IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROYAL INDEMNITY COMPANY,	)	
	)	
Plaintiff	)	
	)	
v.	)	C.A. No. 05C-01-223 RRC
	)	
GENERAL MOTORS CORPORATION,	)	
	)	
Defendant.	)	
	)	

Submitted: April 29, 2005
Decided: July 26, 2005

On Defendant General Motors Corporation's Motion to Dismiss on *Forum Non Conveniens* Grounds. **DENIED.**

On Defendant General Motors Corporation's Alternative Motion to Stay on *Forum Non Conveniens* Grounds. **GRANTED.**

MEMORANDUM OPINION

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COOCH, J.

I. INTRODUCTION

This action involves an insurance coverage dispute between Royal Indemnity Company ("Royal") and General Motors Corporation ("GM") in which Royal seeks a declaratory judgment to determine whether it has any obligation to GM in relation to certain insurance purchased by GM over the course of several decades from Royal, and, if so, the extent of that obligation. GM has filed a similar, but not identical, action against Royal in Michigan in which it seeks a declaratory judgment that GM is entitled to coverage from Royal to indemnify GM for certain asbestos and environmental claims. The parties had a standstill agreement in place not to sue each other that expired on January 25, 2005. The Delaware action was filed electronically[1] in New Castle County Superior Court at 12:01 a.m. on January 26, 2005, one minute after the expiration of the standstill agreement and the Michigan action was filed in Oakland County Circuit Court at 8:01 a.m. on the same day, one minute after that Court's manual filing procedures permitted such filing.

GM then filed a motion in this Court to dismiss or, alternatively, to stay the Delaware action on *forum non conveniens* grounds in favor of the Michigan

[1] Pursuant to Superior Court Civil Rule 5(e).

action.[2] GM argues that a dismissal or a stay of this Delaware action is appropriate because the only Delaware connection in the underlying coverage claim is the fact that both companies are incorporated in Delaware. GM contends that this Court should apply a balancing of theso-called "*Cryo-Maid*" factors in determining whether to grant its motion for a stay or to dismiss. Royal responds that a dismissal or stay should be denied and the Delaware action should go forward because GM cannot establish the requisite strong showing of "overwhelming hardship" necessary to grant a dismissal, and that a "balance of factors" analysis warrants denial of a stay on that basis.[3] The parties further agree, as does this Court, that under the circumstances present in this case, the Delaware and Michigan actions should be deemed "contemporaneously filed," and that any "first filed" deference is not at issue this action.[4]

There are two main issues before this Court. The first issue, relating to the

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[2] Royal had filed a motion to dismiss on *forum non conveniens* grounds in Oakland County, Michigan. Royal's motion to dismiss has been denied. *General Motors Corp. v. Royal & Sun Alliance Insurance Group, PLC, et. al.*, Mich. 6th Cir. Ct. Case No. 05-063-863-CK, McDonald, J. (June 6, 2005) (Opinion and Order) (holding that "[w]ith regard to the *forum non conveniens* motion, the Court finds that it does not appear that this action would be more appropriately brought in Delaware").

[3] At oral argument counsel for Royal explained that "GM . . . appear[ed] in its opening brief, to brief this as a motion to dismiss" without "really . . . address[ing] the stay prong"; therefore, Royal mostly responded to GM's motion as if it were a motion to dismiss. April 29, 2005 Oral Argument transcript at 33. Royal subsequently acknowledged that, as to the motion to stay, the Court should use the "balance of factors" test. *Id.* at 37.

[4] *Id.* at 31.

requested dismissal, has two parts, a) whether (as Royal asserts) GM must show "overwhelming hardship and inconvenience" in relation to the so-called "*Cryo-Maid* factors" or whether (as GM asserts) GM need merely show that, on balance, the factors favor dismissal, and b) whether GM has established the requisite showing for a dismissal pursuant to the appropriate standard. The second issue, (which arises only if the Court declines to dismiss the case) relating to the alternative request to stay, is whether, in order to justify a stay, GM has shown that "on balance, the *forum non conveniens* factors warrant the grant of a stay."

This Court holds that in order to gain dismissal, GM must meet the "overwhelming hardship" standard and that GM has not "establish[ed] that [it] will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware"[5]; therefore, its motion to dismiss on *forum non conveniens* grounds is **DENIED.** The Court further holds, however, that GM has shown that "on balance, the *forum non conveniens* factors warrant the grant of a stay" and its motion for a stay is **GRANTED.**

[5] *Chrysler First Business Credit Corp. v. 1500 Locust LP*, 669 A.2d 104, 107 (Del. 1994).

II. FACTUAL AND PROCEDURAL BACKGROUND

Both parties are Delaware corporations. General Motors Corporation, a very large vehicle manufacturer, was incorporated under Delaware law in 1916.[6] GM has maintained its worldwide headquarters and principal place of business in Michigan since its incorporation. GM employs about 321,000 people around the world and it has manufacturing operations in 32 countries and its vehicles are sold in 200 countries.[7] In 2004, GM sold nearly 9 million cars and trucks globally.[8] GM's global headquarters are at the GM Renaissance Center in Detroit.[9] Since 1947, GM has operated an assembly plant near Wilmington now employing approximately 1800 employees and producing 11,729 units in 2004.[10] GM also sells its cars and trucks in Delaware through a network of authorized dealerships. The 97th annual meeting of General Motors stockholders in 2005 was held in Wilmington.[11]

Royal's principal place of business is in North Carolina. Royal was

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[6] *See* http://www.gm.com/company/corp_info/history for a detailed history of the founding of GM.

[7] *Id.*

[8] http://www.gm.com/company/corp_info/

[9] http://www.gm.com/company/corp_info/

[10] http://www.gm.com/company/corp_info/global_operations/north_america/usa.html

[11] http://www.gm.com /company/investor_information/stockholder_info/ann_mtg/mtg_details.html

incorporated in New York from 1910 until 1980 when it reincorporated in Delaware. Royal issued various insurance policies to GM beginning sometime prior to 1954 and concluding in 1995.[12] Royal has been licensed to do business in Michigan since 1955 and is apparently still licensed in Michigan[13] although it claims to no longer have any employees in Michigan.[14] The Royal insurance policies issued to GM were serviced by the Detroit Insurance Agency, which had an exclusive arrangement with Royal Indemnity of North America.[15] It is not clear from the record when the relationship between Royal and GM began. GM claims that the relationship began "at least [by] 1921"[16]; however, neither party apparently has any copies of policies before 1954. In the Michigan action, Royal & Sun Alliance Insurance Group PLC is one of the named defendants. It appears that Royal & Sun Alliance Insurance Group PLC is a British holding company and Royal is one of its holdings.

In December 2003, Royal received notice from counsel, who was representing an unnamed client, indicating that the client believed that Royal was

[12] Affidavit of Lynn Haley at ¶3.

[13] GM's Reply App., Ex. 1 (Henry Aff.), ¶16.

[14] April 29, 2005 Oral Argument Transcript at 40.

[15] Affidavit of Arthur E. Judson at ¶¶ 2,3.

[16] GM's Motion to Dismiss or Stay at 4.

responsible for insurance coverage to the client for certain asbestos-related and environmental liability claims. The client was later identified as GM and the parties then entered into a Standstill and Confidentiality Agreement while negotiations took place. In October 2004, GM requested that Royal defend and indemnify GM and its predecessors and assigns in connection with several asbestos-related and environmental liability claims. Royal terminated the Standstill and Confidentiality Agreement in January 2005, citing GM's alleged failure to provide specific information about the coverage, and, as previously noted, the two suits were then immediately and contemporaneously filed.

III. DISCUSSION

A. Analysis of *Forum Non Conveniens*, the *Cryo-Maid* Factors and "Contemporaneously Filed" Actions.

The motions before this Court are motions to dismiss or stay on *forum non conveniens* grounds.[17] The Delaware Supreme Court has held that "as a general rule, litigation should be confined to the forum in which it is first commenced (whether that forum is Delaware or another jurisdiction), and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by

[17] Royal initially appeared to argue that the Delaware action should be granted "first filed status" because Royal had filed its claim at 12:01 a.m. on January 26, 2005 and the Michigan action, filed by GM, was filed at 8:01 a.m. on the same day. Royal, however, conceded at oral argument that the Delaware action and the Michigan action should be considered as "contemporaneously

commencing litigation involving the same cause of action in another jurisdiction of its own choosing."[18] Delaware courts are "highly deferential to a plaintiff's choice of forum [as well as] respectful of its sister states."[19] As a general rule, Delaware courts will not dismiss an action on *forum non conveniens* grounds unless the defendant can show the challenged action is the rare case in which litigating in Delaware will constitute where an "overwhelming hardship."

In *General Foods Corp. v. Cryo-Maid, Inc.*, the Delaware Supreme Court established the guidelines for analyzing a motion to stay under *forum non conveniens* grounds holding that

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filed" actions, thereby making unnecessary any analysis of the "first-filed" rule."

[18] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 282 (Del. 1970). While Delaware courts recognize that deference should be accorded to a first filed action, Delaware courts will not reward a party for winning a "race to the courthouse." Delaware courts have not created a "bright line" test to determine whether two actions are contemporaneously filed because determining "contemporaneous filing" status is based on the specific facts of each case. *Texas Instruments Incorporated. v. Cyrix Corp.*, 1994 Del. Ch. LEXIS 31 (holding that "[i]nvolved [in the motion to dismiss or stay] is a race to the courthouse [and the fact that the plaintiff] won that race by five hours should not, without more, impose upon the defendant the significant burden of proving inconvenience and hardship"); *Azurix Corp. v. Synagro Technologies, Inc.*, 2000 Del. Ch. LEXIS 25 *15 (Del. Ch. 2000) (holding that "[s]ince the difference in time of filing is so close, it is fair to treat the competing actions as contemporaneously filed . . . [in order] to avoid rewarding the winner of a race to the courthouse"). However, the Court of Chancery has held that "[t]he fact that the court treats these actions as contemporaneously filed does not mean that the first time-stamp should lose all relevance. In close cases where the issue of convenience is in equipoise, it makes sense as a matter of comity to regard the first time-stamp factor as a tipping one in a *forum non conveniens* analysis." *In re IBP, Inc. Shareholders Litigation*, 2001 Del. Ch. LEXIS 40 at n.19. For the reasons set forth *infra*, this Court does not find the issue of whether to grant a stay to be a "close case."

[19] *In Re IBP, Inc.,* 2001 Del. Ch. LEXIS 40 at *24.

> [w]hen similar actions between the same parties involving the same issues are filed in separate jurisdictions the court in which either of said actions is filed may in the exercise of its discretion hold that action in abeyance to abide the outcome of the action pending in the other court. The power is inherent in every court and flows from its control over the disposition of causes on its docket. The decision is one to be made in the light of all the circumstances in order to determine the best and most economical means of determining the controversy.[20]

The guidelines, referred to as the *Cryo-Maid* factors, are:

> (1) The relative ease of access to proof;
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> (2) the availability of compulsory process for witnesses;
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> (3) the possibility of the view of the premises, if appropriate, and
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> (4) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.
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> (5) whether or not the controversy is dependent upon the application of Delaware law, which the courts of this State more properly should decide than those of another jurisdiction.[21]

Delaware courts after *Cryo-Maid* have also considered "the pendency or non-pendency of any similar actions in other jurisdictions" as in effect a sixth factor.[22]

In *Kolber v. Holyoke Shares, Inc.*, the Delaware Supreme Court held that the *Cryo-Maid* factors should be used to analyze a motion to dismiss on *forum non*

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

[21] *Cryo-Maid, Inc.*, 198 A.2d 681.

[22] *Ison v. E.I. DuPont*, 729 A.2d 832, 837-38 (Del. 1999), *American Home Products Corp. v. Adriatic Insur. Co.*, 1991 Del. Super. LEXIS 428 *11, *Azurix Corp.,* 2000 Del. Ch. LEXIS 25 at *12, *Freidman*, 752 A.2d at 552.

conveniens grounds.[23] The Supreme Court, however, held in *Kolber* that "[t]he requisite showing with respect to such factors is far greater . . . for a dismissal than for a stay. The *Kolber* court further held that "the ultimate defeat of the plaintiff's choice of forum, may occur only in the rare case in which the combination and weight of the [*Chro-Maid*] factors to be considered balance overwhelmingly in favor of the defendant."[24] The Supreme Court reaffirmed in *Ison* that "the trial court must find 'overwhelming hardship' to the defendant if the case is to be dismissed."[25]

While the case law on the standards of proof required to dismiss or stay an action on *forum non conveniens* grounds is well settled when there is no prior case to the Delaware action pending, or where the Delaware action is the prior pending action, the case law is not as well developed in the infrequent case, as here, of "contemporaneously filed" actions. The Delaware Supreme Court has not expressly addressed this issue. However, the Court of Chancery, in two recent cases, in *dicta,* queried whether the standard for a motion to stay and a motion to dismiss should not be the same standard (a balancing of the *Cryo-Maid* factors), a

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[23] *Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444, 446-47 (Del. 1965).

[24] *Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444, 447 (Del. 1965); *Chrysler First Business Credit Corp. v. 1500 Locust L.P.*, 669 A.2d 104, 105 (Del. 1995) (holding that "[t]he trial court must consider the weight of those factors in the particular case and determine whether any or all of them truly cause both inconvenience and hardship").

[25] *Ison*, 729 A.2d at 837-38.

standard which relies more upon the discretion of the court than the "overwhelming hardship" standard permits.

The Court of Chancery in *Friedman v. Alcatel Alsthom* and *Azurix Corp. v. Synagro Technologies, Inc.* decided the same issue that is now before this Court, *i.e.*, what burden of proof should be imposed on a defendant seeking dismissal when there is a contemporaneously filed competing action. The Court of Chancery ultimately, and somewhat reluctantly, held that the appropriate standard is the "overwhelming hardship" standard.[26] Those cases also held that, with respect to a stay, that the appropriate standard is a "balancing" test. Both cases, however, appear to have expressed dissatisfaction with a requirement of application of the heavier burden of the "overwhelming hardship" standard with respect to dismissal of a contemporaneously filed action; GM, relying on this *dicta*, argues that this Court, in consideration of its motion to dismiss, should "engage in a 'genuine inquiry into whether the parties' dispute should be heard,' based on a balancing of the [*Cryo-Maid*] factors."[27] In effect, GM asks the Court not to follow the holdings in *Friedman* and *Azurix* insofar as the burden of proof for a motion to dismiss is concerned.

In *Friedman v. Alcatel Alsthom*, two actions had been filed in separate

[26] *Friedman*, 752 A.2d at 552, *Azurix*, 2000 Del. Ch. LEXIS 25 at *2.

[27] GM's Motion to Dismiss or Stay at 12.

federal district courts. A few hours after at least one of the federal actions was filed, the plaintiffs filed their complaint in the Court of Chancery. Subsequently numerous other federal actions were filed and ultimately consolidated into one federal action. The Court of Chancery was then asked to stay or dismiss the Delaware action on *forum non conveniens* grounds in what the Court held were contemporaneously filed actions.

The *Friedman* Court held that the Delaware action had been filed "simultaneously" with the consolidated federal actions and stayed, but did not dismiss, the Court of Chancery action. Notably, the *Friedman* Court observed that

> [d]espite occasional references to the trial courts' discretion, little room for exercising that discretion exists given the [Supreme Court's] strictures. At least where a party urges a court to stay or dismiss a Delaware action in favor of a later filed action in another jurisdiction, these standards make perfect sense. It is, in [the Court's]view, a much less viable standard for analysis where actions can be deemed to be filed contemporaneously. The real issue when dealing with simultaneously filed actions seems to be whether the moving party seeks a dismissal or a stay, and, in either instance what is the burden of persuasion?[28]

The *Friedman* Court then rhetorically asked that "[in this contemporaneously filed action] [s]ince [the defendant] asks for dismissal *or* a stay, must [the defendant] show undue, significant or overwhelming hardship or

[28] *Friedman*, 752 A.2d at 552.

only that, on balance, the "*Cryo-Maid* factors" preponderate in favor of a dismissal or a stay?"[29] The Court, however, felt constrained to hold that

> [i]f dismissal [is at issue], then the question becomes whether any of the factors "establish that defendant[s] will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware." The burden is on the defendants to prove hardship and inconvenience. "Absent such a showing, plaintiffs' choice of forum must be respected." When, on the other hand, a party seeks only to stay the contemporaneously filed action, the issue is simply "whether on balance, the *forum non conveniens* factors warrant the grant of a stay." Where there are simultaneous filings, it seems to [the Court] that more discretion to dismiss should be placed in the hands of trial judges to determine whether the courts and the public's interest really necessitates trial in multiple jurisdictions given the limited resources of the courts and the enormous expense of litigation. Nevertheless, because that discretion does not seem to be as broad as some might think it should be, [the Court] addresses the *forum non conveniens* factors to determine whether the defendant has demonstrated undue, overwhelming or significant hardship in defending - which would merit a dismissal - or that, on balance, the *Cryo-Maid* factors warrant a stay, or neither.[30]

The *Friedman* Court thus thought it appropriate to suggest, in *dicta*, that a "balancing" test might be appropriate in consideration of a motion to dismiss a contemporaneously filed action.

The Court of Chancery revisited this issue two months later in *Azurix Corp. v. Synagro Technologies, Inc.* In *Azurix*, the plaintiff had filed its complaint in the Court of Chancery on a Friday afternoon and the following Monday, the defendant sued the plaintiff in a Texas court over essentially the same disputes. The

[29] *Friedman*, 752 A.2d at 552.

[30] *Friedman*, 752 A.2d at 552.

defendant moved in the Court of Chancery to dismiss or stay the plaintiff's Delaware action arguing that based on *forum non conveniens* grounds, the action should be litigated in Texas. The *Azurix* Court found that the Delaware and Texas actions were contemporaneously filed and, applying the *forum non conveniens* factors, the Court held that Texas was the more convenient as well as the more logical forum to resolve the parties' dispute and the Court, therefore, granted a stay, applying a "balancing" test.[31]

Azurix noted that "[i]n evaluating either a motion to dismiss or a motion to stay on the grounds of *forum non conveniens,* Delaware courts consider six factors."[32] The Court then recited the "*Cryo-Maid* factors," noting that the factors "should be used as a guide to the Court's exercise of discretion.[33] However, in another expression of the Court's apparent belief that a trial judge should be afforded more discretion to potentially dismiss an action than *forum non conveniens* case law allowed, the Court observed

> [d]espite occasional references to the trial courts' discretion, little room for exercising that discretion exists given the above strictures. When a party urges a court to stay or dismiss a Delaware action in favor of a later filed action in another jurisdiction, these standards make perfect sense. As [this Court has] previously noted in another case, however, these criteria are far less helpful in evaluating contemporaneously filed actions. If there are

[31] *Azurix*, 2000 Del. Ch. LEXIS 25 at *2.

[32] *Azurix*, 2000 Del. Ch. LEXIS 25 at *13.

[33] *Azurix*, 2000 Del. Ch. LEXIS 25 at *13.

> contemporaneous filings, the trial judge should be afforded more discretion "to determine whether the courts and the public's interest really necessitates trial in multiple jurisdictions given the limited resources of the courts and the enormous expense of litigation."[34]

And, in language that further echoed its holding in *Friedman*, *Azurix* held that

> [the defendant] seeks either dismissal or, in the alternative, a stay. To justify dismissal, [the defendant] must "establish that [it] will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware." The burden is on the defendant to prove hardship and inconvenience." Absent such a showing, plaintiff[s'] choice of forum must be respected." When, on the other hand, a party seeks only to stay the contemporaneously filed action, the issue is simply "whether on balance, the *forum non conveniens* factors warrant the grant of a stay." For this claim to be dismissed, [the defendant] would have to demonstrate that it would suffer undue, overwhelming or significant hardship if it is required to litigate in Delaware. As explained . . . within the context of the *Cryo-Maid* factors, [the defendant] can not meet that burden. Synagro bears a much lighter burden, however, in order to justify a stay. [T]o warrant a stay of [the plaintiff's] contemporaneously filed action, the *Cryo-Maid* factors must on balance simply tip in favor of [the defendant's] Texas action.[35]

Azurix and *Friedman* collectively hold that when two actions are contemporaneously filed, on a motion to dismiss the standard of proof is "overwhelming hardship" and on a motion to stay the standard is a "balancing test" of the *Cryo-Maid* factors.

GM also relies on a 1995 Delaware Supreme Court case, *Acierno v. New Castle County*, a case not cited in either *Friedman* or *Azurix*, that held that "first filed" deference need not be given to a Delaware action that was contemporaneously filed (although technically filed first) with an action from

[34] *Azurix*, 2000 Del. Ch. LEXIS 25 at *14.

another jurisdiction. GM argues that under *Acierno*, this Court should not require GM to show that it will suffer "overwhelming hardship" if forced to litigate in Delaware, but rather, that on balance, the Delaware action should be dismissed.

In *Acierno*, Acierno had filed an action in the United States District Court for the District of Delaware claiming, among other things, that New Castle County's denial of his building permit violated his constitutional rights. The federal action was dismissed, without prejudice. The County then filed in the Court of Chancery an action seeking declaratory relief that Acierno had not right to proceed with commercial development on property zoned for manufacturing. Acierno then filed a second federal action several minutes after the state action had been filed, seeking federal injunctive relief. Acierno subsequently filed a motion to stay the Court of Chancery action in favor of the second federal action and the County (as plaintiff) moved for summary judgment in the Court of Chancery on the grounds that the Board of Adjustment's decision to deny Acierno's permit request became final and binding when Acierno failed to appeal that decision. The Court of Chancery denied Acierno's motion to stay on *forum non conveniens* grounds and granted the County's motion for summary judgment because Acierno had not filed an appeal of the Board of Adjustment's denial of his permit request.

Acierno argued on appeal to the Delaware Supreme Court that the Court of

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[35] *Azurix*, 2000 Del. Ch. LEXIS 25 at *15-16.

Chancery had erred in giving the County's declaratory judgment action "first-filed" status.[36] Acierno further argued that

> [i]f the County's action is not accorded first-filed status, [then] a stay is mandated because: (i) the parties to the two actions are the same; (ii) the issue raised in the state action is being litigated in the federal action; (iii) the federal court is capable of providing prompt and complete relief; and (iv) a stay would avoid wasteful duplication of limited judicial resources.[37]

The Supreme Court, however, disagreed with Acierno's analysis. The issue before the Supreme Court was whether the Court of Chancery had treated New Castle County's action as being "first filed" and thus afforded the "hardship and inconvenience" deference due a "first filed" action, or whether the Court of Chancery had correctly deemed the two actions as "contemporaneously filed" and used a *forum non conveniens* analysis. The Supreme Court found that

> the Court of Chancery properly considered the relevant factors in exercising its discretion to deny the stay. The trial court did *not* give any weight to the fact that the County's action technically was the first filed.[38]

The Supreme Court further found that "[the]plaintiff was not required to prove hardship and inconvenience and the trial court gave no deference to the County's choice of forum."[39] The Supreme Court's holding in *Acierno* (that Acierno did not

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[36] *Acierno v. New Castle County*, 679 A.2d 455, 458 (Del. 1995).

[37] *Acierno*, 679 A.2d at 458.

[38] *Acierno*, 679 A.2d at 458.

[39] *Acierno*, 679 A.2d at 458.

have to prove "hardship and inconvenience") was related only to the question of the standard of proof required for a motion to stay a contemporaneously filed state action in favor of a Federal action. The Supreme Court, however, did not indicate, either explicitly or implicitly, that the standard on a motion to dismiss when two actions are contemporaneously filed should be the lower standard of the "balancing" test used in a motion to dismiss.

GM, relying on *Acierno*, argues that *both* a motion to dismiss or a motion to stay a contemporaneously filed action should be decided under a balance of the "*Cryo-Maid* factors" standard of proof rather than the "overwhelming hardship" standard.[40] GM contends that the Supreme Court's decision in *Acierno* stands for the proposition that "deference to a Delaware plaintiff's choice of forum is not warranted where its action is filed contemporaneously with a competing action, and the Supreme Court has endorsed the application of a balancing test in deciding *forum* [*non conveniens*] motions in such situations."[41] GM acknowledges that the Supreme Court in *Acierno* "was not presented with the question of what burden of proof should be imposed on a defendant seeking dismissal rather than a stay when there is a contemporaneously filed competing action."[42] GM apparently argues

[40] GM's Reply Brief at 5.

[41] GM's Reply Brief at 5.

[42] GM's Reply Brief at 6.

that the *Acierno* court implicitly held that there ought to be no different standard applied. GM contends that "[t]here simply is no principled reason why a higher burden of proof should be imposed [in a contemporaneously filed Delaware action] where dismissal is sought, because deference to the plaintiff's choice of forum is equally unwarranted" in a motion to dismiss as a motion to stay.[43]

The Court of Chancery has since interpreted *Acierno* to mean (with respect to a stay) that

> where two lawsuits are simultaneously filed--one in a Delaware state court and the other in a different forum--the Delaware court should decide a motion to stay the Delaware action as a discretionary matter, without giving deference to either party's choice of forum. 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. That approach, which imposes no special or heightened burden of persuasion, leads straightforwardly to the following burden of persuasion: towards which of the two competing fora do the forum non conveniens factors preponderate?[44]

Acierno, thus, does not directly support GM's argument that a lower standard of proof should be applied when a court decides a motion to dismiss a contemporaneously filed action because neither the Supreme Court in *Acierno* nor

[43] GM's Reply Brief at 5.

[44] *HFTP Investments, L.L.C. v. ARIAD Pharmaceuticals, Inc.*, 752 A.2d 115, 122 (Del. Ch. 1999).

the Court of Chancery in *HFTP* addressed the issue of what standard of proof was required for a motion to dismiss.[45]

This Court agrees with the observation expressed in *Friedman* (and in essence repeated in *Azurix*) that it may make sense for "more discretion to dismiss to be placed in the hands of trial judges [in "contemporaneously filed" actions] to determine whether the courts' and the public's interest really necessitates trial in multiple jurisdictions given the limited resources of the courts and the enormous expense of litigation."[46] However, this Court finds, as did the Court of Chancery, that its discretion to dismiss in *forum non conveniens* claims in contemporaneously filed cases, is apparently limited by the Delaware Supreme Court's numerous holdings that a defendant must show "overwhelming hardship" in order to dismiss a plaintiff's action in favor of an action in another jurisdiction.

Therefore, this Court, following the lead of *Friedman* and *Azurix*, addresses the *forum non conveniens* factors in the instant case by determining whether GM

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[45] *HFTP Investments, L.L.C. v. ARIAD Pharmaceuticals, Inc.*, 752 A.2d 115 (Del. Ch. 1999) (holding that "[when both . . . action[s] [are] deemed simultaneously filed . . . as a consequence, [the movant] is not required to prove hardship and inconvenience, [and] the Court is not required to give significant deference to [the palintiff's] choice of forum, and the appropriate standard is whether, on balance, the forum non conveniens factors warrant the grant of a stay"); *In re IBP Shareholders Litig. v. Tyson Foods, Inc.*, 2001 Del. Ch. LEXIS 40 (holding that "[t]o prevail on pure [*forum non conveniens*] grounds [where there are contemporaneously filed actions], [the movant] must convince [the Court] that, on balance, the relevant 'forum *non conveniens* factors warrant the grant of a stay').

[46] *Friedman*, 752 A.2d at 552.

has "demonstrated undue, overwhelming or significant hardship in defending [Royal's claim in Delaware]- which, [if shown], would merit a dismissal - or [if dismissal is not warranted, whether], on balance, the *Cryo-Maid* factors warrant a stay."[47]

The continued application by Delaware courts of the "overwhelming hardship" standard to a motion to dismiss a contemporaneously filed action on *forum non conveniens* grounds is a determination ultimately to be made by the Supreme Court.

B. Application of the *Cryo-Maid* Factors

1. Applicability of Delaware Law

It appears to this Court that Delaware law will not be an issue in this case. Both parties agree. "Delaware has adopted the choice of law approach from the Second Restatement of Conflicts for both tort and contract."[48] The insurance contract(s) in dispute were apparently negotiated in Michigan between a Michigan based company (GM) and an insurance company that was incorporated in New York, and presumably headquartered in New York, at the time the contracts were executed. This Court need not now decide which choice of law will be applicable, as it is sufficient for this analysis to note that neither party advocates the

[47] *Friedman*, 752 A.2d at 552.

[48] *Eisenmann Corp.*, 2000 Del. Super. LEXIS 25 at *33.

application of Delaware law. While Delaware courts have often applied the law of other jurisdictions, in these circumstances Michigan has the greater interest in applying its substantive law. Accordingly, although in this case the choice-of-law factor does not rise to the overwhelming hardship standard under a motion to dismiss, it does favor granting a stay in favor of the Michigan action.

2. Relative ease of access to proof

This Court has held that "[i]n assessing the relative ease and convenience of the selected forum, one meaningful consideration is the proximity of the forum to necessary proof."[49] GM argues that Delaware is not the home of any presently known material witnesses, documents, or other items of relevant proof. GM also contends that none of the environmental sites in question are located in Delaware, nor is there evidence that any of the subject insurance policies were negotiated or delivered within the state. In contrast, GM has maintained its principal base of business in Michigan, including its insurance and risk management operations.[50] Royal had retained brokers in Michigan in connection with the subject policies, and the policies were apparently either negotiated and delivered in Michigan or New York.[51]

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[49] *American Home Products Corp.*, 1991 Del. Super. LEXIS 428 at *15.

[50] GM's Motion to Dismiss or Stay at 2-3.

[51] GM's Motion to Dismiss or Stay at 3-4.

Royal does not deny GM's assertions; however, Royal argues that no matter where this case is to be tried, discovery will be sought as to evidence that is scattered throughout the country. Thus, Royal argues that litigation in any forum would entail a significant amount of travel for the parties, lawyers, and witnesses. Royal bases its forum choice, in part, on its contention that Delaware is approximately equidistant between Royal's main base of operations in North Carolina and GM's worldwide headquarters in Michigan. Royal also argues that GM, as a large corporation, has the resources to transport documentary evidence without overwhelming hardship.

The Court recognizes that discovery in this case will probably entail a great deal of travel and require the parties to produce a large number of documents. However, although the parties in this case are both corporations which do business worldwide[52] and have the resources to transport the documentary evidence without substantial hardship, "common sense dictates that there is more hardship incurred in transporting documentary evidence when there is no evidence located in the forum state than when part of the evidence is located in the forum state."[53] In addition, many of GM's witnesses are located in Michigan and elsewhere and

[52] GM has manufacturing operations in 32 countries and its vehicles are sold in 200 countries. Royal's parent company is a British based company.

[53] *American Home Products Corp.*, 1991 Del. Super. LEXIS 428 at *15.

apparently not in Delaware. The Court of Chancery has held that when "employees are forced to appear in a forum far from their homes and jobs, that clearly [imposes a] burdens upon them, their families and their employers."[54] Because the parties have the resources to transport the documents without undue burden, there is not the "overwhelming hardship" required to support the grant of the motion to dismiss. However, the important fact is that there is no relevant evidence nor material witnesses located in Delaware nor material witnesses and the fact that the extra step of transporting the documents to Delaware for trial can easily be avoided weighs in favor of a stay.

3. Compulsory process

GM argues that no known witnesses reside in Delaware and that GM cannot compel attendance of witnesses who reside in other states. GM contends that a portion of its witnesses are employees and former employees who are residents of Michigan and could be subject to compulsory process there, unlike in Delaware. Royal argues that as an employer, GM should be able to command its current employees to appear. Royal also argues that it has minimal corporate operation in Michigan and that it would be inconvenient for its witnesses to travel to Michigan.

As GM has acknowledged, some of its former employee-witnesses are quite elderly and it might well be difficult for them to travel at all, this being particularly

[54] *Texas Instruments Incorporated.*, 1994 Del. Ch. LEXIS 31 at *14.

true for those former employees no longer living in Michigan. To some extant, their testimony can probably be presented by depositions, thereby negating any travel burden. As to current employees, the Court of Chancery has noted that although "an employer may have the practical ability to command its employees to appear at a trial in Delaware . . . [the] practical ability is not the equivalent to having the legal power to compel a witness's attendance."[55] Given the relative ease with which one can travel and the use of depositions and electronic technology, the availability or unavailability of compulsory service, should not be an absolute bar to litigating in Delaware and this factor does not rise to the level of "overwhelming hardship." However, as a practical matter, limiting the travel to Delaware and disruption that travel can entail when there are no known witnesses in Delaware favors granting a stay.

4. Pendency of similar actions

GM argues that the Michigan action is not only similar to the Delaware action but the Michigan action is broader than the Delaware action in that it joins three additional Royal companies and seeks relief beyond just the declaratory judgment sought by Royal in Delaware. Royal, however, argues that the Michigan action will not conclusively determine the parties' obligations.[56] Royal contends

[55] *Texas Instruments Incorporated.*, 1994 Del. Ch. LEXIS 31 at *14.

[56] Royal's Response at 14.

that the Michigan action involves only a portion of the coverage at issue in the Delaware action.[57] Royal argues that the original Michigan complaint seeks coverage only between the years 1954 through 1971, while the Delaware action seeks a declaratory judgment as to possible coverage prior to 1954 and from 1971 through 1994.[58] In response to GM's argument that the Michigan action is more complete because GM is seeking damages there as well as declaratory relief, Royal argues that under Delaware law GM is required to assert its damages claim against Royal as a compulsory counterclaim.[59]

It appears to this Court that the Michigan action is similar, but not identical, to the Delaware action.[60] GM has amended its Michigan complaint to include pre-1954 policies. GM has also represented that "it does not seek insurance coverage from Royal for the post-1971 policies and will not do so in any forum with respect to the asbestos-related and environmental claims at issue in [the Delaware] and the Michigan litigations."[61] Royal expressed concern at oral argument that if the post-

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[57] Royal's Response at 5.

[58] April 29, 2005 Oral Argument transcript at 42.

[59] Royal's Response at 15.

[60] The Michigan Circuit found that the Delaware action and the Michigan action were "almost identical." *General Motors Corp. v. Royal & Sun Alliance Insurance Group, PLC, et. al.*, Mich. 6th Cir. Ct. Case No. 05-063-863-CK, McDonald, J. at 2 (June 6, 2005) (Opinion and Order).

[61] GM's Reply Brief at 13.

1971 policies are not included in the current litigation it leaves open the possibility that GM could come back at a later date and assert claims under those policies.[62] However, as GM argues, Royal can apparently file a counter-claim seeking a declaratory judgment in the Michigan action to include the post-1971 policies.[63]

This Court has held that "[t]his factor remains important in the modern world as it relates generally to comity among available forums."[64] When analyzing this factor, "[t]he weight accorded . . . depends upon whether the two actions are similar, not whether they are identical."[65] The Court of Chancery has held that "the critical question is not whether [a party] must assert its claims in . . . [an action], but whether [it] can assert them."[66] The State of Michigan Circuit Court for the County of Oakland has denied Royal's motion to dismiss.[67] Presumably, that action will now continue on to a conclusion on the merits. The fact that there is another similar case covering the same parties and similar actions pending in

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[62] April 29, 2005 Oral Argument transcript at 43.

[63] GM's Reply Brief at n.16.

[64] *Eisenmann Corp.*, 2000 Del. Super. LEXIS 25 at *34.

[65] *Texas Instruments Incorporated.*, 1994 Del. Ch. LEXIS 31 at *18.

[66] *Texas Instruments Incorporated.* 1994 Del. Ch. LEXIS 31 at *18.

[67] *General Motors Corp. v. Royal & Sun Alliance Insurance Group, PLC, et. al.*, Case No. 05-063-863-CK, McDonald, J. (June 6, 2005) (Opinion and Order) (holding that "[w]ith regard to the *forum non conveniens* motion, the Court finds that it does not appear that this action would be more appropriately brought in Delaware").

Michigan, while not rising to the level of "overwhelming hardship," does weigh in favor of a stay.

5. Need to view the premises

GM acknowledges that "there likely will be no need to view premises in this action."[68] Additionally, this Court has held that "[in] environmental insurance coverage cases, viewing the premises is not necessary in the first instance for determining the scope of insurance coverage under the policies."[69] As this Court has held, "[a] view of the premises in this case is highly unlikely, but the fact that Delaware does not have any of the environmental sites within its jurisdiction transforms the possibility of a view from unlikely to impossible."[70] Royal agrees with GM's assertion that there is no need to view the premises in this action.[71] As this factor is given little weight under the current facts, it therefore does not constitute "overwhelming hardship"; however, this factor does slightly favor a stay.

6. Other practical considerations

The final factor "involves weighing any other consideration that would serve

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[68] GM's Motion to "Stay or Dismiss this Action on *Forum Non Conveniens* Grounds" at 18.

[69] *American Home Products Corp.,* 1991 Del. Super. LEXIS 428 at *19. *See, e.g., Monsanto Co. v. Aetna Casualty and Surety Co.,* 559 A.2d 1301, 1308 (Del. Super. 1988).

[70] *American Home Products Corp.*, 1991 Del. Super. LEXIS 428 at *19.

[71] Royal's Response at 20.

to make the trial easy, expeditious and inexpensive."[72] GM argues that "the consequences of this litigation will be felt in Michigan, but not at all in Delaware."[73] GM contends (correctly) that the only connection between this action and Delaware is that both parties are incorporated in Delaware. Royal responds that Delaware has an legitimate public interest in making its courts available to citizens who have elected to incorporate in Delaware.[74] Royal further responds that "the citizens of Michigan have little, if any, interest in whether GM receives insurance coverage for the underlying claims."[75]

This case is a classic example of the type of case that causes judicial administrative difficulty.[76] The only connection between the parties and Delaware is that both parties are incorporated here. In addressing *dicta* from *Ison* that appeared to favor a weighing of the plaintiff's choice of forum against a defendant whose only connection is that it is incorporated in Delaware, the Supreme Court, in

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[72] *Texas Instruments Incorporated.*, 1994 Del. Ch. LEXIS 31 at *19.

[73] GM's Motion to Stay at 20.

[74] Royal's Response at 16. *See Azurix*, 2000 Del. Ch. LEXIS 25 at *25 (holding that "Delaware has a very legitimate interest in making its courts available to citizens who have elected to incorporate here"); *Monsanto Co.,* 559 A.2d at 1315 (holding that "Delaware has an interest in opening its Courts to Delaware citizens in order to provide them with a forum in which to seek justice").

[75] Royal's Response at 16.

[76] *American Home Products Corp.*, 1991 Del. Super. LEXIS 428 at *25.

a subsequent case, stressed that ""the traditional showing a defendant must make in order to prevail on a motion to dismiss 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."[77] However, the Supreme Court has not addressed this issue on a motion to stay a contemporaneously filed action. The insurance contracts in the instant case do not have their situs in Delaware. This case involves an insurance coverage dispute that was entered into, presumably, in Michigan between a Michigan based company and a North Carolina based company, which was incorporated in New York when the contracts were executed.

Contrary to Royal's position, it is the citizens of Delaware that have "little, if any, interest in whether GM receives insurance." This claim will be decided either using Michigan law or New York law and not Delaware law. This case ultimately would have little precedential effect in Delaware. Given the Supreme Court's holding in *Mar-Land*, 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. However, the fact that this case will ultimately be decided, presumably, under Michigan or New York law and not upon Delaware law, does favor a stay.

[77] *Mar-Land Indu. Contrs., Inc.*, 777 A.2d at 780.

Based on the above analysis of the *forum non conveniens* factors set forth in *Cryo-Maid,* this Court finds that the GM has not shown it would be subject to "overwhelming hardship" by litigating this case in Delaware such as to warrant the granting of it motion to dismiss. However, based on the same examination under a *forum non conveniens* analysis, this Court finds that on balance the "*Cryo-Maid* factors" warrant a stay. Accordingly, this action will be stayed pending the resolution of the Michigan action.

V. CONCLUSION

For the foregoing reasons, GM's motion to dismiss this action on *forum non conveniens* grounds is **DENIED**; however, GM's alternative motion to stay this action on *forum non conveniens* grounds is **GRANTED**.

IT IS SO ORDERED.

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oc: Prothonotary