IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETROPLAST PETROFISA PLASTICOS S.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 4304-VCP
	)	
AMERON INTERNATIONAL CORP.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: June 19, 2009
Decided: October 28, 2009

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PARSONS, Vice Chancellor.

Plaintiff, Petroplast Petrofisa Plasticos, S.A. ("Petroplast"), brought this action against Defendant, Ameron International Corporation ("Ameron"), seeking damages, specific performance, and injunctive relief stemming from an information-sharing relationship that commenced when the two parties entered into a Technology Purchase Agreement ("TPA" or the "Agreement") in 2002. Petroplast's Complaint contains five counts asserting causes of action against Ameron for: (I) breach of contract, (II) violation of California's Uniform Trade Secret Act, (III) conversion, (IV) unjust enrichment, and (V) common law misappropriation. This matter is currently before the Court on Ameron's motion to stay or, in the alternative, for judgment on the pleadings.

Ameron seeks a stay on *forum non conveniens* grounds, arguing that this suit should yield to a declaratory judgment action Ameron filed in a California federal court almost a month after Petroplast filed this action. If the motion to stay is not granted, Ameron seeks judgment on the pleadings as to Counts II through V of the Complaint, claiming that a provision in the TPA waives Petroplast's right to assert these claims against Ameron.

Because I find that Ameron has failed to show that it will suffer overwhelming hardship if this action is allowed to continue, I deny the motion to stay. Further, having concluded that Ameron has failed to show that Petroplast can prove no set of facts entitling it to relief on Counts II through V, I also deny Ameron's motion for judgment on the pleadings.

I. BACKGROUND[1]

A. The Parties

Petroplast is a pipe manufacturing company organized and headquartered in Argentina. Petroplast deals primarily in the business of engineering systems for projects involving the processing, transportation, and storage of fluids and also engages in the transportation of electric power. One of Petroplast's core businesses is the manufacturing of composite pipe for use in infrastructure projects. Petroplast focuses its business on the South American market.

Ameron, a Delaware corporation with its principal place of business in Pasadena, California, manufactures pipe from various materials, including steel, concrete, and fiberglass. Ameron markets its piping systems to utility companies and operators of oil platforms and marine vessels, among others. Ameron sells its products internationally, serving markets in the United States, Latin America, Europe, Africa, and Asia.

B. Facts

1. Ameron approaches Petroplast

In 2002, an executive associated with Ameron contacted Pedro Pablo Piatti, a Petroplast executive, to inform him that Ralph S. "Rocky" Friedrich, a Senior Vice President at Ameron, was going to be in Brazil and wished to visit Petroplast's facility in Curitiba while he was there. Piatti agreed to allow Friedrich to visit this facility, and, on

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[1] Unless stated otherwise, the facts recited herein come from the Complaint and are assumed to be true for purposes of Ameron's motion for judgment on the pleadings.

August 8, 2002, Friedrich toured Petroplast's Curitiba, Brazil facility. A few weeks later, Friedrich, seeking to enhance Ameron's ability to manufacture sand-filled pipe, wrote to Piatti to propose a technology transfer between Petroplast and Ameron. Piatti felt Petroplast could benefit from this arrangement, and the parties entered into the TPA on October 4, 2002.

2. The Technology Purchase Agreement

Under the terms of the TPA, Petroplast agreed to give Ameron certain software used for pipe design, copies of test reports, descriptions of pipe-making processes, names of materials suppliers, and other information relevant to Petroplast's sand-filled pipe manufacturing processes. In return, Petroplast was to receive $25,000, as well as "copies of Ameron's test data and reports resulting [from] its testing and development program."[2]

The TPA is a three-page document. The first page is an Ameron Purchase Order form which indicates that Ameron is paying Petroplast $25,000 for its information. The subject of the Purchase Order is described as "Technology Purchase per attached Appendix 'A'." The second page of the TPA, entitled "Purchase Order Terms and Conditions" (the "P.O. Terms and Conditions Section"), is on the reverse side of the Purchase Order form and contains boilerplate conditions written in exceedingly small print. Appendix "A," the third and final page of the TPA, contains the specific terms of the Petroplast-Ameron deal. This page recites eight classes of information Petroplast was to transfer to Ameron, as well as Ameron's obligations to Petroplast.

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[2] Friedrich Aff. Ex. A.

Paragraph 14 of the P.O. Terms and Conditions Section states: "Unless otherwise agreed in writing, no commercial, financial or technical information disclosed by Seller [Petroplast] to Buyer [Ameron] shall be deemed secret or confidential and Seller shall have no rights against Buyer with respect thereto except such rights as may exist under applicable patent laws."[3]

Paragraph 21 of the P.O. Terms and Conditions Section provides: "Only the laws of the state shown in Buyer's [Ameron's] address, printed on the reverse side hereof, shall govern the interpretation of this Order."[4] The state shown in Ameron's address in the TPA is California; accordingly, California law governs Petroplast's claims under the TPA.[5]

3. The events of the years following the TPA

In the months after the parties agreed to the TPA, Petroplast fulfilled its obligations under the TPA by providing Ameron with the requisite information and samples. On January 15, 2003, Ameron paid Petroplast the $25,000 called for in the Agreement.

On January 16, 2003, Friedrich told Piatti that Ameron would have preliminary results from tests done on Petroplast pipe samples within two months. On May 22, 2003, following several requests from Piatti for test results, Friedrich told Piatti that Ameron

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[3] *Id.* The P.O. Terms and Conditions Section appears to consist of standard form provisions related to a purchase order.

[4] *Id.*

[5] *Id.*

did not have any "formal reports" to give to Petroplast, but promised to send data within the next week. On October 1, 2003, Piatti met with Friedrich at Ameron's facility in California, but still did not receive any "test reports or procedural improvements."[6] Piatti sent several additional requests for information in the ensuing months. On both June 28 and September 10, 2004, Ron Ulrich, an Ameron employee, promised to send test reports to Piatti. On September 15, 2004, Ameron finally sent some limited technical information to Petroplast, but the information was unrelated to what was promised in the TPA.

Over the next year, Piatti repeatedly requested the promised information from Ameron, but these requests were all ignored. In August and September 2005, Piatti asked to visit Ulrich at Ameron's plant in Burkburnett, Texas. Ulrich responded: "Due to other conflicts, it is not possible for you to visit and meet with any of us at the Burkburnett plant during this time."[7] Ameron continued to ignore Piatti's requests for information until Petroplast filed this suit on January 22, 2009.

While it rebuffed Petroplast's efforts to obtain the information provided for in the TPA, Ameron allegedly used Petroplast's information to develop a pipe that the City of Los Angeles could employ in its sewer system. Ameron's pipe received conditional approval from the City and was used in the Los Angeles sewer system by August 1, 2007 at the latest. According to the Complaint, however, Ameron never provided Petroplast

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6 Compl. ¶ 52.

7 *Id.* at ¶ 65.

with any information regarding the approval and certification of this pipe for use by the City.

4. Facts relating to the motion to stay

To defend against Petroplast's assertion that Ameron's pipe has received regulatory approval from the City of Los Angeles, Ameron intends to elicit the testimony of three employees of the City, Keith Hanks, Jeong Park, and Edward Arrington. These witnesses all reside in Southern California, outside the reach of this Court's subpoena power.[8]

Additionally, Ameron expects to rely on the testimony of a number of witnesses regarding the parties' relationship and the TPA, among other things. These witnesses are current or former employees of Ameron. Two of those witnesses reside in Texas, and the rest in California. Neither party identified any likely witness in Delaware. Likewise, no documents relevant to this case are located in or near Delaware. The documents Ameron intends to use are located in Southern California, while Petroplast's documents are located in either Argentina or Brazil.

C. Procedural History

Petroplast filed its Complaint in this action (the "Delaware Action") on January 22, 2009 seeking damages, specific performance, and injunctive relief based on

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[8] DOB at 6. "DOB" stands for Defendant's opening brief. The remaining briefs on Defendant's motion to stay or for judgment on the pleadings are referred to as follows: "POB" for Plaintiff's opposition brief; "DRB" for Defendant's reply brief; and "PSB" for Plaintiff's sur-reply brief.

five counts: breach of contract, violation of California's Uniform Trade Secrets Act,[9] conversion, unjust enrichment, and common law misappropriation. On February 18, 2009, after answering Petroplast's Complaint, Ameron filed the pending motion to stay or, in the alternative, for judgment on the pleadings.

On February 17, 2009, Ameron filed a declaratory judgment action against Petroplast in the United States District Court for the Central District of California (the "California Action") that raises legal and factual issues identical to those in the Delaware Action.[10] After Petroplast refused to accept service informally in the California Action, Ameron proceeded to make service under the Hague Convention, which it ultimately accomplished on August 10, 2009.[11]

The parties fully briefed Ameron's motion to stay or for judgment on the pleadings. Contending that Ameron's reply brief raised arguments in support of its motion for judgment on the pleadings that were not in its opening brief, Petroplast moved to strike portions of the reply brief or, in the alternative, for permission to file a sur-reply. At argument on the parties' motions, I denied Petroplast's motion to strike, granted its motion to file a sur-reply, and reserved decision on Ameron's motion. This

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9 Cal. Civ. Code §§ 3426.1 to 3426.11.

10 *Ameron Int'l Corp. v. Petroplast Petrofisa Plasticos, S.A.*, Case No. CV-09-1119 PA (CWx); DOB at 7.

11 Pl.'s Suppl. Submission Regarding Def.'s Mot. to Stay or in the Alternative for J. on the Pleadings. Because Petroplast recently has been served in the California Action, the arguments it made in its briefs and at oral argument concerning the lack of service in the California Action are moot and will not be discussed.

Memorandum Opinion comprises the Court's rulings on Ameron's motion to stay or, in the alternative, for judgment on the pleadings.

D. Parties' Contentions

Ameron seeks a stay of this action pending resolution of the California Action on the ground of *forum non conveniens*. According to Ameron, litigation of this action in Delaware would cause it overwhelming inconvenience and hardship, primarily because it intends to call several witnesses who cannot be compelled to testify in Delaware if this action goes to trial. Petroplast counters that Ameron has failed to meet the imposing burden of showing the overwhelming hardship required for a court to grant a stay on *forum non conveniens* grounds.

In the alternative, Ameron contends that if the motion to stay is not granted, it is entitled to judgment on the pleadings as to Counts II through V of Petroplast's Complaint. Ameron bases this argument primarily on paragraph 14 of the TPA's P.O. Terms and Conditions Section which, it alleges, bars Petroplast from asserting any cause of action relating to the information it conveyed to Ameron.

Petroplast contends that Ameron misunderstands the causes of action it alleges in Counts II through V. Petroplast asserts that the claims for misappropriation of trade secrets, conversion, unjust enrichment, and common law misappropriation all are grounded in tort law, and thus are not subject to paragraph 14 of the Agreement. Petroplast further argues that because it has alleged sufficient facts to support each Count of its Complaint, Ameron cannot show it is entitled to judgment on the pleadings.

II. ANALYSIS

A. Motion to Stay

When a party attempts to stay a first-filed Delaware Action[12] on *forum non conveniens* grounds, it "must establish with particularity that [it] will be subjected to overwhelming hardship and inconvenience if required to litigate in Delaware."[13] This standard places a heavy burden on the movant, as "Delaware courts consistently uphold a plaintiff's choice of forum except in rare cases."[14]

In determining whether a movant has shown overwhelming hardship, Delaware courts look to the *Cryo-Maid* factors for guidance.[15] The six factors identified in *Cryo-Maid* and its progeny are: (1) the relative ease of access to proof; (2) the availability of compulsory process for witnesses; (3) the possibility of viewing the premises; (4) whether the controversy is dependent upon the application of Delaware law; (5) the pendency or nonpendency of a similar action in another jurisdiction; and (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.[16] I will discuss each of the factors relevant here in turn.[17]

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12 Because Petroplast commenced this suit twenty-six days before Ameron filed the California Action, this suit constitutes the first-filed action. *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 284 (Del. 1970).

13 *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2006).

14 *Id.* at 135.

15 *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).

16 *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1198-99 (Del. 1997).

1. The relative ease of access to proof

The evidence pertinent to this case is located outside the state of Delaware. Ameron's documents are located primarily in Southern California, where it is headquartered. The witnesses Ameron intends to call are located in either Southern California or Texas. All of Petroplast's documents and witnesses are located in South America, where it is based. Furthermore, Ameron contends that its employees will be burdened if they are forced to attend a trial in Delaware, as they will have to leave their families and will be unable to attend to their business matters during this time.

These facts do not establish overwhelming hardship, however. Documentary evidence can easily be transported to Delaware, and Ameron has not identified any evidence that it would be unable to produce in Delaware. In fact, "collecting evidence from other jurisdictions is regularly handled with ease in this Court."[18]

Ameron's arguments concerning its employees are similarly unpersuasive. At most, these employees will have to make one cross-country round trip to Delaware and be away from their families and jobs for a few days while the trial takes place. While this would impose some burden on these witnesses and Ameron, I consider this burden to be only moderate, especially for executives of a company with international operations.

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[17] Neither party seriously contends that the third factor, the possibility of viewing the premises, is relevant in this case. Accordingly, that factor is not discussed further.

[18] *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 118 (Del. Ch. 2009).

The only case Ameron cites for the proposition that it will suffer overwhelming hardship if its employees have to travel to Delaware is *Texas Instruments*.[19] That case, however, was decided by the Court of Chancery fifteen years ago and pre-dates a string of cases in which the Delaware Supreme Court has made manifest that a party must show *overwhelming* hardship to gain a stay on *forum non conveniens* grounds.[20] In *Texas Instruments*, the court granted the motion to stay on a showing of mere "inconvenience and hardship" and, in that respect, engaged in an analysis of the *Cryo-Maid* factors that differs materially from that which a Delaware court would undertake today.[21]

Although Ameron may have shown that having to transport its documents and employees to Delaware for trial will cause it some hardship and inconvenience, a stay on *forum non conveniens* grounds is not warranted simply because Delaware is not the optimally convenient forum. Instead, Ameron must show that it will suffer overwhelming hardship if forced to litigate in Delaware. Ameron has not met that burden as to the relative ease of access to proof factor.

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19 *Texas Instruments Inc. v. Cyrix Corp.*, 1994 WL 96983 (Del. Ch. Mar. 22, 1994).

20 *See Berger*, 906 A.2d at 136; *Taylor*, 689 A.2d at 1198; *Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 998 (Del. 2004); *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 778 (Del. 2001); *Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 267 (Del. 2001); *Ison v. E.I. du Pont de Nemours & Co., Inc.*, 729 A.2d 832, 838 (Del. 1999).

21 *Compare Texas Instruments*, 1994 WL 96983, at *4-6, *with Berger*, 906 A.2d at 136-38.

2. The availability of compulsory process for witnesses

Ameron intends to call several third party witnesses (*i.e.*, parties not controlled by Ameron) who live in Southern California and, thus, are not amenable to compulsory process in Delaware. Specifically, Ameron identified three employees of the City of Los Angeles who would testify about the City's approval of Ameron's pipe.[22] Ameron asserts that a "large part" of Petroplast's breach of contract claim is based on Ameron's efforts to gain approval from the City of Los Angeles, which, it contends, makes the testimony of these witnesses particularly important. Thus, according to Ameron, it would suffer overwhelming hardship if it were "forced to defend itself in Delaware without any ability to rely on the live testimony of [these] independent third party witnesses who could explain to the trier of fact the complicated regulatory approval process and thus provide a strong defense to Petroplast's breach of contract claim."[23]

Petroplast denies that this shows overwhelming hardship because Ameron is capable of using videotaped depositions or even videoconferencing to present the testimony of these witnesses during trial in such a manner that the finder of fact will be able to make credibility determinations, if necessary. Petroplast further contends that

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[22] Another California witness Ameron intends to rely on for similar testimony, Gordon Robertson, is a third party in the sense that he is retired and, thus, no longer works for Ameron. Yet, Ameron has made no showing that Robertson would be unwilling to come to Delaware voluntarily to testify. Consequently, the possibility that Ameron might call Robertson as a witness has no impact on my analysis.

[23] DRB at 4.

videotaped depositions are particularly appropriate here because there is no issue regarding the credibility of the witnesses that cannot be compelled to testify at trial. This is because, according to Petroplast, the testimony of these witnesses concerns Los Angeles' approval of Ameron's pipe, a "formal governmental act" for which the relevant evidence would be documented on paper.[24] In response, Ameron relies on cases where the court has said: "Deposition testimony, videotaped or otherwise, is a poor substitute for live testimony."[25]

I find that Ameron has not shown it will suffer overwhelming hardship on the basis of this factor. Contrary to Ameron's assertion, courts in Delaware have found that videotaped depositions can be an adequate means of presenting testimony in comparable circumstances.[26] The court in *Brandin* concluded that the "availability of compulsory

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[24] Arg. Tr. at 30. Ameron has not submitted any evidence to the contrary.

[25] *Sumner Sports, Inc. v. Remington Arms Co.*, 1993 WL 67202, at *5 (Del. Ch. Mar. 4, 1993). *See also In re Chambers Dev. Co. S'holders Litig.*, 1993 WL 179335, at *6 (Del. Ch. May 20, 1993) ("While this Court frequently allows for methods other than live testimony, *i.e.*, depositions and written interrogatories, there is no question that from a decisionmaker's perspective such methods are poor substitutes and certainly not equivalents.").

[26] *See Brandin v. Deason*, 941 A.2d 1020, 1025-26 (Del. Ch. 2007); *DeEmedio v. Nationwide Ins. Co.*, 1987 WL 6452, at *2 (Del. Super. Jan. 22, 1987) ("With the advent of videotape technology, much of the "live testimony" benefits can be captured through deposition."); *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 118-19 (Del. Ch. 2009) ("the process of issuing commissions to take discovery in another state is efficient, effective, and routinely accomplished.") (quoting *County of York Employees Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *3 (Del. Ch. Oct. 28, 2008)). Court of Chancery Rule 32(a) allows for the use of depositions at trial, while 10 *Del. C.* § 368 authorizes this Court to grant commissions.

process" factor deserved "relatively little weight" even though the defendants had named three specific groups of witnesses who could not be compelled to testify in Delaware. This was because the testimony of these witnesses could be admitted through deposition or videoconference.[27] Because Ameron is fully capable of presenting the testimony of any witness who cannot be compelled to testify in Delaware through either deposition, videoconference, or both, this factor does not support a finding of overwhelming hardship.

The two cases Ameron cited for the proposition that a Delaware court will grant a motion to stay because witnesses cannot be compelled to testify in this State, *Sumner Sports* and *In re Chambers*, are distinguishable, as both of these cases predate the Supreme Court's clarification of the *forum non conveniens* standard.[28] The courts in *Sumner Sports* and *In re Chambers* did not find any overwhelming hardship, but instead granted motions to stay or dismiss because Delaware was not the most convenient forum for the litigation.[29] Ameron must, however, show that it will suffer overwhelming hardship if some of its witnesses are unable to present live testimony in person at trial, which it has failed to do.

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27 *Brandin*, 941 A.2d at 1025-26.

28 *See supra* note 20.

29 *In re Chambers*, 1993 WL 179335, at *8; *Sumner Sports*, 1993 WL 67202, at *7.

3. Whether the controversy is dependent upon the application of Delaware law

Neither party contends that Delaware law applies to the merits of this controversy. Rather, it appears that California law will apply pursuant to paragraph 21 of the TPA's P.O. Terms and Conditions Section. Still, this fact does little to advance Ameron's cause as "Delaware courts often decide legal issues under the law of other jurisdictions."[30] Indeed, the Supreme Court has held that "[t]he application of foreign law is not sufficient reason to warrant dismissal under the doctrine of *forum non conveniens*."[31]

4. The pendency or nonpendency of a similar action in another jurisdiction

There is a similar action pending in another jurisdiction, with Ameron having filed a mirror image declaratory judgment action in California almost a month after Petroplast filed this action. The pendency of the California Action, however, cannot be said to cause overwhelming hardship to Ameron by requiring it to litigate in two forums. This "problem" is of Ameron's own making, as it filed the California Action after it knew it faced litigation in Delaware.

Moreover, Petroplast has implied that it will move to dismiss the California Action based on perceived procedural defects in that action and has articulated at least a colorable argument in support of such a motion. Petroplast criticizes the California

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30 *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 137 (Del. 2006).

31 *Id.*; *see also Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1198-99 (Del. 1997); *Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 998 (Del. 2004); *Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 267 (Del. 2001).

Action as a transparent attempt to circumvent the federal laws regarding the removal of cases. The federal removal statute, 28 U.S.C. § 1441(b), provides that actions that are otherwise removable based on diversity of parties' citizenship "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[32] Because Ameron is incorporated in Delaware, and, therefore, a citizen of this State, it cannot remove this action to federal court. Were Ameron not a Delaware citizen, it could have sought removal and then moved to transfer the action to California on the ground that it is a more convenient forum. Because Section 1441(b) forbids this, Ameron is now trying to achieve the same result by filing a federal action for declaratory judgment in California and seeking to stay the Delaware Action. As Petroplast notes, there is at least some reason to question the viability of such a reactive declaratory judgment action.[33]

Furthermore, only this Court has all of the relevant issues before it. The Delaware Action raises all of the issues between the parties and seeks all relief to which the parties may be entitled. In contrast, the California Action seeks only declaratory judgment.

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[32] 28 U.S.C. § 1441(b).

[33] *See H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir. 1951) (noting that the Federal Declaratory Judgment Act does not "enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the removal act."). Petroplast also suggests that it will seek dismissal of the California Action based on the Federal Anti-Injunction Act, 28 U.S.C. § 2283, because the preclusive effect of a judgment in the California Action would effectively enjoin the proceedings in this Court. This argument also appears to be colorable, but I express no further opinion regarding it.

While the California Action, like the Delaware Action, raises the issue of whether Ameron has breached the TPA, the California court does not have before it the question of what relief, if any, Petroplast would be entitled to in the event a breach is found.

Based on all of these considerations, I find that the pendency of the California Action does not provide any material support for Ameron's motion to stay.[34]

5. All other practical problems that would make the trial of the case easy, expeditious and inexpensive

For this factor, Ameron alleges that Delaware has "a very limited interest" in deciding this matter. Ameron also contends that Petroplast will suffer little prejudice if the Delaware Action is stayed, as this action is in its early stages and discovery has yet to begin.

Neither of these arguments is correct. Because the adjudication of the rights of one of its corporations is involved, Delaware has more than "a very limited interest" in this matter. Moreover, the Supreme Court has ruled that "the traditional showing a defendant must make in order to prevail on a motion to [stay] on the ground of *forum non conveniens* is not varied where a dispute's only connection to Delaware is the fact that the defendant is a Delaware entity."[35] I also question Ameron's assertion that Petroplast

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[34] The two possible outcomes in the Delaware Action are: (1) Petroplast wins and this Court awards it whatever remedy is proper; or (2) Ameron wins and has no further need to seek a declaratory judgment in California. Thus, if the Delaware Action is allowed to proceed to its conclusion, there would be no need to litigate in California.

[35] *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 780 (Del. 2001) (quoting *Warburg, Pincus*, 774 A.2d at 267).

will not be prejudiced if this action is stayed, in that Petroplast then would be deprived of its choice of forum. Thus, this last *Cryo-Maid* factor provides little, if any, support for Ameron's motion to stay this action.

In summary, while Ameron has shown that Delaware may not be the ideal forum in which to litigate this dispute, the standard it must meet to obtain a stay on *forum non conveniens* grounds is not whether there is a better forum available, but whether it will suffer overwhelming hardship if required to litigate in Delaware. Only in rare cases will Delaware courts grant a motion to stay on *forum non conveniens* grounds. This is not one of those rare cases. Having considered the six *Cryo-Maid* factors in the circumstances of this case, I find that Ameron has not shown that it will suffer overwhelming hardship if this action goes forward. Accordingly, I deny Ameron's motion to stay.

B. Motion for Judgment on the Pleadings

"A party is entitled to judgment on the pleadings [under Court of Chancery Rule 12(c)][36] when, accepting as true and drawing all reasonable inferences from the nonmoving party's well-pleaded facts, 'there is no material fact in dispute and the moving party is entitled to judgment under the law.'"[37] A court may not grant the motion unless it appears beyond doubt that the claimant can prove no set of facts in support of its

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[36] Rule 12(c) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

[37] *Firemen's Ins. Co. of Wash., D.C. v. Birch Pointe Condo. Ass'n*, 2009 WL 1515550, at *3 (Del. Ch. May 29, 2009) (quoting *In re Seneca Invs. LLC*, 2008 WL 4329230, at *2 (Del. Ch. Sept. 23, 2008)).

claims which would entitle it to relief. The Rule 12(c) standard has been described as "almost identical"[38] to the Rule 12(b)(6) standard and favors the plaintiff.[39]

Ameron contends that judgment on the pleadings should be granted as to Counts II through V of Petroplast's Complaint. In making that argument, Ameron relies primarily on paragraph 14 of the TPA's P.O. Terms and Conditions Section, which it contends waives all of Petroplast's rights as to Ameron's use of Petroplast's information. Paragraph 14, entitled "Proprietary Information – Confidentiality," provides that: "Unless otherwise agreed in writing, no commercial, financial or technical information disclosed by Seller [Petroplast] to Buyer [Ameron] shall be deemed secret or confidential and Seller shall have no rights against Buyer with respect thereto except such rights as may exist under applicable patent laws."[40]

Petroplast objects to consideration of the TPA for purposes of this motion because it was not attached to its Complaint. In analyzing a motion under Rule 12(c), a court may consider documents "integral to or incorporated into the complaint by reference."[41] Ameron contends that the TPA is integral to Petroplast's breach of contract claim, thus warranting its consideration on the pending motion. Petroplast acknowledges that the

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38 *Acierno v. Goldstein*, 2004 WL 1488673, at *2 (Del. Ch. June 25, 2004) (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 1456494, at *4 (Del. Ch. Nov. 5, 2001)).

39 *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 (Del. Ch. 2000).

40 Friedrich Aff. Ex. A.

41 *McMillan*, 768 A.2d at 500 (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995)).

TPA is integral to its breach of contract claim (Count I), but notes that Ameron does not seek judgment on the pleadings as to that claim. Petroplast further asserts that none of the four other claims in the Complaint are based on the TPA, but rather sound in tort and stem from a "scheme by Ameron to convert and misappropriate Petroplast's technology," of which the TPA was only one aspect.[42] Thus, Petroplast argues that the TPA cannot be considered for purposes of this motion.

The TPA is integral to Count I; therefore, it may be considered part of the Complaint. As Petroplast correctly points out, Count I avers a breach of contract, while Counts II through V could be characterized as tort claims. Still, contrary to Petroplast's argument, the statements in the TPA, at least arguably, could be considered in connection with all of the Counts. I need not decide that issue, however, because even if Ameron is correct and the TPA is part of the Complaint, paragraph 14 would not entitle Ameron to judgment on the pleadings.

Ameron alleges that paragraph 14 "contains an unambiguous and written waiver of all rights against Ameron, as to Ameron's use of Plaintiff's technology,"[43] and, thus, bars Petroplast from bringing any claim relating to information that Petroplast transferred to Ameron. Petroplast gives paragraph 14 a narrower construction, contending that it only bars claims relating to the secrecy or confidentiality of Petroplast's information. Under this construction, paragraph 14 would not bar Counts III through V of the

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42 POB at 28.

43 DOB at 19.

Complaint because the elements of these claims do not require either secrecy or confidentiality. Petroplast's reading of paragraph 14 appears to be reasonable, even if it is not the only plausible interpretation of that paragraph. Hence, the provision is ambiguous,[44] and this Court can consider extrinsic evidence to resolve the perceived ambiguity.[45] Because the factual record has not yet been developed, however, the ambiguous nature of paragraph 14 precludes entry of judgment on the pleadings as to Counts III through V.

Moreover, the front side of the standard form Purchase Order that forms page one of the TPA describes what is being purchased as "Technology Purchases per attached Appendix 'A'." Appendix "A" is a one-page document that appears to set forth the major terms of the parties' Agreement.[46] The preamble of Appendix A states that Petroplast "has full and exclusive ownership rights to the technology which is the subject of this

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[44] Contract language is ambiguous if it is "reasonably susceptible of two or more interpretations or may have two or more different meanings." *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003) (citing *Kaiser Alum. Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996)); *see also Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[45] *See Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991) ("When there is uncertainty in the meaning and application of the terms of the contract, this Court, and the trial court, will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the proper interpretation of the contract."); *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.*, 175 Cal. App. 4th 64, 73 (Cal. Ct. App. 2009).

[46] Although Appendix "A" is not signed, the first page of the TPA is signed by an Ameron purchasing agent and states that it was "confirmed with" Piatti of Petroplast. Friedrich Aff. Ex. A.

purchase order . . . as well as the right to grant to Ameron non-exclusive perpetual right to use such technology."[47] This statement implies the continued existence of Petroplast's proprietary information despite its "sale" to Ameron and, therefore, appears to conflict with paragraph 14. As a result, the parties' intent regarding the purpose of paragraph 14 as it relates to Petroplast's trade secrets claim also is ambiguous. Thus, I find that the language of the TPA is not sufficiently clear and unambiguous to support granting any part of Ameron's motion for judgment on the pleadings.

Ameron made certain additional arguments as to each of Counts II through V of the Complaint. I next consider each of those arguments in turn.

1. Count II – The California UTSA

California's Uniform Trade Secrets Act ("CUTSA")[48] prohibits the misappropriation of trade secrets. CUTSA defines a "trade secret" as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[49]

Here, Ameron argues that Petroplast cannot state a claim for trade secret misappropriation because Petroplast agreed in paragraph 14 of the TPA that no

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47 Friedrich Aff. Ex. A.

48 Cal. Civ. Code §§ 3426.1-3426.11.

49 *Id.* at § 3426.1.

information Petroplast disclosed to Ameron "shall be deemed secret or confidential,"[50] and, therefore, there can be no trade secret.[51] As previously noted, however, the language in paragraph 14 of the TPA is ambiguous. Thus, its meaning cannot be determined without affording Petroplast an opportunity to develop, through discovery, any relevant extrinsic evidence. In such circumstances, a court cannot render judgment on the pleadings. Because Ameron's argument regarding the CUTSA claim relies solely on paragraph 14, its motion for judgment on the pleadings as to Count II of the Complaint must be denied.

2. Count III – Conversion

The elements of a claim for conversion under California law are: (1) the plaintiff's ownership of the property at the time of the conversion; (2) the defendant's wrongful act or disposition of the property; and (3) damages.[52]

Ameron argues that Count III of the Complaint should be dismissed because a conversion claim cannot be based on a breach of contract, citing a decision in *Taylor v. Forte Hotels*.[53] In response, Petroplast contends that the *Taylor* case merely stands for the proposition that a breach of contract on its own cannot constitute a conversion

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50 Friedrich Aff. Ex. A.

51 *Forcier v. Microsoft Corp.*, 123 F. Supp. 2d 520, 528 (N.D. Cal. 2000).

52 *Shopoff & Cavallo LLP v. Hyon*, 85 Cal. Rptr. 3d 268, 284 (Cal. Ct. App. 2008).

53 *Taylor v. Forte Hotels Int'l*, 235 Cal. App. 3d 1119 (Cal. Ct. App. 1991).

because conversion requires an act that is knowingly or intentionally done.[54] The Complaint alleges that Ameron intentionally took possession of Petroplast's property as part of a scheme to deprive Petroplast of its proprietary information.[55] Thus, Petroplast adequately alleges the requisite intentional wrongful act.

Ameron also argues that Petroplast has failed to allege conversion damages, which, according to Ameron, generally are based on the value of the converted property. In particular, Ameron contends that Petroplast made no allegation that it was harmed because it was prevented from using its technology. Instead, the allegations of harm focus on the fact that Petroplast did not receive the promised testing data from Ameron.[56] This argument lacks merit. Petroplast alleges in Count III that it "suffered significant damages as a result of the Ameron's [sic] misappropriation of Petroplast's property."[57] At this early stage in the litigation, this is a sufficient allegation of damages to survive the plaintiff-friendly Rule 12(c) standard. Therefore, I deny Ameron's motion for judgment on the pleadings as to Count III of the Complaint.

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54 *Id.* at 1124.

55 Compl. ¶ 106.

56 DRB at 16.

57 *See* Compl. ¶ 108.

3. Count IV – Unjust Enrichment

The elements of a claim for unjust enrichment are: (1) defendant's receipt of a benefit; (2) defendant's unjust retention of the benefit; (3) at plaintiff's expense; and (4) injury to plaintiff.[58]

Ameron's lone argument in favor of judgment on the pleadings on Petroplast's unjust enrichment claim is that Petroplast waived this claim by virtue of paragraph 14 of the TPA. As discussed previously, paragraph 14 is ambiguous and conceivably could be construed as not precluding Petroplast's unjust enrichment claim. Accordingly, Ameron's motion for judgment on the pleadings as to Count IV of the Complaint is denied.

4. Count V – Common Law Misappropriation

The elements of a claim for common law misappropriation under California law are: "(1) the plaintiff has made a substantial investment of time, effort and money into creating the thing misappropriated, such that the 'thing' can be characterized as a property right; (2) the defendant has appropriated the 'thing' at little or no cost; and (3) the defendant's actions have injured the plaintiff."[59]

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58 *Peterson v. Cellco P'ship*, 80 Cal. Rptr. 3d 316, 323-24 (Cal. Ct. App. 2008).

59 *Hollywood Screentest of Am., Inc. v. NBC Universal, Inc.*, 60 Cal. Rptr. 3d 279, 293 (Cal. Ct. App. 2007).

Relying on the *K.C. Multimedia* case,[60] Ameron argues that CUTSA preempts Petroplast's cause of action for common law misappropriation. In *K.C. Multimedia*, the court found that "CUTSA's 'comprehensive structure and breadth' suggests a legislative intent to occupy the field,"[61] and, thus, ruled that CUTSA preempted all common law claims "based on the same nucleus of facts as the misappropriation of trade secrets claim for relief."[62]

Petroplast emphasizes that it pled the common law misappropriation and CUTSA claims in the alternative, so that, if the Court ultimately finds that the information it provided to Ameron does not constitute a trade secret under CUTSA, Petroplast's common law claim still would provide a basis for recovery.[63]

Courts have held on several occasions that a plaintiff can plead a common law misappropriation claim as an alternative to a CUTSA claim in case the information at issue is found not to be a trade secret.[64] In these cases, the courts found that CUTSA

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60 *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939 (Cal. Ct. App. 2009).

61 *Id.* at 957 (quoting *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 953 (N.D. Cal. 2003)).

62 *Id.* at 958 (quoting *Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1035 (N.D. Cal. 2005)).

63 PSB at 6.

64 *See First Advantage Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 941-42 (N.D. Cal. 2008); *Callaway Golf Co. v. Dunlop Slazenger Gp. Ams., Inc.*, 295 F. Supp. 2d 430, 436-37 (D. Del. 2003); *Think Village-Kiwi, LLC v. Adobe Sys., Inc.*, 2009 WL 902337, at *2-3 (slip copy) (N.D. Cal. Apr. 1, 2009). It is unclear whether *Think Village-Kiwi* will be published. Consequently,

provides a remedy for misappropriation of *trade secrets* only, and not for all confidential information. A review of those cases further shows that in instances where preemption was found, the information at issue clearly constituted a trade secret. In allowing the common law misappropriation claims to proceed in the alternative with the CUTSA claims, the courts also have held that if it is later determined that the information at issue constitutes a trade secret, the common law cause of action then would be preempted by CUTSA and subject to dismissal.[65]

Consistent with this case law, I hold that Petroplast may plead and pursue a common law misappropriation claim in the alternative with a CUTSA claim at this early stage in the proceedings. The language of § 3426.7, CUTSA's preemption provision, states that CUTSA "does not affect . . . other civil remedies that are not based upon misappropriation of a trade secret."[66] Because Petroplast does not base its common law misappropriation claim on the existence of a trade secret, but rather admits this claim applies only if the information at issue is not a trade secret,[67] the misappropriation claim falls within the ambit of the "civil remedies" that CUTSA does not affect. Additionally, Ameron denies that Petroplast's information constitutes a trade secret, thereby

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although I find the logic of that decision persuasive, I have not relied on *Think Village-Kiwi* in deciding the pending motion.

65 *First Advantage*, 569 F. Supp. 2d at 941-42; *Callaway*, 295 F. Supp. 2d at 436-37; *Think Village-Kiwi*, 2009 WL 902337, at *2-3.

66 Cal. Civ. Code § 3426.7.

67 PSB at 6.

differentiating this case from cases that have found preemption because there was no dispute that the information at issue constituted a trade secret.[68] Accordingly, I hold that CUTSA does not necessarily preempt Petroplast's common law misappropriation claim. If the Court ultimately determines, however, that the information Petroplast gave to Ameron qualifies as a trade secret, the claim for common law misappropriation may be dismissed as preempted.

In addition to its preemption argument, Ameron contends that Petroplast's misappropriation claim fails to plead injury in that it does not allege that Petroplast was damaged by Ameron's use of its information.[69] Yet, Count V of the Complaint alleges that "Ameron's misappropriation has caused Petroplast significant injury."[70] Based on the limited record before me at this time, I cannot say that Petroplast's allegations of injury, in the context of the Complaint as a whole, could not support a claim for misappropriation. Thus, Ameron's motion for judgment on the pleadings as to Count V must be denied.

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68 DRB at 15.

69 *Id.* at 17.

70 Compl. ¶ 116.

III. CONCLUSION

For the foregoing reasons, I deny Ameron's motion for a stay on *forum non conveniens* grounds. I also deny in its entirety Ameron's motion for judgment on the pleadings as to Counts II through V of the Complaint.

IT IS SO ORDERED.