IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BP OIL SUPPLY COMPANY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N09C-11-028 JRS
	)	
CONOCOPHILLIPS COMPANY,	)	
	)	
Defendant.	)	
	)	

Date Submitted: January 12, 2010
Date Decided: February 25, 2010

MEMORANDUM OPINION

Upon Consideration of Defendant's
Motion to Dismiss, or in the Alternative, to Stay Proceedings.
DENIED.

Paul A. Bradley, Esquire, James J. Maron, Esquire, Onofrio de Gennaro, Esquire, MARON MARVEL BRADLEY & ANDERSON, P.A., Wilmington, Delaware. Michael H. King, Esquire, DEWEY & LEBOEFF, LLP, Chicago, Illinois. Attorneys for Plaintiff.

Richard H. Morse, Esquire, Monté T. Squire, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware. Sean Grimsley, Esquire, BARTLIT BECK HERMAN PALENCHAR & SCOTT, LLP, Denver, Colorado. Attorneys for Defendant.

SLIGHTS, J.

I.

On November 24, 2009, defendant, ConocoPhillips Company ("CPC"), filed a Motion to Dismiss, or in the Alternative, to Stay Proceedings on *Forum non Conveniens* Grounds ("the Motion"). Plaintiff, BP Oil Supply Company ("BP"), has responded to the Motion and the Court has heard oral argument. After carefully considering the Motion and response, the Court has determined that the Motion must be **DENIED**.[1]

II.

The underlying dispute involves the *force majeure* clause of an agreement between BP and CPC that required BP to deliver 54,000 barrels of crude oil per day to CPC in Empire, Louisiana and, in exchange, required CPC to deliver 54,000 barrels of crude oil per day to BP in Cushing, Oklahoma. The *force majeure* clause allegedly was triggered by under-deliveries that occurred in August and September, 2008, due to Hurricanes Ike and Gustav. BP is seeking damages in excess of $51 million

[1] As will be discussed below, the Motion seeks dismissal of this Delaware action in favor of a Texas action filed by CPC involving the same controversy. BP has moved the Texas court to dismiss or stay that action ("the Texas Motion"). The Texas Motion, previously scheduled to be heard in January, was rescheduled to be heard on February 26, 2010, presumably to afford this Court an opportunity to decide the motion *sub judice* in advance of the hearing in Texas. *See* Letter from Paul A. Bradley, Attorney for Plaintiff, to The Honorable Joseph R. Slights, III (Jan. 25, 2010). While the Court fully intended to offer its guidance to the parties well in advance of the Texas hearing, personal and professional distractions have made doing so quite difficult. Apologies are extended to the parties and to my counterpart in Harris County, Texas for the timing of this decision.

resulting from CPC's alleged breach of contract.[2]

When mediation between BP and CPC stalled, both BP and CPC appear to have raced to their respective courthouses of choice to file suit. BP filed this action at 1:02pm (EST) on November 4, 2009; CPC filed its suit in Harris County District Court in Houston, Texas, at 6:40pm (EST) on the same day. BP and CPC are both incorporated in Delaware. BP is headquartered in Warrenville, Illinois. CPC is headquartered in Houston, Texas.[3] The parties appear to agree that Delaware law will not apply to this controversy, but do not agree as to what State's law will apply (in the running are Texas, New York and possibly Illinois).[4]

III.

CPC contends that Texas is the appropriate forum in which to adjudicate this dispute. According to CPC, the Delaware and Texas actions are contemporaneously filed actions. As such, BP may not avail itself of a "first-filed" forum preference. Instead, CPC urges the Court to engage in a traditional *forum non conveniens* analysis and argues that application of each of the well-settled factors implicated by this analysis compels a finding that Texas, not Delaware, is the most appropriate forum for

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[2] Compl. ¶ 47.

[3] *Id.* at ¶¶ 1-2.

[4] *See* Def.'s Mot. ¶ 9; Pl.'s Resp. 4.

this litigation.

Not surprisingly, BP disagrees and cites four grounds in opposition to the motion.[5] First, BP contends that the lawsuits were not contemporaneously filed. Rather, BP argues that CPC "hastily prepared a declaratory judgment action [in Texas] simply as a tactic to defeat BP's choice of forum" and, consequently, "the strong presumption in favor of BP's choice of forum should remain."[6] Second, BP contends that CPC's motion is predicated upon an erroneous assumption that it does not need to show overwhelming hardship in order to obtain a stay. Because a stay likely will have the same effect as dismissal, BP contends that the Court should follow recent decisions out of the Court of Chancery in which the court has held that the more stringent "overwhelming hardship" standard must be satisfied under these circumstances to justify a stay.[7] Next, BP argues that even if the Court finds that CPC is not obliged to carry the overwhelming hardship burden, the Court still should conclude that "no factors tip decisively in favor of the Texas litigation."[8] Finally, BP argues that "compelling reasons exist for keeping the action in this Court," including Delaware's interest in resolving disputes among its corporate citizens and the fact that,

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[5] Pl.'s Resp. 2.

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.*

as plead, only the Delaware complaint can lead to a resolution of all issues implicated by the parties' controversy.[9]

IV.

The decision to grant a motion to dismiss or stay a Delaware action on *forum non conveniens* grounds rests within the sound discretion of the court.[10] There is no right to a stay or dismissal of Delaware litigation in favor of litigation elsewhere.[11] In exercising its discretion, "[t]he Court should inform its analysis with considerations of comity and the necessities of an orderly and efficient administration of justice."[12]

The threshold question for the Court is which of several very different standards to apply when deciding this motion to dismiss or stay. 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 preference.[13] Where two or more actions are contemporaneously filed, the Court "examines a motion to stay 'under the

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[9] *Id.*

[10] *Rosen v. Wind River Sys., Inc.*, 2009 WL 1856460, at *3 (Del. Ch. June 26, 2009).

[11] *See In re Bear Stearns Cos. S'holder Litig.*, 2008 WL 959992, at *5 (Del. Ch. Apr. 9, 2008).

[12] *Id.*

[13] *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970); *Rosen*, 2009 WL 1856460, at *3.

traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other.'"[14] If the Court finds that the actions were contemporaneously filed, then the Court must consider which of the movant's requested remedies - - dismissal or stay of the Delaware litigation - - is appropriate. To justify dismissal, the movant must demonstrate that litigating in Delaware would cause overwhelming hardship.[15] To justify a stay, the movant need only demonstrate that the preponderance of applicable forum factors "tips in favor" of litigating the dispute in the non-Delaware forum.[16] BP has argued that another layer must be added to the analysis, pointing to the Court of Chancery's recent decision in *In re Citigroup Inc. Shareholder Derivative Litigation*.[17] There, the court held that where a stay of litigation would have the same ultimate effect as dismissal, the more stringent

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[14] *Rosen*, 2009 WL 1856460, at *3(*citing Rapoport v. The Litig. Trust of MDIP, Inc.*, 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005)). The six factors (hereinafter the "forum factors") the Court must consider are: "(1) the applicability of Delaware law in the action; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the pendency or non-pendency of similar actions in other jurisdictions; (5) the possibility of a need to view the premises; and (6) all other practical considerations which would serve to make the trial easy, expeditious and inexpensive." *See Azurix Corp. v. Synagro Tech., Inc.*, 2000 WL 193117, at *4 (Del. Ch. Feb. 3, 2000) (*citing Miller v. Phillips Petroleum Co. Norway*, 537 A.2d 190, 202 (Del. 1988); *Gen. Foods Corp. v. Cyro-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964)).

[15] *See Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997).

[16] *Azurix*, 2000 WL 193117, at *5.

[17] 964 A.2d 106 (Del. Ch. 2009).

overwhelming hardship standard should apply.[18] As discussed below, in this case, a determination of the proper standard dictates the result.

A. The Delaware and Texas Actions Were Contemporaneously Filed

Delaware courts consistently have held that where two suits are filed mere hours apart, they are considered contemporaneously filed for purposes of *forum non conveniens*.[19] This approach to actions filed close in time discourages so-called "races to the courthouse."[20] As the Texas and Delaware actions were filed only hours apart, neither may be considered first filed.[21] Accordingly, the Court is not required to give significant weight to BP's choice of forum under *McWane*, but instead will begin its analysis with the traditional *forum non conveniens* standard.[22]

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[18] *Id.* at 117 n.16.

[19] *See, e.g.*, *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 4516645, at *2 (Del. Ch. Oct. 8, 2008) (holding two actions were contemporaneously filed when they were filed three business days apart); *In re Bear Stearns*, 2008 WL 959992, at *5 (finding complaints were contemporaneously filed where they were filed "only three days apart"); *Azurix*, 2000 WL 193117, at *3-4 (finding two actions to be contemporaneously filed where the first was filed at 4:28pm (EST) on a Friday, and the second was filed early the following Monday morning); *In re Chambers Dev. Co.*, 1993 WL 179335, at *7 (Del. Ch. May 20, 1993) (noting that the Court will treat as contemporaneously filed complaints that are filed within the same general timeframe); *Am. Guar. & Liab. Ins. Co. v. Intel Corp.*, 2009 WL 2589597, at *8 (Del. Super. July 24, 2009) (finding two actions contemporaneously filed where they were filed thirteen hours apart).

[20] *Texas Instruments, Inc. v. Cyrix Corp.*, 1994 WL 96983, at *3-4 (Del. Ch. Mar. 22, 1994).

[21] The Court rejects BP's argument that CPC filed a "preemptive strike" in Texas only upon learning of BP's intent to file in Delaware. Rather, the Court accepts CPC's representation that it was unaware of the Delaware action when it filed the Texas action. *See* Def.'s Mot. ¶ 5; Def.'s Ex. 6 ¶ 7.

[22] *See Rosen*, 2009 WL 1856460, at *2.

B. CPC Must Show Overwhelming Hardship Because A Stay Likely Would Have The Same Effect As Dismissal

At oral argument, CPC conceded that, within the traditional *forum non conveniens* framework, it cannot satisfy the strict overwhelming hardship standard necessary to obtain a dismissal of this action.[23] Accordingly, the Court will turn directly to the question of whether the Delaware action should be stayed in favor of the Texas action. In this regard, the Court must first consider whether a stay of the litigation would be tantamount to dismissal and, if so, whether the Court should consider the forum factors under the more lenient "tip the balance" standard or the more onerous "overwhelming hardship" standard.[24] According to *In re Citigroup*, a stay has the same effect as a dismissal where "[a] stay in favor of another action results in the action in Delaware being put on hold until the resolution of the action in another jurisdiction, at which point principles of *res judicata* would likely apply [to bar the further prosecution of the Delaware action]."[25] In this case, if the Texas action would result in the complete adjudication of all claims arising out of the underlying

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[23] *See Azurix*, 2000 WL 193117, at *4 (noting that overwhelming hardship standard applies to motion to dismiss a contemporaneously filed Delaware action).

[24] *Accord In re Citigroup*, 964 A.2d at 117 n.16. As stated, CPC argues that it need only tip the balance of the forum factors in favor of litigating in Texas in order to justify a stay of the Delaware action; BP argues that, when a stay is tantamount to dismissal, CPC must show that a consideration of the forum factors reveals that litigating in Delaware would cause CPC overwhelming hardship.

[25] *In re Citibank*, 964 A.2d at 117-18 n.16.

dispute between CPC and BP, then *In re Citigroup* would instruct that a stay of the Delaware action would be tantamount to dismissal, thus implicating the overwhelming hardship standard.[26]

In re Citigroup, and its progeny, *Rosen v. Wind River Systems*, are persuasive authority. In both decisions, the Court of Chancery discussed the policy justifications behind the more stringent overwhelming hardship standard in cases where dismissal is the requested remedy.[27] The court went on to discuss the fact that those same considerations are equally important and applicable in a case where, as here, a stay

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[26] *Id.*

[27] *See In re Citigroup*, 964 A.2d at 117-18 n16 ("This Court has clearly articulated the policy justifications for requiring a showing of overwhelming hardship in order to dismiss on grounds of *forum non conveniens*, for example, (1) the plaintiff's interest in litigating in the chosen forum, (2) Delaware's interest in deciding issues of Delaware law, and (3) Delaware's interest in adjudicating disputes involving Delaware entities." (citing *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 956-64 (Del. Ch. 2007)); *Rosen*, 2009 WL 1856460, at *3 (adopting the policy justifications discussed in *In re Citigroup*, and noting that "when a motion to stay on forum non conveniens grounds would have the same ultimate effect as dismissal, the same overwhelming hardship burden should apply").

would likely have the same effect as dismissal.[28] The court observed that "[t]o [hold] otherwise would allow and encourage defendants to move this Court for a stay rather than a dismissal, and thereby achieve the same result without the showing of hardship articulated by the Supreme Court."[29]

The motion *sub judice* presents exactly the scenario contemplated by the court in *In re Citibank*.[30] As a matter of Texas Civil Procedure, the Texas action would

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[28]*In re Citigroup*, 964 A.2d 117-18 n. 16 ("A stay in favor of another action results in the action in Delaware being put on hold until the resolution of the action in another jurisdiction, at which point principles of *res judicata* would likely apply. In light of this practical consideration, this Court must defer to the doctrine of the Supreme Court of this State, and the policy considerations underlying such doctrine, and should be extremely chary about disposing of cases on grounds of *forum non conveniens*, either by granting dismissal or a stay."). *See also Rosen*, 2009 WL 1856460, at *3 (same).

[29] *Id.*

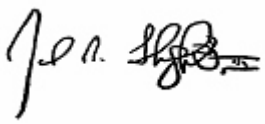
[30] In so concluding, the Court is mindful that *In re Citigroup* addressed a controversy that involved claims of Delaware law being litigated in competing jurisdictions. *Id.* at 118. This fact, however, was not mentioned in the lead up to the court's determination that it would apply the overwhelming hardship standard because the requested stay would amount to a dismissal of the Delaware action. *Id.* Rather, the court focused on the practical result of the requested stay in determining which of two very different standards to apply. This focus is consistent with the legion of Delaware cases that have applied an overwhelming hardship standard in the face of motions to dismiss Delaware litigation even when another state's law will apply. *See, e.g.*, *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 780 (Del. 2001) ("'[T]he 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.") (quoting *Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 268 (Del. 2001)); *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *17 (Del. Ch. July 14, 2008) (declining to dismiss or stay the Delaware action, despite a virtually identical action pending in Illinois and the fact that Kansas law governed, because the defendant did not satisfy the overwhelming hardship standard); *Royal Indem. Co. v. Gen. Motors Corp.*, 2005 WL 1952933, at *12 (Del. Super. July 26, 2005) (granting the motion to stay, but finding that the fact that Delaware law was not implicated did not rise to the level of overwhelming hardship such that dismissal would be warranted).

likely resolve all disputes between the parties.[31] Principles of *res judicata* would then likely prevent this Court from rehearing the same issues already decided in Texas, and the Delaware action ultimately would be dismissed.[32] Therefore, in this case, a stay would have the same effect as a dismissal. Accordingly, CPC must show that litigating in Delaware would cause overwhelming hardship in order to warrant either dismissal or a stay on *forum non conveniens* grounds. As CPC has conceded that it cannot meet this burden, the analysis ends here.

VI.

Based on the foregoing, defendant CPC's Motion to Dismiss, or in the Alternative, to Stay Proceedings on *Forum Non Conveniens* Grounds must be **DENIED.**

IT IS SO ORDERED.



Joseph R. Slights, III

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[31] CPC acknowledged at oral argument that, under the Texas Rules of Civil Procedure, all of the underlying claims and counterclaims associated with this dispute would likely be swept into the pending declaratory judgment action and ultimately resolved by the Texas court.

[32] *See Rosen*, 2009 WL 1856460, at *3; *In re Citigroup*, 964 A.2d at 117-18 n.16.