

only party common to both suits, although the dispute in each derives from the same employment contract.

The material allegations of the present complaint are as follows. The plaintiff is a resident of Portland, Maine. Complaint ¶ 2. The defendant is a resident of Steubenville, Ohio and the owner, directly or indirectly, of the Louis Berkman Company. *Id.* ¶¶ 3-4. The plaintiff is a 15 percent shareholder in D.S.P., Inc. ("D.S.P."), a Maine corporation doing business in Auburn, Maine under the trade name of Diamond Snowplow. *Id.* ¶¶ 5-6. The Louis Berkman Company is a 50 percent shareholder in D.S.P. *Id.* ¶ 7.

On or about June 1, 1988 the plaintiff and D.S.P. entered into an employment agreement. *Id.* ¶ 8 and Exh. A thereto. At about the same time the plaintiff, the Louis Berkman Company and

action pursuant to Fed. R. Evid. 201 governing judicial notice of "judicative facts." "Judicative facts are the ultimate facts in the case, plus those evidential facts that are sufficiently central to the controversy that they should be left to the jury unless clearly indisputable." 21 C. Wright & K. Graham, *Federal Practice and Procedure* ¶ 5103 at 478 (1977). The present action does not fall within either category. Neither the motion to stay nor the motion to dismiss compels the court to consider the merits of the claim currently before it. Therefore, while the court is free to take judicial notice of the fact that a concurrent state court proceeding exists and that allegations are made therein, it cannot notice the "truth" of those allegations until a final judgment has been entered in the state action which reflects such fact findings. *See Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990)(federal courts may take judicial notice of proceedings in other courts if relevant to matters at hand); *E.I. Du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986)(federal court taking judicial notice of complaint filed in state action).

others entered into a shareholders agreement. *Id.* & 9. The defendant knew of the plaintiff's contractual relationship with D.S.P. and interfered with his existing and prospective contractual relations with the company. *Id.* && 10-13. As a result of this interference, the plaintiff's employment was terminated in breach of the employment agreement. *Id.* & 12.

The defendant's conduct was improper and his interference was accomplished through fraud and intimidation. *Id.* & 14. In September, October and November of 1990 the defendant attempted to acquire the plaintiff's D.S.P. stock in order to take control of D.S.P. for his own benefit or the benefit of other corporations in which he has a substantial interest. *Id.* & 22. In his attempt to accomplish this goal, the defendant caused the plaintiff to be ejected from a D.S.P. directors' meeting, to be stripped of his directorship and ultimately to lose his job. *Id.* & 12. The defendant also attempted to make the plaintiff's stock unmarketable, threatened unfavorable employment references if the plaintiff refused to sell his stock to the defendant and caused the plaintiff embarrassment and financial distress. *Id.* && 23-26. The defendant has acted with malice and has caused the plaintiff to suffer severe emotional distress. *Id.* && 20-21.

The defendant's threatened actions have also been detrimental to D.S.P. and its shareholders. *Id.* & 16, 18. Specifically, the defendant has threatened to use his influence to induce one of D.S.P.'s primary creditors to enforce guarantees against certain shareholders and also to induce D.S.P. creditors to create financial distress for D.S.P. by forcing the corporation into bankruptcy. *Id.* && 14-16.

II. THE MOTION TO STAY

“ [W]hen a state court and a federal court enjoy concurrent jurisdiction over a particular suit, they both may, and, under some circumstances, must, proceed with the respective litigations simultaneously.” *Burns v. Watler*, 931 F.2d 140, 145 (1st Cir. 1991) (citation omitted). In *Burns*, the Court of Appeals for the First Circuit acknowledged that “[a] narrow exception to this rule does exist” and that “reasons of wise judicial administration” may warrant that a federal court stay or dismiss a suit due to the pendency of concurrent state proceedings.” *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976)). The First Circuit emphasized the limited nature of this exception in *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7 (1st Cir. 1990), when it stated that “the surrender of jurisdiction in favor of parallel state proceedings . . . is permissible only in exceptional circumstances” *Id.* at 12 (citation omitted). “[T]he pendency of an overlapping state court suit is an insufficient basis in and of itself to warrant dismissal of a federal suit.” *Id.*

In deciding upon a motion to stay, the court must balance several factors to determine whether exceptional circumstances exist.² To ensure that only exceptional cases are dismissed from federal court, the district court must approach its decision with the balance heavily weighted in favor of the exercise of jurisdiction.” *Id.* (citation omitted). Based on a consideration of the factors relevant to the

² Those factors include: (1) whether either court has assumed jurisdiction over a *res*; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the concurrent forums obtained jurisdiction; (5) whether federal or state law provides the rule of decision; and (6) the adequacy of the state forum to protect the parties' rights. See *Colorado River*, 424 U.S. at 818; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-26 (1983). Additional factors may include the presence or absence of concurrent jurisdiction and the vexatious or contrived nature of the federal claim. *Villa Marina*, 915 F.2d at 12 (citations omitted).

instant case, I conclude that the "exceptional circumstances" exception does not apply and that a stay is unwarranted.

The defendant here argues that four factors militate in favor of a stay: a stay would avoid piecemeal litigation, the state court was first to assume jurisdiction and can grant complete relief, no federal issue is involved and the federal suit is reactive and vexatious. *See* Defendant Louis Berkman's Memorandum of Law in Support of Motion to Stay or, in the Alternative, to Dismiss for Failure to State a Claim ("Defendant's Memorandum") at 7.

Two of the factors can be disposed of easily. When a federal court assumes diversity jurisdiction, it is common that no federal questions are raised. Second, it is not enough to say that the state court assumed jurisdiction first. The Court in *Moses H. Cone* cautioned against giving "too mechanical a reading to the 'priority' element." *Moses H. Cone*, 460 U.S. at 21. The better approach is to measure the progress of each action. However, the defendant does not argue this point; rather, he focuses on the "complete relief" argument which correlates with his assertion that a stay would avoid piecemeal litigation.

The court in *Villa Marina* noted that, while the decision to have a state court resolve all issues "seems eminently reasonable at first blush," possibly reducing friction between jurisdictions, reducing inefficiency and limiting the parties' financial burdens, "[s]uch a liberal approach toward dismissal is, however, inconsistent with the *Colorado River* requirement that the balance be heavily weighted in favor of the exercise of jurisdiction." *Villa Marina*, 915 F.2d at 13 (citation omitted). The court stated that

[d]ismissal is not warranted simply because related issues otherwise would be decided by different courts, or even because two courts otherwise would be deciding the same issue. . . . [S]omething more than a concern for judicial efficiency must animate a federal court's decision to give up jurisdiction.

...

Thus, in considering whether the concern for avoiding piecemeal litigation should play a role in this case, the district court must look beyond the routine inefficiency that is the inevitable result of parallel proceedings to determine whether there is some exceptional basis for requiring the case to proceed entirely in the [state] court.

Villa Marina, 915 F.2d at 16.

Finally, the defendant argues that the plaintiff's federal claim is "reactive and vexatious." I am not persuaded. *Villa Marina* suggests that such a finding might be possible where a defendant in a state-court proceeding becomes dissatisfied with that court's preliminary resolution of some issue and seeks to raise the same issue in a federal forum "in the hope of obtaining a more favorable determination." *Id.* at 15 (citation omitted). Such forum shopping is obviously criticized. However, that is not the case here. The plaintiff is indeed the defendant in the state action, but his federal suit is not a response to the preliminary resolution of an issue in state court. The plaintiff here is suing an individual in federal court who is not a party in the state action. If the plaintiff feels that he was wrongfully discharged, he is within his rights to seek redress in a proper forum against those he believes are responsible for the alleged tort.

Consideration of the remaining *Colorado River* factors³ counsels in favor of the court's obligation to exercise its jurisdiction.

III. THE MOTION TO DISMISS⁴

³ The defendant does not argue the applicability to this case of any of the three remaining factors: jurisdiction over a *res*, inconvenience of the federal forum and adequacy of the state forum to protect the parties' rights.

⁴ I note at the outset that the defendant has submitted an affidavit with attachments in conjunction with his motion. If the court accepts such extra-pleading material, it must convert the motion to dismiss into one for summary judgment. It is within the court's complete discretion to reject any materials beyond the pleadings if it feels that they are not comprehensive enough to facilitate

The defendant argues, in the alternative, that the plaintiff's complaint should be dismissed for two reasons: failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and failure to join an indispensable party pursuant to Fed. R. Civ. P. 12(b)(7). I find no basis for dismissal on either ground.

A. Dismissal Under Fed. R. Civ. P. 12(b)(6)

In ruling on a Rule 12(b)(6) motion to dismiss, the court must take the material allegations of the complaint as true and construe the pleadings in the light most favorable to the plaintiff. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 25 (1st Cir. 1987); *Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987). The motion will be granted "only if, when viewed in this manner, the pleading shows no set of facts which could entitle plaintiff to relief." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988). The court, however, has "no duty to 'conjure up unpled allegations' in order to bolster the plaintiff's chances of surviving a 12(b)(6) motion to dismiss." *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 444 (1st Cir. 1990) (quoting *Gooley*, 851 F.2d at 514). The plaintiff must "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gooley*, 851 F.2d at 515.

1. Interference with Contractual Relationship

disposition of the action. See 5A C. Wright & A. Miller, *Federal Practice and Procedure* ' 1366 at 491-93 (1990). I find that the proffered affidavit and attachments are inconclusive and decline to consider them. The court may, however, consider the employment agreement because it is attached to the complaint. See 5A Wright & Miller, *Federal Practice and Procedure* ' 1357 at 299 (1990).

The Maine Supreme Judicial Court ("Law Court") has long recognized that if a person by fraud or intimidation procures the breach of a contract that would have continued but for such wrongful interference, that person can be liable in damages for such tortious interference." *Pombriant v. Blue Cross/Blue Shield of Maine*, 562 A.2d 656, 659 (Me. 1989) (citation omitted). The complaint alleges that the defendant interfered with the plaintiff's contractual relationship with D.S.P.⁵ The plaintiff further alleges that the defendant's interference was improper and was accomplished through fraud and intimidation. Such interference includes ordering the plaintiff to leave a directors' meeting, informing him that his directorship was terminated and depriving him of any opportunity to participate in the management of D.S.P. The complaint further alleges that the defendant attempted to intimidate the plaintiff into selling his shares of D.S.P. stock. As a result of these actions, the plaintiff alleges that he was fired and was precluded from future prospective financial relations with the corporation.

The defendant asserts that, as a member of D.S.P.'s board of directors, he cannot interfere with D.S.P.'s own contracts as a matter of law. However, if the evidence should later establish that the defendant does hold such a position, that is not the end of the matter. Although I have been unable to unearth any Maine caselaw on this precise issue, other courts offer helpful guidance.⁶ Applying the

⁵ The plaintiff's complaint alleges interference with contractual relations, both existing and prospective. Interference with prospective contractual relations is "a recognized extension of the more typical tort." *Kazmaier v. Wooten*, 761 F.2d 46, 51 (1st Cir. 1985); Restatement (Second) of Torts ' 766B at 20 (1979). The plaintiff must allege, as he must in the related tort, intentional interference without justification. See *Kazmaier*, 761 F.2d at 52; Restatement ' 766 comment s, ' 766B comment f.

⁶ The caselaw appears to make no substantial distinction between "directors" and "officers" as to privilege from liability. The general rule is that "an officer or director is privileged to induce the corporation to violate a contractual relation, provided that the officer or director acts in good faith and believes that the action is for the best interests of the corporation. Where officers or directors act against the interest of the corporation, act for their own pecuniary benefit or with the intent to harm the plaintiff in inducing the breach of contract, they can be held liable to the injured party." 3 W. Fletcher, *Fletcher Cyclopaedia of the Law of Private Corporations* ' 1001 at 706-07 (rev. perm. ed. 1986) (citations omitted).

caselaw of our sister-state of Massachusetts, the First Circuit has held that corporate officers are privileged from tortious interference claims if they were acting within the scope of their employment responsibilities and without malice. See *Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 11-12 (1st Cir. 1986). In addition, the Court of Appeals for the Seventh Circuit has held that, "when the action [of a corporate officer] is detrimental to the corporation and outside the scope of corporate authority, immunity ceases to exist." *George A. Fuller Co. Div. of Northrop Corp. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1333 (7th Cir. 1983) (citation omitted). Assuming that this principle extends to directors, the defendant may not escape liability.

The complaint here alleges that the defendant acted without authority, against the corporation's best interests and with malice. I find that the allegations, if true, establish that the defendant induced the breach to injure the plaintiff and further his personal goals and that he acted contrary to the best interest of the corporation. This would defeat the defendant's immunity defense. In addition, the allegations "include the essential element of intimidation." *MacKerron v. Madura*, 445 A.2d 680, 683 (Me. 1982) (citation omitted). In sum, the plaintiff has stated a claim upon which relief can be granted.

2. Intentional Infliction of Emotional Distress

The Law Court adopted the Restatement (Second) of Torts' definition of this cause of action in *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979). It held that "a defendant is subject to liability if he engages in extreme or outrageous conduct that intentionally or recklessly inflicts severe emotional distress upon another." *Id.* at 155. This court, applying Maine law, has stated that it must determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Dempsey v. National Enquirer*, 702 F. Supp. 927, 930

(D. Me. 1988). ``Where reasonable men may differ, it is for the jury . . . to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." Restatement (Second) of Torts ' 46 comment h at 77 (1965).

In *Rubin v. Matthews Int'l Corp.*, 503 A.2d 694 (Me. 1986), the Law Court noted that ``the concept of outrageousness has expanded from its roots in cases involving funerals and death messages." *Id.* at 699-700. ``Courts are most likely to confront and recognize a claim of outrageousness when the parties are apparently bound by contracts regulating an economic relationship." D. Givelber, *The Right to Minimum Social Recovery and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42, 69 (1982) (cited with approval in *Rubin*, 503 A.2d at 700). Conceding in *Rubin* that the defendant's actions in non-contractual situations might not satisfy the traditional notion of ``outrageousness," the Law Court found that the plaintiff's allegations stated a claim for intentional infliction of emotional distress in light of the contractual relationship.

In the instant case, the defendant argues that the allegations do not rise to the level of ``extreme" and ``outrageous" conduct needed to survive a motion to dismiss. In addition, the defendant characterizes the ``severity" of the plaintiff's alleged emotional distress as the product of an internal corporate dispute that ``is routinely endured by reasonable men." *See* Defendant's Memorandum at 16.

The complaint alleges that the defendant's conduct caused him severe emotional distress. That conduct allegedly includes causing the plaintiff to lose his job resulting in financial distress, embarrassing him by ejecting him from a board meeting, stripping him of his directorship, threatening unfavorable references if the plaintiff refused to sell his stock to the defendant, attempting to make the plaintiff's stock unmarketable and depriving the plaintiff of his lawful right, as part-owner, to participate

in the affairs and management of the corporation. Applying Maine law, I conclude that the complaint reasonably states a claim for intentional infliction of emotional distress.

B. Dismissal Under Fed. R. Civ. P. 12(b)(7)

The defendant argues that the plaintiff's federal claim must be dismissed because he failed to join D.S.P. as a necessary and indispensable party. He states that, because "D.S.P. has an interest in having all issues related to its alleged breach of [the plaintiff's] employment contract litigated in one forum," it is a necessary party under Fed. R. Civ. P. 19(a). *See* Defendant's Memorandum at 9 n.5. Since joinder of D.S.P. would destroy diversity jurisdiction, the defendant argues that the court must dismiss the complaint under Fed. R. Civ. P. 12(b)(7).

Fed. R. Civ. P. 12(b)(7) provides for dismissal of a claim for failure to join a party under Rule 19. Rule 19 analysis is a two-step process, yet the defendant appears to homogenize the two steps by failing to recognize that D.S.P. falls short of Rule 19(a)'s requirements, let alone meeting the test of Rule 19(b). It is settled law that whether a particular party is necessary and indispensable under Rule 19 "can only be determined in the context of the particular litigation." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968). The First Circuit set forth the framework for Rule 19 analysis in *Pujol v. Shearson Am. Express., Inc.*, 877 F.2d 132 (1st Cir. 1989). The court must first decide whether the person fits the definition of those who should "be joined if feasible" under Rule 19(a). In doing so, the court is to consider the following factors: (1) in the person's absence, can the court accord complete relief among those already parties; and (2) is the person's claimed interest in the subject matter of the action such that his absence may (a) impair or impede that person's ability to protect that interest or (b) leave those already parties subject to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest?" *Id.* at 134.

While it is conceivable that D.S.P. has an interest in this proceeding -- inasmuch as it may be obligated to indemnify its board members in actions against them -- that interest alone does not satisfy Rule 19(a) requirements. The court is able to afford complete relief to either party in the absence of D.S.P. Moreover, D.S.P. itself does not claim an interest in the subject matter of this litigation.

IV. CONCLUSION

For the foregoing reasons, I **DENY** the defendant's motion for stay and recommend that his motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 12th day of June, 1991.

*David M. Cohen
United States Magistrate Judge*