IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SELECTIVE WAY INSURANCE COMPANY, SELECTIVE INSURANCE COMPANY OF AMERICA, AND SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST,	)	
Plaintiffs,	)	C.A. No.: N25C-05-212 EMD CCLD
v.	)	
HOUSE OF CHEATHAM LLC,	)	
Defendant.	)	

Submitted: December 22, 2025[1]
Decided: March 27, 2026

Upon Defendant's Motion to Dismiss or to Stay Proceedings
GRANTED.

Joelle E. Polesky, Esquire, Stradley Ronon Stevens & Young, LLP, Wilmington, Delaware; Shari L. Klevens, Esquire, Dentons US LLP, Atlanta, Georgia; Craig M. Giometti, Esquire, Dentons US LLP, Houston, Texas. *Attorneys for Plaintiffs Selective Way Insurance Company, Selective Insurance Company of America, and Selective Insurance Company of the Southeast.*

Carla M. Jones, Esquire, Jesse L. Noa, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware; Nicholas G. Hill, Esquire, Anthony P. Tatum, Esquire, McGuireWoods LLP, Atlanta, Georgia. *Attorneys for Defendant House of Cheatham LLC.*

DAVIS, P.J.

[1] The Court has also considered the Letter, dated March 11, 2026, from Carla M. Jones, Esq., to the Honorable Eric M. Davis ("Status Letter") (D.I. No. 29).

I. INTRODUCTION

This is a declaratory judgment action assigned to the Complex Commercial Litigation Division of the Superior Court. On May 19, 2025, Selective Way Insurance Company ("SWIC"), Selective Insurance Company of America ("SICA"), and Selective Insurance Company of the Southeast ("SICSE") (collectively, the "Plaintiffs" or "Selective") commenced this action. Selective asserts three declaratory judgment claims against House of Cheatham, LLC (the "Defendant" or "HOC"). Selective seeks a declaration that: (i) Selective has no duty to defend or to indemnify HOC in connection with certain underlying lawsuits; (ii) HOC has an obligation to indemnify Selective's insured, HOC Incorporated ("HOC Inc."), in connection with the underlying lawsuits; and (iii) if HOC is entitled to coverage under the applicable policies, the policies' contractual liability exclusion precludes coverage for HOC's indemnity obligations under the Asset Purchase Agreement ("APA").

Presently before the Court is the Defendant's Motion to Dismiss or, in the Alternative, to Stay the Proceedings (the "Motion"), which was filed on July 30, 2025. Selective filed its opposition brief on September 16, 2025. HOC filed its reply brief on October 6, 2025.

The Court heard oral argument on the Motion on December 22, 2025. At the conclusion of the hearing, the Court took the Motion under advisement.

For the reasons stated below, the Motion is **GRANTED,** and this action is **DISMISSED**.

II. BACKGROUND

A. THE PARTIES

1. Plaintiffs

SWIC is a New Jersey corporation with its principal place of business in New Jersey.[2] SICA is also a New Jersey corporation with its principal place of business in New Jersey.[3] SICSE is an Indiana corporation with its principal place of business in New Jersey.[4]

2. Defendant

HOC is a Delaware limited liability company.[5] HOC acquired all the assets and liabilities of HOC, Inc. through the APA in 2011.[6]

B. NATURE OF THE DISPUTE

1. The Selective Policies

In 2009, HOC purchased commercial general liability coverage from Selective for successive one-year policy periods running from December 1, 2009, through December 1, 2022 (the "Selective Policies").[7] The Selective Policies each provided for indemnity coverage in the amount of $1,000,000 per occurrence and $2,000,000 in the aggregate.[8]

a. The Insuring Agreement

The Selective Policies contain the following Insuring Agreement:

> [Selective] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. [Selective] will have the right and duty to defend the insured against any "suit" seeking those damages. However, [Selective] will have no duty

[2] Complaint for Declaratory Relief ("Compl.") (D.I. No. 1) ¶ 10.
[3] *Id.* ¶ 11.
[4] *Id.* ¶ 12.
[5] *Id.* ¶ 13.
[6] *Id.* ¶ 28.
[7] *See id.* ¶ 16.
[8] *Id.* ¶ 17.

> to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply . . .[9]

The Selective Policies, in relevant part, define an "insured" as

> [a]n organization [designated in the Declaration] other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are insureds, but only with respect to their liability as stockholders.[10]

The Selective Policies further state that "[t]hroughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy."[11]

b. Transfer of Rights and Duties

The Selective Policies provide a pertinent transfer of rights and duties provision, which is applicable to all types of coverage contained in the Selective Policies.[12] Namely, the Selective Policies provide that "[y]our rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured."[13]

c. Contractual Liability Exclusion

The Selective Policies each contain a "Contractual Liability Exclusion."[14] The "Contractual Liability Exclusion" states:

> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) That the insured would have in the absence of the contract or agreement; or
> (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the

[9] *Id*. ¶ 18.
[10] *Id*. ¶ 19.
[11] *Id*.
[12] *Id*. ¶ 20.
[13] *Id*.
[14] *Id*. ¶ 21.

> contract or agreement. Solely for the purposes of 7 liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
>
> > (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
> > (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.[15]

An "Insured Contract" is defined under the Selective Policies as:

> [t]hat part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.[16]

d. Umbrella Coverage

The Selective Policies issued for the policy periods between December 1, 2009, through December 1, 2013 (the "2009 – 2013 Selective Policies"), also included commercial umbrella liability coverage ("Umbrella Coverage").[17] The 2009 – 2013 Selective Policies provided for Umbrella Coverage in the amount of $4,000,000 for each occurrence and in the aggregate, in excess of the underlying coverage provided by the Selective Policies, where applicable.[18]

i. Umbrella Coverage Insuring Agreement

The Umbrella Coverage contains the following Insuring Agreement:

> [Selective] will pay on behalf of the insured, the "ultimate net loss" in excess of the "retained limit" that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies. [Selective] will have the right and duty to defend the insured against any "suit" seeking those damages when the "underlying insurance" does not provide coverage or the limits of "underlying insurance" have

[15] *Id*.
[16] *Id*. ¶ 22.
[17] *Id*. ¶ 23.
[18] *Id*.

> been exhausted. When [Selective] have no duty to defend, [Selective] will have the right to defend, or to participate in the defense of, the insured against any other "suit" seeking damages to which this insurance may apply. However, [Selective] will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage" or "personal and advertising injury" to which this insurance does not apply.[19]

The Umbrella Coverage further defines "insured" as

> [a]n organization [designated in the Declaration] other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are insureds, but only with respect to their liability as stockholders.[20]

ii. Umbrella Coverage Contractual Liability Exclusion

The Umbrella Coverage also contains a "Contractual Liability Exclusion."[21] The Umbrella Coverage "Contractual Liability Exclusion" provides that the Umbrella Coverage does not apply to "[a]ny obligation or liability assumed by the insured under any contract or agreement."[22] However, the Umbrella Coverage "Contractual Liability Exclusion" further states that "[t]his exclusion does not apply to the extent that coverage is provided for the insured by 'underlying insurance.'"[23]

2. The APA

On December 21, 2021, HOC and HOC Inc. executed the APA.[24] Under the APA, HOC Inc. transferred its assets and liabilities to HOC.[25] Among other items, the APA transferred the "rights to control [HOC Inc.'s] insurance policies and rights to the benefits of such policies, including rights and proceeds arising from or relating to the Acquired Assets" to HOC.[26]

---

[19] *Id*. ¶ 25.
[20] *Id*. ¶ 26.
[21] *Id*. ¶ 27.
[22] *Id*.
[23] *Id*.
[24] *Id*. ¶ 28.
[25] *Id*.
[26] *Id*. ¶ 29.

HOC Inc. allegedly did not seek written consent from Selective for the assignment of rights prior to executing the APA.[27] Following the execution of the APA, HOC Inc. also purportedly failed to notify Selective of the purported assignment of rights under the APA.[28]

HOC also agreed to "assume, satisfy, perform, fulfill, and discharge in full all of the Assumed Liabilities" pursuant to the APA.[29] Under the APA, "Assumed Liabilities" was defined to include, in relevant part, "all Liabilities of [HOC Inc.] arising out of the conduct or operation of the Business by [HOC Inc.] or its Affiliates prior to the Closing or the ownership or use of the Acquired Assets to the extent arising out of events, transactions or circumstances prior to the Closing."[30]

3. The Hair Relaxer Litigation

Beginning in 2022, numerous persons filed lawsuits in federal court against HOC Inc. and/or HOC,[31] in which these persons allege that HOC Inc.'s and HOC's products contained carcinogens that caused cancer.[32] On February 6, 2023, the underlying federal lawsuits were consolidated in the United States District Court for the Northern District of Illinois.[33] This multidistrict litigation is captioned *In re: Hair Relaxer Marketing Sales Practices and Products Liability Litigation* (the "Hair Relaxer Litigation").[34]

[27] *Id*. ¶ 31.
[28] *Id*. ¶ 30.
[29] *Id*. ¶ 34.
[30] *Id*. ¶ 35.
[31] HOC Inc. and HOC are manufacturers of hair products.
[32] Compl. ¶ 39.
[33] *Id*. ¶ 40.
[34] *Id*.

4. Notice of the Underlying Federal Lawsuits to Selective

Following the commencement of the federal lawsuits, HOC provided Selective with notice of a lawsuit that was consolidated as part of the Hair Relaxer Litigation.[35] Selective agreed to defend HOC Inc. in connection with the Hair Relaxer Litigation.[36]

Additionally, HOC sought coverage for the Hair Relaxer Litigation under the Selective Policies on the basis that the APA assigned HOC Inc.'s rights under the Selective Policies to HOC.[37] Selective denied coverage, claiming that HOC is not an insured under the Selective Policies and that any purported assignment was ineffective.[38]

On January 29, 2024, Selective sent HOC a request for information stating that Selective was "continuing to investigate and evaluate the claims presented."[39] Selective did this notwithstanding its position that Selective was not obligated to provide coverage under the Selective Policies to HOC.[40]

On March 20, 2024, Selective changed its position regarding coverage claiming that the indemnification provisions of the APA required HOC to defend HOC Inc. in connection with the Hair Relaxer Litigation primary to Selective's duty to defend HOC Inc. under the Selective Policies.[41] Moreover, Selective claimed that they were entitled to indemnification under the APA.[42] As part of this communication, Selective requested confirmation within ten days that HOC agreed to indemnify, defend, and hold HOC Inc. harmless from the claims, causes of

---

[35] *Id*. ¶ 43.
[36] *Id*.
[37] *Id*. ¶ 44.
[38] *Id*. ¶ 45.
[39] Defendant's Motion to Dismiss Plaintiffs' Complaint or to Stay Proceedings ("Def. Mot.") (D.I. No. 15) at 7, Ex. B ¶ 131.
[40] *Id.*
[41] *See* Compl. ¶ 46.
[42] *Id*.

action, and damages sought in the Hair Relaxer Litigation.[43] HOC failed to respond to the March 20, 2024, communication within ten days.[44]

C. THE UNDERLYING LAWSUITS

1. The Federal Action

On June 26, 2024, Selective filed a complaint for declaratory relief against HOC in the United States District Court for the Northern District of Georgia (the "Federal Court") in an action captioned *Selective Way Insurance Company v. House of Cheatham LLC* (the "Federal Action").[45] Aside from differences in formatting and jurisdictional allegations, Selective's complaint in the Federal Action is substantively identical to the complaint filed in this action.[46]

The parties began litigating the Federal Action. On August 16, 2024, HOC filed its answer and asserted counterclaims against Selective and several other insurers.[47] On December 3, 2024, HOC asserted amended counterclaims to add additional insurers as parties.[48] In early 2025, the parties entered a joint discovery plan, made their initial Rule 26 disclosures, and the Federal Court entered a scheduling order.[49]

On March 4, 2025, the Federal Court undertook a jurisdiction inquiry, requesting further disclosures concerning each party's citizenship.[50] As a result, the parties determined that there was no diversity of citizenship between HOC and Selective.[51] HOC asked for consent to file a joint motion to dismiss without prejudice for lack of jurisdiction.[52]

---

[43] *Id*. ¶ 47.
[44] *Id*. ¶ 48.
[45] Def. Mot. at 8.
[46] *Id*.
[47] *Id*. at 9.
[48] *Id*.
[49] *Id*.
[50] *Id*. at 9-10.
[51] *Id*. at 10.
[52] *Id*.

In April 2025, HOC suggested refiling the action in Georgia state court, which would have jurisdiction over all the parties.[53] However, the parties were unable to reach an agreement.[54]

On May 7, 2025, HOC notified the Federal Court regarding the lack of jurisdiction and that HOC had sought (and failed to acquire) consent to file a voluntary dismissal.[55] On May 14, 2025, Selective and the other insurers involved in the Federal Action filed a response to inform the Federal Court that they would "work with HOC…" regarding the proposed voluntary dismissal.[56]

On July 24, 2025, HOC, Selective, and the other insurers in the Federal Action filed a voluntary dismissal without prejudice.[57] On July 25, 2025, the Federal Court entered an order dismissing the Federal Action without prejudice.[58]

2. The Georgia State Action

On July 28, 2025, HOC filed a complaint (the "Georgia State Action" and, collectively with the Federal Action, the "Georgia Litigation") in the Superior Court of Georgia (the "Georgia Court"). HOC asserted substantively the same claims as those set forth in the amended counterclaims in the Federal Action.[59] Specifically, HOC asserted claims against Selective relating to Selective's refusal to: (i) provide a complete defense to HOC; and (ii) fully pay HOC's costs incurred in the Hair Relaxer Litigation.[60]

---

[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*. at 11.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 11-12.

The Georgia State Action includes more parties than in this action.[61] Several defendants have answered HOC's complaint. Moreover, certain defendants have filed motions for judgment on the pleadings.[62] Those motions are either fully briefed or are almost completely briefed.[63] The Georgia Court scheduled a joint hearing on all the motions for April 20, 2026.[64]

D. PROCEDURAL POSTURE

On May 19, 2025, Selective commenced this action asserting three declaratory judgment claims against HOC. Selective seeks a judgment declaring that (i) they have no duty to defend or to indemnify HOC in connection with underlying lawsuits; (ii) HOC has an obligation to indemnify HOC Inc. in connection with the Hair Relaxer Litigation; and (iii) if HOC is entitled to coverage under the Selective Policies, the Selective Policies' contractual liability exclusion precludes coverage for HOC's indemnity obligations under the APA.

Presently before the Court is the Motion, which was filed on July 30, 2025. Selective filed their opposition brief on September 16, 2025. HOC filed its reply brief on October 6, 2025. The Court heard oral arguments on the Motion on December 22, 2025. The Court then took the Motion under advisement.

III. PARTIES' CONTENTIONS

A. THE MOTION

HOC argues that the Court should dismiss or, in the alternative, stay the instant action for several reasons. HOC asserts that the Court lacks subject matter jurisdiction as Selective effectively requests specific performance.[65] HOC further contends that, with respect to Count II,

[61] Status Letter at 1-2.
[62] *Id.*
[63] *Id.* at 2.
[64] *Id.*
[65] Def. Mot. at 13.

Selective lacks standing to enforce the APA.[66] HOC also maintains that the Court should dismiss or stay this action under Delaware's *forum non conveniens* doctrine.[67] HOC states that the action should be dismissed or stayed pursuant to either *McWane*[68] or Delaware's "traditional" *forum non conveniens* factors.[69] Finally, HOC argues that the declaratory judgment action is overripe.[70]

B. PLAINTIFFS' OPPOSITION

Selective opposes the Motion, contending that Selective does not seek, nor has it pled a claim for, specific performance.[71] Selective further maintains that it has standing to enforce the APA as a subrogee of HOC Inc.[72] Selective next argues that the Court should not dismiss or stay this action pursuant to Delaware's *forum non conveniens* doctrine.[73] Selective contends that the *Cryo-Maid* test applies and not *McWane*.[74] Moreover, Selective reasons that the *Cryo-Maid* factors favor Selective.[75] Finally, Selective contends that their declaratory judgment claims are not overripe.[76]

IV. STANDARD OF REVIEW

Upon a motion to dismiss under Rule 12(b)(6), the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-

---

[66] *Id*. at 14.
[67] *Id*. at 16.
[68] *Id*. at 17.
[69] *Id*. at 24.
[70] *Id*. at 31.
[71] Plaintiffs' Response in Opposition to Motion to Dismiss Complaint or to Stay Proceedings ("Pl. Opp'n") (D.I. No. 20) at 13.
[72] *Id*. at 15.
[73] *Id*. at 18.
[74] *See id*. at 19.
[75] *Id*. at 22.
[76] *Id*. at 28.

moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[77] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[78]

V. DISCUSSION

A. THE COURT HAS SUBJECT MATTER JURISDICTION OVER SELECTIVE'S DECLARATORY JUDGMENT CLAIMS.

In Delaware, the Court of Chancery has subject matter jurisdiction over equitable claims, whereas the Superior Court has subject matter jurisdiction over legal claims.[79] "Specific performance 'is a purely equitable remedy'" under which the Court of Chancery has subject matter jurisdiction.[80] Contrarily, declaratory judgments are "creatures of statute[s]" and are not considered a "purely equitable remedy."[81] Accordingly, the Superior Court may exercise subject matter jurisdiction over declaratory judgment claims.[82]

HOC asserts that the Court lacks subject matter jurisdiction as Selective effectively requests specific performance.[83] In support, HOC cites case law standing for the proposition that "Delaware courts look beyond the mere form to the substance of the pleadings when determining subject matter jurisdiction[.]"[84]

---

[77] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy,* No. 09C-09-136, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[78] *Ramunno v. Crawley,* 705 A.2d 1029, 1034 (Del. 1998).
[79] *See Clark v. Teeven Holding Co., Inc.* 625 A.2d 869, 875 (Del. Ch. Dec. 16, 1992).
[80] *26 Capital Acquisition Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 471 (Del. Ch. Sept. 7, 2023) (citing *Chavin v. H.H. Rosin & Co.*, 246 A.2d 921, 922 (Del. 1968)).
[81] *Kraft v. WisdomTree Investments, Inc.*, 145 A.3d 969, 985 (Del. Ch. Aug. 3, 2016).
[82] *See Burris v. Cross*, 583 A.2d 1364, 1372 (Del. Super. Sept. 27, 1990).
[83] Def. Mot. at 13.
[84] *Id.*; *see also Cartanza v. Cartanza*, 2012 WL 1415486, at *4 (Del. Super. Apr. 16, 2012).

Selective argues that they do not seek, nor have they pled, an action for specific performance.[85] Instead, Selective maintains that they have asserted valid declaratory judgment claims over which the Court has subject matter jurisdiction.[86]

In *Alcoa World Alumina LLC v. Glencore Ltd.*, the Court granted declaratory relief in a case where the "gravamen of [the] action [was] whether Alcoa ha[d] to indemnify Glencore under an agreement with respect to liability that may arise with [a separate action]."[87]

Alcoa is on point. As in *Alcoa*, Selective seeks judicial determinations as to the parties' defense and indemnity rights and obligations under the APA and Selective Policies. While such a determination would obligate HOC to act, Selective is not seeking a court order compelling HOC to take any sort of action. Equitable relief would be needed only if the Court were to grant Selective's requested relief and HOC refused to act in compliance with the Court's determination.[88] Then, Selective would need to initiate a specific performance action in the Court of Chancery.

Accordingly, the Court finds that it has subject matter jurisdiction over Selective's declaratory judgment claims.

B. SELECTIVE HAS STANDING TO ENFORCE THE APA.

"As a general rule, only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions."[89] Delaware courts routinely dismiss contractual claims for lack of standing where the plaintiff is not a party to the applicable contract.[90] However,

---

[85] Pl. Opp'n at 13.
[86] *See id*. at 15.
[87] *Alcoa World Alumina LLC v. Glencore Ltd.*, 2016 WL 521193, at *7 (Del. Super. Feb. 8, 2016).
[88] *See Graciano v. Adobe Healthcare, Inc.*, 2024 WL 960946, at *6 (Del. Ch. Nov. 29, 2023) (finding that the plaintiff had an adequate remedy at law in the form of a declaratory judgment from the Superior Court, and noting that specific performance would only be necessary if there was a refusal or failure to act in accordance with the Final Order).
[89] *Bako Pathology LP v. Bakotic*, 288 A.3d 252, 271 (Del. 2022).
[90] *See Maglione v. BCBSE, Inc*., 2003 WL 22853421, at *3 (Del. Super. July 29, 2003).

notwithstanding the fact that an individual or entity is not a party to the contract or an intended third party beneficiary thereto, a subrogee to the contract may nonetheless have standing to enforce the contract's provisions.[91] Subrogation allows an individual or entity "to stand in the shoes of another and assert that [party's] rights against a third party."[92]

HOC argues that Selective cannot seek relief under the APA.[93] Specifically, HOC contends that Selective lacks standing as Selective is not a party to the APA nor are they an intended third-party beneficiary to the APA.[94] Selective maintains that, although not a party or third-party beneficiary to the APA, Selective has standing to enforce the APA as a subrogee of HOC Inc.[95]

The Court does not read Selective's cause of action as one that attempts to enforce the provisions of the APA as a party to or third-party beneficiary to the APA. In the Complaint, Selective alleges that "Selective has agreed to defend HOC Inc. in connection with the [Hair Relaxer Litigation] and, as HOC Inc.'s insurer, Selective is subrogated to HOC Inc.'s right to defense and indemnification from [HOC] in connection with the [Hair Relaxer Litigation]."[96] As such, Selective contends that, as the subrogee of HOC, Inc., the APA controls as to whether Selective has standing to enforce the APA's indemnification provisions.

The Court finds, at this stage of the proceedings, that Selective has standing to enforce the provisions of the APA solely as a subrogee of HOC Inc. In accordance with the terms of the

[91] *See Rodriguez v. Great Am. Ins. Co.*, 2022 WL 591762, at *7 (Del. Super. Feb. 23, 2022) (explaining that "subrogation allows a third-party to replace one of the parties to a contract and then assume the rights of that contracting party to sue the counterparty.").
[92] 73 Am. Jur. 2d Subrogation § 1.
[93] Def. Mot. at 14.
[94] *Id*. at 15.
[95] Pl. Opp'n at 15.
[96] Compl. ¶ 66.

Selective Policies, Selective is subrogated to HOC Inc.'s right to defense and indemnification under the APA from HOC. The Selective Policies state:

> [i]f the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to [Selective]. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to [Selective] and help [Selective] enforce them.[97]

The language of the Selective Policies arguably allows Selective to enforce HOC Inc.'s rights under the APA if HOC Inc. has a right to recover as against HOC. Therefore, Selective's second count for indemnification from HOC is a valid claim as Selective is "standing in the shoes" of HOC Inc. and asserting HOC Inc.'s rights under the APA against HOC.

Accordingly, because Selective may enforce the APA as a subrogee of HOC Inc., the Court finds that Selective has standing with respect to Count II.

C. THE INSTANT ACTION IS DISMISSED PURSUANT TO MCWANE .

1. McWane applies as the Georgia State Action is considered first-filed.

To determine the applicable *forum non conveniens* standard, Delaware courts inquire as to the pendency or non-pendency of a similar action in another jurisdiction.[98] "[W]hen the Delaware case is the first filed between the parties, the Court applies the *Cryo-Maid* test…."[99] "[W]hen there is a prior pending case in another jurisdiction between the same parties involving the same issues, the Court applies the *McWane* test…."[100] Finally, if "prior litigation between the parties has been dismissed and there is no other prior pending litigation between the parties, the Court applies the *Gramercy* test…."[101]

---

[97] Pl. Opp'n at 17; *see also* Compl. ¶¶ 8, 46, 66.
[98] *See Cresa Global Inc. v. Chirisa Capital Management (US) LLC*, 2025 WL 53168, at *2 (Del. Super. Jan. 9, 2025).
[99] *Id*.
[100] *Id*.
[101] *Id*.

However, the Court does not make a determination as to which action was first-filed "mechanically or using a bright-line test."[102] "Rather, [the] Court's complementary objectives of discouraging both forum shopping and contrived races to the courthouse require a more nuanced analysis."[103] As such, a determination as to which action is first-filed is "determined by reference to the underlying procedural facts."[104]

HOC argues that the *McWane* test applies as the Georgia State Action is a pending first filed action.[105] In support, HOC cites to several Delaware cases that purportedly stand for the proposition that the Georgia State Action relates back to the date that the Federal Action was filed.[106] Importantly, HOC relies upon *United Phosphorus, Ltd. v. Mirco-Flo*.

Selective asserts that the *Cryo-Maid* test applies as this action was filed before the Georgia State Action.[107] Selective contends that HOC's relation back argument is improper and, nonetheless, bolsters Selective's argument that this action is first filed.[108]

The timeline of the relevant filings is as follows: (i) the Federal Action was filed on June 26, 2024;[109] (ii) HOC filed an answer and counterclaims in the Federal Action; (ii) the instant action was filed on May 19, 2025;[110] and (iii) the Georgia State Action was filed on July 28, 2025.[111] Thus, as a technical matter, the instant action was filed prior to the commencement of the Georgia State Action. However, the analysis does not end there.

---

[102] *Rapoport v. Litigation Trust of MDIP Inc.*, 2005 WL 3277911, at *2 (Del. Ch. Nov. 23, 2005).
[103] *Id*.
[104] *Id*.
[105] Def. Mot. at 19.
[106] *See id*. at 19-20.
[107] Pl. Opp'n at 19.
[108] *See id*. at 20-21.
[109] Def. Mot. at 8.
[110] *See generally* Compl.
[111] Def. Mot. at 11.

In *United Phosphorus*, the Delaware Supreme Court reversed the Superior Court's dismissal in favor of previously filed litigation in Georgia.[112] There, United Phosphorus ("UP") had filed an action against Micro-Flo in Delaware federal court (the "Delaware Federal Action").[113] While the Delaware Federal Action was pending, Micro-Flo filed an action in Georgia (the "Georgia Action") and sought to transfer the Delaware action to Georgia.[114] Following the dismissal of the Delaware Federal Action, UP refiled its claims in Delaware Superior Court (the "Superior Court Action").[115]

In reversing the dismissal of the Superior Court Action in favor of the Georgia Action, the Supreme Court found that the third-filed Superior Court Action related back to the date the Delaware Federal Action was filed.[116] The Supreme Court reasoned that, for *forum non conveniens* purposes, the two "salient facts" were that "(i) UP did not voluntarily abandon its first choice of forum, and (ii) when forced to refile in State court, UP repeated the exact same state law claims as it raised in its original federal complaint."[117] The court further explained that a finding to the contrary "would defeat the purposes of our *forum non conveniens* rules if [the Court] were to protect Micro-Flo's choice of forum instead of UP's.[118]

Delaware courts have recognized that *United Phosphorus* is inapplicable where "the plaintiff in a federal action refiles the state law claims in a state court of a state other than where the federal court is located."[119] That is what occurred in this case. Specifically, Selective initially filed its declaratory judgment claims in Georgia federal court. After its realization that

---

[112] *See United Phosphorus, Ltd. v. Micro-Flo*, 808 A.2d 761, 765 (Del. 2002).
[113] *Id*. at 763.
[114] *See id.*
[115] *See id*.
[116] *See id*. at 764-65.
[117] *Id*. at 765.
[118] *Id*.
[119] *Rapoport,* 2005 WL 3277911, at *3.

the claims would be dismissed in Georgia federal court for lack of jurisdiction, Selective filed nearly identical claims in this Court. Accordingly, *United Phosphorus* is factually different from this case. However, the unique circumstances here mean the analysis cannot end by applying *United Phosphorus*.

Notwithstanding, the Court finds that the Georgia State Action was first-filed for purposes of determining the applicable *forum non-conveniens* doctrine. An inquiry into the underlying procedural facts indicates that Selective engaged in forum-shopping and a contrived race to the courthouse.

Selective filed the Federal Action. HOC did not just answer Selective's complaint. HOC also sought affirmative relief through counterclaims…*i.e.*, HOC became a counterclaim plaintiff. In March 2025, the Georgia federal court undertook a jurisdictional inquiry in the Federal Action which led to the determination that the court lacked jurisdiction.[120] Over the course of the next several months, the parties attempted to negotiate the voluntary dismissal of the Federal Action.[121] As part of the negotiations, HOC proposed that Selective refile its claims in Georgia state court.[122] On May 7, 2025, after initially refusing to consent to the voluntary dismissal, Selective informed the Georgia federal court that they would "work with HOC…" regarding the proposed voluntary dismissal.[123] Shortly thereafter, Selective seemingly "blindsided" HOC by racing to Delaware to file the instant action.

Selective attempts to explain its decision to refile in Delaware stating that they could not have refiled its declaratory judgment claims in Georgia state court after denying coverage and

[120] Def. Mot. at 9-10.
[121] *See id*. at 10.
[122] *Id*.
[123] *Id*.

voluntarily dismissing the Federal Action.[124] Thus, there is only one other plausible reason for Selective's decision to unilaterally abandon its initial choice of forum in Georgia – Selective believed that litigating in Delaware would result in a more favorable outcome. The filing of the instant action was seemingly a tactical maneuver designed to confer first-filed status upon Selective. However, "[t]he Court will neither reward the winner of a race to the courthouse nor the manipulator of the litigation process by affording them first-filed status and imposing the accompanying heavy burden on the opposing party to defeat their choice of forum."[125]

Moreover, the Court cannot ignore the fact that HOC joined and began litigating the Federal Action. HOC filed an answer. HOC became a counterclaim plaintiff in the Federal Action. As such, HOC is more like a plaintiff that did not voluntarily abandon its forum in Georgia.

Therefore, while a basic temporal analysis indicates that this action is first-filed, a nuanced inquiry into the underlying procedural facts demonstrates that the Georgia State Action should be considered first-filed for purposes of determining the applicable *forum non conveniens* doctrine. Accordingly, the Court finds that the *McWane* test applies.

2. McWane Analysis

"Delaware courts considering a motion to stay or dismiss in favor of a previously filed action have applied [the *McWane*] three factor test: (i) is there a prior action pending elsewhere; (ii) in a court capable of doing prompt and complete justice; (iii) involving the same parties and

[124] *See* Pl. Opp'n at 29-30. Selective relies on *Drawdy v. Direct General Ins. Co.*, 586 S.E.2d 228 (Ga. 2003). The reasoning in *Drawdy* supports Selective's argument; however, Selective had alternatives. First, as recognized in *Drawdy*, Selective could have simply defended HOC under a reservation of rights and then pursued a declaratory judgment action in Georgia. *Id*. at 230-31. Second, Selective could have worked with HOC to file an action in Georgia with HOC as the plaintiff and Selective as the defendant. This is what HOC suggested to Selective prior to Selective filing this action. Moreover, that is exactly what has happened with the Georgia State Action.
[125] *Rapoport,* 2005 WL 3277911, at *4.

the same issues."[126] "If all three criteria are met, '*McWane* and its progeny establish a strong preference for the litigation of a dispute in the forum in which the first action' was filed."[127]

a. The Georgia State Action is a pending first-filed action.

The Georgia State Action is currently pending in Georgia state court. For the same reasons set forth above, the Court finds that the Georgia State Action must be considered first-filed. Accordingly, the first *McWane* prong is met.

b. Georgia state court is capable of doing prompt and complete justice.

HOC argues that Georgia state court satisfies the second *McWane* prong for several reasons. First, HOC contends that "this Court has repeatedly found that Georgia courts satisfy this prong of *McWane*" in the context of insurance coverage disputes.[128] HOC further maintains that the instant action does not involve any important or unsettled issues of Delaware law.[129] Finally, HOC asserts that the closely related claims before the Georgia state court may moot the instant declaratory judgment claims.[130] In support, HOC cites to *Logan v. Loco Florida, LLC*, which stands for the proposition that Delaware courts have routinely applied *McWane* where "'closely relate[d]' claims pending in another jurisdiction 'may moot the requested declarations' in the Delaware action."[131]

Selective does not respond to HOC's arguments as to the *McWane* test. Instead, Selective maintains that the instant action should not be dismissed or stayed pursuant to *Cryo-Maid*.[132]

---

[126] *LG Elec's, Inc. v. InterDigital Comm's, Inc.*, 114 A.3d 1246, 1252 (Del. 2015).
[127] *Id*. (internal citation omitted).
[128] Def. Mot. at 21.
[129] *Id*.
[130] *See id*. at 22-23.
[131] *Id*.; *See also Logan v. Loco Florida, LLC*, 2024 WL 1191990, at *4 (Del. Super. Mar. 20, 2024).
[132] *See* Pl. Opp'n at 18-28.

The Court finds that the Georgia state court is capable of doing prompt and complete justice for several reasons. First, HOC is correct that the Court has previously found that Georgia state courts are capable of rendering prompt and complete justice in the context of insurance coverage disputes.[133] Moreover, it is undisputed among the parties that Georgia law governs the Selective Policies, which predominate over this litigation. Finally, it appears to the Court that Selective's second and third counts are contingent on a declaration as to Selective's first count regarding the enforceability of the anti-assignment provision under Georgia law. Thus, because nearly identical and closely related claims have been made in Georgia state court, a decision on such claims may moot the requested declarations in this action.

Accordingly, the second *McWane* prong is met.

c. The Georgia State Action involves the same parties and issues.

"It is well-settled that *McWane* favors a stay 'not only where the parties and issues are identical, but also where there exists a substantial or functional identity between the two [issues] such that they arise out of a common nucleus of operative fact."[134] This factor concerns "the possibility of conflicting rulings which would come forth if both actions were allowed to proceed simultaneously."[135]

HOC argues that the third *McWane* prong is met as "this action is essentially identical to its Complaint in the Federal Action."[136] HOC further asserts that its "counterclaims against Selective in the Federal Action are substantially the same as the subsequently filed [Georgia]

[133] *See Lima Delta Co. v. Global Aerospace, Inc.*, 2016 WL 691965, at *6 (Del. Super. Feb. 19, 2016) (dismissing a case in favor of a first-filed action and finding that "Georgia is capable of rendering prompt and complete justice….").
[134] *Bright Data, Inc. v. Meta Platforms, Inc.*, 2023 WL 5322293, at *4 (Del. Super. Aug. 18, 2023) (quoting *Tulum Mgmt. USA LLC v. Casten*, 2015 WL 7546003, at *2 (Del. Ch. Oct. 15, 2009)).
[135] *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park Dr. BNK Invs., L.L.C.*, 2009 WL 3335332, at *7 (Del. Ch. Oct. 15, 2009).
[136] Def. Mot. at 23.

State Action complaint."[137] HOC acknowledges that the parties are not identical to those in the Georgia State Action.[138] However, HOC posits that this fact "does not change [the] analysis" under Delaware law.[139]

Again, Selective does not respond to HOC's arguments as to the third *McWane* prong.

As a preliminary matter, HOC's argument focuses on the similarities between this action and the Federal Action. The Court focuses on this action and the Georgia State Action as relevant for purposes of conducting a *McWane* analysis. Notwithstanding, the Court finds that the Georgia State Action involves the same issues as this action. Both the Georgia State Action and this action "require nearly identical determinations."[140] Specifically, both actions involve declaratory judgment claims regarding the rights and obligations to defend and indemnify under the APA as between Selective and HOC.

The Court also finds that, while the parties in the Georgia State Action are not identical, the parties are the same for purposes of a *McWane* analysis. Delaware courts have previously found that "[p]arties are substantially the same under *McWane* where related entities are involved but not named in both actions."[141] Here, HOC and each Selective entity are also named in the Georgia State Action complaint.[142] The difference between the parties in this action and the Georgia State Action is the inclusion of several additional insurers.[143] However, it appears to the Court that the inclusion of the additional insurers does not affect the claims asserted between HOC and Selective. Thus, for purposes of *McWane*, the parties are the same

[137] *Id*. at 24.
[138] *See id*.
[139] *Id*.
[140] *Highland Pipeline Leasing, LLC v. Magellan Pipeline Co., L.P.*, 2021 WL 1292794, at *4 (Del. Super. Apr. 6, 2021).
[141] *Id*.
[142] *See generally* Def. Mot., Ex. I.
[143] *See generally* Compl.; *see also* Def. Mot., Ex. I.

even though other related entities are involved in the Georgia State Action and were not named in this action.

Therefore, the third *McWane* prong is met.

Accordingly, in an exercise of its discretion, the Court will dismiss this action pursuant to *McWane* in preference to the Georgia State Action.[144]

VI. CONCLUSION

For the reasons set forth above, the Motion is **GRANTED,** and this action is **DISMISSED**.

IT IS SO ORDERED.

March 27, 2026
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, President Judge

cc: File&ServeXpress

[144] The Court will not address the issue of whether Selective's claims are "overripe." The decision to dismiss the action under McWane moots the issue of overripeness.