IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA., et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. N13C-01-043 MMJ CCLD
CROSSTEX ENERGY SERVICES, L.P.,	)	
Defendant.	)	

Submitted: September 19, 2013
Decided: December 13, 2013

Upon Defendant's Motion to Dismiss
DENIED

Upon Defendant's Alternative Motion to Stay
GRANTED

OPINION

Francis J. Murphy, Esquire (Argued), Murphy & Landon, Christopher H. Coleman, Esquire, Jacob T.E. Stutzman, Esquire, Alexandra F. Markov, Esquire, James L. Warren, III, Esquire, Carroll Warren & Parker PLLC, Attorneys for Plaintiffs

David J. Baldwin, Esquire, Janine L. Hochberg, Esquire, Potter Anderson & Corroon LLP, Ernest Martin, Jr., Esquire (Argued), Britton D. Douglas, Esquire, Haynes & Boone LLP, Attorneys for Defendant

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

Plaintiffs ("Underwriters") issued several property insurance policies ("Policies") to Defendant Crosstex Energy Services, L.P. ("Crosstex") for the period from May 1, 2012 to May 1, 2013. In 2012, a sinkhole began forming adjacent to a pipeline that Crosstex owns near Assumption Parish, Louisiana. Crosstex notified Underwriters that it intended to file a claim under the Policies. On January 7, 2013, Underwriters sent Crosstex a denial of the coverage letter. Underwriters filed suit in Delaware Superior Court on the same day.

Crosstex filed suit in the 162nd District Court of Dallas County, Texas, on January 10, 2013. Crosstex was served with process in the Delaware case on January 16, 2013. Crosstex had actual knowledge of the Delaware suit prior to receiving service of process.

The Texas court issued an Order on September 16, 2013, denying a stay of the Texas proceedings. The Order did not state the Texas court's reason for denying the stay. The Texas court subsequently held a hearing on Underwriters' Motion for Protective Order, which was denied.

On July 15, 2013, Crosstex filed this Motion to Dismiss, or in the Alternative, to Stay on the grounds of improper venue pursuant to Rule 12(b)(3) of the Rules of Civil Procedure for the Superior Court of the State of Delaware; and on *forum non conveniens* grounds in favor of the action filed in Texas.

STANDARD OF REVIEW

Improper Venue

Superior Court Civil Rule 12(b)(3) governs a motion to dismiss or stay due to improper venue. The Court should "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[1] "The Court can 'grant a dismissal motion before the commencement of discovery on the basis of affidavits and documentary evidence if the plaintiff cannot make out a *prima facie* case in support of its position.'"[2] However, the Court usually must allow the plaintiff to take discovery where the plaintiff "advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges."[3] "In reviewing a motion to dismiss, the court must assume as true all the facts pled in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the plaintiff."[4]

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[1] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super.).

[2] *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super.) (citing *Simon v. Navellier Series Fund,* 2000 WL 1597890, at *3-*7 (Del. Ch.)).

[3] *Id*.

[4] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (citing *Anglo Am. Sec. Fund, L.P. v. S.R. Global Intern. Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003)).

Forum non Conveniens

At issue in this case is the standard of review applicable to dismiss this action or to grant a stay based on *forum non conveniens*. The Court first must address the timing of the Delaware action and the Texas action to determine which standard is applicable. "A motion to stay or dismiss on grounds of *forum non conveniens* is addressed to the sound discretion of the Court."[5] The doctrine of *forum non conveniens* is not a vehicle for the Court to determine which forum would be most convenient for the parties.[6] The Court "cannot perfunctorily apply *McWane* or *forum non conveniens* if either doctrine is to accomplish the purposes for which they were crafted by the Delaware Supreme Court."[7] When applying either doctrine, the Court "always must consider judicial economy and principles of comity."[8]

"Where one of two 'competing' actions is filed before the other, the so-called *McWane* standard controls and the first-filed action generally is entitled to

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[5] *Tex. Instruments Inc. v. Cyrix Corp.*, 1994 WL 96983, at *2 (Del. Ch.) (citing *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 37 (Del. 1991)).

[6] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 117 (Del. Ch. 2009).

[7] *Rosen v. Wind River Sys., Inc.*, 2009 WL 1856460, at *3 (Del. Ch.).

[8] *Id.*; *see Carvel v. Andreas Holding Corp.*, 698 A.2d 375, 378 (Del. Ch. 1995); *Adirondack GP, Inc., v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch.).

preference."[9] "Where two or more actions are contemporaneously filed, the Court 'examines a motion to stay under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other.'"[10]

If the Court finds that the actions were filed contemporaneously, the movant seeking dismissal has the burden to prove that litigating in Delaware would cause overwhelming hardship.[11] Where a stay of litigation likely would have substantially the same effect as a dismissal, the overwhelming hardship standard applies. [12]

"To justify a stay, the movant need only demonstrate that the preponderance of applicable forum factors 'tips in favor' of litigating in the non-Delaware forum."[13] "In balancing all of the relevant factors, the focus of the analysis should be which forum would be the more 'easy, expeditious, and inexpensive' in which to litigate."[14]

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[9] *BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 WL 702382, at *2 (Del. Super.); *see McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.,* 263 A.2d 281, 283 (Del. 1970).

[10] *Id*.

[11] *BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 WL 702382, at *2.

[12] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 117.

[13] *Id*.

[14] *Royal Indem. Co. v. Gen. Motors Corp.*, 2005 WL 1952933, at *7 (Del. Super.) (citing *HFTP Inv., L.L.C. v. ARIAD Pharm., Inc.*, 752 A.2d 115, 122 (Del. Ch. 1999)).

"Delaware courts examine six factors, known as the *Cryo-Maid*[15] factors, when determining whether to dismiss or stay an action on *forum non conveniens grounds*."[16] The Court will consider: (1) whether Delaware law governs the case; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the pendency or nonpendency of a similar action or actions in another jurisdiction; (5) the possibility of a view of the premises; and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.[17]

ANALYSIS

Contentions of the Parties

Crosstex offers two arguments in support of its Motion: (1) venue is improper in Delaware; and (2) the *forum non conveniens* factors weigh in favor of a dismissal or stay. First, Crosstex contends that the Court should dismiss or stay the Delaware action pursuant to Rule 12(b)(3) because venue is improper. Crosstex interprets the Policies' Service of Suit clause to mandate venue in Dallas, Texas. Second, Crosstex contends that the Court should dismiss or stay the Delaware action based on *forum non conveniens*. Crosstex argues that the actions

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

[16] *Certain Underwriters at Lloyds Severally Subscribing Policy No. DP359504 v. Tyson Foods, Inc.*, 2008 WL 660485, at *3 (Del. Super.).

[17] *Cryo-Maid,* 198 A.2d at 684; *Parvin v. Kaufmann,* 236 A.2d 425, 427 (Del. 1967).

were filed contemporaneously and should be evaluated under the six *forum non conveniens* factors. Crosstex argues that the six factors favor the Texas lawsuit and that none of the factors favor the Delaware lawsuit.

Underwriters contend that Delaware is a proper venue, and support this claim with three main points: (1) the Policies allow Plaintiffs to choose their venue; (2) the Texas precedent regarding service of suit, relied upon by Crosstex, does not apply under these circumstances; and (3) Underwriters did not prevent Crosstex from exercising its Policy rights. Underwriters contend that to justify a dismissal or stay, Crosstex bears the burden of demonstrating that litigating in Delaware is an overwhelming hardship and inconvenience, and that Crosstex fails to meet this burden. Underwriters argue that the actions cannot be considered contemporaneously filed, and even if the actions are contemporaneous, the overwhelming hardship and inconvenience standard still applies.

Venue Pursuant to Rule 12(b)(3)

"Delaware courts generally 'give effect to the terms of private agreements to resolve disputes in a designated judicial forum.'"[18] The issue is whether the Service of Suit clause establishes a mandatory or permissive forum.

[18] *Prestancia Mgmt. Grp., Inc. v. Va. Heritage Found.*, 2005 WL 1364616, at *7 (Del. Ch.) (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 5-4[a], at 5-53 to 5-54 (2005)).

Crosstex contends that Delaware is an improper venue because the Underwriters agreed to litigate disputes in Crosstex's chosen forum. Crosstex established its chosen forum by filing the Texas action. Crosstex concludes that the Service of Suit clause mandates venue in Dallas, Texas, and that Delaware was no longer a proper venue after the Texas action was filed. Crosstex argues that the usual deference courts give to the forum of the first-filed action is not dispositive here. Crosstex cites *Loveman v. Nusmile, Inc.,*[19] for the proposition that when parties contractually agree to litigate claims in a different state, the court should dismiss a lawsuit filed in the improper forum even when that lawsuit was filed first.

Underwriters contend that the Service of Suit clause creates a permissive forum rather than a mandatory forum. Underwriters argue that Texas courts have recognized that a permissive forum selection clause does not amount to a mandatory forum selection clause. In *Southwest Intelecom, Inc. v. Hotel Networks Corporation*, the Texas Court of Appeals found that the clause: "The Parties stipulate to jurisdiction and venue in Ramsey County, Minnesota, as if this Agreement were executed in Minnesota," created a permissive forum.[20] The Texas Court of Appeals found that the clause required the parties to submit to the

[19] 2009 WL 847655, at *1.

[20] 997 S.W.2d 322, 323 (Tex. App. 1999).

jurisdiction of a Ramsey County court if a suit was filed there, but did not prohibit jurisdiction elsewhere and did not provide the Minnesota courts with exclusive jurisdiction.[21]

The Texas Court in *In re Wilmer Cutler Pickering Hale and Dorr LLP* considered a "Consent to Jurisdiction" clause. The clause stated in relevant part that defendants "irrevocably consent to the jurisdiction of the courts of the State of Delaware for all purposes in connection with any action or proceeding which arises out of or relates to this Agreement . . . ."[22] The Texas Court of Appeals found that this language should be interpreted as a permissive consent to jurisdiction clause.[23] Underwriters also cite *International Insurance Company v. McDermott, Inc.,* in support of its position that "the Service of Suit clause does not give the insured the right to prevent the insurer from bringing an action of its own, in a forum of the insurer's choosing, against the insured."[24]

The Court declines to dismiss or stay the action on the grounds of improper venue pursuant to Rule 12(b)(3). The Court finds that the Service of Suit clause does not operate as a mandatory forum selection clause. The Service of Suit clause provides: "Insurers . . . will submit to the jurisdiction of any court of competent

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[21] *Id*. at 323.

[22] 2008 WL 5413097, at *4 (Tex. App.).

[23] *Id*.

[24] 956 F.2d 93, 96 (5th Cir. 1992).

jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute waiver of Insurers' rights to commence an action in any court of competent jurisdiction in the United States…."

The Court finds that Underwriters had a right to bring their action in Delaware. Crosstex was able to designate its forum of choice under the Service of Suit clause. However, Crosstex had not yet designated a forum when Underwriters filed the Delaware action. The Court finds that Delaware is not an improper forum. Underwriters were able to file in Delaware because a forum had not yet been established under the Service of Suit clause and the Service of Suit clause specifically states that Underwriters are able to file an action in any court of competent jurisdiction.

Contemporaneous Actions

The threshold question before the Court is which standard to apply in deciding this motion on the grounds of *forum non conveniens*. To determine the applicable standard, the Court must examine whether the actions were filed contemporaneously, or whether Underwriters' action should be considered first-filed.

Contemporaneous Filing

The Court first must decide if the Delaware action and the Texas action should be considered contemporaneously filed. Crosstex states that it was in negotiations with Underwriters prior to the denial of coverage. Crosstex's right to establish jurisdiction under the Service of Suit clause is triggered by Underwriters' "failure . . . to pay any amount claimed to be due." Underwriters denied coverage on January 7, 2013. Crosstex's opportunity to file a lawsuit establishing jurisdiction under the Service of Suit clause began when the denial was issued. Underwriters filed the Delaware action one hour after denying coverage. Chronologically, Underwriters' Delaware action was filed first and Crosstex's Texas action was filed three days later. However, "Delaware courts have recognized that there are situations where actions should be considered to have been filed contemporaneously."[25]

Where the actions are considered contemporaneously filed, the Court evaluates the motion to stay "under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other."[26] Alternatively, "[w]here one of two 'competing' actions is filed before the

[25] *In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *7 (Del. Ch.).

[26] *BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 WL 702382, at *2 (citing *Rosen v. Wind River Sys., Inc.*, 2009 WL 1856460, at *3).

other, the so-called *McWane* standard controls and the first-filed action generally is entitled to preference."[27]

Where "the actions were filed within the same general time frame, the Court considers the actions simultaneously filed so as to avoid a 'race to the courthouse.'"[28] Delaware courts have declined to give first-filed status to actions "filed in a trivially faster manner, especially where the first-filing party rushed into court without giving prior notice of its decision to eschew a non-litigious resolution to the problem facing the parties."[29] Delaware courts have considered the circumstances surrounding the first-filed action in determining if it should receive the deference generally afforded to a first-filed action.[30] In *Playtex, Inc. v.*

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[27] *Id*.

[28] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 115-16 (considering actions filed on November 6, 2007 and November 9, 2007, as filed contemporaneously).

[29] *In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *8 n.18; *see also Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117, at *3 (Del. Ch.) (finding actions contemporaneously filed when the first was filed on a Friday at 4:28 p.m. and the second was filed the following Monday morning); *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 552 (Del. Ch. 1999) (considering actions filed several hours apart as contemporaneous); *Tex. Instruments, Inc. v. Cyrix Corp.*, 1994 WL 96983, at *3-*4 (considering actions filed several hours apart as contemporaneous).

[30] *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 40913, at *4 (Del. Super.); *see Air Prods. & Chems., Inc. v. Lummus Co.*, 252 A.2d 545, 547 (Del. Ch. 1968), *rev'd on other grounds*, 252 A.2d 543 (Del. 1969) (suggesting that less deference should be afforded when the plaintiff in the first-filed action is "jockeying for position" by "defensively establishing priority as to forum.").

Columbia Cas. Co., this Court found that the first-filed action was not entitled to deference where it was "filed in anticipation of an action for damages by Playtex, the natural plaintiff."[31]

The Court finds that the Delaware action and the Texas action were filed contemporaneously. The Court takes into account the close timing between the filing of the Delaware action and the Texas action. The Court also considers that Crosstex, as the insured, is in the role of the natural plaintiff following a denial of coverage.[32]

Crosstex filed the Texas action three days after coverage was denied. The coverage denial served as notice to Crosstex that Underwriters were abandoning a non-litigious strategy to settle the coverage dispute. Underwriters filed suit in Delaware approximately one hour after issuing the coverage denial. Crosstex had approximately one hour to establish exclusive jurisdiction under the Service of Suit clause. The Court declines to give the Delaware action first-filed priority status, which would have the effect of rewarding Underwriters for winning a race to the courthouse.

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[31] 1989 WL 40913, at *4.

[32] *See In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *7-8 (finding that where the first-filing party was "jockeying for position" with the other party, a natural plaintiff, the action was contemporaneous with the later-filed action in another jurisdiction. The Court reasoned that such behavior "has been an important factor in Delaware decisions which have denied 'first-filed' status to such suits." (citing *Williams Gas Supply Co.,* 594 A.2d at 36)).

Reactive Filing

In *Dura Pharmaceuticals, Inc. v. Scandipharm, Inc,.*[33] the Delaware Court of Chancery noted that no authority suggests that "in the absence of other, special circumstances, a second-filed, *reactive* Delaware action will succeed in ousting a foreign plaintiff of its choice of forum simply by the speed with which it is filed."[34] The parties in *Dura Pharmaceuticals* were free to file suit for several weeks before they filed actions in separate forums within one business day of each other.[35] *Dura Pharmaceuticals* gives preference to the first-filed forum, "in the absence of an agreement clearly specifying some other exclusive venue."[36]

Underwriters argue that Crosstex's Texas action is a reactive suit and therefore may not be considered contemporaneously filed with the Delaware action.

The Court finds that Crosstex's action was not reactive. The parties here did not have several weeks to bring a suit before the first action was filed. Crosstex filed suit three days after the denial of coverage. Additionally, denial of coverage is a sufficient independent reason for an insured to file suit. The Texas suit was not filed simply in reaction to the Delaware action.

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[33] 713 A.2d 925 (Del. Ch. 1998).

[34] 713 A.2d at 929 (emphasis in original).

[35] *Id*.

[36] *Id*. at 931.

Alternatively, the "Choice of Law and Jurisdiction" Endorsement stating that the parties agree to "submit to the exclusive jurisdiction of the Service of Suit clause" could qualify as a "special circumstance" considered by the *Dura Pharmaceuticals* Court. The Court finds that the Texas action is not precluded from being considered contemporaneous.

Texas Law and the Service of Suit Clause

The Policies include a "Choice of Law and Jurisdiction" Endorsement, which states: "This insurance shall be governed by and construed in accordance with the Law of Texas and each party agrees to submit to the exclusive jurisdiction of the Service of Suit clause contained herein." It is uncontested that Texas law applies.

The Service of Suit clause provides:

> It is agreed that in the event of the failure of the Insurers hereon to pay any amount claimed to be due, the Insurers, at the request of the Insured will submit to the jurisdiction of any court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute waiver of Insurers' rights to commence an action in any court of competent jurisdiction in the United States . . . . [I]n any suit instituted against any one of them upon this Contract, Insurers will abide by the final decision of such Court or any Appellate Court in the event of an appeal.

Crosstex argues that the clause allowing Underwriters to commence an action in any court of competent jurisdiction in the United States cannot be read to override Crosstex's right to have Underwriters submit to the jurisdiction of, and

abide by the final ruling of, Crosstex's court of choice. Crosstex relies on *American International Specialty Lines Insurance Company v. Triton Energy Limited* ("*Triton*")[37] and *London Market Insurers v. American Home Assurance Company* ("*London Market*").[38] These cases apply Texas law to Service of Suit clauses which are substantially identical to the clause at issue in this case.[39] The *Triton* and *London Market* courts required the insurer to submit to the jurisdiction of the Texas court selected by the insured, when the insurer later filed a parallel declaratory judgment action in a different state.[40]

In *Triton*, the Triton Energy Company ("Triton") was litigating an action in Texas state court asserting claims for coverage. On November 9, 1999, Triton joined American International Special Lines Insurance Company ("AISLIC") in the litigation. On November 12, 1999, AISLIC brought a declaratory judgment action in the United States District Court for the Central District of California. The Texas court issued an anti-suit injunction, enjoining AISLIC from proceeding with the declaratory judgment action.[41] The Texas Court of Appeals affirmed.[42]

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[37] 52 S.W.3d 337 (Tex. App. 2001).

[38] 95 S.W.3d 702 (Tex. App. 2003).

[39] *London Mkt. Insurers v. Am. Home Assurance Co.*, 95 S.W.3d at 709-10; *Am. Int'l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d at 340.

[40] *London Mkt. Insurers v. Am. Home Assurance Co.*, 95 S.W.3d at 709-10; *Am. Int'l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d at 340-41.

[41] *Am. Int'l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d at 339.

The Service of Suit clause in *Triton* stated that "in any suit instituted against [AISLIC] upon this contract, [AISLIC] will abide by the final decision of such court or of any appellate court in the event of any appeal."[43] The Insurer in *Triton* argued that the provision should be interpreted to mean that it "will not contest jurisdiction in a suit brought against it by Triton," and that the Insurer "is free to assert its own claims in other courts as well, whether or not suit has already been instituted by the insured."[44] Triton argued that the Insurer's "additional promise to 'abide by the final decision of such court' precludes [AISLIC] from asserting its claims in a separate proceeding when Triton has already initiated an action to recover amounts claimed to be due under the insurance policy."[45] The trial court agreed with Triton's argument, reasoning that "the promise to 'abide by the final decision of such court' would be 'meaningless' if it did not require [AISLIC] to litigate the claims in the suit first brought by Triton."[46]

In *London Market*, Asarco, Inc. ("Asarco") filed a declaratory judgment action in Texas to determine its rights under the insurance policies London Market

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[42] *Id*. at 343.

[43] *Id*. at 340.

[44] *Id*.

[45] *Id*.

[46] *Id*. at 340-41.

Insurers ("Insurers") issued to Asarco.[47] More than four months later, Insurers filed suit in New York for a declaratory judgment.[48] The Texas court granted Asarco's motion for an anti-suit injunction to preclude Insurers from prosecuting the New York action.[49] The *London Market* court stated that a "touchstone of consideration in anti-suit injunctive relief is whether the injunction was necessary 'to prevent an irreparable miscarriage of justice.'"[50] The agreement in *London Market* contained a Service of Suit clause, in which Insurers agreed to submit to the jurisdiction selected by Asarco and to be bound by the final decision of the court.[51] The trial court found that because Insurers filed suit in New York after Asarco filed in Texas, Asarco met its burden of proving "the potential for an irreparable miscarriage of justice."[52]

Underwriters contend that these two Texas cases, relied upon by Crosstex, are inapplicable to this case because in *Triton* and *London Market* the insured filed first. Underwriters rely primarily on *International Insurance Company v.*

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[47] *London Mkt. Insurers v. Am. Home Assurance. Co.*, 95 S.W.3d at 704.

[48] *Id*.

[49] *Id*.

[50] *Id*. at 709 (citing *Forum Ins. Co. v. Bristol-Myers Squibb Co.,* 929 S.W.2d 114, 119 (Tex. App. 1996)).

[51] *Id*.

[52] *Id*. at 710.

McDermott Incorporated ("*McDermott*")[53] to support their theory that Crosstex cannot block Underwriters' Delaware action by filing a second action in another jurisdiction.

In *McDermott*, International Insurance Fire Company ("International") issued umbrella and excess liability policies to McDermott, Inc. ("McDermott").[54] McDermott made a formal demand to International for payment and stated that it would institute proceedings against International if payment was not received within thirty days.[55] After thirty days, International did not pay and McDermott did not institute proceedings.[56] After an additional twenty-five days, International filed a declaratory judgment action in the United States District Court for the Eastern District of Louisiana.[57] Two weeks later, McDermott filed an action in Texas state court to recover amounts allegedly owed under the policies at issue.[58] McDermott then moved to dismiss International's action, claiming that McDermott had the right to choose the forum under the Service of Suit clause.[59]

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[53] 956 F.2d 93 (5th Cir. 1992).

[54] *Id*. at 94.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] *Id*. at 95.

[59] *Id*.

The federal district court granted McDermott's Motion to Dismiss, concluding that the Service of Suit clause "was a 'forum selection clause' and that because McDermott, the insured, had chosen the Texas state court as its forum, the federal action had to be dismissed."[60] The Fifth Circuit Court of Appeals vacated the decision and remanded, stating that a "Service of Suit clause does not give the insured the right to prevent the insurer from bringing an action of its own, in a forum of the insurer's choosing, against the insured."[61] The Fifth Circuit Court of Appeals reasoned that allowing the insured to have the insurer's suit dismissed by later filing suit in a state court could become a mechanism to block the insurer from "its right to seek a declaratory judgment or other redress from the courts."[62] The *McDermott* Court also interpreted the scope of the Service of Suit clause. "[W]hen the action is first instituted by the insurer, the Service of Suit clause simply has no application."[63]

The Fifth Circuit in *McDermott* acknowledged the possibility that allowing the insured to select the forum for its action and allowing the insurer to select a

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[60] *Id*.

[61] *Id*. at 96.

[62] *Id*.

[63] *Id*. at 95-96; *see Ace Capital v. Varadam Found.*, 392 F. Supp. 2d 671, 675 (D. Del. 2005) (finding that "[i]t would be unreasonable to construe the Service of Suit provision to mean that an insured can block an insurer's valid declaratory judgment action by merely filing a subsequent lawsuit in another jurisdiction.").

forum for its action could create a race to the courthouse.[64] The *McDermott* Court was clear in its reluctance to allow the insured to effectively block an insurer's action by a later filing in state court.[65] Notably, the parties in *McDermott* had almost a month, following the insurer's failure to pay upon the demand of the insured, in which either party could have filed suit before the first action was filed.[66]

McDermott is distinguishable from this case. The relevant policy language is not the same. The Service of Suit clause in *McDermott* provided:

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.[67]

In this case, the Policies state that "Insurers will abide by the final decision of such Court . . ." and that the Underwriters agreed "to submit to the exclusive jurisdiction of the Service of Suit clause." However, the Service of Suit clause specifically negates any "waiver of Insurers' rights to commence an action in any court of competent jurisdiction in the United States."

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[64] *Int'l Ins. Co. v. McDermott Inc.*, 956 F.2d at 96.

[65] *Id*.

[66] *Id*. at 94.

[67] *Id*. at 95.

Underwriters cite *Ace Capital v. Varadam Foundation*[68] in support of their argument that Crosstex should not be able to block Underwriters' Delaware action from proceeding. Ace Capital ("Insurer") filed a declaratory judgment in the United States District Court for the District of Delaware against Varadam Foundation ("Varadam") regarding an insurance policy issued by Insurer to Varadam. Varadam filed a Motion to Transfer Venue to the United States District Court for the Southern District of Florida, which was denied. The *Ace Capital* Court found that "it would be unreasonable to construe the Service of Suit provision to mean that an insured can block an insurer's valid declaratory judgment action by merely filing a subsequent lawsuit in another jurisdiction."[69] *Ace Capital* references *McDermott* for the proposition that the Service of Suit clause only applies to actions brought by the insured.[70] In *Ace Capital*, Defendant Varadam did not file a parallel suit in another jurisdiction.[71]

Underwriters cite *Rouse v. Texas Capital Bank, N.A.* ("*Rouse*")[72] in support of their argument that the anti-suit injunction in *Triton* rested on the fact that the insured filed first. In *Rouse*, the insurer filed the first action in Texas court on

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[68] 392 F. Supp. 2d 671 (2005).

[69] *Id*. at 675.

[70] *Id*. at 671 (citing *Int'l Ins. Co. v. McDermott Inc.*, 956 F.2d at 95-96).

[71] *Id*.

[72] 394 S.W.3d 1 (Tex. App. 2001).

April 30, 2010; the insured filed the second action in Oklahoma on May 11, 2010.[73] The Texas court issued an anti-suit injunction precluding the insured from proceeding with the Oklahoma action.[74] *Rouse* distinguishes the Service of Suit clause in *Triton*, stating that the clause in *Triton* "precluded the insurance company from asserting claims against the insured after the insured initiated an action under the policy."[75]

The Court finds that the cited service of suit cases are distinguishable. It appears that none of these cases involved two actions that were deemed to have been filed contemporaneously. Further, in *London Market* and *Triton*, the insured (the natural plaintiff) filed first and the insurer later filed in another jurisdiction.[76] The insurers in both cases had agreed to be bound by the final decision of the court in the respective Service of Suit clauses.[77] In *McDermott*, the insurer filed first and the Fifth Circuit Court of Appeals declined to let the first-filed action be blocked by the insured filing a second action in another jurisdiction.[78] However, the policy language in *McDermott* did not prohibit an inference of waiver of jurisdictional

[73] *Id*. at *4.

[74] *Id*.

[75] *Id*. at *9.

[76] *London Mkt. Insurers v. Am. Home Assurance Co.*, 95 S.W.3d at 704; *Am. Int'l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d at 339.

[77] *London Mkt. Insurers v. Am. Home Assurance Co.*, 95 S.W.3d at 709-10; *Am. Int'l Specialty Lines Ins. Co. v. Triton Energy Ltd.*, 52 S.W.3d at 340.

[78] *Int'l Ins. Co. v. McDermott Inc.*, 956 F.2d at 96.

objection by the insurer. In *Rouse*, the Court was interpreting a forum selection clause.[79] Also, the insurer in *Rouse* filed first and was able to maintain its jurisdiction of choice.[80] In *Ace Capital*, there was no second-filed action.[81]

The Court finds the cases instructive, but not controlling. The Court also finds that a dismissal or stay in this case would not infringe on the insurer's contractual right to seek redress from the courts.

Forum Non Conveniens

The Court evaluates whether a stay or dismissal of the Delaware action is justified by considering six factors: (1) whether Delaware law governs the case; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the pendency of any similar action in another jurisdiction; (5) the possibility of a need to view the premises; and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.[82]

The first factor, the applicability of Delaware law, favors the Texas action. The Choice of Law and Jurisdiction Endorsement mandates that Texas law governs the Policies. It is undisputed that Texas law governs this dispute.

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[79] *Rouse v. Texas Capital Bank, N.A.*, 394 S.W.3d at 3-4.

[80] *Id*. at 9.

[81] *Ace Capital v. Varadam Found.*, 392 F. Supp. 2d 671.

[82] *General Foods Corp. v. Cryo-Maid, Inc.,* 198 A.2d at 684; *Parvin v. Kaufman*, 236 A.2d at 427.

The second factor, ease of access to proof, tilts slightly in favor of the Texas action. This is a dispute over insurance coverage and is essentially a document case. Crosstex asserts that all or a vast majority of the relevant documents and persons with knowledge relevant to this dispute are located in Texas. The "modern methods of information transfer" now available minimize the Court's concern over the potential inconvenience of transporting documents to Delaware.[83] A number of witnesses are employees of Crosstex and are located in Dallas, Texas. It may be inconvenient for Crosstex employees located in Texas to appear in Delaware, but Crosstex can control the employees' appearance.

The third factor − the lack of compulsory process in Delaware – again slightly favors the Texas action. None of the known potential witnesses reside in Delaware. The bulk of the witnesses reside in Texas, and as private individuals, would not be subject to compulsory process in Delaware. However, many of the witnesses are Crosstex employees. Compulsory process is generally not required to obtain the appearance of witnesses aligned with one of the parties.[84] Crosstex has not identified necessary witnesses that are not Crosstex employees and that are not subject to process. Underwriters further argue that because Texas courts

[83] *Rapoport v. Litig. Trust of MDIP Inc.*, 2005 WL 3277911, at *5 (Del. Ch.); *Asten v. Wangner,* 1997 WL 634330, at *3 (Del. Ch.).

[84] *Rosen v. Wind River Sys., Inc*., 2009 WL 1856460, at *6.

recognize foreign subpoenas,[85] witnesses located in Texas may be compelled to appear and testify in the Delaware action.

In evaluating the fourth factor, the pendency of a similar action in another jurisdiction, the Court considers that the Texas action is broader than the Delaware action. The Texas action includes claims for violations of the Texas Insurance Code's Prompt Payment of Claims Statute. This Court is able to decide issues arising under Texas statutes.[86] However, the Court recognizes that this is a Texas-specific statutory issue. The Court considers the authority of one court to grant complete relief, but that is not outcome determinative under this prong of the *forum non conveniens* analysis.[87]

The fifth factor, the possibility of a need to view the premises, is a neutral factor. The relevant site in Louisiana is approximately 450 miles from Crosstex's preferred forum in Dallas, Texas. If viewing the premises becomes relevant, videos and photographs can be used to examine the scene.[88]

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[85] Tex. Civ. Prac. & Rem. Code Ann. § 20.002 (West 2013); Tex. R. Civ. Proc. 201.2.

[86] *See LeCroy Corp. v. Hallberg*, 2009 WL 3233149, at *8 (Del. Ch.).

[87] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 117.

[88] *Lee v. Choice Hotels Int'l Inc.*, 2006 WL 1148755, at *5 (Del. Super.).

The sixth factor weighs other practical considerations "that would serve to make the trial easy, expeditious and inexpensive."[89] Crosstex argues that other practical considerations favoring the Texas action include Underwriters' motive for filing in Delaware, judicial economy, and the public interest.

The Court may consider the parties' motives for filing in the respective jurisdictions.[90] Crosstex contends that Underwriters' motive for filing in Delaware was forum shopping. The Court finds that Underwriters did not engage in forum shopping. Forum shopping "implies a plaintiff choosing among multiple courts for the one that offers him the most favorable law."[91] Here, the choice of forum offers no apparent advantage to Underwriters. The Court focuses instead on the natural alignment of the parties. In the Delaware action, Underwriters (the plaintiffs) are the natural defendants, and Crosstex (the defendant) is the natural plaintiff. In contrast, the parties are (re)aligned properly as natural plaintiff and defendant in the Texas action.[92]

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[89] *Royal Indem. Co. v. General Motors Corp.*, 2005 WL 1952933, at *11.

[90] *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117, at *6.

[91] *Blanco v. AMVAC Chem. Corp.*, 2012 WL 3194412, at *9 (Del. Super.).

[92] *E-Birchtree, LLC v. Enterprise Products Operating L.P.*, 2007 WL 914644, at *3 (Del. Super.).

In *E-Birchtree*, this Court found the plaintiff (the natural defendant) had engaged in forum shopping.[93] The plaintiff in *E-Birchtree* filed in Delaware to take advantage of a three-year statute of limitations.[94] The applicable statute of limitations in the Texas action was four years.[95] Here, Underwriters do not gain a similar advantage by filing in Delaware. Underwriters explained at oral argument that they selected Delaware Superior Court because it has experience with these types of cases. Underwriters filed on the Complex Commercial Litigation Docket, expecting that the case would move expeditiously. Underwriters value a fast resolution to this dispute because they have set aside a substantial reserve fund based on the underlying claims. The Court may consider judicial economy in evaluating the sixth factor.[96]

The court in the Texas action has denied a motion to stay. The Texas action involves substantive claims beyond the declaration of non-breach at issue here. The Texas action could provide prompt and complete justice. The Court also takes

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[93] *Id*.

[94] *Id.*

[95] *Id.*

[96] *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117, at *6.

into account the principles of comity between courts and the natural alignment of the parties.[97]

The Court considers the public interest.[98] Crosstex and one of the thirteen Underwriters are incorporated in Delaware. Incorporation alone "is not sufficient contact with Delaware to support the selection of Delaware as a forum."[99] However, "Delaware has a very legitimate interest in making its courts available to citizens who have elected to incorporate here."[100] While the Court does not discount Delaware's interest in making its courts available to Delaware corporations, it does consider that no other ties to Delaware are present in this lawsuit.[101] "The practical consideration that the only connection to Delaware is that the parties are incorporated here does not rise to the level of overwhelming hardship required for a motion to dismiss on *forum non conveniens* grounds."[102] However, that the case will ultimately be decided upon Texas law does affect the

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[97] *E-Birchtree, LLC v. Enterprise Products Operating L.P.*, 2007 WL 914644, at *3.

[98] *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117, at *6.

[99] *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 559 A.2d 1301, 1315 (Del. Super. 1988).

[100] *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 WL 193117, at *7.

[101] *Id*.

[102] *Royal Indem. Co. v. Gen. Motors Corp.*, 2005 WL 1952933, at *11.

balance in favor of the Texas action in considering a motion to stay on *forum non conveniens* grounds.[103]

"When actions are contemporaneously filed, the standard of proof for a dismissal is 'overwhelming hardship' and on a motion to stay the standard is a 'balancing test' of the *Cryo-Maid* factors."[104] However, "where a stay will likely have substantially the same effect as a dismissal, the defendant must show that one or more of the factors, either separately or together, would subject the defendant to sufficient hardship to warrant staying the proceedings."[105]

The Court declines to dismiss the action on the grounds of *forum non conveniens*. Based on the *forum non conveniens* analysis of the *Cryo-Maid* factors, the Court finds that Crosstex has not shown that it would be subject to overwhelming hardship by litigating in Delaware.

This Court has not been presented with any evidence or argument that granting a stay would not have the same effect as a dismissal. The Court finds that on balance, the *forum non conveniens* factors tip in favor granting a stay of the Delaware action.

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[103] *Id*.

[104] *Id*. at *6.

[105] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 117; *see BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 WL 702382, at *2.

CONCLUSION

The Court finds that the Delaware action shall not be dismissed on the grounds of improper forum pursuant to Rule 12(b)(3). At the time Underwriters filed this action, a designated forum had not yet been established under the Service of Suit clause.

The Court finds that the Delaware action and Texas actions were filed contemporaneously. The Court considers the close proximity in time between the filings. Underwriters will not be awarded favorable first-filed status for commencing and winning a race to the courthouse.

Crosstex has not shown litigating in Delaware would subject it to "overwhelming hardship" under any combination of the *Cryo-Maid* factors evaluated in the *forum non conveniens* analysis. However, the Court finds that, on balance, the factors favor the Texas action.

THEREFORE, Crosstex's **Motion to Dismiss, or in the Alternative, to Stay** is hereby **GRANTED IN PART AND DENIED IN PART.** This Delaware action is hereby stayed until final resolution of the related action pending before the 162nd District Court of Dallas County, Texas, or until such further order of this Court. The parties are directed to submit a status report to this Court on or before six months from the date of this Opinion.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston