SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Justice

PATRICIA DEVINE

-v-

EDISON SCHOOLS, INC.

INDEX NO. 602295/03

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion is decided in accordance with the attached Decision and Order

FILED

FEB 13 2004

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 2/5/04

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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PATRICIA DEVINE, on behalf of herself and all others similarly situated,

Plaintiffs,

Index No. 602295/03

-against-

EDISON SCHOOLS, INC, BENNO C. SCHMIDT, JR., CHRIS WHITTLE, JOHN B. BALOUSEK, CHRIS CERF, JOAN COONEY, CHARLES DELANEY, FLOYD FLAKE, RONALD F. FORTUNE, EDWARD S. **HARRIS**, PAUL L. LINCOLN, LOWELL W. ROBINSON, and TIMOTHY P. SHRIVER,

Defendants.

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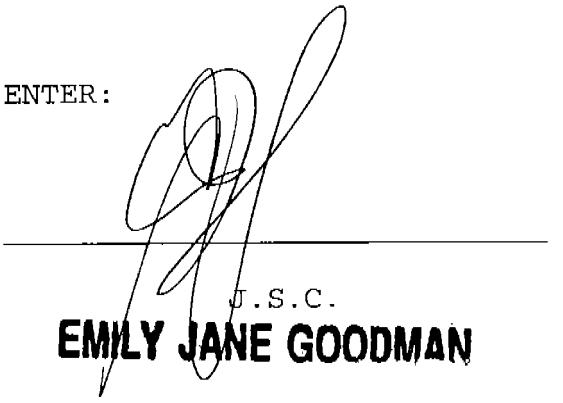
Emily Jane Goodman, J.:

In this action brought by shareholders to enjoin the proposed merger between defendant Edison Schools, Inc. (Edison) and defendant Liberty Partners (Liberty), plaintiffs move, **by order** to show cause, for an order compelling expedited discovery. Defendants Edison, and John B. Balousek, Joan Ganz Cooney, Rev. Floyd H. Flake, Ronald F. Fortune, Edward S. Harris, **Lowell** W. Robinson and Timothy P. Shriver (the director defendants) cross-move for an order dismissing the shareholder first amended class action complaint (amended complaint). Defendants Benno C. Schmidt, Jr., Chris Whittle, Chris Cerf, Adam T. Feild, Chris Scarlatta, John Chubb, Jim Howland, Deborah McGriff, Donald Sunderland, Laura Eshbaugh, Kathleen Hamel, Joe Keeney, Martha

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 5, 2004

ENTER:



J.S.C.
EMILY JANE GOODMAN

Olson, and David Graff (the officer defendants) join in the director defendants' cross motion.

I. Background

Edison is a publicly traded company in the business of the private operation of public schools. It is incorporated in Delaware, but is headquartered in New York. The named plaintiffs, Patricia Devine and Ron Young (Young) are shareholders in Edison, and purport to represent a potential class of similarly situated persons.

According to the amended complaint, Edison has experienced a number of financial reversals since its initial, and highly hopeful, public offering in 1999. On July 14, 2003, Edison announced that it had signed a merger agreement for a "going-private" transaction with a company formed by defendant Chris Whittle (Whittle), Edison's founder and CEO, and an affiliate of defendant Liberty. Pursuant to the terms of the merger agreement, each share of Edison Class A and Class B stock would be acquired for $1.76 per share, in cash. The new company would continue to be managed by Whittle, and some other members of Edison's senior management.

It is plaintiffs' contention that the price of $1.76 per share does not represent the "attractive premium" suggested by Whittle (Amended Complaint, ¶ 50), but *is*, rather, a "substantial discount" off the true worth of Edison's stock (*id.*, ¶ 51),

rendering the consideration provided for in the **merger** agreement "woefully inadequate" and "unfair" to Edison's shareholders, and which "clearly does not represent the true value of the Company.'' *Id.*, ¶ 52.

In the present action, plaintiffs bring claims for breach of fiduciary duty on the part of defendants in approving the merger without, among other things, considering alternatives to the transaction with Whittle and Liberty; failing to conduct an auction ***to*** obtain the best value for Edison's shareholders; failing to conduct a market check to ensure that the price of $1.76 per share was the best obtainable; and relying on a flawed valuation analysis from Edison's financial advisor, Evercore Group, Inc, (Evercore). Plaintiffs also allege that Evercore had a conflict of interest, having had a prior relationship with Liberty. Plaintiffs also bring a claim for defendants' alleged failure to disclose material information in the preliminary proxy statement which it presented to the Securities and Exchange Commission (SEC), which allegedly resulted in harm to plaintiffs.

Immediately upon the announcement of the merger agreement, on July **14,** 2003, several lawsuits were filed in the Chancery Court in the State of Delaware, where Edison is incorporated, all seeking class action status. Proceedings are presently taking place to determine lead counsel in those actions. One of the actions was commenced by Young, a named plaintiff herein *(Young* ***v***

Belousek, C.A. **No.** 20426 [Del Ch]). However, Young claims that he commenced the instant action on July 17, 2003 to add the claim of failure to disclose, and to include the officer defendants, some or all of whom are allegedly not amenable to jurisdiction in Delaware. Young claims that he will discontinue the Delaware action if the present action is allowed to proceed.

II. Present Motions

Plaintiffs are seeking expedited discovery, because they believe that the special meeting **at** which the merger **will** be voted upon is imminent, and that discovery is necessary before they can make a proper motion to enjoin the vote. Defendants move for dismissal of the complaint on grounds of forum non convenience (CPLR 327), prior pending action (CPLR 3211[a][4]), and failure to state a cause of action (CPLR 3211[a][7]).

III. Discussion

A. Prior Pending Action and Forum Non Conveniens

Pursuant to CPLR 3211(a)(4), an action may **be** dismissed where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States ... ." *Id*. Courts have broad discretion in deciding whether to dismiss an action on this ground *(see, Whitney v Whitney*, 57 NY2d 731 [1982]), and the court, instead, "may make such order as justice requires ... ." CPLR 3211(a)(4).

Defendants have also moved for dismissal under CPLR 327(a),

which calls for the dismissal of an action if "in the interest of substantial justice the action should be heard in another forum ... ." *Id.* It is appropriate to consider these alternative grounds of relief, because "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." *White Light Productions, Inc. v On The Scene Productions, Inc.*, 231 AD2d 90, 93 (1st Dept 1997).

In the present case, Young commenced a suit substantially similar to the present one several days after the announcement of the merger, and shortly before the commencement of the present action. According to plaintiffs, Young joined in the present action, by the filing of the amended complaint with plaintiff Devine, when he allegedly realized that claims existed which allegedly include the officer defendants, with regard to the alleged deficits in the preliminary proxy statement.

If an action is to be dismissed pursuant to CPLR 3211(a)(4), "it is necessary that there be a sufficient identity as to both the parties and the causes of action asserted in the respective actions." *White Light Productions, Inc. v On The Scene Productions, Inc.*, 231 AD2d at 93; *see also Trump Empire State Partners v Empire State Building Associates*, 245 AD2d 188 (1st Dept 1997) (dismissal under CPLR 3211(a)(4) appropriate when there is a "substantial identity of parties" and "'essential'

identity of issue [citation omitted]"). The existence of "some additional parties" does not bar dismissal. *Barringer* v *Zgoda*, 91 AD2d 811, 811 (3d Dept 1982); ***see*** *also* *White Light Productions, Inc. v On The Scene Productions, Inc.*, 231 AD2d 90, *supra*.

In the present instance, the two actions share a substantial identity of parties, and an essential identity of issue, i.e., whether the merger should be enjoined due to the breaches of fiduciary duty allegedly perpetrated by the defendants. *See* *Schaller* v *Vacco*, 241 AD2d 663, 663 (3d Dept 1997)(while legal theories in different actions may differ, dismissal under 3211[a] [4] appropriate where actions are based on "same actionable wrong" and "seek the same relief"). Here, the wrongs allegedly committed by the defendants, with regard to their alleged breaches of fiduciary duty, mirror the faults allegedly affecting the preliminary proxy statement, and both claims call for the identical injunctive and monetary relief. *And*, while jurisdiction over the officer defendants might be unfeasible, plaintiffs have failed to state that their claim for failure to disclose arising from the preliminary proxy statement cannot be brought against the director defendants in the Delaware action, or that the officer defendants are necessary parties to such a claim. As a result, dismissal of the present action, in favor of the action which Young previously commenced in Delaware, is

appropriate under CPLR 3211(a) **(4).**

The action must be dismissed pursuant to CPLR 327 as well. *"An* action, properly subject to jurisdiction in the courts of this State, may nevertheless be dismissed if a court determines that, 'in the interest of substantial justice the action should be heard in another forum.'" *World Point Trading PTE, Ltd. v Credito Italiano, 225* AD2d 153, 158 (1st **Dept** 1996), quoting CPLR327(a) and ***Islamic Republic of Iran v*** *Pahlavi,* 62 NY2d 474, 478-479 (1984), ***cert*** *denied* 469 **US** 1108 (1985). The doctrine is **based** on "justice, fairness and convenience [internal quotes and citation omitted]" ***(Grizzle v Hertz*** *Corporation, 305* AD2d 311, 312 [1st Dept 2003]), "and the burden is on the party challenging the forum to demonstrate that the action would be **best** adjudicated elsewhere." Id.; see ***also Islamic Republic*** *of Iran v Pahlavi, supra.*

Among the factors to be considered in determining a motion under CPLR 327 are "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit." ***Islamic Republic*** *of Iran v* ***Pahlavi,*** *62* NY2d at 479; ***see*** *also* ***Grizzle v*** *Hertz Corporation, 305* AD2d 311, *supra.* Courts have also considered the likelihood that, in a shareholder action, the state of incorporation will have an interest in the outcome, especially since "the issue of corporate governance ... is

governed by the law *of* the State in which the corporation is chartered ... ." *Hart v* ***General Motors*** *Corporation*, 129 AD2d 179, 182 (1st Dept 1987).[1]

In a case decided **by** the Appellate Division, First Department, it was determined that **a** case, otherwise jurisdictionally sound, should nonetheless **be** heard in the courts of the State of Delaware, where the defendant corporation was incorporated, especially where, as here, there were multiple litigations (i.e., two) already pending in that jurisdiction. *See Sturman V Singer*, 213 AD2d 324 (1st **Dept** 1995). The *Sturrnan* court reasoned that "Delaware, the State of incorporation, has a paramount interest in this claim that corporate decisions to make investments and hire **a** consulting firm amounted **to** a breach of fiduciary duty ... ." ***Id.*** at 325. The *Sturman* court concluded that "the New York court would be burdened with the task of deciding a dispute with the **knowledge** that the State of incorporation could decide quite differently," so **as** to raise the concern of inconsistent decisions between the two jurisdictions. ***Id.***

In the present case, there are 12 similar actions pending in

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[1]This court notes that there is no support for defendants' claim that the affairs of a foreign corporation ***must*** **be** adjudicated in the state of incorporation, the **so-called** "internal affairs doctrine." However, as stated in *Hart (supra)*, the matter should be adjudicated under the law of the state of incorporation, and will be a matter of concern to that state.

Delaware, one brought by one of the plaintiffs herein. Defendants have the burden of defending in two jurisdictions, facing the possibility that the actions in two states will result in inconsistent rulings. Based on these facts, Delaware's obvious interest in the matter, concerning the management and operation of a Delaware corporation, and the applicability of Delaware law to this action, this court determines that Delaware is the appropriate forum for the resolution of the present action. Therefore, defendants' cross motion should be granted.

IV. Conclusion

Because there is a prior pending action, and this jurisdiction is an inconvenient forum for the determination of this action, where numerous similar actions are already pending in Edison's state of incorporation, defendants' cross motion should be granted, and plaintiffs' motion denied.

Accordingly, it is

ORDERED that plaintiffs' motion for expedited discovery is denied as moot; and it is further

ORDERED that defendants' cross motion to dismiss the complaint is granted to the extent that the complaint is dismissed pursuant to CPLR 3211(a)(4) and 327; and it is further

ORDERED that the first amended class action complaint is dismissed, with costs and disbursements to the moving defendants as taxed by the Clerk of the Court; and it is further