IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AZURIX CORP.,	)	
	)	
Plaintiff,	)	
	)	
V.	)	C.A. No. 17509
	)	
SYNAGRO TECHNOLOGIES, INC.,	)	
	)	
Defendant.	)	

Submitted: December 30, 1999
Decided: February 3, 2000

Alan J. Stone and David J. Teklits of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, Attorneys for Plaintiff.

P. Clarkson Collins, Jr., Joseph R. Slights, III and James E. Drnec of Morris, James Hitchens & Williams, Wilmington, Delaware. Attorneys for Defendant.

STEELE, V.C.

Two Delaware corporations, Azurix Corp. and Synagro Technologies, Inc., began merger talks that eventually proved fruitless. Before those talks began, Synagro was allegedly in the midst of upwards of seventeen separate acquisition negotiations. As part of a "Standstill" Agreement reached between the two companies, Azurix purportedly agreed not to use information it gathered from its merger discussions with Synagro in order to acquire any of the companies with which Synagro was allegedly negotiating. Seemingly laying the foundation for a merger, Synagro also agreed to make certain acquisitions in return for Azurix's promise to inject much-needed capital into Synagro. According to Azurix, Synagro breached the Standstill Agreement and also wrongfully impeded Azurix's attempts to acquire a third company. According to Synagro, it was Azurix that breached the Standstill Agreement by using confidential information, which it gleaned from Synagro, in its attempt to acquire that third company and by wrongfully refusing to invest in Synagro as agreed,

Azurix filed its complaint in this Court, on a Friday afternoon. The following Monday, Synagro sued Azurix in a Texas court over essentially the same disputes. Synagro moved to dismiss or stay Azurix's Delaware action arguing that the Delaware Court of Chancery lacked subject matter jurisdiction and that based on *forum* non *conveniens* grounds this action should be litigated in Texas.

Because the Delaware and Texas actions must be considered to be contemporaneously filed and because after the application of the *forum non conveniens* factors, it appears that Texas will be the more convenient as well as the more logical forum to resolve the parties' dispute, I grant a stay.

I. Background

While both Azurix and Synagro are Delaware corporations, each has their respective corporate offices in Houston, Texas. Azurix is in the wastewater service industry. Synagro is in the bio-solids waste disposal business.

In early 1999, Azurix and Synagro began exploratory discussions regarding possible collaborative efforts or strategic alliances between the two companies. On February 1, 1999, Azurix and Synagro entered into a confidentiality agreement in order for the parties to be able to exchange non-public information.

Synagro was, at the time of these talks, purportedly negotiating to acquire approximately seventeen different companies. [1] The acquisition of some or all of those companies would seemingly make Synagro a more attractive partner. As a result of Synagro's ongoing negotiations, Azurix and Synagro supplemented the February 1 confidentiality agreement to allow Azurix to gain access to information regarding the companies Synagro claimed it was negotiating to acquire. In return,

[1] Azurix claims that it was given a list of twenty-two different companies, not seventeen, with which Synagro was purportedly negotiating.

Azurix agreed to refrain for a period of time from acquiring, offering to acquire or negotiating to acquire the companies that Synagro purportedly sought to acquire.

Azurix claims it was under the belief that any merger with Synagro would occur only after Synagro completed the acquisition of eight of the companies on Synagro's target list. Azurix maintains that in mid-September 1999, Synagro finally disclosed to Azurix that it did not have sufficient funds or credit available to purchase any of the companies on its target list. Synagro then proposed that Azurix buy Synagro preferred stock, an infusion of capital that would presumably enable Synagro to effect the planned acquisitions. A merger between Synagro and Azurix would then be completed. Azurix consented to the investment plan, but contends the parties agreed that Azurix would be free to begin discussions with Waste Management about acquiring BioGro.

By late September 1999, after initial discussions with Azurix, Waste Management was purportedly anxious to begin formal negotiations regarding a sale of BioGro to Azurix. Waste Management was not ready to begin formal negotiations until it received confirmation from Synagro that Azurix was free to make a deal, however. Synagro refused to confirm Azurix's ability to deal. In fact, Synagro considered Azurix still bound by their Standstill Agreement, which Synagro believed prevented Azurix from acquiring BioGro.

Anxious to acquire BioGro, Azurix filed this Action on Friday, October, 29, 1999, seeking to enjoin Synagro from interfering with Azurix's consummation of the purchase of BioGro and a declaratory judgment stating that Azurix had no obligation to purchase Synagro's preferred stock. Synagro filed a similar action against Azurix in a Texas court early the following Monday, November 1, 1999. In the Texas Action, Synagro sought a temporary restraining order enjoining Azurix from allegedly misusing Synagro's confidential and propriety information and from acquiring BioGro. Both actions focused on the language of the Standstill Agreement and the parties' actions surrounding it.

The Texas court has stayed the Texas Action awaiting this Court's decision on Synagro's motion to dismiss or stay. Waste Management has informed Azurix that it plans to auction BioGro and sell it to the highest bidder.

II. Parties Contentions

Synagro moves to dismiss this Action arguing that Azurix has adequate remedies at law and that this Court lacks subject matter jurisdiction. Alternatively, Synagro moves to dismiss or stay this Action in favor of the Texas Action on *forum* non *conveniens* grounds. Azurix opposes Synagro's motion to dismiss or stay, and contends that the Delaware Court of Chancery is the appropriate forum in which to resolve the parties' disputes.

III. Analysis

A. The challenge to Delaware's equity jurisdiction

Equity jurisdiction can arise in two ways: (1) from the invocation of an equitable right, or (2) from the request for an equitable remedy when there is no adequate remedy at law. As Azurix's request for equitable remedies is the purported basis for this Court's jurisdiction, I will focus on that source of equity jurisdiction.

Even though a contract is legal in nature, equity jurisdiction may still exist in the event of a breach. This is so when the only full and adequate remedy, "likely relating to the special nature of the obligation or the unique nature to which it relates, may be an injunction or an equitable rescission or an order compelling specific performance, remedies that are available only in a court of equity."[2] If a party seeks equity jurisdiction on the basis of asserting a claim to an equitable remedy, it must show that any alternate legal remedy would be inadequate.

When deciding whether equity has jurisdiction, the Court looks at the face of the complaint, as of the time of filing, with all material factual allegations taken to be true.[3] Therefore, events occurring after the complaint is filed are generally irrelevant to this determination.

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[2] DONALD J WOLFE, JR. AND MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 2-3(b), at 36 (1998).

[3] ***See Diebold Computer Leasing, Inc. v. Commercial Credit Corp.,*** Del. Supr., 267 A.2d 586, 590-91. (1970).

A plaintiff can not simply creatively plead for an equitable remedy in order to coax an equity court into hearing its case. Unless there is an underlying equitable right, the exercise of equity jurisdiction is inappropriate "where a complete remedy otherwise exists but where plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic 'open sesame' to the Court of Chancery."[4]

Azurix's complaint does more than simply incant traditional equity liturgy. Azurix seeks specific enforcement of Synagro's purported agreement to waive the restriction on Azurix's acquisition of BioGro and an injunction to prevent Synagro's interference with that acquisition. Synagro contends that Azurix had an adequate remedy at law at the time it tiled the complaint because Azurix could assert the alleged waiver agreement as a defense to Synagro's attempt to enforce the confidentiality and standstill agreements. Synagro, however, forgets that jurisdiction is determined at the time the complaint is filed. When Azurix filed in Delaware there was not a pre-existing case, in Texas or anywhere else, in which Azurix could have asserted such a defense.

Further, Azurix's attempted acquisition of BioGro was unique and time sensitive. Azurix purportedly brought this action to thwart interference from Synagro in that endeavor. Finally, it is irrelevant that Waste Management has

[4] ***IBM Corp. v. Comdisco, Inc.,*** Del. Ch., 602 A.2d 74, 78 (1991).

since decided to auction BioGro because, as stated above, jurisdiction attaches, or fails to attach, at the time of filing.

I find that this Court has subject matter jurisdiction over this action. Since jurisdiction over this claim attached when Azurix filed, this Court maintains jurisdiction through the course of this litigation.

B. Is Azurix's Delaware action first-filed or merely contemporaneously filed?

Synagro argues that this action should be dismissed or stayed under the doctrine of *forum non conveniens.* Under that doctrine, a court may decline to hear a case before it "whenever considerations of convenience, expense and the interests of justice dictate that litigation in the forum selected by the plaintiff would be unduly inconvenient, expensive and otherwise inappropriate."[5]

Before engaging in a *forum non conveniens* analysis, however, a Delaware court must first determine whether application of the so-called first-filed rule is more appropriate.[6] The first-tiled rule applies when a party seeks to stay or dismiss a Delaware action in favor of a first-filed action pending in federal or

[5] ***Sumner Sports, Inc. v. Remington Arms*** Co., Del. Ch., C.A. No. 11841, Chandler, V.C. (Mar. 4, 1993), mem. op. at 15 (quoting ***Monsanto Co. v. Aetna Cas. & Sur. Co.,*** Del. Super., 559 A.2d 1301, 1304 (1988)).

[6] See DONALD J. WOLFE, JR. AND MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 5-2, at 213 (1998) (discussing the competing analyses).

another state jurisdiction.[7] In contrast, the doctrine of forum *non conveniens* applies when there is no other action with similar parties involving similar issues pending in another jurisdiction, or when the action filed elsewhere is filed later than or contemporaneously with the filing in Delaware.*

The procedural facts determine whether this Action should be considered first-filed or contemporaneously filed. Azurix filed this Action at 4:28 P.M., EST on Friday, October 29, 1999.[9] Early the following Monday, Synagro tiled the Texas Action. The parties filed only scant minutes apart, if one excludes the time the respective court offices were closed. It would be inequitable to count the weekend hours against Synagro because it was impossible for it to have filed during those hours. Since the difference in time of filing is so close, it is fair to treat the competing actions as contemporaneously filed.[10] Support for my finding is borne out of this Court's desire to avoid rewarding the winner of a race to the courthouse.' [1]

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[7] ***McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.,*** Del. Supr., 263 A.2d 281, 284 (1970).

[8] *Id.*

[9] Our Register in Chancery stops stamping to acknowledge filings at 4:30 P.M. daily and does not acknowledge weekend tilings.

[10] ***See Texas Instruments, Inc. v. Cyrix Corp.,*** Del. Ch., C.A. NO. 13288, 1994 WL 96983, at *3-4, Jacobs, V.C. (Mar. 22, 1994) (actions treated as simultaneously-tiled when five hours intervened between filing of competing complaints); ***In re Chambers Dev. Co. Shareholders Litig.,*** Del. Ch., C.A. No. 12508, mem. op. at 14, Chandler, V.C. (May 20, 1993) (treating actions tiled within the same general time period as simultaneously-tiled).

[11] ***Texas Instruments, Inc.,*** *supra*, at *4.

"Since the actions must be considered simultaneously filed, neither action commands the high ground which would otherwise force the court to approach the analysis in a manner which defers to a plaintiffs choice of forum."'* I must, therefore, employ a traditionalforum *non conveniens* analysis.

In evaluating either a motion to dismiss or a motion to stay on the grounds of *forum non conveniens,* Delaware courts consider six factors: (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 any 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.[13] These six factors should be used as a guide to the Court's exercise of discretion.[14]

The Supreme Court has provided direction on how these six factors are to be applied:

> (i) Only in a rare case should a plaintiffs choice: of forum be defeated in favor of a later-filed action in another jurisdiction; (ii) in order to prevail on a forum non conveniens motion, a defendant must establish, with particularity, that it will be subjected to undue hardship and inconvenience if

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[12] ***Friedman v. Alcatel Alsthom***, Del. Ch., C.A. No. 166.50, slip op. at 14, Steele, V.C. (December 10, 1999).

[13] ***General Foods Corporation v. Cyro-Maid, Inc.,*** Del. Supr., ***198*** A.2d 681, ***684 (1964); Miller v. Phillips Petroleum*** Co. ***Norway,*** Del. Supr., 537 A.2d 190,202 (1988).

[14] ***Sumner Sports Inc. v. Remington Arms Co.,*** Del. Ch., C.A. No. 11841, slip op. at 6, Chandler, V.C. (Mar. 4, 1993).

> required to litigate in Delaware; (iii) the factors to be considered in evaluating a *forum non conveniens* motion are those [discussed above]; and (iv) a defendant must establish that one or more of [the discussed-above] factors actually causes such significant hardship and inconvenience.[15]

Despite occasional references to the trial courts' discretion, little room for exercising that discretion exists given the above strictures. When a party urges a court to stay or dismiss a Delaware action in favor of a later filed action in another jurisdiction, these standards make perfect sense. As I have previously noted in another case, however, these criteria are far less helpful in evaluating contemporaneously filed actions.[16] If there are contemporaneous filings, the trial judge should be afforded more discretion "to determine whether the courts and the public's interest really necessitates trial in multiple jurisdictions given the limited resources of the courts and the enormous expense of litigation."[17]

The key issue when dealing with contemporaneously filed actions is whether the moving party seeks a dismissal or a stay, and, in either instance what is the burden of persuasion? [18]

Here, Synagro seeks either dismissal or, in the alternative, a stay. To justify dismissal, Synagro must "establish that defendant[s] will suffer overwhelming

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[15] ***Chrysler First Business Credit Corp.*** v. ***1500 Locust L.P.,*** Del. Supr., 669 A.2d 104, 107 (1995).
[16] ***See Friedman,*** *supra,* at 15.
"Friedman, *supra,* at 16-17.
[18] ***See HFTP Investments v. ARIAD Pharmaceuticals,*** Del. Ch., C.A. No. 17501, Jacobs, V.C. (Dec. 9, 1999) (stating "the second issue (after determining that neither case is "first filed" and

hardship and inconvenience if forced to litigate in Delaware."[19] The burden is on the defendant to prove hardship and inconvenience.[20] "Absent such a showing, plaintiff[s'] choice of forum must be respected."[21] When, on the other hand, a party seeks only to stay the contemporaneously filed action, the issue is simply "whether on balance, the forum *non conveniens* factors warrant the grant of a stay."[22] For this claim to be dismissed, Synagro would have to demonstrate that it would suffer undue, overwhelming or significant hardship if it is required to litigate in Delaware. As explained in detail below, within the context of the ***Cryo-Maid*** factors, Synagro can not meet that burden.

Synagro bears a much lighter burden, however, in order to justify a stay. Here, to warrant a stay of Azurix's contemporaneously filed action, the ***Cryo-Maid*** factors must on balance simply tip in favor of Synagro's Texas action.

1. Applicability of Delaware law

The agreements at issue contain choice of law provisions stating that Texas law will govern any disputes. While Delaware courts are capable of applying the law of another state, or even another country,[23] the parties to the agreements

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that a *forum non conveniens* analysis is required) is what standard or burden of persuasion applies").

[19] ***Id***. at. 108.

[20] ***ANR Pipeline*** Co. v. ***Shell Oil*** Co., Del. Supr., 525 A.2d 991, 992 (1997).

[21] ***Chrysler First,*** *supra,* at 108.

[22] ***HFTP Investments,*** *supra,* at 13.

[23] ***Taylor v. LSI Logic***, Del. Supr., 689 A.2d 1196, 1199 (1997).

clearly wish Texas law to be the focus of the Court's attention. Given that intention, a Texas court should be afforded the edge in any analysis regarding what court is best suited to resolve this dispute. Conversely, neither party can, "absent unusual circumstances, claim surprise or inconvenience of litigating against another Delaware corporation in the state of incorporation of both parties."[24] Therefore, while this factor offers no evidence of undue, overwhelming or significant hardship to Synagro if it litigates in Delaware, one should fairly suspect that Texas law could be more conveniently applied by a Texas Court.

2. Relative ease of access to proof

Myriad boxes of documents already produced, additional evidence that may still be produced, and almost all the relevant witnesses are located in Texas. The relevant negotiations also took place in Houston with the assistance of Houston law firms. Synagro does clearly face some logistical burden in defending itself in Delaware, but when a defendant possesses substantial resources such burdens are "substantially attenuate[d]."[25]

There has been much debate over whether Synagro does indeed possess substantial resources. In his affidavit, the Executive Vice-President and General Counsel for Synagro, Alvin L. Thomas II, states that Synagro has historically

[24] ***Asten v. Wangner***, Del. Ch., C.A. No. 15617, ltr. op. at 2, Steele, V.C. (Oct. 3, 1997).
[25] ***Monsanto Co. v. Aetna Casualty & Surety*** Co., Del. Super., 559 A.2d 1301, 1307 (1988).

grown by acquiring other bio-solids companies. As a "roll-up" company, Synagro maintains a high debt to equity ratio, which requires a large percentage of Synagro's cash flow to service. Thomas implies that this strategy does not afford Synagro discretionary liquid funds to spend on unexpected contingencies, like protracted litigation in Delaware. He notes that "[b]ecause of Azurix's tiling, Synagro has been forced to hire a second set of lawyers in Delaware, which it cannot afford to do. In addition, the cost of plane tickets, hotel bills, rental cars, conference rooms, shipping fees for documents, etc. is likely to exceed several hundred thousand dollars."[26]

Azurix is skeptical of Thomas's bleak financial portrait of Synagro. It points out that Synagro filed a Form 10-Q with the SEC late in 1.999 which reported gross revenues of over $15.8 million, net income of over $1.6 million for the three months ending September 30, 1999, and total assets of over $93 million. Synagro argues those statistics are not telling and that Azurix overlooked the most relevant numbers in that tiling: namely, that Synagro's cash on hand for the present period is only $337,261.00. Synagro also adds that the Form 10-Q does not reflect the financial hardships that Synagro is presently suffering as a result of Azurix's failure to inject capital into Synagro as Azurix had purportedly promised.

[26] Thomas, Aff. at ¶ 19.

Only a few months ago, I was faced with an analogous case in which a French company, Alcatel Alsthom, advanced an argument similar to the one Synagro now makes.[27] I could not find that Alcatel Alsthom lacked substantial resources because it was a large multinational corporation that operated not only in Europe but also throughout the world.[28] Synagro is undeniably not Alcatel Alsthom, but neither is Synagro a sole proprietorship running a single Houston car wash. Synagro falls somewhere in between those two extremes, but in my opinion, absent extraordinary circumstances any company incorporating in Delaware does so with the expectation that it might be forced to muster the resources necessary to defend litigation in Delaware. Synagro fails to convince me that defending here constitutes "undue" or "overwhelming" hardship. On the other hand, the presence of the contending parties corporate offices "just down the street" from the Texas courthouse and the presence of most witnesses and documents in Texas mitigates in favor of Synagro's Texas Action going forward and this action being stayed.

3. Compulsory process

For this prong, I must evaluate whether "another forum would provide a substantial improvement as to the number of witnesses who would be subject to compulsory process."[29] The majority of witnesses, the respective corporate

[27] ***See Friedman,*** *supra*, at 18.
[28] In 1998, Alcatel Alsthom had net sales of 21.26 billion Euros.
[29] ***Mt. Hawley Ins. Co. v. Jenny Craig, Inc.,*** Del. Super., 66% A.2d 763, 769 (1985).

offices, and the relevant documents are all located in Texas. Synagro also tells me that a witness, whose testimony it regards as pivotal, Rod Gray, is no longer affiliated with Azurix. Synagro states that Gray is a Texas resident and is subject to compulsory process there, but not in Delaware. While there are mechanisms to resolve similar evidentiary problems employed every day in Delaware litigation, Texas would indeed have an edge over Delaware in the ease with which Synagro could compel the witnesses necessary to its case.

4. Pendency of similar actions

The facts underlying this Action and the Texas Action are remarkably similar. To my knowledge there are no issues before me now on which the Texas Court could not provide full, final and complete relief. Since this Action does not differ significantly from the Texas Action nor can this Court provide relief that the Texas court cannot, this factor cuts in favor of neither jurisdiction. The Texas' Court's courtesy in allowing Delaware to first analyze *forum non conveniens* issues does not demonstrate reluctance on its part to entertain the parties' dispute.

5. Need to view the premises

This factor is not applicable and is given no weight.

6. Other practical considerations

Under this prong, Delaware courts have examined a wide array of considerations including judicial economy,[30] the motives of the parties in filing suit in the respective jurisdictions,[31] and public interest.[32]

Perhaps judicial economy considerations may be slightly better served if this matter is litigated in Texas because the parties and the parties' primary counsel are located in Texas. Conceivably, the closer proximity of the parties, their counsel, the documents and witnesses to the Houston courthouse could make litigating this matter more efficient in Texas.

But, since the Texas court has pragmatically deferred to this Court's pending resolution of the *forum non conveniens* based motion to dismiss or stay, there is no real risk of duplicative efforts. In effect, I will spend more time on this case *or* my counterpart in Texas will spend more time on this case depending on where it is ultimately litigated, but in no scenario would we both be expending equal and duplicative efforts to resolve the matter.

Synagro alleges that Azurix filed in a Delaware equity court in order to avoid having to try this matter in front of a jury. For reasons not entirely clear to

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[30] *See id.*

[31] ***See GTE Mobilnet, Inc. v. Nehalem Cellular, Inc.,*** Del. Ch., C.A. No. 13072, 1994 WL 116194, at *5, Chandler, V.C. (Mar. 17, 1994).

[32] ***See Monsanto***, Del. Super, 559 A.2d at 1314-15.

me, Synagro implies its arguments would be better received by a jury than would Azurix's arguments. While I wonder why any business would prefer a jury trial, the parties relative taste for lay resolution of their purely commercial dispute, is not relevant to my decision.[33]

I turn next to public interest considerations. The consequences of this litigation will be first and foremost felt in Texas. Presumably, most if not all of the employees of the two parties are Texas residents. Further, the companies operate primarily in Texas.

On the other hand, Delaware has a very legitimate interest in making its courts available to citizens who have elected to incorporate here. Both Azurix and Synagro chose Delaware as their place of incorporation in order to avail themselves of our laws and courts. While I can not lightly disregard their decisions to incorporate here, I do note that no issues of Delaware law or corporate governance dominate this dispute.

In short, there are no practical considerations to support Synagro's claim of undue hardship. As a purely "practical" matter, Synagro may find it more expensive to litigate this dispute in its state of incorporation, but this does not

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[33] *See Asten v. Wangner*, Del. Ch., C.A. No. 15617, ltr. op. at 5, Steele, V.C. (Oct. 3, 1997) (stating "I can find no Delaware case that says that our non-jury Court of Chancery should yield dispute resolution between its Delaware corporate citizens to jury trials in other jurisdiction"); ***Dimeling, Schreiber & Park v. Packaging Industry Group,*** Del. Ch., CA. No. 1157, 1991 WL 260762, at *6, Chandler, V.C. (Nov. 15, 1991) (stating "[a]s far as defendant's argument that it cannot argue before a jury in this action or obtain punitive damages, I find it to be meritless")

constitute the kind of undue hardship or overwhelming burden contemplated under our test.

A much lesser burden must be met to support a stay, however. The practical considerations flowing from the fact that the principal offices of these Delaware corporations are in Texas and the fact that most witnesses and documents are located in Texas clearly mitigate in favor of staying this action and allowing the parties to litigate similar factual and legal issues in Texas.

IV. Conclusion

An analysis of the ***Cryo-Maid*** factors here fails to demonstrate that the defendant carried its burden of establishing the "undue," "significant" and/or "overwhelming" burden necessary to dismiss this simultaneously filed action. The analyses does, for the reasons explained above, demonstrate that the ***Cryo-Maid*** factors preponderate in favor of staying this Delaware action while the Texas action proceeds to a conclusion.

Accordingly, Synagro's ***motion to stay is granted*** and its ***motion to dismiss is denied.***

IT IS SO ORDERED.

Vice Chancellor