UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE CULVER EDUCATIONAL FOUNDATION, an Indiana not-for-profit corporation,	)	**No. 09 CV 1413**
Plaintiff,	)	**Judge Wayne R. Andersen**
v.	)	**Magistrate Judge Jeffrey Cole**
MICHAEL X. CRONIN et al.,	)	
Defendants.	)	

CONSERVE SCHOOL DEFENDANTS' RULE 12(B)(1) MOTION TO DISMISS

The Conserve School Defendants[1] move to dismiss the Second Amended Complaint of The Culver Educational Foundation ("Culver")[2] under Fed. R. Civ. P. 12(b)(1). The Court lacks subject matter jurisdiction because Culver seeks the *res* of a trust that is the subject of pending litigation in Wisconsin and over which the Wisconsin court has prior exclusive jurisdiction. See Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939).

Background

1. This case concerns a trust created by James R. Lowenstine, a Chicago industrialist and philanthropist and the longtime majority owner of Central Steel and Wire Company ("Central Steel"). This lawsuit is Culver's second in this Court in this decade seeking to seize

[1] Collectively, Defendants Michael X. Cronin, John F. Calhoun, Michael J. Sullivan, Ronald V. Kazmar, and Christopher Rodgers, individually and as Trustees of the James R. Lowenstine Trust dated August 17, 1981 and the Conserve School Trust thereunder, and Conserve School Corporation.

[2] Docket No. 13.

the trust assets for itself and to eliminate another private school in the process. Like the previous lawsuit, this case is without merit and ought to bring Culver no closer to its goals.

2. When Mr. Lowenstine died in 1996, he left most of his assets -- including his controlling interest in Central Steel and "Lowenwood," his land in the North Woods of Wisconsin -- to a trust he called the Conserve School Trust (the "Trust").

3. Mr. Lowenstine appointed the directors of Central Steel (his business colleagues) to be the individual trustees of the Trust. He instructed them to use the Trust assets to operate a school called the "Conserve School" and authorized them to use Lowenwood for that purpose. (Second Amended Complaint, Ex. A, Article VI, ¶¶ A-B) After Mr. Lowenstine's death, the trustees designed and built the School, which opened its doors in 2002 as a four-year boarding school for high school students. (Second Amended Complaint, ¶ 43)

4. Culver is a remote contingent beneficiary of the Trust: it takes only if the trustees are unsuccessful in obtaining tax-exempt status for the school or "if for any other reason *the trustees determine* at any time that it is legally impossible or otherwise impractical to operate the Conserve School." (Id. Ex. A, Article VI, ¶ M (emphasis added))

5. Conserve School has tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, and the trustees have never made a determination that it is legally impossible or otherwise impractical to operate the School. Nonetheless, throughout the Trust's history, Culver has looked for ways to take the assets of the Trust for itself, either by persuasion or by force of law.

6. For example, in 1997, shortly after Mr. Lowenstine's death and long before the School was built, Ralph Manuel, Culver's headmaster, wrote to John M. Tiernan, who was then

the managing trustee of the Conserve School Trust. Mr. Manuel proposed that Culver take the Trust assets and the Conserve School trustees continue to control Central Steel.

> I and Jim Henderson, the Chairman and CEO of Cummins Engine Company and the President of Culver's Board[,] would very much like to meet with you and any other representatives of the Lowenstine Trust to discuss whether there are any ways in which Culver can assist the Trust in accomplishing Mr. Lowenstine's objectives. For example, Culver would be willing to consider an agreement with the trustees whereby Culver would preserve and maintain Lowenwood and would undertake to operate a school there along the lines set forth in Section M.3(b)(2) of Article VI of the Trust. As part of any such agreement, the Foundation would waive the sale requirement and limitations set forth in Paragraph M.1 of Article VI. Thus, the directors would continue to manage the Company, and the trustees would continue to deal with the shares of the Company in the Trust as they determine to be in the best interests of the Company and its shareholders. In return, the Foundation would expect to receive regular dividends on the Company shares in the Trust, and any other assets of the Trust would be distributed to Culver.

(A copy of Mr. Manuel's letter is attached hereto as Exhibit 1.) The Conserve School trustees declined Culver's proposal and instead proceeded to implement the plan that Mr. Lowenstine entrusted to them by building the School.

7. As noted above, in 2005 Culver filed a three-count complaint contending that the trustees had violated the Trust by establishing Conserve School and continuing to operate it. See The Culver Educational Foundation v. C. Daniel Blythe et al., No. 05 C 6480 (N.D. Ill.) (Kendall, J.) ("Culver I"). Culver stipulated to the dismissal of that claim with prejudice the following year. Culver I, Docket Nos. 89 & 90 (May 24 & 25, 2007).

8. On March 5, 2009, Culver filed the instant case, contending this time that the trustees violated the Trust and breached their fiduciary duties by deciding in January 2009 to transition Conserve School from a four-year boarding school to a semester school. Culver

asserts that the semester school is barred by two provisions of the trust instrument and demands that the Trust assets be turned over to Culver.

9. Not coincidentally, this is the same claim that thirty-one Conserve School parents made just two weeks earlier in Wisconsin state court. On February 20, 2009, the parent plaintiffs (the "Parents") sued the Conserve School Defendants in Vilas County, Wisconsin -- where Conserve School is located -- seeking a temporary restraining order and a permanent injunction to require that Conserve School remain a four-year boarding school. See Conserve Community LLC et al. v. Conserve School Corporation et al., No. 09 CV 54 (Vilas County, Wisconsin).[3] Although Culver seeks radically different relief, its legal theory is the same as the Parents': both complaints assert that the trustees' decision violates Article VI, Paragraph B(10) and Article VI, Paragraph K of the trust instrument.

10. Culver has named the Parents as parties here, but its complaint makes no mention of the prior Wisconsin action that obviously inspired it.

11. The Parents' emergency motion for temporary injunctive relief was heard in Vilas County on March 6, 2009. Culver sent three lawyers to watch: two of its Chicago attorneys (Messrs. Horwitch and Fitzgerald), who made the 300-mile journey to Eagle River, and Culver's Wisconsin counsel (Michael Eckert).

12. The Wisconsin court denied the temporary injunction, ordered expedited discovery, and set the case for a trial on the Parents' request for permanent injunction on April

[3] A certified copy of the Wisconsin complaint is attached hereto as Exhibit 2. The Court may take judicial notice of that complaint. See, e.g., 520 South Michigan Ave. Associates, Ltd. v. Shannon, 549 F.3d 1119, 1137 n.14 (7th Cir. 2008); Deicher v. City of Evansville, Wisconsin, 545 F.3d 537, 541-42 (7th Cir. 2008).

22-23, 2009. Culver continued to monitor developments, securing copies of pleadings and inquiring about the status of discovery, but elected not to participate in discovery or otherwise.

13. Nor, according to this Court's docket, has Culver done anything to advance this action other than amending its complaint twice and effecting service on some of the defendants, even after hearing the judge in Vilas County enter an expedited discovery and trial schedule in order to minimize the period of uncertainty facing the parents who need to make plans for their children's education in the coming year.

14. On April 7, 2009, more than six weeks after the Parents' case was filed, Culver moved to intervene as a defendant in the Wisconsin case and also filed a motion to dismiss that case in favor of the later-filed action in this Court. Culver has noticed its motion for April 17, 2009 -- a mere five days before the Wisconsin trial.

15. While asserting that it is not actually submitting to the Wisconsin court's jurisdiction (despite moving to intervene in that case), Culver contends that it nonetheless has standing to seek either a dismissal or a stay of the Wisconsin action pending this Court's judgment.

Argument

16. Culver has it backwards. Because the Wisconsin court has already taken jurisdiction over the trust *res*, this Court is precluded from doing so. Culver's complaint must be dismissed under the doctrine of primary exclusive jurisdiction.

17. Although the Supreme Court has spoken clearly concerning the primary exclusive jurisdiction doctrine many times over more than 100 years,[4] its articulation 80 years ago in

[4] See 13F Fed. Prac. & Proc. Juris. 3d § 3631 n.15 (citing twenty-six Supreme Court decisions stretching back to 1849).

Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939), remains the benchmark. Indeed, courts often refer to the primary exclusive jurisdiction doctrine as the Princess Lida doctrine.

18. The specific issue in Princess Lida was precisely the issue facing this Court: "whether the exercise of jurisdiction by a state court over the administration of a trust deprives the federal court of jurisdiction of a later suit involving the same subject matter." 305 U.S. at 457. The Supreme Court's answer was yes:

> The [Pennsylvania] Common Pleas Court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are ... quasi in rem, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit subsequently brought for the same relief, and the petitioners were properly enjoined from proceeding in that court.

Id. at 467-68. The Court's rationale was straightforward:

> We have said that the principle applicable to both federal and state courts that the first court assuming jurisdiction over property may maintain and exercise that jurisdiction *to the exclusion of the other*, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the other court must control the property. The doctrine is necessary to the harmonious operation of federal and state tribunals.

Id. at 466 (emphasis added) (internal citations omitted).

19. The Seventh Circuit has repeatedly applied the primary exclusive jurisdiction doctrine set forth in Princess Lida. See, e.g., Norton v. Bridges, 712 F.2d 1156 (7th Cir. 1983) (requiring dismissal of subsequent federal action concerning claim to trust assets where state court had prior jurisdiction); Gradel v. Piranha Capital, L.P., 495 F.3d 729, 731 (7th Cir. 2007) (same).

20. Gradel, which was decided just two years ago, is instructive. In that case, this Court entered judgment in favor of certain hedge fund investors. The investors attached one of the hedge fund's accounts with the clearing firm Pershing and sought a turnover order based on this Court's judgment. The court-appointed receiver in a subsequent federal case in California then intervened and moved to vacate the attachment. This Court vacated the attachment and denied the investors' request for a turnover order. Gradel, 495 F.3d at 730-31. Invoking Princess Lida, the Seventh Circuit reversed, ruling that the California action should not have proceeded at all because this Court had prior exclusive jurisdiction over the *res* in question.

> But can a court in Chicago issue an order that will affect funds held by a court in California? In this case it can, because the receiver intervened in the Chicago suit and by doing so submitted himself to the jurisdiction of the court in which that suit was pending. He can therefore be ordered to acknowledge the plaintiffs' claim to the funds. What is more, he can and should be ordered to turn over to the plaintiffs the money seized from [the hedge fund's] account with Pershing, since "*as between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property . . . [namely the $1 million in the Pershing account] is entitled to retain it without interference and cannot be deprived of its right to do so*."

Id. at 731 (emphasis added) (internal citations omitted).

21. Along the same lines, several district courts have recently invoked Princess Lida in dismissing actions against trustees seeking damages for negligence and breach of fiduciary duty. See, e.g., Shaw v. First Interstate Bank of Wisconsin, N.A., 695 F. Supp. 995, 997-1000 (W.D. Wis. 1988) (granting Rule 12(b)(1) motion on Princess Lida grounds); Straus v. Straus, 987 F. Supp. 52, 55-56 (D. Mass. 1997) (same).

22. Indeed, Straus rejected the claim that Princess Lida did not extend to suits "where judgment is sought personally against the trustees." Id. at 54. The court explained:

> The gravamen of the plaintiffs' Complaint (whatever the labels that have been attached to the individual claims) is that the trustees have "breached their fiduciary obligations, including failure to properly investigate beneficiary need ... and refusal to make appropriate distributions of principal." Because fundamentally, the resolution of plaintiffs' lawsuit would require the court "to construe the trust and define its duties, obligations and responsibilities of Trustees" it is *quasi in rem* in nature and therefore controlled by Princess Lida.

Id. at 55 (internal citation omitted) (ellipsis in original).

23. Here, there is no dispute that the Wisconsin action and this one seek to control the administration and disposition of the same *res*: the assets of the Conserve School Trust. The Parents are seeking an injunction requiring the Trust assets to be used to fund a particular type of school or to be paid over to their newly formed limited liability company, while Culver is seeking an injunction requiring that the assets be transferred to Culver. See Docket No. 13, Second Amended Complaint, Prayer ¶ D; Parents' Complaint (Exhibit 2 hereto), Demand ¶ 2.

24. Nor is there any dispute that the Wisconsin action was filed first. (Exhibit 2) Under the Princess Lida doctrine, these two undisputed facts require dismissal of this case.[5]

25. Of course, it is possible that the Wisconsin case will be finally resolved at the hearing scheduled for April 22-23. But whatever happens, this case cannot proceed until the Wisconsin case concludes.

WHEREFORE, the Conserve School Defendants respectfully request that the Court dismiss Culver's Second Amended Complaint.

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[5] While this motion implicates little evidentiary matter for the Court to consider beyond a comparison of the two complaints, it is well settled that "[i]n reviewing a 12(b)(1) motion, a court may look beyond the complaint and view any extraneous evidence submitted by the parties to determine whether federal jurisdiction exists." S.W.L., Inc. v. Envirotech, Inc., No. 04 C 2984, 2004 WL 1444855, at *1 (N.D. Ill. Jun. 28, 2004) (citing United Transp. Union v. Gateway Western Ry. Co., 78 F.3d 1208, 1210 (7th Cir. 1996)).

Respectfully submitted,

Dated: April 13, 2009

/s/ Lawrence H. Heftman

Roger Pascal
David C. Blickenstaff
David C. Giles
Lawrence H. Heftman
SCHIFF HARDIN LLP
233 S. Wacker Drive, Suite 6600
Chicago, IL 60606
(312) 258-5500
rpascal@schiffhardin.com
dblickenstaff@schiffhardin.com
dgiles@schiffhardin.com
lheftman@schiffhardin.com

Attorneys for Defendants Michael X. Cronin, John F. Calhoun, Michael J. Sullivan, Ronald V. Kazmar, and Christopher Rodgers, individually and as Trustees of the James R. Lowenstine Trust dated August 17, 1981 and the Conserve School Trust thereunder, and Conserve School Corporation

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on April 13, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

Gino L. DiVito
Mark H. Horwitch
John Matthew Fitzgerald
TABET, DIVITO & ROTHSTEIN LLC
209 S. LaSalle St., 7th Floor
Chicago, Illinois 60604
Email: gdivito@tdrlawfirm.com
Email: mhorwitch@tdrlawfirm.com
Email: jfitzgerald@trdlawfirm.com

William J. McKenna, Jr.
FOLEY & LARDNER
321 North Clark Street
Suite 2800
Chicago, IL 60610
Email: wmckenna@foley.com

I hereby certify that on April 13, 2009, I caused copies of the foregoing to be placed in the U.S. mail to the following addresses:

Patricia A. Lins & Lawrence Sutter
51998 Canal Rd.
Houghton, MI 49931

Deb Crawford
P.O. Box 61
Phelps, WI 54554-0061

/s/ Lawrence H. Heftman
Lawrence H. Heftman