

NOT FOR PUBLICATION WITOUT APPROVAL
FROM THE COMMITTEE ON OPINIONS

Ironridge Global IV, Ltd.
Plaintiff,

vs.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION:
MONMOUTH COUNTY

Olde Monmouth Stock Transfer,
Co., Inc. and Scripsamerica, Inc.
Defendants.

Docket No.: MON-L-772-15

Argued: September 10, 2015

Decided: November 13, 2015

Katie A. Gummer, J.S.C.

Michael T. Hensley, Esq., of Bressler, Amery & Ross on behalf of defendant
ScripsAmerica, Inc.

Matthew M. Oliver, Esq., of Lowenstein Sandler, LLP on behalf of plaintiff
Ironridge Global IV, Ltd.

I. Procedural History

This matter arises out of the acquisition by plaintiff Ironridge Global IV, Ltd. (“Ironridge”) of certain debts of defendant Scripsamerica, Inc. (“Scrips”). In October 2013, Ironridge brought suit in the Superior Court of California to collect on those debts. Affidavit of Robert Schneiderman (“Schneiderman Aff.”), ¶2. Ironridge and Scrips in that case agreed to a settlement in which Scrips would provide shares of its common stock to Ironridge in satisfaction of its outstanding debt to Ironridge. *Id.*, ¶¶ 3-4. The parties filed a joint application with the California Superior Court for approval of the Stipulation of Settlement (“Stipulation”). *Id.*, ¶4. The Court approved the Stipulation on November 18,

2013. Certification of Matthew M. Oliver, Esq., (“Oliver Cert”), Ex. E. Paragraph 6(a)(ii) of the Stipulation required Scrips to issue “an irrevocable and unconditional instruction, in form and substance acceptable to [Ironridge] and the transfer agent, to reserve for and issue to [Ironridge] all shares of Common Stock required by the Order.” Id., Ex. C. Paragraph 18 of the Stipulation provides that “[u]pon entry of the order approving this Stipulation, the action shall be dismissed in its entirety, with the Court retaining jurisdiction to enforce the terms of the Stipulation and Order . . . ” Id. Scrips issued the irrevocable letter of instruction (“Irrevocable Instruction”) on November 8, 2013, to its transfer agent, defendant Olde Monmouth Stock Transfer Co., Inc. (“Olde Monmouth”). An initial issuance of 8,690,000 shares and an additional issuance of 1,615,550 shares for a total of 10, 305,550 shares was made to Ironridge. Schneiderman Aff., ¶12.

Ironridge sought the issuance of an additional 1,646,008 shares of Scrip’s stock. Id., ¶14. Scrips objected, claiming that it had discovered that Ironridge was manipulating illegally Scrips’s stock price. Ironridge filed an application with the California Superior Court, seeking an order compelling the issuance of an additional 1,646,008 shares of stock. Oliver Cert., Ex. H. Scrips opposed that application. Schneiderman Aff., ¶17. On May 6, 2014, California Superior Court Judge Rolf M. Treu entered an order (the “Enforcement Order”) enforcing the initial order that had approved the Stipulation and directed Scrips to issue the additional 1,646,008 shares of common stock to Ironridge pursuant to the court’s November 8, 2013 Order approving the settlement and the Stipulation. Oliver Cert., Ex. H. Scrips appealed the Enforcement Order on May 7, 2014. The

Enforcement Order was stayed pending the appeal. The appeal was dismissed on June 30, 2015. Ironridge Global IV, Ltd. v. ScripsAmerica, Inc., 189 Cal. Rptr. 3d 583 (Cal. Dist. Ct. App. 2015). The Supreme Court of California denied review on September 30, 2015. Ironridge Global IV, Ltd., V. ScripsAmerica, Inc., 2015 Cal. LEXIS 7153, (Cal. Sept. 30, 2015).

On May 22, 2014, Scrips filed an action in the United States District Court for the Central District of California, seeking a declaration that it did not have to issue the additional 1,646,008 shares sought by Ironridge. Oliver Cert., Ex. 3; Schneiderman Aff., ¶15. On November 3, 2014, the District Court granted in part Ironridge's motion to dismiss Scrips's Complaint, specifically dismissing Scrips's claim for a declaration that it was "excused from performing generally under the stipulation." ScripsAmerica, Inc. v. Ironridge Global LLC, 56 F. Supp 3d 1121, 1166 (C.D. Cal. 2014). Scrips thereafter filed an Amended Complaint. On March 26, 2015, the District Court granted Ironridge's second motion to dismiss and dismissed the Amended Complaint. Oliver Cert., Ex. J. On April 27, 2015, Scrips filed a Second Amended Complaint. On August 11, 2015, the District Court granted Ironridge's motion to dismiss the Second Amended Complaint with prejudice and dismissed the Second Amended Complaint in its entirety. ScripsAmerica, Inc. v. Ironridge Global LLC, 2015 U.S. Dist. Lexis 105 494 (C.D. Cal. Aug. 11, 2015).

While Scrips's appeal was still pending in the California Superior Court, Ironridge in March of 2015 sought another Additional Issuance¹ of 15,000,000 shares. *Schneiderman Aff.*, ¶20. Scrips objected and instructed Olde Monmouth not to transfer the shares. *Id.*, ¶21. Olde Monmouth failed to issue the requested shares. Ironridge filed the Complaint in this matter against Olde Monmouth on March 6, 2015. In its one-count Complaint against Olde Monmouth, plaintiff seeks money damages for breach of contract as a third-party beneficiary to the Stipulation. This Court granted Scrips's motion to intervene on May 29, 2015.

On March 10, 2015, under the caption ScripsAmerica, Inc. v. Olde Monmouth Stock Transfer Co., Docket No. MON-L-801-15, Scrips filed an Order to Show Cause seeking to enjoin Olde Monmouth from transferring Scrips's common stock to Ironridge. On March 10, 2015, the Court granted the preliminary restraints sought by Scrips and ordered that the parties seek clarification from the California Superior Court as to whether the stay of the Enforcement Order applied not only to the Additional Issuance of the 1,646,008 shares, but also to the second request for 15,000,0000 shares. In addition to seeking the California Superior Court's clarification, Ironridge also sought an order holding Scrips in contempt of court for its instructions to Olde Monmouth to withhold the transfer of shares. On April 24, 2015, the California Superior Court entered an order confirming that its Enforcement Order and, thus, the

¹ Additional Issuance is a defined term in the Stipulation.

accompanying stay, encompassed only the Additional Issuance of 1,646,008 shares and did not apply to the subsequent request for 15,000,000 shares. Schneiderman Aff., Ex. C. The court denied without prejudice Ironridge's motion for contempt, indicating that it could renew the motion "after new issue order made and disobeyed." Id., Ex. D. On April 29, 2015, Scrips voluntarily dismissed its Complaint and injunction application under Docket Number MON-L-801-15. Oliver Cert., Ex. R. On May 12, 2015, this Court entered an Order dissolving the temporary restraints previously entered in Docket No. MON-L-801-15. Id., Ex. S.

After the April 24, 2015 Order of the California Superior Court and Scrips's voluntary dismissal of Docket No. MON-L-801-15, counsel for Ironridge issued a letter to Olde Monmouth on April 30, 2015, demanding the issuance of the 15,000,000 shares given that the restraints on Olde Monmouth had been dissolved. Id., Ex. T. Counsel for Scrips issued a letter that same day instructing Olde Monmouth to "refrain from making any such transfer." Id., Ex. U.

On June 25, 2015, Scrips filed a motion to dismiss this case.² On July 1, 2015, counsel for Ironridge provided Olde Monmouth's counsel with a copy of the California Court of Appeal's June 30, 2015 decision dismissing Scrips's appeal of the Enforcement Order and renewed Ironridge's request for the transfer of the 15,000,000 shares. Id., Ex. Y. In response, counsel for Scrips on behalf of

² Defendant Olde Monmouth has not made any submissions either in support of or in opposition to Scrips's motion.

Scrips demanded that Olde Monmouth refrain from making any immediate transfer of shares to Ironridge. Id.

II. The Parties' Arguments

A. Defendant Scrips's Argument in Support of Its Motion to Dismiss

Defendant argues that plaintiff's Complaint must be dismissed for three reasons: the comity doctrine and this Court's purported lack of subject-matter jurisdiction; the doctrine of forum non conveniens; and the doctrine of election of remedies.

1. Comity

Defendant argues that Rule 4:6-2(a) permits a motion to dismiss for lack of subject-matter jurisdiction in cases in which the comity doctrine is invoked, citing Exxon Research v. Industrial Risk Insurers, 341 N.J. Super. 489 (App. Div. 2001). Defendant asserts that the requisite elements for a dismissal under the comity doctrine exist here: (1) the existence of a first-filed action in another state; (2) both cases involve substantially the same parties, claims, and legal issues; and (3) plaintiff will have opportunity to obtain adequate relief in the prior jurisdiction. See American Home Prods. Corp. v. Adriatic Ins. Co., 286 N.J. Super. 24, 37 (App. Div. 1995).

Defendant argues that the California Superior Court action, which was filed in October 2013, satisfies the "first-filed action in another state" prong. See Schneiderman Aff., at ¶2. This case was filed on March 6, 2015. See Certification of Michael T. Hensley, Esq. ("Hensley Cert."), Ex. A. Defendant Scrips asserts that the California action and the instant action involve

substantially the same parties, claims, and legal issues. Defendant notes that in both actions, Ironridge is the plaintiff and Scrips is the defendant. Defendant contends that although Olde Monmouth is a defendant here and a non-party in the California action, Olde Monmouth was subject to the California Superior Court's Enforcement Order. Defendant also contends that Olde Monmouth is only a nominal party in this matter because it is merely the transfer agent for Scrips.

Defendant argues that both matters involve substantially the same issues and claims. Defendant asserts that Ironridge's claims here arise out of its attempt to enforce the terms of the Stipulation that is the subject of the California action. Specifically, defendant asserts that Ironridge has asserted a breach-of-contract claim against Olde Monmouth in this case due to Olde Monmouth's failure to issue shares, at Scrip's direction, in violation of the Stipulation. Defendant argues that in this case, just as in the California action, it has challenged the validity of the requested issuance of shares based on plaintiff's failure to meet certain prerequisites required for an additional issuance under the Stipulation. Thus, defendant concludes that both matters are predicated on the interpretation and enforcement of the Stipulation.

Defendant asserts that the Stipulation states that the California Superior Court retains jurisdiction to interpret and enforce the Stipulation's terms. The Stipulation states that "the Court retain[s] jurisdiction to enforce the terms of the stipulation and Order by ex parte application, judgment, motion or other proceeding" See Schneiderman Aff., Ex. A, ¶18. Defendant also contends

that the California Superior Court exercised jurisdiction over those issues by instructing Ironridge to make a motion to enforce before that court, which Ironridge has not done. See Schneiderman Aff., ¶28.

Defendant also argues that any attempt to distinguish the two actions by asserting a breach-of-contract claim based on the Irrevocable Instruction fails because the Irrevocable Instruction was made pursuant to, and is empowered by, the Stipulation. Defendant asserts that any attempt to enforce the Irrevocable Instruction is an attempt to enforce the Stipulation.

Defendant argues that plaintiff will have the opportunity to obtain adequate relief in the California Superior Court action. Specifically, defendant asserts that Ironridge would receive the shares at issue if it is successful in any forthcoming request for Additional Issuances in the California action. Defendant concludes that the Court should dismiss plaintiff's action on the grounds of comity and in deference to the California Superior Court action. Alternatively, defendant asserts that the Court may exercise its discretion to stay, rather than dismiss, this case.

2. Forum Non Conveniens

Defendant argues that if the Court does not dismiss this case on comity grounds, it should dismiss it based on the doctrine of forum non conveniens. Defendant asserts that a consideration of the private and public interest factors demonstrates that California is the more convenient forum. Defendant notes that the initial action was filed in California. Defendant asserts that the public interest factors weigh against laying jurisdiction in New Jersey, which according to

defendant has no relationship to the subject matter of this suit other than the location of Olde Monmouth.

3. Election of Remedies

Defendant argues that plaintiff's California Superior Court action and the related enforcement application bars plaintiff from bringing this case. Defendant asserts that plaintiff elected to file the California Superior Court action and the subsequent enforcement applications in that matter. Defendant concludes that plaintiff thereby is precluded from bringing this case, in which it seeks a remedy in addition to the previously-elected enforcement applications made in California.

B. Plaintiff Ironridge's Argument in Opposition to Defendant's Motion

Plaintiff notes that Olde Monmouth is the principal defendant in this case, having been sued for its decision not to honor its contract. Plaintiff asserts that Olde Monmouth has filed an Answer with denials and defenses, but has sat idle while Scrips, as intervenor, seeks dismissal. Plaintiff notes that in this case it does not seek the transfer of any of Scrips's property, but only money damages for Olde Monmouth's breach of contract.

1. Comity

Plaintiff argues that defendant fails to carry its burden to establish any of the elements under the doctrine of comity. First, plaintiff asserts that there is no first-filed action in another state because that matter has been adjudicated. Plaintiff asserts that dismissals or stays for comity purposes are entertained only when there is an action "pending in another state" and allow for a stay "until the prior action has been adjudicated." American Home Prods. Corp., 286 N.J.

Super. at 33. Plaintiff argues that the California Superior Court matter was adjudicated initially by the entry into the Stipulation of Dismissal and that the defendant's subsequent appeal has been dismissed.

Plaintiff contends that the parties to the California Superior Court action and the parties here are not the same or substantially the same. Plaintiff asserts that it sued Scrips in the California matter, but sued Olde Monmouth in this case. Plaintiff argues that the only reason Scrips is a party to this case is because of its decision to intervene. Plaintiff also argues that the differences in the parties sued was not an accident, but reflects the meaningful difference in the disputes underlying each action. Plaintiff argues that it sued Olde Monmouth here because of its breach of the Irrevocable Instruction. Plaintiff asserts that in the California matter, the issue was Scrips's debt to Ironridge. Plaintiff argues that the Stipulated Order resolving the California case "did not purport to . . . resolve or adjudicate [Ironridge's] rights as against any party other than Defendant ScripsAmerica Inc." See Oliver Cert., Ex. Q (Clarification Order), at ¶2. Plaintiff notes that Olde Monmouth was not a party to the California case, never advanced an interest or an argument in that case, and was never subjected to the California Superior Court's jurisdiction. Plaintiff argues that Olde Monmouth never had any relationship with Ironridge until it voluntarily signed the Irrevocable Instruction, which is an instrument that was created after the parties in California had brought the California Superior Court matter to conclusion.

Plaintiff argues that the claims and issues in the cases are not the same. Plaintiff asserts that to continue blocking any stock transfers as required by the

Stipulation, Scrips must convince the Court that this case is part of its existing dispute with Ironridge. However, plaintiff argues that the heart of the instant matter is a contractual obligation that Olde Monmouth, rather than Scrips, freely undertook and owes to Ironridge. Plaintiff argues that it brought this breach-of-contract matter as an aggrieved third-party beneficiary, which is fundamentally different from the issues litigated in California. Plaintiff also makes clear that it is not seeking specific performance, a declaratory judgment, or other injunctive relief. Plaintiff asserts that instead, it is seeking a money judgment as damages for Olde Monmouth's decision not to honor the specific, identifiable, past requests for shares. Plaintiff further asserts that the California Court of Appeal's decision dismissing Scrips's appeal has res judicata effect and forecloses Scrips's attempts to resist the transfer of shares that plaintiff has requested.

Plaintiff also argues that even if defendant could carry its burden to show a substantial similarity between parties, claims, and legal issues, the weighing of special equities warrants the denial of its motion because a dismissal of this case would cause plaintiff to endure great hardship and inconvenience. Specifically, plaintiff asserts that it will not be afforded the opportunity to seek adequate relief in the first-filed jurisdiction because that case has reached final judgment, which would preclude plaintiff from amending its Complaint to seek relief against Olde Monmouth. Plaintiff also asserts that defendant has declared its intent to appeal and stay future enforcement orders in perpetuity, which would render the Stipulation ineffectual. Plaintiff contends that defendant's obstructive conduct guarantees that relief in California is "a long way off." Plaintiff also raises

concerns that California lacks jurisdiction over Olde Monmouth, which would then be able to escape liability for its breach of contract.

2. Forum Non Conveniens

Plaintiff argues that requiring Olde Monmouth and Scrips to litigate in this forum is not unfair. Plaintiff asserts that New Jersey is the appropriate forum for litigating the conduct of Olde Monmouth, a corporation that has offices twenty miles from the Monmouth County courthouse. Plaintiff asserts that Scrips willingly intervened in this matter and also had filed in this Court the prior Order to Show Cause, evidencing a comfort and willingness to litigate in New Jersey. Plaintiff also asserts that Scrips filed a Complaint and Consent Order against Olde Monmouth in an unrelated case last year. See ScripsAmerica, Inc. v. Olde Monmouth Stock Transfer Co., Inc., Docket No. MON-C-7-14. Plaintiff argues that a consideration of the private and public interest factors governing a forum non conveniens determination leads to the conclusion that New Jersey is the preferable forum over California. Plaintiff concludes that dismissal in this forum would cause it to suffer significant prejudice.

3. Election of Remedies

Plaintiff argues that the doctrine of election of remedies is inapplicable here. Plaintiff asserts that the doctrine applies where a party has sought remedies that are logically inconsistent, citing Ray v. Beneficial Fin. Co. of N. Jersey, 92 N.J. Super. 519, 535 (Ch. Div. 1966). Plaintiff asserts that it has made qualitatively different requests to the California and New Jersey courts for relief from different parties. Plaintiff argues that its requests have been

consistent and are not contradictory. Plaintiff contends that even if it were to achieve remedies that amounted to double recovery, any liable party is free to request a set off.

C. Defendant's Reply to Plaintiff's Opposition

Defendant argues that the Irrevocable Instruction is inextricably intertwined with the Stipulation. Defendant asserts that its affirmative defenses in this action require a court to determine both the validity of the Stipulation and the validity of the demand for an Additional Issuance of 15,000,000 shares made pursuant to the Stipulation. Because the Irrevocable Instruction is completely contingent on the interpretation of the Stipulation, defendant reasserts that that interpretation is reserved for the California Superior Court pursuant to Judge Treu's Order.

1. Comity

Defendant asserts that the California Superior Court action has not been finally adjudicated and contends that the dismissal of its appeal does not constitute a final adjudication. Defendant asserts that the June 30, 2015 Order dismissing its appeal was entered based on a procedural defect and that the court did not consider the substantive merits of its appeal. Defendant asserts that the remedy sought by plaintiff should be sought through the enforcement mechanisms of the California state action.

Defendant reasserts that the two matters both clearly involve substantially the same parties. Defendant argues that plaintiff's assertion that Olde Monmouth was absent from the California state action is undermined by the facts that Olde

Monmouth was subject to the Court's Enforcement Order and that Ironridge sought a contempt ruling against Olde Monmouth and its employees in the California Superior Court action. See Hensley Cert., Ex. A; Supplemental Certification of Michael Hensley ("Hensley Supp. Cert."), Ex. A. Specifically, defendant asserts that Ironridge's motion papers in support of its contempt application sought an order for contempt against, among others, "Olde Monmouth Stock Transfer Co., Inc. and Matthew Troster." See id.

Defendant reasserts that the two matters involve substantially the same claims and issues. Defendant argues that the Stipulation and Irrevocable Instruction are inextricably intertwined and must be read together and that if it does not dismiss this case, this Court would be required to interpret the Stipulation and determine its validity. Defendant argues that the case law is clear that ministerial changes to format, but not the substance of pleadings, is not sufficient to survive a comity analysis and dismissal. See Sensient Colors, Inc. v. Allstate Ins. Co., 193 N.J. 373, 392 (2008).

Defendant reasserts that Ironridge will have the opportunity for adequate relief in the California Superior Court action. Defendant argues that Ironridge will receive the shares it seeks if it is successful in making its request for an Additional Issuance. Defendant reasserts that provision of an Additional Issuance is subject to preconditions contained in the Stipulation that must be met.

Defendant reasserts that the equities weigh in favor of having the California Superior Court retain jurisdiction. Defendant argues that Ironridge

original chose California as its forum state and has continued litigating in that forum up until the filing of this action. Defendant reasserts that plaintiff would not be prejudiced by dismissal of this case because it simply would be required to continue its enforcement efforts in California.

2. Forum Non Conveniens

Defendant reasserts that plaintiff's choice of New Jersey as its forum is "demonstrably inappropriate" and that California is the adequate alternative forum.

II. Conclusions of Law

Pursuant to Rule 4:6-2(a), a party may file a motion to dismiss on the basis that the Court does not have subject-matter jurisdiction over the case. The motion may be raised at any time, including on appeal. See R. 4:6-3; Hamilton, Johnston & Co. v. Johnston, 256 N.J. Super. 657 (App. Div.), certif. denied, 130 N.J. 595 (1992). "Subject-matter jurisdiction involves the threshold determination as to whether the court is legally authorized to decide the question presented." See Carroll v. United Airlines, 325 N.J. Super. 353, 357 (App. Div. 1999) (citing Gilbert v. Gladden, 87 N.J. 275, 280-81 (1981)). Because it is a threshold determination, any issues regarding subject-matter jurisdiction "must be addressed before considering the substantive merits of the matter." See New Jersey Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 411 (App. Div. 1997).

A. Comity

A motion to dismiss under Rule 4:6-2(a) for lack of subject matter jurisdiction may be based on the assertion that comity grounds preclude the matter from continuing. See Exxon, 341 N.J. Super. at 505-11. “New Jersey has long adhered to ‘the general rule that the court which first acquires jurisdiction has precedence in the absence of special equities.’” Sensient Colors, Inc., 193 N.J. at 386 (quoting Yancoskie v. Delaware River Port Auth., 78 N.J. 321, 324 (1978)). Pursuant to the first-filed rule, a “New Jersey state court ordinarily will stay or dismiss a civil action in deference to an already pending, substantially similar lawsuit in another state, unless compelling reasons dictate that it retain jurisdiction.” Id. (citing O’Loughlin v. O’Loughlin, 6 N.J. 170, 179 (1951)). The question is not “whether a state court has the power to exercise jurisdiction over a case filed within its jurisdiction,” but rather is “whether the court should restrain itself and not exercise that power.” Id. at 386-87 (citing O’Loughlin, 6 N.J. at 179). In the interest of maintaining “harmonious relations with our sister states, . . . comity and common sense counsel that a New Jersey court should not interfere with a similar, earlier-filed case in another jurisdiction that is ‘capable of affording adequate relief and doing complete justice.’” Id. at 387 (quoting O’Loughlin, 6 N.J. at 179). Therefore, courts should approach a comity analysis with “a presumption in favor of the earlier-filed action.” Id.

In Sensient, our Supreme Court modified the three-factor comity analysis test originally set forth by the Appellate Division in American Home Products, 286

N.J. Super. at 37. To obtain a stay or dismissal of a later-filed action for reasons of comity, the moving party must establish under the modified approach, “(1) that there is a first-filed action in another state, [and] (2) that both cases involve substantially the same parties, the same claims, and the same legal issues” Sensient, 193 N.J. at 390 (quoting American Home Prods., 286 N.J. Super. at 37). The moving party is required to establish only that the “parties, claims, and issues in the two lawsuits are substantially the same, not exactly the same.” Id. at 391 (emphasis in original). If the party that is seeking a comity stay or dismissal satisfies its burden on those two factors, then the burden is shifted to the other party to demonstrate one or more “special equities for allowing the second-filed action to proceed.” Id. at 390-91 (citing American Home Prods., 286 N.J. Super. at 37). The Court in Sensient held that the third American Home Products factor, “that plaintiff [in the second-filed action] will have the opportunity for adequate relief in the prior jurisdiction,” was better categorized as a special equity and that the burden of establishing the existence of a special equity is more properly placed on the rebutting party asserting it after the shifting of the burden. See id.

1. First-Filed Action

Here, there is and can be no dispute as to which matter was filed first. The California Superior Court action was filed in October of 2013; this case was filed on March 6, 2015. However, the parties dispute whether the California action has been resolved and, thus, is no longer pending, vitiating the need for the comity analysis. A stay of the later-filed action may be obtained “until the

prior action has been adjudicated.” See American Home Prods., 286 N.J. Super. at 33. Logically, if the prior matter has been adjudicated, then there is no reason for the entry of a stay. Likewise, dismissal under comity grounds is an issue only when a substantially similar action “is pending in another state” Id. at 34.

The District Court in Scrips’s federal case matter stated that “once the state court litigation concludes, its determination as to whether the enforcement order was properly entered, and as to the legality of Ironridge’s conduct under the stipulation, will have preclusive effect with respect to Scrips’ breach of contract and breach of the implied covenant claims.” ScripsAmerica, Inc. v. Ironridge Global LLC, 56 F. Supp. 3d at 1155-56. The court further wrote that “the state court’s conclusion as to whether Ironridge breached the stipulation will apply not only to the 1.6 million shares, but to the issuance of additional shares as well” because “the conduct at issue and the alleged injury, i.e., Ironridge’s purported breach of the stipulation and Scrips’ issuance of additional shares, are the same.” Id. at 1156.

The California state court appeal was pending at the time the District Court issued its opinion. The California Court of Appeal dismissed the appeal on June 30, 2015. Defendant’s argument that the matter is not adjudicated because the court did not reach the merits of the claim is not persuasive. The California Court of Appeal wrote that “the opposition contends defendant was not required to comply with the trial court’s ‘invalid’ order. However, we will not consider defendant’s arguments on the merits of the injunction because arguments as to the merits are irrelevant to the application of the disentitlement doctrine.”

Ironridge, 189 Cal. Rptr., at 589. The court begins the next sentence by writing, “[a]nd, in any event, defendant’s claims are plainly without merit.” Id. The court then addressed the contention that the Stipulation is void. The court noted that a judgment is void if “there is a lack of subject jurisdiction over the subject matter or the person” and may be voidable if the court has jurisdiction, but exceeds that jurisdiction by acting “without the occurrence of certain procedural prerequisites.” Id. at 589 (internal quotations omitted). The court stated that “a person may not assert as a defense that the order merely was erroneous.” Id. (internal quotations omitted). In considering Scrips’s arguments, the court wrote that “[t]here is no question that the court had jurisdiction over the parties and the subject matter, and that the parties expressly authorized the court to enforce the settlement on an ex parte basis.” Id. The court concluded by writing that “[w]e find no procedural irregularity or other defect that would support a credible claim that the order was either void or voidable. Defendant’s appeal merely challenges the order as erroneous.” Id. at 589-90. Thus, although the California Court of Appeal dismissed Scrips’s action pursuant to the state’s disentanglement doctrine and wrote that it would not consider the merits of Scrips’s arguments because they were inapplicable to a disentanglement doctrine analysis, the court undeniably rejected the merits of Scrips’s arguments. Moreover, the Supreme Court of California denied review of September 30, 2015. 2015 Cal. LEXIS 7153 (Cal. Sept. 30, 2015).

As a threshold matter, this Court finds that there is no existing first-filed case in another jurisdiction because the California state matter reached final

adjudication. The comity doctrine cannot bar another action in the absence of an earlier-filed matter.

2. Parties, Claims, and Issues

Even if a first-filed case currently existed, this Court would deny the motion under the remaining prongs of the comity analysis. As noted, for the comity doctrine to apply, the two matters at issue must involve substantially the same parties, claims, and issues. See Sensient, 193 N.J. at 391. Ironridge and Scrips are plaintiff and defendant, respectively, in both this matter and the California Superior Court action. Here, however, Ironridge commenced suit against defendant Olde Monmouth only, who was not a party to the California matter. Scrips's presence in this case was a result of its motion to intervene. All parties are not substantially the same.

Even accepting the argument that the parties are substantially the same, the Court cannot conclude that the claims and issues are substantially the same. Ironridge commenced the California Superior Court case purportedly to collect on debt owed to it by Scrips. The Stipulation entered in that case allowed the California Superior Court to retain jurisdiction to enforce the Stipulation. One of the provisions of the Stipulation required Scrips to deliver to its transfer agent "(ii) an irrevocable and unconditional instruction, in form and substance acceptable to Plaintiff and the transfer agent, to reserve for and issue to Plaintiff all shares of Common Stock required by the Order" See Oliver Cert., Ex. C, at 3. The same day that the Stipulation was filed, Scrips provided Olde Monmouth with the Irrevocable Letter of Instruction, which is the subject of this case. See id., Ex. D.

The terms of the Irrevocable Instruction set forth a number of requirements that Olde Monmouth was to follow. See id. The Irrevocable Instruction states that it serves as Scrips’s “irrevocable authorization, instruction and direction to [Olde Monmouth] to . . . (iii) issue any additional Shares required pursuant to the terms of the Order upon receipt of notice from the Company or Ironridge.” Id. The Irrevocable Instruction provides that it “irrevocably authorizes [Olde Monmouth] to rely upon the legal opinion of Company’s counsel or Ironridge’s counsel, opining that the Shares (a) are legally issued, fully paid and non-assessable . . .” Id. Pursuant to the Irrevocable Instruction, Olde Monmouth is “irrevocably authorized, instructed and directed, upon [its] receipt of . . . notice from Company or Ironridge, to use [its] commercially reasonable efforts to credit, within one trading day, the Shares to which Ironridge is entitled under the Order” Id. The letter was signed by representatives for both Scrips and Olde Monmouth on behalf of their respective companies.

Thus, this case deals with a breach-of-contract action against Olde Monmouth for money damages arising out of its failure to transfer stocks as directed by the Irrevocable Instruction. The California Superior Court matter involved the collection of debt Scrips owed to Ironridge and the subsequent enforcement of the Stipulation. The issue before the California court was Scrips’s breach of the Stipulation by directing Olde Monmouth to withhold any stock transfers. Thus, the relief sought in California was for specific performance of the Stipulation whereas here only money damages are sought regarding Olde Monmouth’s alleged breach. Further, the Stipulation and the Irrevocable

Instruction are two distinct contracts. Scrips and Ironridge voluntarily entered into the Stipulation; Scrips and Old Monmouth voluntarily entered into the Irrevocable Instruction. Therefore, both suits contemplate enforcement of or damages arising out of two separate contracts. The fact that the Stipulation may need to be interpreted by the Court does not necessarily mean that the matters are substantially the same. There is no reason that this Court would be unable to interpret the contract and apply the applicable law in adjudicating the matter before it.

Additionally, the Court notes that the clarification Order issued by Judge Treu on April 24, 2015, plainly states that the May 6, 2014 Order “did not purport to resolve or adjudicate any other requests, disputes or claims nor did it purport to resolve or adjudicate Plaintiff’s rights as against any party other than Defendant SCRIPSAMERICA, INC.” See Oliver Cert., Ex. Q at 2, ¶2. Contrary to defendant’s assertion, nothing else on the record indicates that Judge Treu instructed Ironridge to adjudicate all subsequent, tangentially related claims in California.

Accordingly, the Court finds that the claims and issues are not substantially the same.

3. Relative Hardships

The Court finds that if the burden were shifted to Ironridge, it would be able to establish special equity concerns that warrant the continued litigation of this case in New Jersey. Plaintiff has sought damages from Olde Monmouth arising from its failure to perform under the Irrevocable Instruction. It is not clear

that Ironridge would be able to sustain the same matter in California. Moreover, as noted by the Honorable Joseph P. Quinn during the argument of Scrips's Order to Show Cause in Docket No. MON-L-861-15, "[Scrips] is a company that is obviously in some . . . precarious financial circumstance. And you know, they are now I think . . . somewhat teetering on the brink here" See id., Ex. P at T26:22 to 27:1. If the Court were to dismiss this matter and Scrips were to become insolvent and unable to issue shares of value, Ironridge would be greatly prejudiced by its inability to recover what may be due to it under either the Stipulation or the Irrevocable Instruction.

Accordingly, Scrips's motion to dismiss on comity grounds is hereby DENIED.

B. Forum Non Conveniens

Forum non conveniens is an equitable doctrine that allows "a court to decline to exercise jurisdiction when a trial in another available jurisdiction 'will best serve the convenience of the parties and the ends of justice.'" Yousef v. General Dynamics Corp., 205 N.J. 543, 557 (2011) (quoting Gore v. U.S. Steel Corp., 15 N.J. 301, 305 (1954)). A plaintiff's choice of forum will ordinarily be honored by a court that has jurisdiction over a case. See id. (citing Kurzke v. Nissan Motor Corp., 164 N.J. 159, 170 (2000)). Ultimately, however, it is the court's decision "whether the ends of justice will be furthered by trying a case in one forum or another." Id. (citing Kurzke, 164 N.J. at 165-65). Any proposed alternative forum must be adequate and "the defendant must be 'amenable to

process' in that forum.” Id. (quoting Wangler v. Harvey, 41 N.J. 277, 286 (1963)).

A court should not dismiss a matter on the ground of forum non conveniens “unless the choice of forum is ‘demonstrably inappropriate.’” Id. (quoting Kurzke, 164 N.J. at 171-72). A court should consider certain private-interest and public-interest factors in determining whether a choice of forum is “demonstrably inappropriate.” See id. at 558. Private-interest factors include “‘the relative ease of access to sources of proof’; the ‘availability of compulsory process’; the cost of obtaining the attendance of witnesses; . . . the enforceability of a judgment; and ‘all other practical problems that make trial of a case easy, expeditious and inexpensive.’” Id. (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)). Public-interest factors include “consideration of trial delays that may occur because of backlogs in a jurisdiction; whether jurors should be compelled to hear a case that has no or little relationship to their community; the benefit to a community of ‘having localized controversies decided at home’; and whether the law governing the case will be the law of the forum where the case is tried.” Id. (quoting Gulf, 330 U.S. at 508-09). The burden remains with the defendant to establish that the “plaintiff’s choice of forum is ‘demonstrably inappropriate.’” Id. (quoting Varo v. Owens-Illinois, Inc., 400 N.J. Super. 508, 519-20 (App. Div. 2008)). Moreover,

[A] motion for dismissal due to forum non conveniens should not be heard unless the movant has made a good faith effort to obtain discovery and can provide the court with a record verifying that discovery is unreasonably inadequate for litigating in the forum chosen by the plaintiff. . . . Mere speculation about

potential inadequacies ordinarily is not a sufficient basis to deny the plaintiff the choice of forum.

Kurzke, 164 N.J. at 168.

Here, defendant has not established that plaintiff's choice of forum is demonstrably inappropriate. Defendant Olde Monmouth has its principal place of business located in Monmouth County. It is not clear that defendant would be amenable to process in California. Plaintiff made its decision to sue Olde Monmouth in Monmouth County, and that decision is given deference.

Based on the foregoing, defendant's motion to dismiss on the grounds of forum non conveniens is hereby DENIED.

C. Election of Remedies

"An election of remedies may generally be defined as choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same state of facts." Murphy v. Morris, 12 N.J. Super. 544, 547 (Ch. Div. 1951). The "conditions or elements of election of remedies are (1) the existence of two or more remedies; (2) the inconsistency between such remedies, and (3) a choice of one of them." Id. (citing Levy v. Massachusetts Accident Co., 127 N.J. Eq. 49 (E. & A. 1939)).

Here, plaintiff is seeking damages arising out of the breach of a contract to which it claims to be a third-party beneficiary. The relief sought in the California Superior Court action was for the issuance of shares from Scrips pursuant to the Stipulation. The parties, the relief sought, and the "state of facts" are different in both matters. The requests are consistent with one another and do not

contradict one another. As plaintiff noted in its opposition brief, if defendants are concerned about the possibility of double recovery, they are entitled to request a set-off.

Based on the foregoing, defendant's motion to dismiss on the basis of the election of remedies is hereby DENIED.