IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GLOBAL ENERGY FINANCE, LLC	)	
	)	
Plaintiff,	)	
v.	)	
	)	C.A. No. 08C-10-129 RRC
PEABODY ENERGY CORPORATION, GOLD FIELDS MINING, LLC, and BLUE TEE CORP.,	)	
	)	
Defendants.	)	

Submitted: March 19, 2009
Decided: April 9, 2009

On "Defendants Peabody Energy Corporation and Gold Fields Mining, LLC's Motion to Dismiss or Stay Proceedings in Favor of Earlier Filed Actions."
DENIED.

On "Defendants Peabody Energy Corporation and Gold Fields Mining, LLC's Motion to Dismiss or Stay Defendant Blue Tee Corp.'s Cross-Claims in Favor of an Earlier-Filed Action."
DENIED.

MEMORANDUM OPINION

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COOCH, J.

I. INTRODUCTION

This action involves disputes over who, under various indemnification and other agreements, is liable for millions of dollars in remediation expenses, defense costs and other liabilities arising from environmental claims. Prior to the instant action being filed in Delaware, Gold Fields Mining, LLC ("GFM") had instituted an action against EH3 (the former parent of GEF) in the United Kingdom and an action against Blue Tee in Missouri. On the basis of these previously-filed proceedings, Defendants Peabody and GFM filed a motion to dismiss or stay the instant proceedings

and a motion to dismiss or stay Blue Tee's cross-claims. For the following reasons, both motions are DENIED.

II. FACTUAL AND PROCEDURAL HISTORY[1]

FACTUAL BACKGROUND

A. Parties.

1. Global Energy Finance, LLC ("GEF") is a Delaware limited liability company and a successor by merger to Gold Fields American Corporation ("GFAC"), which, for a period of time, was named Peabody Investments Inc. ("PII"). (GEF's Complaint in the Delaware Action ("GEF Compl.") ¶ 2).
2. Peabody, a Delaware corporation, was formerly named P&L Coal Holdings Corporation ("P&L Coal"). (GEF Compl. ¶ 3).
3. Gold Fields Mining , LLC ("GFML") is a Delaware limited liability company that converted from Gold Fields Mining Corporation ("GFMC"). The term "GFM, II" as used herein, shall refer to both GFML and GFMC. (GEF Compl. ¶ 4).
4. Blue Tee, formerly a Maine corporation, now a Delaware corporation, was formerly known as Gold Fields American Industries, Inc. ("GFAI"). (GFM's Original petition in the Missouri Action ("MO Pet.") ¶ 5; Blue Tee's Missouri Answer ("MO Answer") ¶ 5).

B. The 1985 Reorganization Agreement.

5. As of 1985, Consolidated Gold Fields Plc ("CGF") owned 100% of GFAC, which owned, directly or indirectly, both GFM and GFAI. (GEF Compl. ¶ 6).
6. Blue Tee was formed in 1985 through a leveraged buyout transaction by a GFAI management group, which unfolded as follows: GFAI divested itself of certain properties and securities that had been owned by GFAI and its subsidiaries, following which Blue Tee Acquisition Corporation ("BTAC"), a corporation formed by the GFAI management group, merged into GFAI. After the merger, GFAI was the surviving corporation and changed its name to Blue Tee. (Blue Tee's Missouri Counterclaim ("MO Countercl.") ¶ 5; GFM's First Amended Petition in the Missouri Action ("MO Am. Pet.") ¶ 12).
7. In connection with that leveraged buyout transaction, BTAC, GFAC, and GFAI entered into a Reorganization Agreement dated December 9, 1985 (the "1985 Reorganization Agreement"). (GEF Compl. ¶ 8; MO Countercl. ¶ 7).
8. The 1985 Reorganization Agreement, among other things, provided that GFAC, subject to the limitations contained in Section 6 of that agreement, would indemnify, defend, and hold harmless Blue Tee from "Losses based upon, arising out of or otherwise

[1] Joint Statement of Undisputed Facts for Purposes Motions to Dismiss or Stay Proceedings, Docket Item ("D.I.") 54, prepared at the request of the Court since all parties agreed that, for the purpose of the pending motions, the salient facts are undisputed.

in respect of," among other claims, Environmental Claims, which were defined to mean claims "based upon, arising out of or otherwise in respect of historical mining operations of GFAI and the Subsidiaries" (the "Blue Tee Liabilities"). (1985 Reorganization Agreement; GEF Compl. ¶ 8; MO Countercl. ¶ 7).

9. After completion of the leveraged buyout in December 1985, GFAI (n/k/a Blue Tee) was no longer an affiliate or subsidiary of GFAC. (GEF Compl. ¶ 7).

C. The 1993 Understanding and Agreement.

10. On March 11, 1993, Blue Tee and GFAC entered into the Understanding and Agreement (the "1993 Understanding and Agreement"), which was "made as of the 9th day of December, 1985," the date of the 1985 Reorganization Agreement. (1993 Understanding and Agreement).

11. The 1993 Understanding and Agreement, among other things, referenced GFAC's obligations to indemnify Blue Tee against environmental claims, as defined in the 1985 Reorganization Agreement (the "Environmental Claims"); referenced Blue Tee's and GFAC's agreement that "claims asserted against Blue Tee in respect of the sites listed in the Appendix to [the] Understanding and Agreement represent Environmental Claims"; assigned to GFAC any rights or claims of Blue Tee against certain insurance companies or third parties in respect of various environmental liabilities; and contained an indemnity from GFAC to Blue Tee with respect to that assignment.

12. In 1998, GFAC and Blue Tee entered into two supplements to their 1993 Understanding and Agreement made as of December 9, 1985. The supplements concerned insurance-related indemnities.

D. The 1998 Transactions.

13. In or about 1989, Hanson PLC ("Hanson") acquired CGF and, in February 1997, spun off The Energy Group Plc ("TEG"), which included as subsidiaries CGF and its subsidiaries GFAC and GFM. (GEF Compl. ¶ 11).

14. Soon thereafter, Texas Utilities Company ("TXU") publicly announced its intent to acquire certain of TEG's businesses by tender offer. Lehman Brothers Merchant Banking Partners II L.P. ("Lehman Merchant") expressed interest in purchasing certain other of TEG's businesses. (GEF Compl. ¶ 12).

15. Pursuant to an agreement dated as of March 1, 1998 (the "Participation Agreement"), Lehman Merchant agreed to purchase, through its subsidiary P&L Coal ("Peabody"), the natural resources and Citizens Power businesses of TEG, including GFM, simultaneously with the effective date of TXU's tender for TEG. (GEF Compl. ¶ 13). The transaction was accomplished by TEG causing its subsidiary GFAC, then known as PII, to sell to Peabody all the shares of its natural resources businesses including GFM, and its Citizens Power business. The businesses acquired by Peabody, including GFM, were part of the "Acquired Group" as defined in the Participation Agreement. The businesses acquired by TXU, including GFAC, were part of the "TEG Group" as defined in the Participation Agreement.

16. Following the 1998 transactions, GFM and GFAC were no longer affiliated: GFM became a subsidiary of Peabody; GFAC was a subsidiary of TEG. (GEF Compl. ¶ 15).

17. Pursuant to the Participation Agreement, Peabody and TXU entered into the May 19, 1998 Assumption and Indemnification Agreement (the "Peabody Indemnity"). Under the terms of the Peabody Indemnity, Peabody indemnified the Texas Utilities Group against:

> (i) all claims, demands, suits and liabilities of any kind . . . arising from or out of Purchaser or the Acquired Group, and their past, present and future activities, assets, businesses, [or] employees, . . . including without limitation any environmental claims and liabilities, together with all other claims and liabilities from or out of Purchaser or the Acquired Group; [and]
> (ii) all environmental claims and liabilities resulting from any activities or operations prior to the date hereof by Peabody Investments, Inc. or Peabody Global Investments, Inc. or any of their subsidiaries or predecessors (collectively "PII/PGI") or from conditions on or relating to any property of or controlled by any such entities prior to the date hereof . . . .

Any claim for indemnity under Section (ii) above existed "only to the extent not insured." Pursuant to the Participation Agreement, the definition of "Texas Utilities Group" included "Texas Utilities, . . . together with all affiliates and subsidiaries of Texas Utilities . . . , including TEG and its affiliates and subsidiaries." At that time, GEF was a subsidiary of TEG. (Participation Agreement; Peabody Indemnity; GEF Compl. ¶¶ 23-24).

18. Also pursuant to the Participation Agreement, TEG and Lehman Merchant entered into the May 19, 1998 Indemnification Agreement (the "TEG Indemnity"). Under the terms of the TEG Indemnity, TEG indemnified Lehman Merchant, Peabody and Lehman Merchant's affiliates and subsidiaries against:

> all claims . . . of any kind . . . arising from or out of the TEG Group and their past, present and future activities, assets, businesses, employees, or any persons representing or connected with any such employees, together with all other claims and liabilities from or out of the TEG Group.

(Participation Agreement, TEG Indemnity).

19. GEF and TEG both have indemnification rights against Peabody under the same terms of the Peabody Indemnity, § 3; GEF does not have TEG's indemnification obligations under the TEG Indemnity. (GEF Compl. ¶ 33; Peabody Indemnity; TEG Indemnity).

E. The October 19, 1998 Agreement and Further Events.

20. On October 19, 1998, GFAC/PII and GFM entered into an agreement (the "October 19, 1998 Agreement") whereby, among other things, GFM assumed GFAC's obligations under the 1993 Understanding and Agreement and its Supplements and GFAC/PII assigned to GFM its insurance rights with respect to the Blue Tee Liabilities. (October 19, 1998 Agreement).

21. In mid-2007, GFM raised questions concerning whether and/or to what extent it is obligated to indemnify and defend Blue Tee against environmental liabilities. GFM's questions arose in response to Blue Tee's tender to GFM in June 2007 of three claims asserted against it. GFM inquired as to the basis of Blue Tee's tender of those claims, and Blue Tee's response relied on, among other things, the 1993 Understanding and Agreement.

PROCEDURAL HISTORY

A. The UK Proceeding.

22. On March 11, 2005, company voluntary arrangement ("CVA") proposals were issued for Energy Holdings (No. 3) Limited ("EH3"), formerly TEG, and Energy Holdings (No. 2) Limited ("EH2"), pursuant to Part I of the Insolvency Act 1986.

23. In a section describing "GFM's Indemnification Obligations Under the 1998 Agreements," GEF's Complaint, filed on October 10, 2008, contains an allegation that, "under the Governing Agreements, GEF (an indirect wholly-owned subsidiary of TEG) has a right to indemnification from Peabody Energy with respect to the Blue Tee Liabilities to the extent any such liabilities exist." (GEF Compl. at p.6, ¶ 24). GEF's Complaint also includes a diagram depicting the "structure following the 1998 transactions" in which GEF is shown as a wholly owned subsidiary of TEG. (GEF Compl. ¶ 26).

24. The CVA reflects, in a chart, that EH2 (not EH3, formerly known as TEG), as of March 11, 2005, owns GEF. (CVA at 142). According to the CVA, EH3 and GEF are not in a parent-subsidiary relationship and have not been since, at least, March 11, 2005. (CVA at 142). EH2 and EH3 are in separate insolvency proceedings in the U.K.

25. A CVA is a "formal procedure under the Insolvency Act which enables a company to agree with its creditors a composition in satisfaction of its debts or a scheme of arrangement of its affairs which can determine how its debts should be paid and in what proportions." (CVA at 10; Insolvency Act 1986, the "Insolvency Act," attached as Exhibit B to Peabody's and GFM's Reply Brief). A GFM witness statement submitted with the application described in ¶ 29 below stated that "[t]he arrangement was approved by a meeting of creditors of EH3 held on 31 March 2005." Paragraph 21 of the decision of the Court of Appeal described in ¶ 34 below stated that "GFM was not given notice of the creditors' meetings."

26. Section 4A of the Insolvency Act provides that it applies to a decision "with respect to the approval of a proposed voluntary arrangement." (Insolvency Act, § 4A). Section 5 of the Insolvency Act provides that it "applies where a decision approving a voluntary arrangement has effect under section 4A," and further provides, regarding the "[e]ffect of approval," that "[t]he voluntary arrangement—

> (a) takes effect as if made by the company at the creditors' meeting, and
> (b) binds every person who in accordance with the rules—
>> (i) was entitled to vote at that meeting (whether or not he was present or represented at it), or

> (ii) would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement."

(Insolvency Act, § 5(1)-(2)).

27. In a CVA process, "if the company is being wound up or is in administration, the court may do one or both of the following, namely—

> (a) by order stay or sist all proceedings in the winding up or provide for the appointment of the administrator to cease to have effect;
> (b) give such directions with respect to the conduct of the winding up or the administration as it thinks appropriate for facilitating the implementation of the voluntary arrangement.

(Insolvency Act, §5(3)).

28. On July 13, 2007, the CVA Supervisors of EH3 received a claim form submitted by GFM asserting claims it purportedly had been assigned from Peabody. In the claim form, the nature of the claim was stated as "contractual indemnification," incurred on May 19, 1998 (the date of the TEG Indemnity). Schedule A to the claim form listed the TEG Indemnity, the 1985 Reorganization Agreement, the 1993 Understanding and Agreement, and the 1998 Supplement.

29. On October 16, 2007, the CVA Supervisors of EH3 determined that GFM's claim was time-barred under the terms of Clause 23.5 of the EH3 CVA. On November 5, 2007, GFM issued an application in the Companies Court of the Chancery Division of the High Court of England and Wales, seeking an order reversing the decision of the CVA Supervisors of EH3 as to the timeliness of the GFM claim (the "UK Proceeding").

30. A GFM witness statement submitted with the application in the UK Proceeding stated that the application "concerns only the procedural question of timing and whether the Claim is time-barred" (the "Time Bar Issue"). The only parties in the UK Proceeding were EH3's CVA Supervisors and GFM.

31. On July 10, 2008, the Companies Court of the Chancery Division of the High Court ruled that the alleged claim of GFM was not time barred under Clause 23.5 of the EH3 CVA, and directed the CVA Supervisors to proceed to adjudicate GFM's claim. The only issue ruled on by the High Court with respect to GFM's claim in the EH3 CVA was the Time Bar Issue. (Order in the High Court of Justice).

32. On August 7, 2008, the CVA Supervisors of EH3 posed the following two questions to Peabody:

> On what basis do you say that the environmental liabilities which form the basis of the GFM Claim:
> a) fall within the scope of Section 2 of the Indemnification Agreement dated 19 May 1998 between The Energy Group PLC and Lehman Brothers Merchant Banking Partners II [L.P.] [the TEG Indemnity]; and
> b) fall outside the scope of the Assumption and Indemnification Agreement dated 19 May 1998 between P&L Coal Holdings Corporation and Texas Utilities Company [the Peabody Indemnity]?

(Letter dated August 7, 2008 from JDT Milsom to Peabody Energy Corporation).

33. On October 1, 2008, the CVA Supervisors of EH3 obtained permission to appeal against the order of the Chancellor on the ground of construction of Clause 23.5 of the EH3 CVA.

34. On March 11, 2009, the Court of Appeal affirmed the decision of the High Court and ruled that the appeal should be dismissed. In that judgment, the Court of Appeal stated that "[t]his dispute is about the legal effect of a paragraph in a creditors' voluntary arrangement (CVA) under Part 1 of the Insolvency Act 1986. Paragraph 23.5 set the time limits within which the claim form of a creditor must be lodged with the joint supervisors of the CVA." 35. The CVA Supervisors will proceed to decide the merits of the claim in accordance with the provisions of the EH3 CVA. The CVA provides at Clause 19(b)(i) that "the CVA Supervisors of each CVA Company shall have sole responsibility for determining whether any CVA Claim is an Allowed Claim." (CVA at 105).

36. Under the provisions of the Insolvency Act, "an application to the court may be made" by "a person entitled, in accordance with the rules, to vote at either of the meetings," "a person who would have been entitled, in accordance with the rules, to vote at the creditors' meeting if he had notice of it," "the nominee or any person who has replaced him under section 2(4) or 4(2)," or "the liquidator or administrator," on the grounds that a voluntary arrangement "unfairly prejudices the interests of a creditor, member or contributory of the company" or that "there has been some material irregularity at or in relation to either of the meetings." (Insolvency Act, §6(1)-(2)). But such an application "shall not be made," "in the case of a person who was not given notice of the creditors' meeting, after the end of the period of 28 days beginning with the day on which he became aware that the meeting had taken place." (Insolvency Act, § 6(3)(b)).

37. Under the provisions of the Insolvency Act, if the court, on application, is satisfied as to either of the grounds, the court "may do one or both of the following, namely—

> (a) revoke or suspend any decision approving the voluntary arrangement which has effect under section 4A . . .;
> (b) give a direction to any person for the summoning of further meetings to consider any revised proposal the person who made the original proposal may make . . .

(Insolvency Act, §6(4)). If the court "revokes or suspends an approval under subsection 4(a)," "the court may give such supplemental directions as it thinks fit and, in particular, directions with respect to things done under the voluntary arrangement since it took effect." (Insolvency Act, §6(6)).

38. The CVA provides at Clause 30.1: "If a CVA Creditor or claimant is dissatisfied with the CVA Supervisors' decision with respect to his CVA Claim or with the CVA Supervisors' estimate, he may give notice to the CVA Supervisors of the relevant CVA Company of his intention to apply either paragraphs (A) or (B) of the Dispute Resolution Procedure to determine the existence or amount of the CVA Claim." (CVA at 114).

39. Paragraph (A) of the CVA's Dispute Resolution Procedure provides that, if a CVA Creditor or claimant, after receiving the CVA Supervisors' decision with respect to

his CVA Claim, is dissatisfied with that decision, the CVA Creditor may then commence an action in the Companies Court of the Chancery Division of England and Wales, which will conduct a full, de novo review of all the relevant facts and law relating to the claim and is not restricted in any way to (i) a review based on the material that had been before the CVA Supervisors or (ii) a review limited to an assessment of the reasons provided by the CVA Supervisors for rejecting the claim in whole or in part.

40. Paragraph (B) of the CVA's Dispute Resolution Procedure refers to an "expert determination." (CVA at 172). Paragraph 14 of Paragraph B of Annex 9 provides: "The determination of the *claims tribunal* on each and every issue before it shall be final and binding on the CVA Supervisor, the CVA Creditor, the relevant CVA Company and its Administrators and Liquidators. There shall be no right of appeal from the determination of the *claims tribunal* and there shall be no right to make any claim against members of the *claims tribunal* individually or collectively." (CVA at 173-74) (emphasis in original).

B. The Missouri Action.

41. On June 20, 2008, GFM filed suit against Blue Tee in Missouri (the "Missouri Action"). In its original Petition, GFM and Blue Tee were the only parties. In its Petition, GFM claimed that: (a) Blue Tee was a successor to GFAI and, on that basis, various state and federal environmental agencies and other third parties have alleged that Blue Tee was responsible for environmental damage caused by its predecessors, (b) prior to May 1998, GFM and GFAC [GEF's predecessor] were affiliated, but as of May 19, 1998, became separate and independent companies, and (c) in October 1998 GFAC assigned to GFM its rights and obligations under a 1993 Understanding and Agreement between GFAC and Blue Tee. In its first count, GFM sought a declaration that GFM owed Blue Tee no obligations under the 1993 Understanding and Agreement between GFAC and Blue Tee except to the extent Blue Tee can establish impairment of insurance coverage as a result of the 1993 Understanding and Agreement. In its second count, GFM sought to recover monies previously paid on behalf of Blue Tee under a theory of unjust enrichment.

42. Blue Tee has filed an Answer disputing GFM's allegations with respect to the supposed limitations on its indemnity and defense obligations, and also has filed a Counterclaim. Blue Tee asserts, among other things, that GFM's obligations to indemnify and defend it against environmental liabilities as set forth in the 1993 Understanding and Agreement, which GFM assumed under the October 19, 1998 Agreement with GFAC (then known as Peabody Investments Inc.), are significantly broader than as alleged by GFM, and that the 1993 Understanding and Agreement reaffirmed and, indeed, expanded GFAC's obligations to indemnify and defend Blue Tee against certain environmental liabilities, as embodied in the 1985 Reorganization Agreement. Blue Tee also alleged that the October 19, 1998 Agreement reflects that Peabody also has indemnification obligations relating to the Blue Tee environmental liabilities, as do various statements in Peabody's Securities and Exchange Commission filings. Blue Tee further asserts that GFM's claims for reimbursement are barred, at least in part, by the applicable statute of limitations. Blue Tee also asserts that GFM's claims are barred, at least in part, by principles of judicial estoppel, based on positions asserted in New York insurance

litigation that there was coverage for environmental liabilities under various Blue Tee insurance policies.

43. Blue Tee further asserts that, over a period of approximately 20 years, through an overall course of dealing, as well as individual agreements and courses of dealing with respect to particular claims tendered and accepted, GFM entered into binding obligations to indemnify and defend Blue Tee with respect to past and future environmental liabilities.

44. With respect to all payments made by GFM prior to mid-2007, Blue Tee disputes GFM's allegation that such payments were made on a conditional basis or with any reservation of rights, and asserts that no proper basis exists on which Blue Tee can be required to reimburse GFM for the amounts paid.

45. On September 15, 2008, GFM filed its Answer to Blue Tee's Counterclaim. GFM admitted Blue Tee's allegations that (a) BTAC, GFAC, and GFAI entered into a 1985 Reorganization Agreement, (b) Blue Tee and GFAC entered into a 1993 Understanding and Agreement, and (c) GFAC and GFM entered into an agreement dated October 19, 1998. GFM denied Blue Tee's allegations that: (a) Peabody Energy Corp. has indemnification obligations with respect to Blue Tee's environmental liabilities, (b) that there were further agreements which would give rise to obligations on the part of GFM to indemnify Blue Tee against environmental claims, and (c) that any course of conduct on the part of GFM obligated it to indemnify Blue Tee with respect to its environmental liabilities.

46. On February 10, 2009, GFM filed a motion for leave to amend its Petition to add GEF as a party and "raise claims against GEF that arise out of the identical facts and issues as those raised in the claims raised against Blue Tee." GFM sought leave to add GEF as a party defendant. In GFM's First Amended Petition, GFM alleges (a) the existence of a 1985 Reorganization Agreement between GFAC and Blue Tee, (b) that GFAC/GEF and Blue Tee entered into a 1993 Understanding and Agreement whereby Blue Tee assigned to GFAC/GEF all of Blue Tee's claims against third parties and its rights to insurance claims under policies of insurance that covered certain environmental claims for which GFAC/GEF was indemnifying Blue Tee under the 1985 Reorganization Agreement and GFAC/GEF agreed to indemnify Blue Tee for any liability or impairment of insurance arising out of that assignment, (c) that on March 30, 1998 Blue Tee and GFAC/GEF entered into a supplement to the 1993 Understanding and Agreement, (d) that on October 19, 1988, GFAC/GEF and GFM entered into an agreement whereby GFM assumed only those obligations that GFAC/GEF owed Blue Tee under the 1993 Understanding and Agreement and the 1998 Supplement, and (e) that GFAC/GEF had recently claimed that, under the terms of the October 19, 1998 Agreement, GFM has assumed all of GFAC/GEF's indemnity obligations to Blue Tee under the 1985 Reorganization Agreement.

47. In its first count, GFM sought a declaration that its only obligation to Blue Tee was for claims involving an impairment of insurance coverage. In its second count, GFM sought to recover monies previously paid on behalf of Blue Tee under a theory of unjust enrichment. In its third count, GFM sought a declaration that, under the October 19, 1998 Agreement: (a) GFML assumed only the obligations of GFAC/GEF owed Blue Tee under the terms of the 1993 Understanding and Agreement and the 1998 Supplement, and (b) GFML did not assume any other obligations of GFAC/GEF, including, but not limited to,

any obligations GFAC/GEF may owe Blue Tee under the terms of the Reorganization Agreement.

48. GFM's motion to amend its Petition and add GEF as a party is scheduled to be heard on March 30, 2009.

C. The Delaware Action.

49. On September 17, 2008, Blue Tee sent a letter to GEF, Energy Future Holdings Corporation ("EFH") (formerly TXU), and Peabody, demanding that each of GEF, EFH, and Peabody agree to indemnify and defend Blue Tee and hold it harmless with respect to the Blue Tee Liabilities to the extent that GFM fails to do so, and apprising them of the Missouri Action. (GEF Compl. ¶ 34).

50. GEF filed suit against Peabody, GFM, and Blue Tee in the Delaware Superior Court on October 10, 2008 (the "Delaware Action"). The Delaware Action is the only action pending in which GEF currently is named as a party. GEF's complaint contains six counts.

51. The first claim is for breach of contract against Peabody and GFM with respect to their indemnification obligations for the Blue Tee Liabilities pursuant to the Participation Agreement, the TEG Indemnity, and Peabody Indemnity (together, the "Governing Agreements") and seeks a declaration from the Court that Peabody and GFM are obligated to indemnify GEF fully with respect to the Blue Tee Liabilities. (GEF Compl. ¶¶ 38-42).

52. The second claim is for breach of contract against GFM with respect to the October 19, 1998 Agreement and seeks a declaration from the Court that GFM assumed any obligation that GEF may have to Blue Tee under the October 19, 1998 Agreement. (GEF Compl. ¶¶ 43-47).

53. The third claim is for a declaratory judgment as against GFM and Peabody that GEF never received notice as required by the Governing Agreements and that neither Peabody nor GFM is entitled to any indemnification as to claims settled without GEF's written consent. (GEF Compl. ¶¶ 48-51).

54. The fourth claim is for a declaratory judgment as against Blue Tee that GEF never received notice from Blue Tee pursuant to the 1985 Reorganization Agreement and that GEF and its applicable affiliates are not obligated to indemnify Blue Tee for claims settled without prior notice to GEF. (GEF Compl. ¶¶ 52-54).

55. The fifth claim is for a declaration that a novation has been effected through the course of conduct of Peabody, GFM, and Blue Tee since May 1998 such that GEF and its applicable affiliates are not obligated to indemnify Peabody, GFM or Blue Tee for the Blue Tee Liabilities. (GEF Compl. ¶¶ 55-58).

56. The sixth claim is that GEF has relied on Blue Tee's, Peabody's, and GFM's actions to its detriment and seeking a declaration that Peabody, GFM, and Blue Tee are estopped from seeking indemnity from GEF or its applicable affiliates with respect to any claims relating to the Blue Tee Liabilities. (GEF Compl. ¶¶ 59-64).

57. Blue Tee has filed an Answer, Affirmative Defenses, Cross-Claim and Counterclaim in the Delaware Action. As to GEF, Blue Tee disputes that GEF is entitled to any of the relief sought against it, and maintains that GEF is obligated to indemnify and defend it against certain environmental liabilities under the 1985 Reorganization

Agreement and the 1993 Understanding and Agreement. With respect to GFM, Blue Tee's claims are the same as those asserted in the Missouri Action, as discussed above.
58. As to Peabody, Blue Tee asserts that Peabody is required to indemnify and defend Blue Tee against all of the environmental liabilities in question, under Peabody's agreement to indemnify and defend the Texas Utilities Group and its affiliates and subsidiaries, including TEG and its affiliates and subsidiaries, which included GEF, against such liabilities. Blue Tee asserts that it is a third-party beneficiary of the foregoing Peabody Indemnity. The October 19, 1998 Agreement, in Exhibit A thereto, reflects that Peabody also has indemnification obligations relating to the Blue Tee environmental liabilities, as do various statements in Peabody's Securities and Exchange Commission filings.

D. Motions to Stay.

59. On October 30, 2008, Blue Tee filed a motion in the Missouri Action to dismiss or stay that case in favor of the Delaware action; and, on November 12, 2008, Blue Tee filed, in the Missouri Action, an Amended Motion to Dismiss or Stay This Case [the Missouri Action] Based on Pending Delaware Action, and Alternative Motion to Require Plaintiff to Join GEF as an Indispensable Party or Dismiss This Action for Lack of an Indispensable Party if GEF Cannot Be Joined.
60. The hearing of Blue Tee's amended motion to dismiss or stay the Missouri Action has been deferred by agreement of Blue Tee and GFM in light of GFM's filing, on February 10, 2009, of its motion for leave to amend its petition in the Missouri Action and add GEF as a party. Blue Tee and GFM agreed that GFM's motion to amend its petition and add GEF as a party should be resolved prior to a hearing on Blue Tee's amended motion to dismiss or stay the Missouri Action.
61. On December 17, 2008, Peabody and GFM moved in the Delaware Action to dismiss or stay proceedings in favor of the UK Proceeding and the Missouri Action.
62. On January 6, 2009, Peabody and GFM moved in the Delaware Action to dismiss or stay Blue Tee's cross-claims in favor of the Missouri Action.
63. On February 27, 2009, the Court heard oral argument on the December 17 and January 6 motions to dismiss or stay.

III. CONTENTIONS OF THE PARTIES

A more particularized statement of the numerous contentions of the parties is set forth in the "Joint Statement of Undisputed Facts," but movants Peabody and GFM essentially contend that, based on the strong preference for the forum in which suit was first instituted, this Court should exercise its discretion to dismiss or stay (1) the proceedings brought by Plaintiff in this

Court and (2) Defendant Blue Tee's cross-claims based on the actions in Missouri and the United Kingdom, commenced four months and fifteen months, respectively, before the Delaware Action. Peabody and GFM contend that "both actions involve substantially the same parties and the identical issues of fact and law."[2] Alternatively, with respect to the motion to stay, Peabody and GFM more specifically contend that, "[a]t a minimum, this Court should temporarily stay this case until the Missouri circuit court has the opportunity to rule on pending and likely motions that directly affect this case."[3]

In response, Plaintiff GEF essentially contends that the Delaware Action should not be dismissed or stayed because GEF is not a party to either the Missouri Action or the United Kingdom Action and that the Delaware Action is the first-filed action in which GEF has sought a judicial determination of GEF's contractual rights and obligations with respect to the

[2] Defs. Peabody Energy Corp. and Gold Fields Mining, LLC's Mot. to Dismiss or Stay Def. Blue Tee Corp.'s Cross-Claims in Favor of an Earlier-Filed Action, D.I. 23 at 3.

[3] Defs. Peabody Energy Corp. and Gold Fields Mining, LLC's Reply in Support of Their Mot. to Dismiss or Stay Proceedings in Favor of Earlier Filed Actions and Their Mot. to Dismiss or Stay Def. Blue Tee Corp.'s Cross-Claims in Favor of an Earlier-Filed Action, D.I. 40 at 14. Peabody and GFM made numerous technical arguments in their Reply, identified in the Joint Stipulation of Facts, the specifics of which the Court need not address.

Blue Tee Liabilities, and thus only the Delaware Action can afford the parties "prompt and complete justice."[4]

Defendant Blue Tee also opposes Peabody and GFM's motions and contends that both motions should be denied because the Missouri Action and the United Kingdom Action do not involve the same parties and issues and, consequently, neither can effect "prompt and complete justice" with respect to the controversy involved in this case.

IV. DISCUSSION

The issue is whether this Court should dismiss or stay the action filed in this Court in favor of the two previously-filed actions in Missouri and the United Kingdom. As a general rule, litigation should proceed in the forum in which it is first-filed, and a party should not be permitted to defeat an adversary's choice of forum by commencing litigation involving the same cause of action in another jurisdiction of its own choosing.[5] In *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, the Delaware Supreme Court articulated the standard for motions to dismiss or stay

[4] Apparently, a motion was filed or will be filed in the Missouri Action to join GEF as an indispensable party. However, it does not appear that the Missouri court has ruled on this motion and GEF has asserted that, in any event, the Missouri court cannot exercise personal jurisdiction over it. Hearing Tr. of Feb. 27, 2009, D.I. 52, p. 28:13-29:6.

[5] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

proceedings.[6] Pursuant to *McWane*, the Court should grant such a motion when (1) "there is a prior action pending elsewhere," (2) "in a court capable of doing prompt and complete justice," (3) "involving the same parties" and (4) "the same issues."[7] All of the parties agree that *McWane* is the controlling authority, with Defendants Peabody and GFM[8] contending that the *McWane* factors favor dismissal or stay of the proceedings in this Court, and Plaintiff GEF[9] and Defendant Blue Tee[10] contending that the *McWane* factors do not favor dismissal or stay of the instant action.

It is undisputed that there is a "prior action pending elsewhere"—in fact, there are two pending actions. A key issue raised by the motions before this Court is whether the pending actions involve the "same parties" and the

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[6] *Id.*

[7] *Id.*

[8] Defs. Peabody Energy Corporation and Gold Fields Minin, LLC's Mot. to Dismiss or Stay Proceedings in Favor of Earlier Filed Actions, D.I. 9 at 3 (stating "[t]he *McWane* doctrine requires dismissal of the Delaware Action in favor of cases pending in Missouri and the U.K.").

[9] Pl.'s Answering Br. in Opp'n to Defendants Peabody Energy Corporation and Gold Fields Mining, LLC's Mot. in Favor of Earlier Filed Actions, D.I. 31 at 20 (noting, "a motion to dismiss or stay under *McWane* . . . is only proper if there is some 'prior action pending in another jurisdiction involving the same parties and the same issues.").

[10] Blue Tee Corp.'s Answering Br. in Opp'n to Defs Peabody Energy Corporation and Gold Fields Mining, LLC's Mot. to Dismiss or Stay Proceedings in favor of Earlier Filed Actions and Mot. to Dismiss or Stay Def. Blue Tee Corp.'s Cross-Claims in Favor of an Earlier-Filed Action, D.I. 36 at 17 (stating, "Movants fail to meet the second and third elements of the *McWane* test.").

"same issues," within the meaning of *McWane* and its progeny and whether either or both of those actions can afford "prompt and complete justice." In the Delaware Action GEF is the plaintiff and Peabody, GFM, and Blue Tee are the defendants;[11] in the Missouri Action GFM is the plaintiff and Blue Tee is the defendant;[12] in the United Kingdom Action GFM is the plaintiff and EH3 is the defendant.[13] It is immediately apparent that GEF, the plaintiff in the instant action, is not a party to either the Missouri Action or the United Kingdom Action. While it appears that EH3 and GEF at one point shared a parent-subsidiary relationship, that relationship ended in 2005.[14]

Because GEF is not a party to either the Missouri Action or the United Kingdom Action, the issues raised in the Missouri and United Kingdom pending actions are not the same as the issues raised by GEF in its

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[11] For a thorough statement of facts and claims relating to the Delaware Action, *see* Joint Statement of Undisputed Facts for Purposes Motions to Dismiss or Stay Proceedings, *supra* at pp. 11-12, at ¶ ¶ 49-58.

[12] For a thorough statement of facts and claims relating to the Missouri Action, *see* Joint Statement of Undisputed Facts for Purposes Motions to Dismiss or Stay Proceedings, *supra* at pp. 9-11, at ¶ ¶ 41-48.

[13] For a thorough statement of facts and claims relating to the United Kingdom Action, *see* Joint Statement of Undisputed Facts for Purposes Motions to Dismiss or Stay Proceedings, *supra* at pp. 6-9, at ¶ ¶ 22-40.

[14] Joint Statement of Undisputed Facts for Purposes Motions to Dismiss or Stay Proceedings, *supra* at p. 9, at ¶ 24.

complaint.[15] It follows that neither the Missouri court nor the United Kingdom court is "capable of doing prompt and complete justice" with respect to GEF.

Defendants Peabody and GFM, relying on *McQuaide Inc. v. McQuaide*, argue that the parties in the prior-filed action "need not be exactly identical."[16] In *McQuaide*, the Court found the parties to be "substantially the same" even though the defendant company was not a named party to the previously-filed Pennsylvania action because (1) the plaintiff filed an amended complaint adding the company and (2) the original parties to the non-Delaware action included 100% of the company's shareholders and all of its directors.[17] The *McQuaide* Court explained that, for purposes of a *McWane* analysis, Delaware courts have found parties to be substantially similar "where related entities are involved but not named in both actions, referring to the exclusion as 'more a matter of form than

[15] For example, GEF in this litigation seeks a declaration that a novation has been effected through the course of conduct of Peabody, GFM, and Blue Tee since May 1998 such that GEF and its applicable affiliates are not obligated to indemnify Peabody, GFM or Blue Tee for the Blue Tee Liabilities. *Id.* at p. 22 ¶ 55.

[16] Defs. Peabody Energy Corporation and Gold Fields Mining, LLC's Mot. to Dismiss or Stay Proceedings in Favor of Earlier Filed Actions, at 3-4.

[17] *McQuaide Inc. v. McQuaide*, 2005 WL 1288523, *4 (De. Ch.).

substance.'" [18] Motions to stay have also been granted pursuant to *McWane* where differences between the parties can be remedied by joinder.[19]

The facts of this case are distinguishable from *McQuaide.* In this case, GEF is not a party to either the Missouri Action or United Kingdom Action and none of the parties to those actions (including EH3) can sufficiently represent GEF's interests. In addition, GEF has not been joined as a party to the Missouri Action and it maintains that it is not subject to personal jurisdiction in Missouri.[20] Therefore, because the parties to the instant action are not substantially similar to those of the United Kingdom and Missouri actions, Defendants Peabody and GFM's Motion to Dismiss or Stay Proceedings is denied.

With regard to Defendants Peabody and GFM's Motion to Dismiss or Stay Blue Tee's Cross-Claims, identity of the parties insofar as the Missouri Action is concerned is not at issue because Blue Tee is a named defendant in the Missouri Action. However, Blue Tee has filed a motion to dismiss or

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[18] *Id.* (citing *FWM Corp. v. VKK Corp.*, 1992 WL 87327, *1 (Del. Ch.) (granting a motion to stay after noting the excluded party's de facto involvement in the first-filed action)); *see also AT & T Corp. v. Prime Security Distrib., Inc.*, 1996 WL 633300, *3 (Del. Ch. 1996) (noting "The *McWane* test applies where the two actions involve the same parties *or persons in privity with them."*) (emphasis in original).

[19] *McQuaide*, 2005 WL 1288523, *4 (citing *FWM Corp. v. VKK Corp.*, 1992 WL 87327, *1 (Del. Ch.)).

[20] Pl.'s Answering Br. in Opp'n to Defendants Peabody Energy Corporation and Gold Fields Mining, LLC's Mot. in Favor of Earlier Filed Actions, at 25.

stay proceedings in Missouri based on the pendency of this action and lack of an indispensable party—namely, GEF.[21] The *McWane* Court explained that the purpose of the first-filed doctrine is to avoid

> the wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in the adjudication of the same cause of action in two courts. Also to be avoided is the possibility of inconsistent and conflicting rulings and judgments and an unseemly race by each party to trial and judgment in the forum of its choice. Public regard for busy courts is not increased by the unbusinesslike and inefficient administration of justice such situation produces.[22]

In this situation, however, because neither of the pending actions includes the four parties to the instant action, the goals of the first-filed doctrine cannot be effected if this action is dismissed or stayed. As Blue Tee has correctly explained,

> [I]f the Missouri Action proceeds to adjudicate rights and liabilities between GFM and Blue Tee . . . in the absence of GEF, any such adjudication will not be binding on GEF. When those same issues are then re-litigated in the Delaware Action, with the participation of GEF, an entirely different result could ensue, and only the Delaware Action properly can be deemed to have defined the rights and liabilities between GEF and GFM. Similarly, only the Delaware Action could define the rights and liabilities under the pertinent contracts between Blue Tee and GEF.[23]

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[21] The importance of the inclusion of GEF as a party to the resolution of parties' claims was highlighted by Defendants Peabody and GFM's representation at oral argument that the Missouri action would be voluntarily dismissed if GEF could not be joined as a party to those proceedings. Hearing Tr. of Feb. 27, 2009, p. 29:10-19.

[22] *McWane*, 263 A.2d at 283.

[23] Blue Tee Corp.'s Answering Br. in Opp'n to Defs Peabody Energy Corporation and Gold Fields Mining, LLC's Mot. to Dismiss or Stay Proceedings in favor of Earlier Filed Actions and Mot. to Dismiss or Stay Def. Blue Tee Corp.'s Cross-Claims in Favor of an Earlier-Filed Action, at 19-20.

Thus, in this case it does not appear that the Missouri Action can afford Blue Tee prompt and complete justice, due to the absence of GEF from those proceedings. As stated by GEF, "GEF brought this action to resolve, fully and finally, all the issues among all the parties. And since this is the only action in which GEF is a party, it is the only action that can resolve all those issues."[24]

Defendant Peabody and GFM's Motion to Dismiss or Stay Blue Tee's Cross-Claims is denied.

V. CONCLUSION

For the foregoing reasons Defendants Peabody and GFM's Motion to Dismiss or Stay Proceedings in Favor of Earlier Filed Actions and Defendant Peabody and GFM's Motion to Dismiss or Stay Defendant Blue Tee Corp.'s Cross-Claims in Favor of an Earlier-Filed Action are **DENIED**.

IT IS SO ORDERED.

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oc: Prothonotary

[24] Pl.'s Resp. to Defs. Peabody Energy Corporation and Gold Fields Mining, LLC's Mot. to Dismiss or Stay Def. Blue Tee Corp.'s Cross-Claims in Favor of an Earlier-Filed Action, D.I. 38 at 2.