPLR 3211(a)(4) when, as here, both suits arise out of the same subject matter or series of alleged wrongs (*see*, **White Light Prods. v On The Scene Prods.**, *supra* at 94).¹

With respect to the subject of the actions, the relief sought must be the same or substantially the same (*Id.* at 94). As previously noted, the New York and Delaware actions arise out of the same subject matter or series of alleged wrongs and assert causes of action sounding in breach of fiduciary duty. In addition to class certification, they both seek injunctive relief enjoining the proposed buyout, as well as costs, disbursements, and attorney's fees. There are some differences in the relief demanded. The plaintiffs in the Delaware action seek damages and an accounting, and the plaintiff in the New York action seeks declaratory relief and injunctive relief directing the individual defendants to exercise their fiduciary duty. In addition, the New York action is pleaded with more factual specificity than the Delaware action. However, it cannot be said that the relief demanded is antagonistic and inconsistent or that the purposes of the two actions are entirely different (*Id.* at 94). Under these circumstances, the court finds that the relief sought in

¹ It appears from an examination of the Delaware complaints that the only additional defendants in the Delaware action are NT Acquisition, Inc., and NT Merger Sub, Inc., vehicles created for the purpose of consummating the transaction. Accordingly, their presence in the Delaware action does not raise any substantive issues that are not raised in this action.

the New York and Delaware actions is substantially the same.

CPLR 327(a) permits the court to stay or dismiss an action in the interest of substantial justice when the court finds that the action should be heard in another forum. Under CPLR 327(a) and the common-law doctrine of forum non conveniens, the court may dismiss an action when it determines that, although it has jurisdiction over the action, the action would be better adjudicated elsewhere (*see, Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479). The burden is on the defendant to establish that the selection of New York as the forum will not best serve the ends of justice and the convenience of the parties (*see, Banco Ambrosiano v Artoc Bank & Trust*, 62 NY2d 65, 74; *Islamic Republic of Iran v Pahlavi*, *supra* at 479; *Globalvest Mgmt.Co. v Citibank, N.A.*, 7 Misc 3d 1023[A], at *4). If the balance of conveniences indicates that trial in the plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper (*see, Globalvest Mgmt.Co. v Citibank, N.A.*, *supra* at *4).

The New York courts must consider and balance various competing factors when evaluating whether or not to retain jurisdiction over a particular action (*see, Islamic Republic of Iran v Pahlavi*, *supra* at 479). Although not every factor is necessarily articulated in every case, collectively, courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: the existence of an adequate alternative forum, the situs of the underlying transaction, the residency of the parties, the potential hardship to the defendant, the location of documents, the location of a majority of the witnesses, and the burden on the New York courts (*Id.* at 479; *World Point Trading v Credito Italiano*, 225 AD2d 153,158-159; *Evdokias v Oppenheimer*, 123 AD2d 598, 599; *Globalvest Mgmt.Co. v Citibank, N.A.*, *supra* at *4). A motion to dismiss based on forum non conveniens is subject to the discretion of the court, and no one factor is controlling (*see, Islamic Republic of Iran v Pahlavi*, *supra* at 479; *Globalvest Mgmt.Co. v Citibank, N.A.*, *supra* at *4).

Since this action and two of the Delaware actions were filed on the same day, priority of filing is not a significant factor in this case (*see, White Light Prods. v On The Scene Prods.*, *supra* at 99; *Lowinger v Reckson Assocs. Realty Corp.*, *supra* at 5), nor is the number of individual actions filed in either state a factor to be considered by the court (*see, Lowinger v Reckson Assocs. Realty Corp.*, *supra* at 5).

The fact that Netsmart was incorporated in Delaware weighs in favor of dismissal, but does not, by itself, necessitate a dismissal on forum non conveniens grounds (*see, Berger v Spring Partners*, 9 Misc 3d 1122[A], at *2). When an action involves the internal affairs of a foreign corporation, the state of incorporation has a paramount interest in hearing the claim. Dismissal in favor of the state of incorporation most often occurs when, as here, related actions have already been commenced in such state (*see, Sturman v Singer*, 213 AD2d 324, 325; *Hart v General Motors*, 129 Ad2d 179, 185; *Berger v Spring Partners*, *supra* at *2). Moreover, Delaware is an adequate alternative forum. The Delaware Chancery Court is, of course, capable of deciding the issues presented and granting appropriate relief.

On the other hand, the existence of a substantial nexus between this action and the State of New York weighs against dismissal on forum non conveniens grounds (*see, Berger v Spring Partners, supra* at *2). New York has an interest in protecting its citizens from the questionable acts of foreign corporations when, as here, the foreign corporation has significant contact with New York (*see, Broida v Bancroft*, 103 AD2d 88, 92; *Berger v Spring Partners, supra* at *3). The location of Netsmart's principal place of business is New York, and Netsmart's books and records are located in New York. Netsmart's stock is traded on a New York stock exchange. Netsmart's stockholders' and directors' meetings are held in New York, and a majority of Netsmart's officers and directors reside in New York. Netsmart's employment agreements and other contracts contain forum-selection and choice-of-law provisions that designate New York as the exclusive jurisdiction for the resolution of disputes thereunder. Moreover, the breaches of fiduciary duty alleged in the complaint arise from conduct that occurred in New York (*see, Broida v Bancroft, supra* at 92-93). Finally, the defendants Insight and Bessemer are both headquartered in New York.

Having considered the foregoing factors, the court finds that the most compelling factor in this case is the risk of divergent rulings on the same issue. Given the defendants' significant contacts with New York, it would not be unduly burdensome for them to defend this case in New York. However, the nature of the challenged transaction itself militates against separate determinations by courts of different jurisdictions. One of the abiding principles of the law of corporations is that issues of corporate governance are regulated by the law of the state in which the corporation is chartered, in this case, Delaware (*see, Hart v General Motors, supra* at 182). While this court is perfectly capable of, and would not be unduly burdened by, applying the law of the State of Delaware (*see, Continental Ins. Co. v Garlock Sealing Tech. LLC*, 23 AD3d 287, 288), the validity of the transaction in this case cannot be decided on a state-by-state basis. The confusion that would be created by a Delaware judgment enjoining the buyout and the denial of such relief by this court, or vice versa, is self-evident (*see, Hart v General Motors, supra* at 183-184). While this court is confident that it would address the issue in a similar fashion to the Delaware court, the court is mindful that the issues presented and the record developed is, in large part, dependent upon the choices made by the parties, which adds to the risk of inconsistent determinations. Moreover, this court is cognizant of the fact that Leviticus, a plaintiff in one of the Delaware actions, sought to discontinue its action in Delaware and to commence a similar action in New York. The Delaware court refused to cede jurisdiction to New York and, in fact, has scheduled a preliminary injunction hearing for February 27, 2007. Under these circumstances and in view of the fact that Delaware is an adequate alternative forum, the interest of substantial justice requires this court to defer, as a matter of comity, to Delaware. Accordingly, the motions by the defendants for an order of dismissal are granted.

DATED: February 6, 2007

J. S.C.