COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: June 12, 2008
Decided: July 2, 2008

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RE: E.I. du Pont de Nemours and Co. v. Bayer CropScience, L.P.
C.A. No. 3741-VCL

Dear Counsel,

This letter opinion addresses the defendant's motion to dismiss the complaint for lack of subject matter jurisdiction or, alternatively, for a stay. For the reasons set forth at the hearing of June 12, 2008 and stated herein, the court finds that it has subject matter jurisdiction over this action based on the plaintiff's request for interim injunctive relief, and that a stay is not warranted given that this court is best positioned to expeditiously resolve this time-sensitive dispute.

I.

The plaintiff, E. I. du Pont de Nemours and Company ("DuPont"), filed its complaint on May 5, 2008 seeking specific performance, declaratory judgment,

and equitable relief in the form of a temporary restraining order, a preliminary injunction, and a permanent injunction. The basis for the action is a multi-year supply agreement DuPont entered into with defendant Bayer CropScience, L.P. ("BCS") in May 2007, pursuant to which BCS supplies DuPont with a chemical called isoxadifen ethyl ("isoxadifen"). Isoxadifen is unavailable to DuPont from any other source. The supply agreement is expressly governed by North Carolina law.

DuPont alleges that on February 8, 2008, BCS wrote a letter to DuPont in which BCS expressed its concern that DuPont was in breach of the supply agreement and a separate agreement referred to as the "evaluation agreement." Specifically, BCS complained that DuPont had filed various patent applications referencing isoxadifen without obtaining BCS's prior approval, and that DuPont had registered two products containing isoxadifen–Require Q and Resolve Q–with the United States Environmental Protection Agency even though those products allegedly exceeded the scope of DuPont's rights to use isoxadifen. DuPont responded by email denying that it was in breach, and the parties had a telephone call on the subject on March 4, 2008.

Dissatisfied with DuPont's response, BCS sent another letter on March 13, 2008 stating that it "remain[ed] convinced" that DuPont was in breach of the

supply agreement and evaluation agreement.[1] BCS offered DuPont 60 days to cure these alleged breaches, and stated that "[f]ailing adequate remedy within the sixty-day period, BCS will have the right to terminate [the supply agreement]."[2] BCS then outlined the actions it thought DuPont would have to take in order to cure the alleged breaches.

Two weeks later, on March 26, 2008, DuPont sent BCS a purchase order for its 2009 isoxadifen requirements, and specified that the order had to ship from BCS's facility in Germany by August 4, 2008 to ensure delivery to DuPont by September 1, 2008. On April 15, 2008, DuPont also sent BCS a letter denying that it had breached any agreement, and disputing BCS's right to terminate the supply agreement. After setting out its interpretation of the relevant agreements, DuPont stated it "believes that discussing our respective positions beyond this letter would be mutually beneficial,"[3] and requested that BCS respond by April 25, 2008.

BCS never responded, and no further discussions took place. Instead, at approximately 3 p.m. on May 5, 2008, BCS field a complaint in Superior Court in Durham County, North Carolina. On that same day at 6:44 p.m., DuPont filed a complaint in this court. BCS then filed a motion to dismiss DuPont's complaint for lack of subject matter jurisdiction or, alternatively, to stay in favor of the North

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[1] Compl. Ex. B.
[2] *Id.*
[3] *Id.* at Ex. C.

Carolina action. The motion was fully briefed, and this court heard oral argument on June 12, 2008.

II.

The Motion To Dismiss For Lack Of Subject Matter Jurisdiction

The burden of establishing the court's subject matter jurisdiction rests "with the party seeking the Court's intervention,"[4] and in reviewing the motion, the court may consider documents outside the complaint.[5] Further, the court "must examine the pleadings to determine the true substance of the relief the [plaintiff] seeks, and will not be bound by the form of relief as described [by the plaintiff.]"[6] The existence of jurisdiction is to be ascertained as of the time of the filing of the complaint.[7]

As BCS notes, the jurisdiction of the Court of Chancery is limited to only those cases asserting some equitable right or seeking an equitable remedy. BCS contends that DuPont's anticipatory breach claim was unripe at the time the

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[4] *Ropp v. King*, 2007 WL 2198771, at *2 (Del. Ch. July 25, 2007) (citing *Scattered Corp. v. Chicago Stock Exch.*, 671 A.2d 874, 877 (Del. Ch.1994), *aff'd*, 633 A.2d 372 (1993)); *see also Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1284 n.14 (Del. 2007) (stating that "'[u]nlike the standards employed in Rule 12(b)(6) analysis, the guidelines for the Court's review of [a] Rule 12(b)(1) motion are far more demanding of the non-movant. The burden is on the Plaintiffs to prove jurisdiction exists.'") (quoting *Phillips v. County of Bucks*, 1999 WL 600541, at *1 (E.D. Pa. Aug. 9, 1999)).
[5] *NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 429 n.15 (Del. Ch. 2007); *see also Sloan v. Segal*, 2008 WL 81513, at *6 & n.25 (Del. Ch. Jan. 3 2008).
[6] *Zeneca, Inc. v. Monsanto Co.*, 1996 WL 104254, at *4 (Del. Ch. Mar. 7, 1996).
[7] *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*, 267 A.2d 586, 588 (Del. 1970).

complaint was filed in this court, thereby abrogating DuPont's request for specific performance and other equitable relief. Without this equitable basis, BCS argues, this action is reduced to a request for declaratory judgment over which this court lacks subject matter jurisdiction.[8] DuPont contends that its anticipatory breach claim was ripe at the time the complaint was filed and, it asserts, BCS ignores its claim for interim injunctive relief over which this court has subject matter jurisdiction.

The Supreme Court, in *Diebold Computer Leasing, Inc. v. Commercial Credit Corp.*,[9] found that this court has jurisdiction over requests for interim injunctive relief necessary to maintain the status quo until it is able to determine disputed contract rights.[10] In *Diebold*, the plaintiff entered into a loan agreement with Commercial obligating Commercial to extend a $75 million revolving line of credit. After the agreement was signed, Diebold decided that it needed to diversify

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[8] BCS also contends that specific performance is not available as a remedy for anticipatory breach. In support, BCS cites to *Carteret Bancorp, Inc. v. Home Group, Inc.*, in which the court held that "a promisee who seeks specific enforcement of a contract, rather than damages, fails to state a claim upon which such relief may be granted unless he can allege that the defendant is under a present legal obligation to perform the contract and has wrongfully failed to do so." 1988 WL 3010, at *5 (Del. Ch. Jan. 13, 1988) ("In other words, an anticipatory repudiation theory will not support specific performance relief prior to the time the parties themselves agreed that the performance was due"). The court need not address the merits of this argument to resolve the present dispute.
[9] 267 A.2d 586.
[10] *Id.*; *Travelers Cas. & Sur. Co. of America v. Colonial Sch. Dist.*, 2001 WL 287482, at *3 (Del. Ch. Mar. 16, 2001) (citing *Jefferson Chem. Co. v. Mobay Chem. Co.*, 253 A.2d 512, 514 (Del. Ch. 1969)).

its business operations by forming affiliated corporations that would engage in new businesses. Commercial took the position that, under the loan agreement, its consent was required for Diebold to proceed with its plan. Diebold maintained that no such consent was required.

Commercial told Diebold that it would not consent, and sent Diebold a notice that it would be in default of the loan agreement if it proceeded with the planned diversification. Further, under the terms of the loan agreement, merely by giving this notice of default, Commercial was allowed to, *inter alia*, cut off all further borrowing and declare the $70 million outstanding immediately due and payable. According to Diebold, it could not continue functioning as a business enterprise if Commercial carried out these threats.

Diebold filed an action seeking a declaration that its planned diversification would not breach the loan agreement, and asking this court to enjoin Commercial from acting on its threats. The court held that there was no basis for equitable jurisdiction because the "case [was] basically concerned with the construction of a business contract" and any injunctive relief "would indeed be redundant."[11]

Diebold then attempted to amend its complaint with an allegation that, due to Commercial's threats, it was unable to convince third parties to begin negotiating potential diversification plans in any meaningful way. Citing an

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[11] *Id.* at 589-90.

"urgent need" to diversify, Diebold argued that damages would be an inadequate remedy and, in order for any declaratory relief to be meaningful, it needed to begin such negotiations before the court reached its decision on the meaning of the contract. Thus, Diebold requested immediate, interim injunctive relief prohibiting Commercial from cutting off further borrowing and declaring the amount outstanding immediately due and payable while Diebold began negotiations with third parties. This court denied Diebold's request for leave to amend.

The Supreme Court reversed and found that (1) leave to amend should be granted, and (2) Diebold's request for interim injunctive relief gave the Court of Chancery subject matter jurisdiction over the action. The Supreme Court noted that at the time the complaint was filed, Commercial's intent to carry out its threats was "sufficiently actual, impending, and unconjectural to warrant retention of jurisdiction of the case by the [Court of Chancery]."[12]

Similarly, in this case, DuPont has alleged that it takes time for BCS to manufacture isoxadifen. Therefore, DuPont alleges, even if DuPont obtains declaratory relief in this action, it is uncertain that BCS will have "sufficient supplies manufactured to in fact fill DuPont's order on or before August 4, 2008 . . . ."[13] DuPont further alleges that damages will not be an adequate remedy for

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[12] *Id.* at 591.
[13] Compl. ¶ 44.

such a breach because isoxadifen is a unique product that can be purchased only from BCS, DuPont will suffer irreparable harm to its goodwill if it is forced to discontinue Require Q or Resolve Q, and the products have been promoted for only one crop season, making an accurate calculation of damages impossible. As a result, DuPont alleges, "interlocutory equitable relief is necessary to preserve the status quo while this action is pending,"[14] and asks this court to enter a preliminary injunction directing BCS to perform under the supply agreement during the pendency of this action. The court finds that, at the time the complaint was filed, BCS's intent to cease performance under the supply agreement during the pendency of this action was sufficiently actual, impending, and unconjectural to warrant this court's assertion of jurisdiction over DuPont's request for interim injunctive relief.[15] Therefore, this court has subject matter jurisdiction over this entire matter.[16]

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[14] *Id.* at ¶ 89.
[15] *Travelers Cas.*, 2001 WL 287482, at *3 (citing *Jefferson*, 253 A.2d at 514); *Diebold*, 267 A.2d 586. DuPont's concern was alleviated by a letter agreement executed by the parties on May 9, 2008 under which BCS agreed not to take any action impairing its ability to supply DuPont isoxadifen by September 1, 2008. However, this letter has no effect on this court's jurisdiction because that jurisdiction is "to be ascertained . . . as of the time of the filling of the action." *Diebold*, 267 A.2d at 591.
[16] *Amer. App., Inc. v. State, ex rel. Brady*, 712 A.2d 1001, 1003 (Del. 1998) (noting that the Court of Chancery, in its discretion, may hear and decide pendent legal claims under the "equitable clean-up" doctrine); *see also Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2007 WL 1207106, at *3 (Del. Ch. Feb. 8, 2007).

III.

The *McWane* Doctrine

BCS next argues that the court should stay the action because the North Carolina action was first filed. In support, BCS cites the rule outlined by *McWane Iron Pipe Corp. v. McDowell-Wellman Enginneering Co.*,[17] that "Delaware courts should liberally exercise their discretion in favor of a stay when (1) a first-filed prior pending action exists in another jurisdiction, (2) that action involves similar parties and issues, and (3) the court in the other jurisdiction is capable of rendering prompt and complete justice."[18] DuPont argues the court should disregard the *McWane* doctrine and regard the complaints as contemporaneously filed.

The court declines to apply the *McWane* doctrine in this case. As the court in *In re The Topps Company Shareholders Litigation* stated, "*McWane* most clearly applies when an individual plaintiff sues a defendant in a convenient forum and is then met with a responsive suit by the defendant in another forum."[19] In other words, one of the underlying principles of the *McWane* doctrine is that a plaintiff's choice of forum should be respected (assuming it is a proper forum) and a defendant should not be allowed to engage in forum shopping by subsequently

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[17] 263 A.2d 281 (Del. 1970).
[18] *Enodis Corp. v. Amana Co.*, 2007 WL 1242193, at *2 (Del. Ch. Apr. 26, 2007).
[19] 924 A.2d 951, 956 (Del. Ch. 2007); *see also HFTP Invs., L.L.C. v. Ariad Pharm., Inc.*, 752 A.2d 115, 121 (Del. Ch. 1999) (stating the policy underlying *McWane* is "to prohibit the party seeking a stay from defeating the plaintiff's legitimate choice of forum").

filing its own complaint in another court. However, in this case, as BCS concedes, there is no evidence that DuPont filed its complaint in response to BCS's complaint. Rather, DuPont and BCS simply chose, by sheer coincidence, to file on the same day only hours apart. As such, the policy underlying *McWane* is not implicated.[20] In these circumstances, the court exercises its discretion[21] to treat the complaints as contemporaneously filed.[22]

IV.

Forum Non Conveniens

Where multiple actions are contemporaneously filed, this court evaluates a motion to stay "'under the traditional *forum non conveniens* framework without

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[20] Courts will also sometimes decline to apply the *McWane* doctrine in derivative and representative actions. The underlying reasoning is that "[a] shareholder plaintiff does not sue for his direct benefit. Instead, he alleges injury to and seeks redress on behalf of the corporation. Further, . . . any shareholder with standing may represent the injured party. Thus, this Court places less emphasis on the celerity of such plaintiffs and grants less deference to the speedy plaintiff's choice of forum. [Therefore], this Court proceeds cautiously when faced with the question of whether to defer to a first filed derivative suit, examining more closely the relevant factors bearing on where the case should best proceed, using something akin to a *forum non conveniens* analysis." *Ryan v. Gifford*, 918 A.2d 341, 349 (Del. Ch. 2007) (citing *Biondi v. Scrushy*, 820 A.2d 1148, 1159 (Del. Ch. 2003)); *see also In re Bear Stearns S'holder Litig*., 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008); *In re Topps*, 924 A.2d at 956-57. Obviously, the current case does not implicate these considerations.

[21] *In re Bear Stearns*, 2008 WL 959992, at *5 (citing *Adirondack GP, Inc. v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch. Nov. 13, 1996)); *see also Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (Del. 1964) (noting that the court's discretion to issue a stay is "inherent in every court and flows from its control over the disposition of causes on its docket").

[22] *Azurix Corp. v. Synagro Techs., Inc.*, 2000 WL 193117, at *4 (Del. Ch. Feb. 3, 2000) (finding it "fair" to treat lawsuits alleging breach of contract as contemporaneous when filed only days apart because "since the difference in time of filing is so close"); *see also HFTP Invs.*, 752 A.2d at 121 (treating lawsuits alleging breach of contract as contemporaneous where they were filed a few minutes apart and "neither lawsuit was filed in reaction to the other").

regard to a *McWane*-type preference of one action over the other.'"[23] The *forum non conveniens* factors are: (1) the applicability of Delaware law, (2) the availability of compulsory process for witnesses, (3) the possibility of a view of the premises, (4) the relative ease of access to proof, (5) the pendency or nonpendency of a similar action or actions in another jurisdiction, and (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.[24] In applying the guidelines, this court considers a balancing test that "imposes no special or heightened burden of persuasion" but simply seeks to answer the question "towards which of the two competing fora do the *forum non conveniens* factors preponderate."[25] However, "[i]n balancing all of the relevant [*forum non conveniens*] factors, the focus of the analysis should be which forum would be the more 'easy, expeditious, and inexpensive' in which to litigate."[26]

Here, many of the factors are in equipoise. Both companies are Delaware corporations. Fifteen of DuPont's 19 potential witnesses are based in the

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[23] *In re Bear Stearns*, 2008 WL 959992, at *5 (quoting *Rapaport v. Litig. Trust of MDIP Inc.*, 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005)).
[24] *Id.* at *5 (citing *Ryan*, 918 A.2d at 351); *HFTP Invs.*, 752 A.2d at 121 (citing *First Bus. Credit Corp. v. 1500 Locust L.P.*, 669 A.2d 104, 108 (1995)).
[25] *HFTP Invs.*, 752 A.2d at 122; *see also Azurix*, 2000 WL 193117, at *4 (stating that "when a party seeks only to stay the contemporaneously filed action, the issue is simply whether on balance, the *forum non conveniens* factors warrant the grant of a stay"); *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 553 (Del. Ch. 1999).
[26] *HFTP Invs.*, 752 A.2d at 122; *see also NRG Barriers, Inc. v. Jelin*, 1996 WL 377014, at *6 (Del. Ch. July 1, 1996) (refusing to stay a Delaware lawsuit in favor of a previously filed California action because it was unlikely that the California court could rule before the closing of a merger six weeks later).

Wilmington area, and a majority of DuPont's documents are in Wilmington, while 15 of BCS's 20 potential witnesses reside in North Carolina, and most of its documents are in North Carolina. The parties agree that a view of the premises is not needed. The litigation in North Carolina covers the same parties and similar actions. And, although the contract calls for application of North Carolina law, both Delaware and North Carolina have adopted the relevant articles of the UCC,[27] both follow the objective theory of contract interpretation,[28] this case does not involve any novel issues of North Carolina law, and "Delaware courts are competent 'to wrestle with open questions of the law of sister states or foreign countries.'"[29] Thus, five of the *forum non conveniens* factors, on balance, do not warrant the grant of a stay.

However, the sixth factor–practical problems that would make the trial of the case easy, expeditious, and inexpensive–weighs heavily against granting a stay. In this case, the action filed in North Carolina has not progressed much beyond the

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[27] *See* 6 Del. C. § 2-101, *et seq.*; N.C. Gen. Stat. § 25-2-101, *et seq.*
[28] *Compare Sassano v. CIBC World Mkts. Corp.*, 2008 WL 2267008, at *5 (Del. Ch. Jan. 17, 2008) ("When interpreting a contract, the court's ultimate goal is to determine the parties' shared intent. Because Delaware adheres to the objective theory of contract interpretation, the court looks to the most objective indicia of that intent: the words found in the written instrument."), *with State v. Philip Morris USA Inc.*, 618 S.E.2d 219, 225 (N.C. 2005) ("Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.") (citations omitted).
[29] *See Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811266, at *6 (Del. Super. June 20, 2007) (quoting *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1200 (Del. 1997)).

filing of the complaint. BCS has not moved for expedited treatment. To the contrary, BCS filed an amended complaint on May 16, 2008, extending DuPont's time to file an answer or dispositive motion to June 18, 2008. Further, BCS did not transfer the action to the North Carolina Business Court as allowed under N.C. Gen. Stat. § 7A-45.4(d)(1).[30] In contrast, on May 12, the court heard counsel on the motion to expedite and subsequently entered a scheduling order requiring the parties to complete a substantial part of their discovery by June 23, 2008 and appear at a preliminary injunction hearing on July 16, 2008.

Despite BCS's protestations that "there is no reason to think that one of the North Carolina Business Court judges could not . . . provide the parties with a date in mid-July" to hear DuPont's motion for preliminary injunction, the facts demonstrate that Delaware is the most expeditious forum in which to litigate this time-sensitive dispute. This is not to say that a North Carolina court cannot adjudicate this dispute expeditiously. Indeed, North Carolina is one of the states that has formed a special business court specifically to improve its handling of such disputes, and nothing suggests that those courts are less than adroit at performing that function. However, the Delaware action has thus far moved much more expeditiously than the North Carolina action. Balancing all of the relevant

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[30] This statute provides that a transfer to the business court may be requested by the plaintiff upon filing the complaint or by the defendant within 30 days of receiving a pleading.

factors, five of which are in relative equipoise, the court finds that a stay of the Delaware action is unwarranted.

V.

The motion to dismiss for lack of subject matter jurisdiction or, alternatively, to stay is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor