IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AR CAPITAL, LLC, EDWARD M. WEIL, WILLIAM M. KAHANE, NICHOLAS S. SCHORSCH, and PETER M. BUDKO,	)	
Plaintiffs,	)	
	)	C.A. No. N19C-01-024 MMJ CCLD
v.	)	
	)	**PUBLIC VERSION**
XL SPECIALTY INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, ARGONAUT INSURANCE COMPANY, FREEDOM SPECIALTY INSURANCE COMPANY, QBE INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, STARR INDEMNITY & LIABILITY COMPANY, RSUI INDEMNITY COMPANY, and AXIS INSURANCE COMPANY,	)	
Defendants.	)	

Submitted: March 21, 2019
Decided: April 25, 2019

Upon Defendants Westchester Fire Insurance Company, Starr Indemnity & Liability Company, RSUI Indemnity Company, and Axis Insurance Company's Motions to Dismiss
GRANTED.

Upon Defendants XL Specialty Insurance Company, Continental Casualty Company, Argonaut Insurance Company, Freedom Specialty Insurance Company, and QBE Insurance Company's
Motion to Dismiss or Stay
DENIED.

Marc S. Casarino, Esq., White & Williams LLP, Wilmington, Delaware; Erica Kerstein, Esq., White & Williams LLP, New York, New York; Thomas K. Hanekamp, Esq., Mark A. Swantek, Esq., Aronberg, Goldgehn, Davis, & Garmisa LLP, Chicago, Illinois; Allen Burton, Esq., (Argued), Gerard Saveresse, Esq., Ephraim McDowell, Esq., O'Melveny & Myers LLP, New York, New York and Washington, District of Columbia; Michael R. Goodstein, Esq., Bailey Cavalieri LLP, Columbus Ohio, *Attorneys for Defendants Westchester Fire Insurance Company, Starr Indemnity & Liability Company, RSUI Indemnity Company, and Axis Insurance Company*

Leslie S. Ahari, Esq., (Argued), Alexander R. Karam, Esq., Cyde & Co US, LLP, Washington, District of Columbia; Robert J. Katzenstein, Esq., Eve H. Ormerod, Esq., Smith, Katzenstein, & Jenkins LLP, Wilmington, Delaware; Cara Tseng Duffield, Esq., Matthew W. Beato, Esq., Wiley Rein LLP, Washington, District of Columbia; Michael T. Skoglund, Esq., Tiffany Saltzman-Jones, Esq., Bates Carey LLP, Chicago, Illinois; Michael P. Duffy, Esq., Scarlett M. Rajbanshi, Esq., Peabody Arnold LLP, Boston, Massachusetts; Amber W. Locklear, Esq., Geoffrey W. Heineman, Ropers, Majeski, Kohn, & Bentley LLP, New York, New York; John C. Phillips, Jr., Esq., David A. Bilson, Esq., Phillps, Goldman, McLaughlin, & Hall, P.A., Wilmington, Delaware; Alexis J. Rogoski, Esq., Edward C. Carleton, Esq., Skarzynski, Marick, & Black LLP, New York, New York; Bruce E. Jameson, Esq., John G. Day, Esq., Prickett, Jones, & Elliott P.A., Wilmington, Delaware, *Attorneys for XL Specialty Insurance Company, Continental Casualty Company, Argonaut Insurance Company, Freedom Specialty Insurance Company, and QBE Insurance Company*

Kenneth J. Nachbar, Esq., (Argued), John P. DiTomo, Esq., Elizabeth A. Mullin, Esq., Morris, Nichols, Arsht, & Tunnell LLP, Wilmington, Delaware; Robin L. Cohen, Esq., Natasha Romagnoli, Esq., Orrie A. Levy, Esq., Alexander M. Sugzda, Esq., (Argued), McKool Smith P.C., New York, New York, *Attorneys for Plaintiffs AR Capital, LLC, Edward M. Weil, William M. Kahane, Nicholas S. Schorsch, and Peter M. Budko*

JOHNSTON, J.

PROCEDURAL AND FACTUAL CONTEXT

Introduction

This is an indemnification action. Plaintiff seek declaratory relief and damages for anticipated losses [redacted]

Plaintiffs allege Defendants have failed to treat Plaintiffs fairly and equitably under separate insurance programs (the "ARCT III Policy," "ARCT IV Policy," "AR Capital Policies," and "Drop-Down Policies" (collectively, the "Policies")). Plaintiffs have sought coverage for losses arising from a government investigation involving VEREIT, Inc. ("VEREIT"), f/k/a American Realty Capital Properties, Inc. ("ARCP"), and certain of the companies and personnel [redacted] including American Realty Capital Trust III ("ARCT III"), American Realty Trust IV, Inc. ("ARCT IV"), and AR Capital and its wholly-owned subsidiaries (the "Government Investigation").

The Parties

AR Capital provided advisory services to VEREIT, a real estate investment trust.[1] Individual Plaintiffs Schorsch, Kahane, Weil, and Budko were members of AR Capital.

[1] In 2012 and 2013, VEREIT merged with American Realty Capital Trust III ("ARCT III") and American Realty Capital Trust IV ("ARCT IV"), two other real estate investment trusts. AR Capital and its subsidiaries advised VEREIT, ARCT III, AND ARCT IV about these mergers. As part of these mergers, VEREIT entered into certain asset-purchase agreements with AR Capital subsidiaries. In 2014, VEREIT's Board of Directors alleged reporting irregularities at the company. Numerous lawsuits were filed. [redacted]

There are two classes of Defendants in this action: Westchester Fire Insurance Company, Starr Indemnity & Liability Company, RSUI Indemnity Company, and AXIS Insurance Company provided Difference in Conditions (DIC) policies (hereinafter, "DIC Defendants"); and XL Specialty Insurance Company, Continental Casualty Company, Argonaut Insurance Company, Freedom Specialty Insurance Company, and QBE Insurance Corporation provided Directors and Officers (D&O) policies (hereinafter "D&O Defendants"). The Defendants moved separately to dismiss this action on different grounds.

Plaintiffs seek a declaratory judgment that the DIC Defendants must indemnify them pursuant to DIC insurance policies the DIC Defendants have issued. DIC Defendants argue that this Court lacks personal jurisdiction over the DIC Defendants, and that this Court lacks subject matter jurisdiction because there is no ripe controversy.

Plaintiffs seek indemnification against D&O Defendants, implicating separate D&O Insurance policies. D&O Defendants argue that this Delaware action should be stayed under the "first to file" doctrine of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*[2] D&O Defendants contend that the New York actions were filed first, and that Plaintiffs filed this reactive lawsuit to avoid the New York forum. D&O Defendants also argue that even if the suits are considered to be contemporaneously filed, the case should be dismissed or stayed based on the *forum non*

Plaintiff is now seeking declaratory judgment against various insurers, claiming that the insurers must [redacted]

[2] 263 A.2d 281, 283 (Del. 1970).

conveniens factors stated in *General Food Corp. v. Cryo-Maid, Inc.*[3] because the parties have no meaningful connection to Delaware. D&O Defendants also assert that dismissal without prejudice is appropriate based on Plaintiffs' failure to join an indispensable party over whom the Court lacks personal jurisdiction.

In addition to the parties' briefing on the subject motions to dismiss, the Court received letters following oral argument. The letters informed the Court of the progression of the pending New York actions.

STANDARDS OF REVIEW

Improper Venue

Rule 12(b)(3) governs a motion to dismiss or stay on the basis of improper venue. The Court should "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[4] "The Court can 'grant a dismissal motion before the commencement of discovery on the basis of affidavits and documentary evidence if the plaintiff cannot make out a *prima facie* case in support of its position.'"[5] However, the Court usually must allow the plaintiff to take discovery where the plaintiff "advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges."[6] "In reviewing a motion to

---

[3] 198 A.2d 681, 684 (Del. 1964).
[4] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super.).
[5] *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super.)(citing *Simon v. Navellier Series Fund,* 2000 WL 1597890, at *3 (Del. Ch.)).
[6] *Id.*

dismiss, the court must assume as true all the facts pled in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the plaintiff."[7]

Indispensable Parties

Pursuant to Superior Court Civil Rule 12(b)(7), the Court may dismiss a claim for failure to join a party under Superior Court Civil Rule 19, "which provides for the joinder of persons needed for just adjudication of the claims."[8] Dismissal is warranted under Rule 19 "if the party not joined is indispensable to the case but cannot be made a party."[9] The factors for the Court to consider in making this determination, as stated in Rule 19, include:

> First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[10]

If the party is subject to service of process and the joinder will not deprive the Court of subject matter jurisdiction, the Court may order that the person be made a party.[11]

---

[7] *Loveman,* 2009 WL 847655, at *2 (citing *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.,* 829 A.2d 143, 148-49 (Del. Ch. 2003)).
[8] *Perry v. Dover Fed. Credit Union*, 2004 WL 838840, at *1 (Del. Super.).
[9] *Id.*
[10] Super. Ct. Civ. R. 19(b).
[11] Super. Ct. Civ. R. 19(a).

Personal Jurisdiction

Plaintiffs have the burden to demonstrate a *prima facie* case establishing personal jurisdiction. Plaintiffs "must plead specific facts and cannot rely on mere conclusory assertions."[12] In deciding whether the Court has personal jurisdiction over a nonresident defendant, the Court must engage in a two-step analysis.[13] First, the Court must determine whether Delaware's long-arm statute is applicable.[14] Second, the Court must decide whether subjecting a nonresident defendant to jurisdiction would violate due process.[15]

An exercise of specific jurisdiction requires that a "defendant's suit-related conduct…create[s] a substantial connection with the forum State."[16] Where a Plaintiff fails to allege that the defendant's "in-state activity…gave rise to the episode-in-suit," the defendant is not subject to specific jurisdiction.[17]

---

[12] *Mobile Diagnostics Grp. Holdings, LLC v. Suer*, 972 A.2d 799, 802 (Del. Ch. 2009).
[13] *Matthew v. Woods Group*, 56 A.3d 1023, 1027 (Del. 2012).
[14] *Id.*
[15] *Id.*
[16] *Walden v. Fiore*, 571 U.S. 277, 284 (2014).
[17] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923-24 (2011); *see Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) ("specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction"); *Walden*, 571 U.S. at 283 (specific jurisdiction "depends on an affiliation between the forum and the underlying controversy (i.e., an activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation)").

McWane *and* Cryo-Maid *Factors*

"Where one of two 'competing' actions is filed before the other, the so-called *McWane* standard controls and the first-filed action generally is entitled to preference."[18] "Where two or more actions are contemporaneously filed, the Court 'examines a motion to stay under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other.'"[19]

If the Court finds that the actions were filed contemporaneously, the movant seeking dismissal has the burden to prove that litigating in Delaware would cause overwhelming hardship.[20] Where a stay of litigation likely would have substantially the same effect as a dismissal, the overwhelming hardship standard applies.[21]

"To justify a stay, the movant need only demonstrate that the preponderance of applicable forum factors 'tips in favor' of litigating in the non-Delaware forum."[22] "In balancing all of the relevant factors, the focus of the analysis should be which forum would be the more 'easy, expeditious, and inexpensive' in which to litigate."[23]

"Delaware courts examine six factors, known as the *Cryo-Maid* factors, when

---

[18] *BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 WL 702382, at *2 (Del. Super.); *see McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).
[19] *Id.*
[20] *BP Oil Supply Co.*, 2010 WL 702382, at *2.
[21] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 117.
[22] *Id.*
[23] *Royal Indem. Co. v. Gen. Motors Corp.*, 2005 WL 1952933, at *7 (Del. Super.)(citing *HFTP Invs., L.L.C. v. ARIAD Pharms., Inc.*, 752 A.2d 115, 122 (Del. Ch. 1999)).

determining whether to dismiss or stay an action on *forum non conveniens grounds*."[24] The Court will consider: (1) whether Delaware law governs the case; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the pendency or nonpendency of a similar action or actions in another jurisdiction; (5) the possibility of a view of the premises; and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.[25]

ANALYSIS

DIC Defendants' Motion

Plaintiffs concede that there is no general personal jurisdiction over DIC Defendants. For the Court to exercise general personal jurisdiction over DIC Defendants, DIC Defendants either would have to be incorporated in Delaware, or have their principal places of business in Delaware. DIC Defendants are neither incorporated in Delaware, nor have their principal places of business in Delaware. Therefore, in order for the Court to exercise jurisdiction over DIC Defendants, DIC Defendants must be subject to specific personal jurisdiction.

DIC Defendants cite *Bristol-Myers Squibb v. Superior Court of California, San*

---

[24] *Certain Underwriters at Lloyds Severally Subscribing Policy No. DP359504 v. Tyson Foods, Inc.*, 2008 WL 660485, at *3 (Del. Super.).
[25] *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964); *Parvin v. Kaufmann*, 236 A.2d 425, 427 (Del. 1967).

Francisco County,[26] and *Walden v. Fiore*[27] to support their argument that the Court does not have specific personal jurisdiction over DIC Defendants.

In *Bristol-Myers Squibb*, the United States Supreme Court held that due process did not permit exercise of specific personal jurisdiction in California over nonresident consumers' claims.[28] The plaintiffs sued Bristol-Myers Squibb (BMS) in California alleging that one of the company's drugs had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although BMS engages in business activities in California, it did not manufacture, develop, or advertise the particular drug in California. The Supreme Court found that the "bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State."[29] DIC Defendants argue that any connection with Delaware is insufficient to establish personal jurisdiction in this state because the connections are outside the context of this action.

In *Walden v. Fiore*,[30] the United States Supreme Court considered whether a court in Nevada could exercise personal jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would delay the return of funds to

---

[26] 137 S. Ct. 1773 (2017).
[27] 571 U.S. 277 (2014).
[28] *Bristol-Myers Squibb*, 137 S. Ct. at 1783-84.
[29] *Id.* at 1783.
[30] 571 U.S. 277 (2014).

plaintiffs with connections to Nevada.[31] The Court held that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State. In this case, the application of those principles is clear: Petitioner's relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction."[32] DIC Defendants urge this Court to adopt the Supreme Court's holding and find that DIC Defendants' contacts with Delaware are insufficient to establish specific personal jurisdiction.

DIC Defendants also point out that in *Weil v. VEREIT Operating Partnership LP*,[33] the Delaware Court of Chancery held that VEREIT is not subject to personal jurisdiction in Delaware.[34] The Court determined that VEREIT is a Maryland corporation, and that "there is not a basis for jurisdiction over VEREIT in Delaware for claims under the indemnification agreements."[35]

DIC Defendants further assert that the Delaware long-arm statute does not authorize an exercise of personal jurisdiction over DIC Defendants. Delaware's long-arm statute, 10 *Del. C.* § 3104(c) provides:

> As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:
>
> (1) Transacts any business or performs any character of work

[31] *Id.* at 279.
[32] *Id.* at 291.
[33] 2017 WL 6388058 (Del. Ch.).
[34] *Id.* at *1.
[35] *Id.* at *5.

or service in the State;
(2) Contracts to supply services or things in this State;
(3) Causes tortious injury in the State by an act or omission in this State;
(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
(5) Has an interest in, uses or possesses real property in the State; or
(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

DIC Defendants argue that the Delaware long-arm statute does not apply. Plaintiff's amended complaint acknowledges that DIC Defendants are not Delaware residents. DIC Defendants contend that Plaintiffs only make generalized allegations about DIC Defendants' Delaware contacts. Plaintiffs allege that each "is an insurance company that is licensed to do business in the state of Delaware, among other places." Plaintiffs further allege that each "has written insurance policies covering risks for Delaware citizens," and each "is transacting business in the state of Delaware."

DIC Defendants argue that, given these allegations, three out of six subsections of the long-arm statute cannot apply. Subsections (3) and (4) cannot apply because Plaintiffs have not alleged any "tortious injury" caused by DIC Defendants. Subsection (5) cannot apply because Plaintiffs have not alleged that DIC Defendants have or use real property in Delaware.

DIC Defendants argue that the remaining subsections ultimately have no application because the statute requires that the relevant cause of action "arise from" a nonresident's Delaware business transactions.[36]

The Court finds that it cannot exercise jurisdiction over DIC Defendants. There is neither general jurisdiction, nor specific jurisdiction. DIC Defendants are not incorporated in Delaware, and are not headquartered in Delaware. As to specific jurisdiction, the cause of action does not arise from any DIC Defendants' conduct alleged to have occurred in Delaware. The purported DIC Defendants' connections to Delaware are outside the context of this lawsuit. Thus, Delaware's long-arm statute does not permit an exercise of personal jurisdiction, and an exercise of jurisdiction over DIC Defendants would violate due process. The Court's finding as to personal jurisdiction renders the issue of ripeness moot. Therefore, DIC Defendants' motion to dismiss must be granted.

D&O Defendants' Motion

The New York actions and this action were filed one day apart. The Court finds that the *McWane* doctrine is inapplicable because the cases were filed contemporaneously. Therefore, the *Cryo-Maid* factors control the Court's analysis.

[36] *See Maloney-Refaie v. Bridge at School*, 958 A.2d 871, 878 (Del. Ch.)("section 3104 provides for personal jurisdiction over a nonresident where (1) the nonresident transacted some sort of business in the state, and (2) the claim being asserted arose out of that specific transaction").

Cryo-Maid *Factors*

i. The Relative Ease of Access to Proof

D&O Defendants argue that this factor strongly favors a New York forum because the witnesses, documentary evidence, [redacted] are located predominantly in New York, and none are located in Delaware. [redacted] Further, none of the individual plaintiffs are located in Delaware. One is located in New York. The headquarters of ARCT III, ARCT IV, and AR Capital all were or are in New York.

Plaintiffs argue that this is a neutral factor because the discovery will be largely documentary. Plaintiffs argue that modern means of communication and document transfer would make such discovery as easy to conduct in Delaware as in New York.

The Court finds that this case will be largely documentary and that ease of discovery will not be an issue. Therefore, this factor is neutral in the analysis.

ii. The Availability of Compulsory Process for Witnesses

Defendants argue that XL Specialty anticipates that out-of-state witnesses, who may not be subject to compulsory process in Delaware, will be needed to provide evidence relevant to a critical coverage issue. The parties dispute whether AR Capital is an insured entity under the ARCT policies. All of the entities involved were doing business in New York, and may not be subject to compulsory process in Delaware.

D&O Defendants argue that XL Specialty would be severely prejudiced by the unavailability of anticipated witnesses.

Plaintiffs argue that D&O Defendants only raise issues regarding hypothetical witnesses. Plaintiffs claim that the witnesses are under Plaintiffs' control and could be made available by Plaintiffs. Plaintiffs assert that D&O Defendants have not shown why these potential witnesses could not testify by deposition. Plaintiffs ultimately argue that the lack of compulsory process does not establish overwhelming hardship.

The application of this factor is somewhat unclear at this point. However, no party has sufficiently identified important witnesses who are not subject to compulsory process, and are not under control of either party. The Court finds that this factor is neutral.

iii. The Possibility of the View of the Premises

This factor is not applicable to this action.

iv. Other Practical Considerations

The parties have not identified any further considerations for the Court to consider. Therefore, the Court views this factor as neutral.

v. Whether or Not the Controversy is Dependent Upon the Application of Delaware Law

D&O Defendants' argue that this factor weighs heavily in favor of dismissal or a stay. D&O Defendants argue that while the Court need not decide the choice of law issue now, numerous factors support the application of New York law as opposed to Delaware law. For example, New York is the principal location of the risk and where the policies were delivered. D&O Defendants argue that New York has many obvious and substantive connections to this dispute, but there is no countervailing Delaware interest to warrant application of Delaware law.

Plaintiffs argue that the policies at issue do not contain choice of law issues, and to the extent there is a conflict of law, Delaware courts have recognized that "where the insured risk is the directors' and officers' 'honesty and fidelity' to the corporation," the state of incorporation, not the headquarters, "has the most significant relationship."[37] Plaintiffs argue that AR Capital and the advisor entities that are insured under the relevant policies are all Delaware entities. [redacted] Plaintiffs argue that for these reasons, Delaware law should apply.

In *Chemtura Corporation v. Certain Underwriters at Lloyd's*,[38] this Court faced a similar issue regarding whether or not Delaware law was applicable to a contemporaneously filed out-of-state action. In *Chemtura*, the Court found that the

---

[37] *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at *6 (Del. Super.).
[38] 2015 WL 5340475 (Del. Super.).

choice of law issue had not yet been determined.[39] The Court held further that even if the out-of-state law would apply, "that reason alone should not mandate the stay or dismissal of the Delaware action. Delaware courts regularly apply the law of other jurisdictions."[40] The Court held that this factor was neutral in its analysis.

The Court finds that this factor is neutral at this stage of the proceedings. The Court cannot weigh this factor in favor of either Plaintiffs or D&O Defendants.

vi. Pendency of a Similar Action in Another Jurisdiction

There are currently two actions pending in New York. The Court finds that New York would provide an adequate forum for resolution of this dispute. The New York courts are capable of doing prompt and complete justice.

In *Playtex, Inc. v. Columbia Casualty Co.*,[41] the Court identified the insured as the natural plaintiff in that coverage dispute.[42] Here, the Delaware plaintiffs are the natural plaintiffs because they are the insured. The Court notes that New York does not recognize the natural plaintiff doctrine.

Recent Delaware cases provide the Court guidance for its *forum non conveniens* analysis. "In Delaware, *forum non conveniens* has become associated with the names of

---

[39] *Id.* at *4.
[40] *Id.*
[41] 1989 WL 40913 (Del. Super.).
[42] *Id.* at *4; *see also Chemtura Corporation v. Certain Underwriters at Lloyd's*, 2015 WL 5340475, at *4 (Del. Super.)("When coverage is denied, or the insurer has failed to pay for losses after a substantial amount of time, the insured is the natural plaintiff.").

the Supreme Court cases recognizing the doctrine in various contexts."[43] In *Gramercy Emerging Markets Fund v. Allied Irish Banks, P. L. C.*,[44] the Delaware Supreme Court explained:

> *McWane* draws on *Cryo–Maid*'s factors because both tests are rooted in *forum non conveniens* doctrine. "[W]hat distinguishes the application of [the *forum non conveniens*] factors in the *McWane* [and *Cryo–Maid*] contexts is 'the background presumption against which the elements are applied.'" Under *Cryo–Maid*, defendants must establish overwhelming hardship for Delaware courts to grant dismissal. Under *McWane*, Delaware courts have greater discretion in determining whether a stay or dismissal is proper.[45]

Because this Court has determined that the instant actions were filed contemporaneously, the proper analysis for *forum non conveniens* is under the *Cryo-Maid* factors. Therefore, D&O Defendants have the burden of demonstrating overwhelming hardship justifying dismissal.[46]

The Court finds that the *Cryo-Maid* factors do not weigh overwhelmingly in favor of dismissal. The Court also finds that the New York courts are more than capable of handling this dispute. The New York courts are capable of doing prompt and complete justice.

---

[43] *Aranda v. Philip Morris USA Inc.*, 283 A. 3d 1245, 1250 (Del. 2018)(citing *Gramercy Emerging Markets Fund v. Allied Irish Banks, P. L. C.*, 173 A.3d 1033 (Del. 2017); *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281 (Del. 1970); *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964)).

[44] 173 A.3d 1033 (Del. 2017).

[45] *Id.* at 1038.

[46] *See National Union Fire Insurance Co. of Pittsburgh, PA v. Crosstex Energy Services, L.P.*, 2013 WL 6598736, at *11 (Del. Super.)(citing *Royal Indem. Co. v. General Motors Corp.*, 2005 WL 1952933, at *6 (Del. Super.) ("When actions are contemporaneously filed, the standard of proof for a dismissal is 'overwhelming hardship' and on a motion to stay the standard is a 'balancing test' of the *Cryo-Maid* factors")).

Indispensable Party

Applying the standards articulated in Superior Court Civil Rule 12(b)(7) and Rule 19, courts have held that additional insureds under a policy are not necessary parties. For example, in *Brown v. American International Group, Inc.*,[47] the court rejected in the argument that additional director and officer insureds were necessary parties in a coverage action brought by two directors under a D&O policy.[48]

D&O Defendants argue that VEREIT is an indispensable party because VEREIT's absence from this action will impair its ability to protect its interests. Additionally, VEREIT's absence could subject XL to double, multiple, or otherwise inconsistent judgments.

[redacted] VEREIT, which is aware of this present lawsuit, may seek to intervene in this or any related action to protect its interests.

The Court finds that VEREIT is not an indispensable party.

[47] 339 F. Supp. 2d 336 (D. Mass. 2004)
[48] *Id.* at 342-43.

CONCLUSION

The Court finds that it does not have jurisdiction over DIC Defendants. There is no general jurisdiction because DIC Defendants are not incorporated in Delaware, nor are they headquartered in Delaware. There is no specific jurisdiction because the cause of action does not arise in the context of any DIC Defendants' conduct in the state of Delaware. Delaware's long-arm statute does not permit an exercise of personal jurisdiction, and an exercise of jurisdiction over DIC Defendants would violate due process. The Court's finding as to personal jurisdiction renders the issue of ripeness moot.

Therefore, DIC Defendants' Motion to Dismiss is hereby GRANTED.

This Delaware action is contemporaneously-filed with the New York actions. D&O Defendants have failed to demonstrate overwhelming hardship justifying dismissal. The *Cryo-Maid* factors are mainly neutral, and do not tip in favor of litigating in the non-Delaware forum. VEREIT is not an indispensable party to this suit, and may intervene to protect its interests.

Therefore, D&O Defendants' Motion to Dismiss or Stay is hereby DENIED.

IT IS SO ORDERED.

The Hon. Mary M. Johnston