

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

PRESENT: Cahn
Justice

PART 49m

In Re: The Topps Co. Inc.
Shareholder Litigation

- v -

INDEX NO. 600715/07
MOTION DATE 5/30/07
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

Dated: 6/8/07 [Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

-----X
IN RE: THE TOPPS CO., INC.
SHAREHOLDER LITIGATION

Index No. 600715/07

-----X
HERMAN CAHN, J.:

Defendants The Topps Company, Inc. (Topps), Arthur T. Shorin, Allan [redacted], Stephen
D. Greenberg, Ann Kirschner, David M. Mauer, Jack H. Nussbaum and Richard Tarlowe (the
Topps defendants) move, pursuant to CPLR 3211(a)(4) and 2201, to dismiss or stay this
consolidated shareholder class action in favor of similar class action litigation pending in
Delaware Chancery Court.

On March 6, 2007, a private equity group led by former Disney CEO Michael Eisner
announced that it had entered into an agreement (the Merger Agreement) to purchase Topps, a
publicly-traded corporation incorporated in Delaware and head-quartered in New York, at \$9.75
per share for a total transaction value of \$384.5 million. The Merger Agreement provides for a
40-day "Go-Shop Period" for Topps to actively solicit and entertain other proposal(s) to acquire
the company. Three of the company's ten directors voted against adoption of the Merger
Agreement. Arnaud Ajdler, one of the dissenting directors and Managing Director of Crescendo
Partners, L.P., the second largest Topps' stockholder, publicly objected to the buyout, claiming
that it does not maximize shareholder value. This transaction is currently scheduled to be
submitted for stockholder approval on June 28, 2007.

On March 7th, one day after the announcement, a shareholder class action was filed in
this court, entitled Lipscomb v The Topps Company, Inc., Index No. 600715/07. The complaint

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seeks to enjoin the buyout on the ground that Topps and the individual director defendants breached their fiduciary duties to Topps' shareholders by agreeing to a buyout at a price that materially undervalues the company and does not represent the true value of the stock. Three other shareholder class actions were filed in this court on March 9, 14 and 15, 2007, under Index Nos. 600768/07, 600822/07 and 600837/07, respectively. On March 20th, plaintiffs filed a motion seeking expedited discovery in this action, which was granted by this court on March 30th. These four class actions were consolidated on April 20th, and a consolidated amended class action complaint was served on May 3rd. A Confidentiality Stipulation and Order has been entered. A briefing schedule for preliminary injunctive relief has been set and the court has scheduled a hearing on that motion for June 18th.

However, litigation was also commenced in Delaware. On March 8, 2007, the first of five virtually identical shareholder class actions was filed in Delaware Chancery Court, entitled Freiman v The Topps Company, Inc., C.A.No. 2777-VCS (Del Ch March 8, 2007). Between March 8th and 16th, four more actions were filed in Delaware Chancery Court. On March 26th, the Delaware Chancery Court signed an order consolidating the five actions pending in that court.

The court has been informed that the parties in this action and the Delaware action have agreed to coordinate discovery. As of May 4, 2007, the defendants have produced approximately 39,000 pages of documents, and are currently working to schedule depositions. Every deposition that has thus far been scheduled has been scheduled to take place in New York.

On April 27, 2007, the Topps defendants moved to dismiss, or in the alternative, stay the Delaware action in favor of this New York action. By Opinion dated May 9, 2007, the Chancery

Court denied the motion, concluding, among other things, that Delaware was the appropriate venue because the claims asserted in both consolidated actions are governed by Delaware law and may involve novel questions of law. Interestingly, the Vice Chancellor devotes a substantial portion of his Opinion to arguments urging this court to dismiss or stay the first-filed action in deference to the purported paramount interest of the Delaware courts. However, as discussed more fully below, the Chancery Court's belief that New York law requires this court to dismiss or stay this action in deference to the Delaware action is based on outdated and incorrect legal principles.

After the Chancery Court's ruling and argument on this motion,¹ an additional lawsuit was filed in the Delaware Chancery Court relating to a competing offer made on April 12, 2007 during the go-shop period by The Upper Deck Company (Upper Deck) to acquire Topps at \$10.75 per share. On June 5th, Upper Deck and Northwood Investors LLC commenced an action in Delaware against the Topps defendants and the Eisner entities alleging that the Topps defendants breached a Confidentiality Agreement dated March 19, 2007 between Upper Deck and Topps, committed fraud and breached their fiduciary duties to Topps' shareholders by failing to negotiate with Upper Deck in good faith. In addition, Upper Deck alleges that the director defendants' refusal to declare Upper Deck's offer a "Superior Proposal" and thus Upper Deck an "Excluded Party" under the Merger

¹This new development has been brought to the court's attention by the Topps defendants and plaintiffs in sur-reply letters to the court dated June 5 and 6, 2007, respectively, each side presenting arguments as to how it supports their position.

Agreement was a further breach of their fiduciary duties.² Upper Deck seeks an injunction preventing Topps from enforcing the standstill provisions of the Confidentiality Agreement that prohibit Upper Deck from engaging in a direct tender offer to Topps' shareholders or the direct solicitation of proxies from Topps's shareholders in order to vote against approval of the Merger Agreement. The Chancery Court has added Upper Deck's preliminary injunction motion to its calendar June 11th.

CPLR 3211(a)(4) authorizes a court to dismiss or stay an action on the ground that there is another action pending between the same parties for the same cause of action in another court. The rule gives courts discretion, which should be exercised "to avoid vexatious litigation and duplication of effort, with the attendant risk of divergent rulings on similar issues." White Light Productions, Inc. v On The Scene Productions, Inc., 231 AD2d 90, 96 (1st Dept 1997). The court must consider in which jurisdiction litigation was first commenced, how far each litigation has progressed and which forum has a more significant and substantive nexus to the controversy, and thus is the most appropriate forum for its resolution. Certain Underwriters at Lloyd's, London v Accident and Indemnity Co., 16 AD3d 167, 168 (1st Dept 2005); San Ysidro Corp. v Robinow, 1 AD3d 185, 186 (1st Dept 2003); Seneca Ins. Co. v Lincolnshire Management, Inc., 269 AD2d 274 (1st Dept 2000). Basically, New York courts undertake an analysis similar to that employed in consideration of a forum non conveniens motion (White Light Productions, Inc., 231 AD2d at 93, citing Flintkote Co. v American Mutual Liability Co., 103 AD2d 501, 506 [2d

²Under the Merger Agreement, if Topps receives a Superior Proposal during the go-shop period, Topps' board may designate the party submitting that acquisition proposal an Excluded Party, entitling it to receive certain non-public information and allowing Topps to participate in discussions or negotiations with that party.

Dept 1984], affd 67 NY2d 857 [1986]), by considering and balancing such factors as the situs of the underlying transaction, residency of the parties, potential hardship to the defendants, location of documents and of a majority of the witnesses, and burden on the New York courts. Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984), cert denied 469 US 1108 (1985); World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153, 158-59 (1st Dept 1996).

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.” White Light Productions, Inc., 231 AD2d at 96, quoting City Trade & Industries, Ltd. v New Central Jute Mills Co., 25 NY2d 49, 58-59 (1969). Although priority in the commencement of the action is a factor to be considered in determining whether dismissal pursuant to CPLR 3211(a)(4) is appropriate, it is not necessarily dispositive. Roberts v 112 Duane Associates LLC, 32 AD3d 366, 368 (1st Dept 2006); Certain Underwriters at Lloyd’s, London, 16 AD3d at 168; San Ysidro Corp., 1 AD3d at 186. Exceptions to the first-filed rule are recognized where the action sought to be restrained is vexatious, oppressive or instituted by duplicity or to obtain some unjust or inequitable advantage. Certain Underwriters at Lloyd’s, London, 16 AD3d at 168; San Ysidro Corp., 1 AD3d at 186; White Light Productions, Inc., 231 AD2d at 96-97.

The fact that the Lipscomb action was commenced in New York on the day after the announcement of the Topps’ going private transaction shows the tenacity and ability of this plaintiff and his counsel to act quickly and forcefully to challenge what they believe to be improper actions by the Topps’ board of directors. Forum shopping is not at issue if New York is a logical and proper place to go forward. Seneca Ins. Co. v Lincolnshire Management, Inc.,

269 AD2d 274, 275 (1st Dept 2000), citing Fischer & Porter Co. v Moorco International, Inc., 869 F Supp 323, 325 (ED Pa 1984). The plaintiffs' choice of forum should not be disturbed unless the balance strongly favors the jurisdiction in which the Topps' defendants seek to litigate the claims (Anagnostou v Stifel, 204 AD2d 61 [1st Dept 1994]), otherwise it would be the Topps defendants who would benefit from shopping for what they perceive to be the most favorable forum. In addition to the fact that litigation was first commenced in New York, the Delaware action has not progressed any farther or faster than this action. Discovery has proceeded in tandem in both actions, in order not to unfairly burden defendants with duplicate demands, and briefing schedules for preliminary injunction motions to be heard later this month are in place.

New York clearly has an overwhelming nexus to this controversy and is a highly appropriate forum for its resolution. Topps has substantial ties to New York and plaintiffs' claims arise out of conduct that took place in this state. Topps was founded in Brooklyn, New York in 1938. Its present corporate headquarters and principal place of business is in Manhattan, where its books and records are kept. The majority of Topps' officers and directors either reside or do business in New York. The company's transfer agent, American Stock Transfer & Trust company, is also located in New York, and Topps scheduled its shareholder meetings in New York. Topps' stock is traded on the NASDAQ, which is based in New York. The company's corporate counsel and investor relations firm are similarly located in New York.

The conduct giving rise to the claims in this action involve conduct that occurred almost exclusively in New York. The Merger Agreement was principally negotiated in New York. The meetings of the Topps' board where the merger was discussed and ultimately approved took place in New York, and the closing of the merger is scheduled to take place in Manhattan.

The Merger Agreement has a choice of law clause mandating the application of New York law and a choice of forum clause requiring any suit to be heard in the state or federal courts of New York.

In addition, Topps' independent auditors, legal and financial advisors on the buyout deal and proxy solicitation firm are all located in Manhattan. As such, this court has personal jurisdiction over most of the witnesses who are likely to be called to testify or produce documents.³

This is not the typical situation where a defendant claims that it is inconvenient to litigate in New York. Indeed, in their motion to dismiss or stay the Delaware action, the Topps defendants themselves acknowledged that New York is not an inconvenient forum because Topps is located in New York, as are a majority of the director defendants, relevant documents and witnesses. This acknowledgment by the Topps defendants weighs strongly in favor of maintaining this action in New York. Mionis v Bank Julius Baer & Co., Ltd., 9 AD3d 280, 282 (1st Dept 2004).

In contrast, the only connection with Delaware is that Topps is presently incorporated in that state.⁴ Thus, there is no question that Delaware law will apply to certain aspects of this dispute. Venturetek, L.P. v Rand Publishing Co., Inc., 39 AD3d 317 (1st Dept 2007) ("the law of

³While Delaware has jurisdiction over the director defendants (see 10 Del Code § 3114[a]), compulsory process over many non-party witnesses may be lacking.

⁴Although the Chancery Court stated that Topps has been incorporated in Delaware for "generations" (Opinion, at 18), in fact, it has only been incorporated in Delaware since 1987. The company is successor to Topps Chewing Gum, Inc., which was established as a partnership in Brooklyn, New York in 1938 and was incorporated under the laws of New York in 1947. Kupilas Affirm., Exh. E thereto: Topps' 2006 S.E.C. Form 10-K.

the state in which an entity was incorporated is controlling as to matters relating to its internal affairs”); Hart v General Motors Corp., 129 AD2d 179, 182 (1st Dept 1987) (the issue of corporate governance is governed by the law of the state of incorporation), lv denied 70 NY2d 608 (1987). However, the Merger Agreement contains a New York choice of law provision. As demonstrated by the recent lawsuit filed by Upper Deck, a key issue in this dispute will be whether Upper Deck should have been designated an “Excluded Party” under the Merger Agreement and whether Upper Deck’s \$10.75 per share proposal is a “Superior Proposal” under that agreement. This issue may well entail the application and interpretation of New York law contract law.

In its Opinion denying the Topp defendants’ motion to dismiss or stay the Delaware action, the Chancery Court cited Langfelder v Universal Laboratories (293 NY 200 [1944]) and Rogers v Guaranty Trust Co. of New York (288 US 123 [1933]), for the proposition that jurisdiction must be declined in a case where the determination of the rights of the litigants involves regulation and management of the internal affairs of a corporation incorporated in another state. See Opinion, at 2-3. However, the internal affairs doctrine as expressed in these older cases is now viewed as a discretionary doctrine allowing courts to balance convenience and the relative interests of the states involved. Hart v General Motors Corp., 129 AD2d at 186, supra; Broida v Bancroft, 103 AD2d 88, 90-92 (2d Dept 1984); Berger v Scharf, 11 Misc3d 1072(A), 2006 WL 825171 *2 (Sup Ct, NY County Mar. 29, 2006); Application of Dohring, 142 Misc 2d 429, 431-32 (Sup Ct, Monroe County 1989).

In Broida, the Second Department refused to dismiss a shareholders’ derivative action concerning a proposed recapitalization stock split plan by Dow Jones & Company, a corporation

that was incorporated in Delaware, but based in New York. The court found that Langfelder and Rogers represented an outdated viewpoint, and one that was subject to numerous exceptions.

103 AD2d at 90-92.

The doctrine was questioned by the Supreme Court of the United States in Williams v Green Bay & Western R. R. Co. (326 US 549) and abrogated entirely in the Federal courts a year later in Koster v Lumbermens Mut. Co. (330 US 518, 527), the court holding, in effect, that the "internal affairs" rule is not entitled to separate status and should be treated as one facet under general principles of forum non conveniens. The Restatement of Conflict of Laws, Second (§ 84, Comment d), and numerous commentators, take the same position [citations omitted] * * *

"The vague principle that courts will not interfere with the internal affairs of a corporation whose foreignness is at best a metaphysical concept, must fall before the practical necessities of the modern business world" (Note, 44 Harv L Rev 437, 439). We therefore hold that a suit which concerns the internal affairs of a foreign corporation should be entertained unless the same factors that would lead to dismissal under forum non conveniens principles suggest that New York is an inconvenient forum and that litigation in another forum would better accord with the legitimate interests of the litigants and the public (see Royal China v Regal China Corp., 304 NY 309, 312-313; Goldstein v Lightner, 266 App Div 357, affd 292 NY 670, supra; Weintraub, Conflict of Laws [2d ed], § 4.33, p 211). As succinctly put in the Restatement, "[a] court will exercise jurisdiction over an action involving the internal affairs of a foreign corporation unless it is an inappropriate or an inconvenient forum for the trial of the action" (Restatement, Conflict of Laws 2d, § 313). (underlining added)

Id. at 91-92. After considering Dow Jones' numerous and substantial contacts with New York, which far exceeded the nature and degree of the company's one contact with Delaware -- its incorporation in that state -- the Second Department held that the substantial nexus of the litigation with New York rendered New York the appropriate forum.

The Topps defendants rely on Hart v General Motors Corp. (129 AD2d 179, supra), in which a New York shareholder derivative action challenging a decision of the board of directors of General Motors Corporation, a Delaware company with its principal place of business in Michigan, was dismissed on forum non conveniens grounds in favor of a related pending action

in Delaware. Hart is distinguishable on several important grounds. First, the company at issue, General Motors, was located in Michigan, not New York, and did not have the same substantial ties to New York as does Topps. Second, two derivative actions were filed in Delaware Chancery Court the day before the New York action was commenced, and thus Delaware was the first-filed action. Id. at 181-82. In addition, four additional state court actions were filed in Delaware shortly thereafter, and nine federal court actions filed in five different states had been transferred by the Judicial Panel on Multi-District Litigation to the District of Delaware. Id. at 182. Accordingly, in that case, Delaware was the most logical choice for the action. Third, the trial court had accepted the plaintiff's argument that New York law, not Delaware law, should be applied, leading to the very likely possibility of inconsistent judgments in the two forums. Id. at 186-87. In contrast, the New York plaintiffs in this consolidated action did not commence litigation in this forum to circumvent the requirements of Delaware corporate law.

There has been no showing that retention of the action would unduly burden the Commercial Division, a specialized commercial court that has been successfully handling complex commercial and corporate litigation since its inception in 1993. See A History of the Creation and Jurisdiction of Business Courts in the Last Decade, 60 Business Lawyer 147, 152-58 (2004). The Commercial Division was not established merely to hear contractual disputes. This court is empowered to hear cases involving breach of fiduciary duty claims arising out of corporate restructuring, shareholder derivative actions, and disputes concerning the internal affairs of business organizations; and the dissolution of corporations and other business organizations. Uniform Rules of the Supreme and County Court, 22 NYCRR § 202.70(b)(1), (4), (7) and (11). Shareholder derivative and shareholder class actions concerning Delaware

companies are not an unknown phenomena is the Commercial Division. See, e.g., David Shaev Profit Sharing Account v Cayne, 24 AD3d 154 (1st Dept 2005); Simon v Becherer, 7 AD3d 66 (1st Dept 2004); Pallot v Peltz, 289 AD2d 85 (1st Dept 2001); Wilson v Tully, 243 AD2d 229 (1st Dept 1998); Berger v Scharf, 2006 WL 825171, *supra*; Spear v Conway, 6 Misc 3d 1023(A), 2003 WL 24012118 (Sup Ct, NY County Oct. 17, 2003).

Indeed this court is frequently called upon to apply the laws of Delaware. See, e.g., Venturetek, L.P. v Rand Publishing Co., Inc., 39 AD3d at 317, *supra*; Herzog, Heine, Geduld, Inc. v NCC Industries, Inc., 251 AD2d 173 (1st Dept 1998); Zoo Holdings, LLC v Clinton, 11 Misc 3d 1051(A), 2006 WL 297730 (Sup Ct, NY County Jan. 24, 2006); Johnson v Chase Manhattan Bank USA, N.A., 2 Misc 3d 1003(A), 2004 WL 413213 (Sup Ct, NY County Feb. 27, 2004), *affd* 13 AD3d 322 (1st Dept 2004). Even Delaware courts have determined they are not necessarily the most appropriate forum merely because the application of Delaware law is at issue. See In re Chambers Development Co., Inc. Shareholders Litigation, C.A. No. 12508, 1993 WL 179335 *3 (Del Ch May 20, 1993). Nor is there any basis for the assumption by the Chancery Court that “random litigation results” will occur if a New York commercial court, applying Delaware law, addresses legal issues concerning the fiduciary duties of corporate management with respect to going private transactions involving private equity buyers. See Opinion, at 16. The Commercial Division is as equally capable of dismissing non-meritorious shareholder derivative lawsuits “without rewarding plaintiffs’ lawyers for the simple fact that they filed a lawsuit” (*id.*) as is the Vice Chancellor.

Another factor which the court must address is the residency of the parties. The Chancery Court noted that the initial New York plaintiff, William Lipscomb, is not a resident of New York

but hails from Ohio, and that none of the other plaintiffs in the consolidated action are New York residents. Opinion, at 16. It is equally true that none of the representative plaintiffs in the Delaware action are Delaware residents. However, this action has been brought on behalf of all of Topps' shareholders, who are more likely to be residents of New York than of Delaware. The court notes that four of the company's six largest shareholders are located in New York.

Kupillas Affirm., Exh. C thereto: Topps' S.E.C. Schedule 14-A at 93. As noted above, all of the director defendants reside or work in New York.

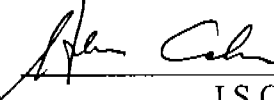
The court is mindful that its ruling may require the defendants, absent a reversal on appeal either here or in Delaware, to defend the fairness of the buyout in two jurisdictions. However, this court is bound to follow and apply New York law, and should not be controlled by the Chancery Court's decision to retain jurisdiction over the parallel litigation in Delaware. Cf. National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enterprises, Inc., 205 AD2d 341, 162 (1st Dept 1994). Accordingly, since New York was the first-filed action, Topps is a New York-based company with numerous New York shareholders, New York is a more convenient forum for most of the parties, non-party witnesses and their attorneys than Delaware, plaintiffs' claims arise out of conduct that took and is taking place in this state, the Merger Agreement is governed by New York law, and this court is prepared to and fully capable of applying Delaware law where it applies, the Topps' defendants motion to dismiss and/or stay this action in deference to the action pending in Delaware is denied.

For the foregoing reasons, it is hereby

ORDERED that the defendant's motion to dismiss or stay this consolidated shareholder class action, pursuant to CPLR 3211(a)(4) and 2201, is denied.

Dated: June 8, 2007

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