IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Jarl Abrahamsen, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 10C-07-129 BEN
	)	
ConocoPhillips Company,	)	
	)	
Defendant.	)	

Jorn Andreassen, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 10C-07-130 BEN
	)	
ConocoPhillips Company,	)	
	)	
Defendant.	)	

Jan Aarsland, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	C.A. No. 10C-07-131 BEN
	)	
ConocoPhillips Company,	)	
	)	
Defendant.	)	

Arne Aasen, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 10C-07-132 BEN
	)	
ConocoPhillips Company,	)	
	)	
Defendant.	)	

ORDER

AND NOW, TO WIT, this 30th day of May, 2014, the Court having heard and duly considered Defendant's Motions to Dismiss and Plaintiffs' opposition thereto,

IT APPEARS TO THE COURT THAT:

1. The 123 Plaintiffs named in these four personal injury cases are all Norwegian citizens[1] and former employees of Phillips Petroleum Company Norway and/or ConocoPhillips Norway.[2] Defendant ConocoPhillips Company ("ConocoPhillips"), formerly known as Phillips Petroleum Company,[3] owned, controlled and/or operated the rigs, platforms and vessels in the North Sea upon which Plaintiffs worked. The Plaintiffs claim that they or their family members were

[1] *See* Hr'g Tr. ("Tr.") 5-6, Oct. 11, 2013 (Trans. ID 54438359).
[2] These companies are wholly owned subsidiaries of the named defendant, ConocoPhillips Company. *See* Pls. Answering Br. In Opp'n to Def. ConocoPhillips Co.'s Mot. to Dismiss ("*Abrahamsen* Ans. Br.") at 5 (Trans. ID. 53301391).
[3] *See Abrahamsen* Compl. ¶ 1 (Trans. ID 32107387). ConocoPhillips is a Delaware corporation with its principal place of business in Houston, Texas. *Id*. at ¶ 2.

injured as a result of exposure to toxic materials, including but not limited to, Benzene and Benzene-containing products such as petroleum products, solvents, and cleaning agents that caused injuries.[4] There is no allegation in the complaints that these exposures occurred anywhere but in Norway, and none of the Plaintiffs claim to have ever lived or worked in the United States.

2. Plaintiffs originally filed these cases as a single class action suit in Cameron County, Texas.[5] ConocoPhillips removed *Holum* to federal court under the Class Action Fairness Act of 2005 ("CAFA") and federal question jurisdiction.[6] ConocoPhillips then moved to dismiss on *forum non conveniens* and international comity grounds.[7] Before that motion was decided, Plaintiffs voluntarily dismissed *Holum* in June, 2009.[8]

3. On April 30, 2010, Plaintiff Jan Aarsland and 120 other plaintiffs filed suit in this Court, captioned *Aarsland, et al. v. ConocoPhillips Co.*, C.A. No. N10C-04-278 BEN.[9] ConocoPhillips moved to dismiss (on the same

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[4] *See, e.g.*, *id.* ¶¶ 10-11.

[5] That lawsuit was captioned *Holum, et. al. v. ConocoPhillips Co.*, Cause No. 2009-01-0506-D ("*Holum*"). *See* Def. ConocoPhillips Co.'s Opening Br. in Supp. of its Mot. to Dismiss in *Abrahamsen* ("*Abrahamsen* Op. Br.") at 4 and Ex. 3 (Trans. ID 52294965).

[6] *See Abrahamsen* Op. Br. at 4.

[7] *Id.* at 4.

[8] *Id* at 4-5 and Ex. 4.

[9] *Id*. at 5 and Ex. 5.

grounds as in *Holum*), and, again, Plaintiffs voluntarily dismissed the case.[10]

4. Plaintiffs filed suit a third time, this time dividing their identically pleaded claims into four separately pleaded complaints.[11] On August 17, 2010, ConocoPhillips timely removed these cases to the United States District Court for the District of Delaware ("District Court") based on CAFA and federal question jurisdiction.[12] Following removal, ConocoPhillips moved to dismiss. The District Court granted ConocoPhillips' motion to dismiss based on *forum non conveniens*.[13] On appeal, the Third Circuit Court of Appeals vacated the District Court's decision and remanded the case to state court, finding that there was no federal jurisdiction.[14]

5. Defendant argues, *inter alia*, dismissal on *forum non conveniens* grounds is warranted here because Plaintiffs are foreign nationals whose claims lack any connection whatsoever with Delaware, and who have filed suit here even though they concede that an adequate forum for the resolution of their claims exists in Norway. Defendant maintains that the doctrine

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[10] *Id*. at 5 and Ex. 6.
[11] *Abrahamsen v. ConocoPhillips Co.*; *Andreassen v. ConocoPhillips Co.*; *Aarsland v. ConocoPhillips Co.*; *Aasen v. ConocoPhillips Co*. *Id.* at 5.
[12] *Id.* at 5 and Ex. 7.
[13] *See id*. at 5-6 and Ex. 8.
[14] *Abrahamsen v. ConocoPhillips, Co.*, 503 Fed.App'x 157 (3d Cir. 2012).

of *forum non conveniens* should be applied to prohibit Plaintiffs from forum shopping and circumventing their own nation's fully available and competent legal system.[15]

6. Defendant further argues that, because these four suits are not "first filed" and Plaintiffs "clearly are forum shopping," "their choice of forum is not entitled to the respect normally afforded under Delaware law" and the overwhelming hardship standard is inapplicable in this case.[16]

7. These suits are not first filed. The prior actions filed by Plaintiffs and the instant four cases arise out of a "common nucleus of operative facts."[17] Where the Delaware action is not first filed, the policy that favors strong deference to a plaintiff's initial choice of forum "requires the Court freely

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[15] *See Abrahamsen* Op. Br. at 1.

[16] *See id.* at 14 (citing *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 (Del. 2010)). Defendant notes that this is Plaintiffs' third action filed in American courts and that at least 36 of the plaintiffs in these actions have already filed workers compensation claims arising from these same injuries before the Norwegian Labor and Welfare Organization. *Id.* at 12. Defendant also argues that, even assuming *arguendo*, Plaintiffs' Norwegian claims were not the first filed, Plaintiffs' multiple prior American suits render the instant suits not the first filed. *Id.* at 12. Defendant points out that the U.S. District Court for the District of Delaware, when dismissing the class action suit, found a "more than plausible" likelihood that Plaintiffs filed in Delaware for forum shopping reasons. *Id.* (quoting *id.* at Ex. 8, n.2). In his order dismissing Plaintiffs' case, Chief Judge Sleet of the District Court stated: "Plaintiffs' counsel has made several statements that indicate that the choice to file in a U.S. jurisdiction was motivated by the perception that 'the sky's the limit when it comes to legal actions in the United States.'" *Id*. at Ex. 8, n.2 (citation omitted).

[17] *See Mayorga, 993 A.2d at 1048;* Abrahamsen Op. Br. 11-14; Def. ConocoPhillips Co.'s Reply in Supp. of its Mot. to Dismiss ("Reply Br.") at 3-6 (Trans. ID 53399818).

to exercise its discretion in favor of staying or dismissing the Delaware action (the '*McWane* doctrine')."[18]

8. Even assuming, *arguendo*, these four suits are "first filed," for the reasons explained below, Defendant has established with the requisite particularity that it will face overwhelming hardship if these suits are litigated in Delaware.

9. Application of the doctrine of *forum non conveniens* presupposes at least two forums in which the defendant is amenable to process, and the doctrine furnishes criteria for a choice between them.[19] The first step the Court must take in considering a *forum non conveniens* motion is to determine whether an alternative forum is available to hear the case. An alternative forum exists where the defendant is already subject to process.[20] It is undisputed that Norway constitutes an available alternative forum in which to litigate the case and that Norwegian trial courts have jurisdiction over the parties.

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[18] *See Mayorga*, 993 A.2d at 1046-47 (citations and emphasis omitted); s*ee also Abrahamsen* Op. Br. at 11-14; Reply Br. at 3-6.
[19] *Harry David Zutz Ins., Inc. v. H.M.S. Assocs. Ltd.*, 360 A.2d 160, 165-66 (Del. Super. 1976).
[20] *See Dietrich v. Texas Nat'l. Petroleum Co.*, 193 A.2d 579, 588-89 (Del. Super. 1963).

10. Delaware's *forum non conveniens* jurisprudence is well established. When there is no issue of prior pendency of the same action in another jurisdiction, the analysis is guided by the "*Cryo-Maid* factors:"[21]

(1) relative ease of access to proof;

(2) availability of compulsory process for witnesses;

(3) possibility of viewing the premises;

(4) whether 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;

(5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and

(6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.

11. For the Court to dismiss based on *forum non conveniens* grounds, the Defendant is required to establish the relevant *Cryo-Maid* factors with particularity.[22] As the Supreme Court recently reiterated in *Martinez v. E.I. DuPont de Nemours and Co., Inc.*:[23]

> A plaintiff's choice of forum should not be defeated except in the rare case where the defendant establishes, through the *Cryo-Maid* factors, overwhelming hardship and inconvenience. It is not enough that all of the *Cryo-*

[21] *See Mar-Land Indus. Contrs., Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 778 (Del. 2001) (citing *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964); *Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 267 (Del. 2001)).
[22] *Mar-Land*, 777 A.2d at 778.
[23] 86 A.3d 1102, 1104 (Del. 2014) (quoting *Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship*, 669 A.2d 104,105 (Del. 1995)).

> *Maid* factors may favor defendant. The 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.

12. The overwhelming majority of evidence and proof necessary to litigate Plaintiffs' claims is located in Norway, and none is located in Delaware.[24] All Plaintiffs, their family members, friends, co-workers and treating physicians are in Norway.[25] All of the Plaintiffs' medical and employment records (many of which are in the possession of third-party witnesses such as treating physicians and hospitals) are in Norway.[26] ConocoPhillips Norway is the repository of the relevant employee records, the relevant safety documents and other related materials, and the place where the overwhelming number of witnesses work or worked.[27] It is possible that some of the relevant discoverable documents located in Norway may not be freely transferred for use in this litigation because the Norway Personal Data Act of 2000 restricts the transfer of data to other countries without equivalent data protection regimes, provides for a data inspectorate to monitor application of safeguards and exceptions, and authorizes fines to be imposed for inappropriate data

[24] *Cf. Martinez v. E.I. Dupont de Nemours & Co.*, 82 A.3d 1, 32 (Del. Super. 2012) ("Delaware is not home to *any known* material witnesses, documents, or other items of relevant proof.") (emphasis in original).
[25] *See, e.g.*, *Abrahamsen* Compl. ¶¶ 57-86; *Abrahamsen* Op. Br. at Ex. 10.
[26] *See Abrahamsen* Op. Br. at 16 and Ex. 8, n.2.
[27] *See id.* at 16.

transfers.[28] It is also possible that requiring Defendant to defend these claims in Delaware could place it at risk of running afoul of Norwegian law.[29] Defendant has demonstrated with particularity that these difficulties in accessing proof contribute substantially to its hardship.

13. ConocoPhillips will most likely have to subpoena third-party documents related to dozens of plaintiffs and hundreds of witnesses, and those subpoenas would need to proceed through the Hague Convention's procedures which would result in delay and added expense, particularly when there are 123 plaintiffs.[30] Moreover, Norway may not comply with ConocoPhillips document requests because Norway has adopted reservations to Hague Convention Article 23 in that it will execute only those requests that specifically identify the documents sought.[31]

14. ConocoPhillips has no means of obtaining compulsory process for unwilling witnesses because those witnesses live in Norway. The parties have specifically preliminarily identified 470 witnesses. Not one is located in Delaware. This is far from a complete list. 171 out of 228 potential company-related witnesses are residents/citizens of Norway, or

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[28] *See id*. at 17.
[29] *Id.*
[30] *See Ison v. E.I. Du Pont de Nemours & Co.*, 729 A.2d 832, 843 (Del. 1999) (describing production of evidence through the Hague Convention procedures as "somewhat cumbersome").
[31] *See Abrahamsen* Op. Br. at 17; *cf. Martinez*, 82 A.3d at 31 (describing Argentinean conditions on conducting discovery through the Hague Convention).

residents/citizens of other European countries, and none are within this Court's subpoena power.[32] Of the 245 identified Plaintiff-related witnesses, 241 are located in Norway, 4 are located in Spain, and the vast majority do not speak English.[33] The number of relevant non-party witnesses in Norway likely is much higher because, so far, less than half of the Plaintiffs have identified any witnesses other than themselves, and all Plaintiffs have reserved their right to disclose additional witnesses.[34] Defendant correctly notes that testimony from these witnesses will be crucial to ConocoPhillips' ability to defend the suit, and all these individuals are outside the Court's subpoena power under Rule 45 of Delaware Superior Court Rules of Civil Procedure. And, as Defendant correctly points out, even if these witnesses were willing to voluntarily travel to Delaware to testify, the "logistical nightmare (not to mention the financial burden) associated with procuring their testimony would be severe."[35] Defendant has "shown with particularity that the location of third party critical witnesses imposes a heavy burden upon it to mount its defense through their cooperation and testimony."[36]

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[32] *See Abrahamsen* Op. Br. at 18 and Ex. 11.
[33] *Id*. at 18 and Ex. 12.
[34] *Id* at 18 and Ex. 10.
[35] *Id.* at 19.
[36] *Martinez*, 82 A.3d at 32.

15. Defendant points out that trying the case in Delaware would entirely eliminate the possibility of a view of the premises – the premises being the oil platforms where the alleged injuries occurred. According to Defendant, a lay fact finder "almost certainly will lack first-hand experience with such platforms, and a site visit would guide an understanding of their basic operations, as well as such site-specific phenomenon alleged in [P]laintiffs' complain."[37] Because the exposures occurred years ago, it seems unlikely a view would be helpful.[38] Moreover, given the state of technology with respect to videography, photography, and computer animation the Court does not find this factor that important.

16. It seems likely that Norwegian law will control this dispute under the most significant relationship test for tort claims, as Chief Judge Sleet noted when he granted Defendant's *forum non conveniens* motion.[39] Application and interpretation of Norwegian law would be complicated by, *inter alia*, the fact that Norway is a civil law jurisdiction and thus precedent is not always readily available.[40] If the case is litigated in

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[37] *Abrahamsen* Op. Br. at 22, n. 4.

[38] *Cf. Martinez*, 82 A.3d at 33 (explaining that inspection of premises may not be necessary when work site conditions have changed).

[39] *See Abrahamsen* Op. Br. at 19-20 and Ex. 8, n.2.

[40] *See id*. at 20. It is undisputed that all the petroleum resources in Norway are government-owned and/or controlled, and the kingdom of Norway has proclaimed it sovereignty over the

Delaware it is likely the parties (and perhaps the Court) would need to retain Norwegian law experts and translators. The parties' Norwegian law experts would be required to travel thousands of miles and the travel expenses and fees would be substantial. As Defendant points out, unlike a straightforward personal injury case, these trials "will entail massive undertakings, both legal and factual, such that the extreme expense and complexity would impose an overwhelming hardship on ConocoPhillips."[41]

17. Litigating this action in Delaware would present many other practical problems. Because the case is not a class action, each Plaintiff will have to prove individual causation and damages. As noted above, in addition to the 123 Plaintiffs, the parties have preliminarily identified hundreds of other Norwegian witnesses. Many of these witnesses speak Norwegian and documents and medical records relevant to their testimony will be in

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seabed and the subsoil of the Norwegian continental shelf in the North Sea. It is further undisputed that the Norwegian Parliament has enacted legislation which vests ownership in the kingdom of all Norwegian natural submarine resources, including petroleum, and authorizing the King to grant rights of exploration and exploitation to Norwegian or foreign persons, including foreign companies, and that petroleum development is not allowed absent express authorization from the Norwegian government. *Id*. at 2-3. *See also Martinez*, 82 A.3d at 33 ("[W]hen [foreign] laws…have been enacted in the context of a civil law system…the application of foreign law imposes that much more of a hardship.").

[41] *Abrahamsen* Op. Br. at 20.

Norwegian.[42] Deposing and arranging travel to the U.S. for trial for the 123 Plaintiffs and potentially hundreds of witnesses will involve arranging overseas travel, and require witnesses to miss work and other obligations for several days. The logistics and expense will be substantial. There is no guarantee the Norwegian witnesses will appear for trial.[43] The only connection between Delaware and these cases is the fact that ConocoPhillips and its two subsidiaries are incorporated here.

18. In *Martinez*, Argentine nationals who claimed they were exposed to asbestos while working in textile plants located in Argentina filed suit against E.I. Du Pont de Nemours and Company, Inc. in Delaware.[44] As in *Martinez*, the Plaintiffs here are not residents of Delaware and the alleged injuries occurred in a foreign country. Under Delaware law, the presumption that the plaintiff's choice of forum should be respected is "not as strong in the case of a foreign national plaintiff as in the case of a plaintiff who resides in the forum."[45] As in *Martinez*, the controversy here is not dependent upon the application of Delaware law, which the

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[42] As Chief Judge Sleet noted, the fact that many of the witnesses will speak Norwegian and relevant documents will be in Norwegian means that significant translation and other costs for depositions, motions practice and ultimately trial will be required. *See Abrahamsen* Op. Br. at Ex. 8, n.2; s*ee also Martinez*, 82 A.3d at 28 ("[T]he fact that virtually all of the records will be Spanish language documents, which will require translation to English before DuPont can use them…contributes mightily to DuPont's hardship.").

[43] *See Abrahamsen* Op. Br. at 21.

[44] *Martinez*, 82 A.3d at 3.

[45] *Ison*, 729 A.2d at 835.

courts of this state should more properly decide than those of another jurisdiction. Rather, the opposite is true. This Court acknowledges that, as noted in *Martinez*, the "important and novel issues of other sovereigns are best determined by their courts where practicable."[46] As in *Martinez*, here there are important, uncertain questions of foreign law. In this instance, those relate to the extensive and comprehensive regulatory and legislative guidelines and mandates concerning health, safety, and the environment related to the petroleum industry in Norway. The parties have a right to have those issues decided by the court whose law is at stake. Norway is better suited to decide those complex legal issues than this Court. The Defendant's interest in obtaining an authoritative ruling from the relevant foreign court on the legal issues upon which liability and damages hinge, as distinguished from a non-authoritative ruling by this Court, weigh heavily in favor of dismissing this action.[47]

19. After carefully considering the *Cryo-Maid* factors, the Court is satisfied that the Defendant has met the high burden of showing with particularity that the burden of litigating in this forum is so severe as to result in

[46] *Martinez*, 86 A.3d at 1110 (citing *TA Instruments-Waters, LLC v. Univ. of Conn.*, 31 A.3d 1204, 1207 (Del. Ch. 2011)).
[47] *See Martinez*, 86 A.3d at 1111.

overwhelming hardship to the Defendant if the lawsuit proceeds in Delaware.

WHEREFORE, IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss for *Forum Non Conveniens* is **GRANTED**.[48]

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JURDEN, J.

[48] Given the Court's ruling dismissing the case on *forum non conveniens* grounds, the Court need not decide Defendant's other two grounds for dismissal: failure to state a claim and statute of limitations.