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SHORT FORM ORDER

INDEX
NO.: 41990-09

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

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 12-10-09
SUBMITTED: 12-10-09
MOTION NO.: 002-MD

IN RE ALLION HEALTHCARE, INC. SHAREHOLDERS LITIGATION

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Upon the following papers numbered 1 27 read on this motion for a stay ; Notice of Motion and supporting papers 1-14 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 15-23 ; Replying Affidavits and supporting papers 24-27 ; it is,

ORDERED that the motion by the defendants for an order staying this action is denied.

The defendant Allion Healthcare, Inc. (hereinafter "Allion") is a Delaware corporation whose corporate headquarters is located in Melville, New York. On October 18, 2009, Allion entered into a definitive merger agreement with the defendants Brickell Bay Acquisition Corp. and Brickell Bay Merger Corp., affiliates of the defendant H.I.G. Capital, LLC, to acquire Allion for $278 million. The merger agreement was unanimously approved by Allion's Board of Directors upon the recommendation of a Special Committee comprised of the defendants Willard Derr and Gary Carpenter. Raymond James & Associates served as Allion's financial advisor, and the law firm of Alston & Bird served as its legal advisor.

On October 20, 2009, the plaintiff Denise Fowler commenced this action challenging the Allion merger. On October 27, 2009, an action challenging the Allion merger was filed in the Delaware Chancery Court by the Virgin Islands Government Employees' Retirement System (hereinafter "VIGERS"). Two days later, on October 29, 2009, Steamfitters Local Union 449 (hereinafter "Steamfitters") filed a second action in the Delaware Chancery Court challenging the Allion merger. That action was subsequently withdrawn. On November 2, 2009, a third action challenging the Allion merger was filed in the Delaware Chancery court by Union Asset Management Holding AG. On November 10, 2009, after withdrawing its prior action in Delaware, Steamfitters commenced an action in this court challenging the Allion merger. On November 16, 2009, the Delaware Charcery Court granted an unopposed motion for class certification by VIGERS and Union Asset Management Holding AG. By an order of this court dated November 18, 2009, the Fowler and Steamfitters actions were consolidated, among other things. The consolidated complaint alleges, inter alia, that the Allion merger unfairly favors a group of shareholders who collectively own 41% of Allion's common stock and that the price Allion's unaffiliated public shareholders will receive for their shares ($6.60 per share) is undervalued. The defendants have moved to stay this action on the grounds that the pending class action in Delaware, Allion's state of incorporation, asserts the same claims against the same defendants as this action, that the Delaware action is being prosecuted more quickly and is ahead of this action in terms of scheduling and discovery, and that the Delaware plaintiffs represent a much larger number of outstanding shares of Allion stock than the plaintiffs in this action. Fowler and Steamfitters oppose the defendants' motion arguing that this action is first in time, that it is not identical to the Delaware action, that New York is the more appropriate forum for the adjudication of this dispute, and that it is the Delaware action that should be stayed, not this action

When there is an action pending in another jurisdiction between the same parties for the same or substantially the same relief, 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).

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 stay or 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). It is well established that, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should not be disturbed (*see*, **Waterways Ltd. v Barclays Bank**, 174 AD2d 324, 327).

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: the existence of an adequate alternative forum, the situs of the underlying transaction, the residency of the parties, the state of incorporation, 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 (**Berger v Spring Partners**, 9 Misc 3d 1122[A] at *3; **Globalvest Mgmt.Co. v Citibank, N.A.**, *supra* at *4). The determination rests within the exercise of the court's sound discretion, and no one factor is controlling (*see*, **Islamic Republic of Iran v Pahlavi**, *supra* at 479).

The fact that Allion is incorporated in Delaware weighs in the defendants' favor (*see*, **Sturman v Singer**, 213 AD2d 324, 325; **Broida v Bancroft**, 103 AD2d 88). On the other hand, Allion's contacts with the State of New York are substantial. Allion's executive office and principal place of business is located in Melville, New York. Allion's stock is traded on the NASDAQ Global Market, which is headquartered in New York City. Four of Allion's six directors work and reside in New York State, and three of them work and/or reside in Suffolk County. Both directors who comprised the Special Committee work and reside on Long Island. Allion's annual shareholder meetings have been held in Melville, New York, for the past five years. Allion's transfer agent, as well as its books and records, are located in New York. Allion's financial advisor and legal counsel both maintain offices in New York. It is anticipated that the closing of the merger will be held in Melville, New York. The proxy statement instructs shareholders to direct certain important communications, such as revocations of tendered proxies and demands for appraisal rights, to Allion at its Melville office. The proxy solicitor is also located in New York. Accordingly, it would appear that Allion's only nexus with Delaware is the fact that it is incorporated there (see, Broida v Bancroft, supra at 93).[1]

The defendants contend that the action in Delaware is proceeding more quickly than this action and that the Delaware plaintiffs represent a much larger number of outstanding shares of Allion stock than the plaintiffs in this action. The record reflects that the Delaware action is not substantially closer to resolution than this action and that the actions already taken by the Delaware court have been unopposed or on consent of the parties. Moreover, for the purpose of determining the issue before the court, the number of shares of stock that the plaintiffs represent is not a significant factor. Indeed, this court is not aware of, nor could the parties cite to, any case in which it has been a factor. Although the defendants suggest that the Delaware

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[1]The defendants Brickell Bay Acquisition Corp. and Brickell Bay Merger Corp. are also Delaware corporations, but they were formed solely in connection with the merger.

plaintiffs may be more representative of the class of shareholders than the plaintiffs in this action, there is no evidence in the record to support such a contention.

The parties agree that the complaint in this action and the complaint in the Delaware action are not identical. This action is pleaded with far more factual specificity than the Delaware action and raises issues that are not raised, and presumably will not be considered, in the Delaware action. While this court recognizes that it poses a potential hardship to the defendants to litigate in two forums, the situs of the underlying transaction is here in New York, where Allion is headquartered, a significant amount of evidence is located, and many of the witnesses work or reside. Much of the disclosure that has been and will be produced is relevant to both actions. The parties have been cooperating in order to avoid duplication of effort, and the court will make every effort to ensure that duplication of effort is minimized. Moreover, the defendants have acknowledged that New York is not an inconvenient forum in which to litigate.

There has been no showing that the retention of this action would unduly burden the court. The Commercial Division has been successfully handling complex commercial and corporate litigation since 1993 (*see*, **Topps Co., Inc. Shareholder Litigation**, 19 Misc 3d 1103[A] at *6). Shareholder class actions involving Delaware companies are not an unknown phenomena in the Commercial Division (**Id**. at *6). Moreover, 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).

Finally, the court notes that, although it is not a controlling factor, Fowler's New York action is first in time. It is still the general rule in New York that the court which has first taken jurisdiction is the one in which the matter should be determined, and it is a violation of the rules of comity to interfere (*see*, **White Light Prods. v On The Scene Prods**., *supra* at 96-99; **Topps Co., Inc. Shareholder Litigation**, *supra* at *3). The plaintiffs' choice of forum should not be disturbed unless the balance strongly favors the jurisdiction in which the defendants seek to litigate their claims or when the action sought to be restrained is vexatious, oppressive, or instituted by duplicity or to obtain some unjust or inequitable advantage (**Topps Co., Inc. Shareholder Litigation**, *supra* at *3). Forum shopping is not at issue if New York is a logical and proper place to go forward (**Id**. at *3).

Consideration of all of the relevant factors leads this court to conclude that the plaintiffs should not be deprived of their chosen forum (*see*, **Broida v Bancroft**, *supra* at 92). New York clearly has an overwhelming nexus to this controversy and is a highly appropriate forum for its resolution (*see*, **Topps Co., Inc. Shareholder Litigation**, *supra* at *3). By contrast, the only connection that this controversy has with Delaware is that Allion is presently incorporated there (**Id**. at *4). Thus, the court finds that the defendants have not met their burden of establishing that the ends of justice and the convenience of the parties would best be served if the litigation were to proceed in Delaware (*see*, **Broida v Bancroft**, *supra* at 92). As a corporation that conducts business in New York, that is alleged to have committed a wrong

arising out of its activities here in New York, and that has an economic impact in this state, Allion sufficiently affects the interests of this jurisdiction to require the defendants to litigate in our courts (**White Light Prods. v On The Scene Prods.**, *supra* at 99). Accordingly, the motion is denied.

Dated: December 22, 2009

HON. ELIZABETH HAZLITT EMERSON

J.S.C.