C.C.A. No. 18373
Court of Chancery of Delaware, New Castle County

IN RE IBP, INC. v. TYSON FOODS, INC.

Decided Apr 18, 2001

C.C.A. No. 18373

Date Submitted: April 17, 2001

Date Decided: April 18, 2001

Joseph A. Rosenthal, Esquire, of ROSENTHAL, MONHAIT, GROSS GODDESS, Wilmington, Delaware; Pamela S. Tikellis, Esquire, of CHIMICLES TIKELLIS, Wilmington, Delaware; of Counsel: Stanley D. Bernstein, Esquire, of BERNSTEIN LIEBHARD LIFSHITZ, New York, New York, Attorneys for Plaintiffs.

David C. McBride, William D. Johnston, Christian Douglas Wright, Esquires, of YOUNG CONAWAY STARGATT TAYLOR, Wilmington, Delaware; of Counsel: Bernard W. Nussbaum, Eric M. Roth, Marc Wolinsky, George T. Conway III, Elaine P. Golin, Don W. Cruse, Jr., Esquires, of WACHTELL, LIPTON, ROSEN KATZ, New York, New York, Attorneys for Defendants John J. Jacobson, Jr., Wendy L. Gramm, Martin A. Massengale, Michael L. Sanem and Jo Ann R. Smith, and Defendant and Cross-Claim Plaintiff IBP, Inc. Thomas J. Allingham II, Anthony W. Clark, Robert S. Saunders, Stephen D. Dargitz, Esquires, of SKADDEN, ARPS, SLATE, MEAGHER FLOM, Wilmington, Delaware, Attorneys for Defendants Tyson Foods, Inc. and Lasso Acquisition Corporation.

Allen M. Terrell, Jr., Gregory V. Varallo, Dominick T. Gattuso, Esquires, of RICHARDS LAYTON FINGER, Wilmington, Delaware, Attorneys for Defendants Donaldson, Lufkin Jenrette, Inc., DLJMBIII, Rawhide Holdings Corp., Rawhide Acquisition Corp., Richard L. Bond, John S. Chalsty, Eugene D. Leman and Robert L. Peterson.

Lawrence C. Ashby, Esquire, of ASHBY GEDDES, Wilmington, Delaware, Attorneys for Archer Daniels Midland.

STRINE, Vice Chancellor

MEMORANDUM OPINION

Cross-claim defendants Tyson Foods, Inc. and Lasso Acquisition Corporation seek dismissal or stay of cross-claim plaintiff IBP, Inc.'s claims. IBP seeks a declaration that a "Merger Agreement" among Tyson, Lasso, and itself is binding, and that Tyson's and Lasso's decision not to consummate the transactions contemplated by that Agreement is improper and should be remedied by an order of specific performance. Taken together, those transactions would involve the acquisition of IBP by Tyson for $30 per share.

At the very end of the business day on March 29, 2001, Tyson announced publicly that it was pulling out of the Merger Agreement and that it had filed suit in Arkansas against IBP. Tyson gave no prior notice to IBP of its intentions. Within five business hours, IBP responded to Tyson's termination of the Merger Agreement by

bringing its cross-claims against Tyson in this court. The cross-claims were filed in a pending class action suit challenging the Merger Agreement, an action in which Tyson had been named as a defendant but had not been served.

In this opinion, I conclude that: (i) Tyson's Arkansas claims and IBP's Delaware cross-claims were contemporaneously filed, and (ii) that most of Tyson's Arkansas claims fall within the scope of a contractual forum selection clause requiring litigation in the courts of Delaware. As a result, I decline Tyson's request that I dismiss or stay this case under the *McWane* doctrine.[1]

[1] *McWane Cast Iron Pipe Corp. v. McDowell-Weliman Engineering Co*., Del. Supr., 263 A.2d 281 (1970).

Likewise, I deny Tyson's motion to stay this action on forum *non conveniens* grounds. Both Tyson and IPB are Delaware corporations, fully capable of litigating this matter efficiently in this court. Most important, because of the forum selection clause, only a Delaware court can handle all the claims between IBP and Tyson, a factor favoring procession of this case here on the expedited schedule that has already been set.

I. The Relevant Parties

IBP is a Delaware corporation with its principal executive offices in South Dakota. It is one of the world's largest manufacturers of beef and pork meat products.

Tyson, meanwhile, is the world's largest purveyor of chicken products and the second-largest maker of tortillas. Tyson is also in the pork products business. Lasso is Tyson's acquisition subsidiary whose sole reason to be is to facilitate the IBP acquisition.

By the Merger, Tyson thus sought to become to meat, what the New York Yankees are to baseball. One suspects that Babe Ruth would have understood Tyson's (now-abandoned) ambition.

II. Factual Background

A. The Events Leading To The Engagement And Subsequent Break-Up of Tyson And IBP

In October 2000, IBP agreed to a leveraged buy-out proposal from Rawhide Holdings Corporation. The Rawhide LBO group included senior members of IBP management. Rawhide's proposal was to purchase all of IBP's shares for $22.25 a share, and IBP agreed to pay a $66.5 million termination fee in the event that it walked away from the proposal.

The Rawhide transaction drew fire from shareholder plaintiffs, who were dissatisfied with the price. of more economic importance was the interest that others then expressed in purchasing IBP at a higher price. The world's leading pork processing firm, Smithfield Food, Inc., soon announced an unsolicited bid for IBP at $25 per share.

Tyson then got into the game, with a December 4, 2000 offer of $26.00 a share. The auction was on. Tyson entered into a confidentiality agreement with IBP that same day.

The confidentiality agreement defined the information it covered, to include any oral or written "Evaluation Material," a term that the agreement defined expansively.[2] Without setting forth the definition in its entirety, it suffices to say that the definition encompasses any otherwise non-public information that Tyson received from IBP.[3]

[2] Conf. Agreement at 1.

[3] *Id*.

The confidentiality agreement explicitly limited Tyson's ability to base litigable claims on assertions that the Evaluation Material it received was false, misleading, or incomplete:

> We understand and agree that none of the Company [*i.e*., IBP], its advisors or any of their affiliates, agents, advisors or representatives (i) have made or make any representation or warranty, expressed or implied, as to the accuracy or completeness of the Evaluation Material or (ii) shall have any liability whatsoever to us or our Representatives relating to or resulting to or resulting from the use of the Evaluation Materials or any errors therein or omissions therefrom, except in the case of (i) and (ii), to the extent provided in any definitive agreement relating to a Transaction.[4]

[4] *Id*. at 2.

By its plain terms, the confidentiality agreement restricts IBP's liability for any false or misleading information in the Evaluation Materials to situations where that false or misleading information was incorporated as a representation, or in some other liability-creating way in a definitive transactional agreement.

The confidentiality agreement also limited Tyson's ability to sue over the Evaluation Materials in a forum of its own choice:

> We hereby irrevocably and unconditionally submit to the exclusive jurisdiction of any State or Federal court sitting in Delaware over any suit, action or proceeding arising out of or relating to this Agreement. We hereby agree that service of any process, summons, notice or document by U.S. registered mail addressed to us shall be effective service of process for any action, suit or proceeding brought against us in any such court. You hereby irrevocably and unconditionally waive any objection to the laying of venue of any such suit, action or proceeding brought in any such court and any claim that any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient form. We agree that a final judgment in any such suit, action or proceeding brought in any such court shall be conclusive and binding upon us and may be enforced in any other courts to whose jurisdiction we are or may be subject, by suit upon such judgment. . . .
>
> This agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware.[5]

[5] *Id*. at 4-5.

Throughout December 2000, IBP engaged in the due diligence process with Tyson and Smithfield in order to facilitate a successful conclusion to their competition for the company. As is typical in such situations, the bidders made moves and counter-moves, and the target acted to encourage them to continuing bidding at successively higher prices.

Tyson and IBP differ sharply about the process of due diligence that occurred during this period. IBP asserts that it was straightforward with Tyson about serious accounting problems at a subsidiary, DFG Foods, that IBP had purchased in the fall of 1998 for $76.4 million. DFG makes kosher foods and other specialty items and accounts (according to IBP) for an immaterial amount of IBP's total operations.

IBP asserts that its Chairman, Robert Peterson, told Tyson that the extent of DFG's write-downs were uncertain, but would be at least $20 million over the $9 million write-down that had already been taken. On December 29, 2000, IBP's Chief Financial Officer, Larry Shipley, supposedly advised Tyson that a write-down of at least $35-

40 million would be required at DFG, and that the write-down could be even greater. IBP asserts that none of this news led Tyson to pull out of the then-hot and heavy bidding war, or to demand additional information.

By contrast, Tyson points out that on December 29, 2000, IBP's lawyers received a fax of a fifteen page comment letter from the Securities and Exchange Commission (the "SEC") that raised concerns about a number of IBP's public filings — including its most recent 10-K and its three most recent 10-Qs. This comment letter was not given to Tyson at that point.[6] Tyson claims that the comment letter cast doubt on the reliability of a great deal of the financial information on which it premised its negotiating posture.

[6] IBP argues that this was simply a mistake. Because the first few pages of the letter address disclosures related to the by-then moribund Rawhide transaction, the attorney who received it allegedly put it aside to focus on a special committee meeting the next day that involved the auction contest between Tyson and Smithfield.

When Tyson was declared the winner of the auction upon the coming of what purists regarded as the true millennium, Tyson was still unaware of the comment letter. On January 1, 2001, IBP, Tyson, and Lasso entered into the Merger Agreement. That Agreement contemplated that Tyson would acquire all of IBP's outstanding shares in a three-step transaction. Step one required Tyson to cause Lasso to make a tender offer for 50.1% of IBP's shares at $30 a share. Step two required Tyson to have Lasso make a tender offer of $30 of its Class A common stock (subject to collar provisions preserving value) for the remaining IBP shares. Step three involved a merger between Lasso and IBP in which non-tendering stockholders would receive $30 worth of Tyson Class A common stock.

The Merger Agreement contained a number of contractual warranties and representations, including that (i) the Form 10-K for the fiscal year ended December 25, 1999 (the "IBP 10-K") and the Form l0-Qs for each of the first three quarters of fiscal 2000 (the "IBP 10-Qs") "did not contain any untrue statement of a material fact or omit to state any material fact . . . necessary to make the statements therein not misleading"; (ii) the IBP 10-K and IBP 10-Qs "each fairly present, in all material respects, in conformity with generally accepted accounting principles applied on a consistent bases . . . the consolidated financial position of [IBP] and its consolidated subsidiaries as of the dates thereof'; and (iii) "there are no [undisclosed] liabilities of [IBP] or any subsidiary of any kind whatsoever . . ., other than . . . liabilities which individually or in the aggregate do not and could not reasonably be expected to have a Material Adverse Effect."[7] A schedule to the Merger Agreement, however, explicitly referred to the possibility of "further liabilities (in addition to IBP's restatement of earnings in its 3rd quarter 2000 [sic]) associated with certain improper accounting practices at DFG Foods."[8]

[7] Merger Agreement §§ 5.07, 5.08, 5.11.

[8] *Id*. Disclosure Schedule 5.11.

Tyson initiated its $30 cash tender offer on January 5, 2001, as required by the Merger Agreement. On January 10, 2001, the SEC comment letter was delivered to Tyson by IBP. Two days later, Tyson touted the IBP-Tyson combination in words that show that not all of George Orwell's prophecies failed to come true:

> The recently announced acquisition of IBP is going to transform Tyson Foods, Inc. (NYSE: TSN) into the ***preeminent protein provider*** going forward and immediately provide Tyson with the scale and management expertise needed to lead the industry, Tyson chairman, president and chief executive officer, John Tyson, told shareholders at the company's Annual Shareholders' Meeting today at the Walton Arts Center in Fayetteville, AR.[9]

[9] IBP Cross-claims ("CC") ¶ 29 (quoting Tyson Press Release) (emphasis added).

By late January, 2001, Tyson was becoming more cautious, however. It extended the tender offer until early February, citing the unresolved concerns of the SEC and its own reliance on the accuracy of IBP's public filings. Although Tyson remained committed to the combination, it signaled the possibility that its position could change depending on how things worked out with the SEC, which had by then referred the IBP matter to its Division of Enforcement.

On February 28, 2001, Tyson announced that it was terminating its tender offer. This had the effect of triggering a provision of the Merger Agreement that applied if Tyson had not consummated the tender offer as of that date. That provision required Tyson to restructure its offer to permit IBP stockholders a choice between $30 in cash or $30 worth of Tyson stock.

IBP announced on March 13, 2001 that it was restating the IBP 10-K and the IBP l0-Qs. These restatements included a charge to earnings at DFG of nearly $45 million, and other smaller changes that IBP asserts are not material in the overall scheme of its business. Tyson publicly responded to the restatements in a positive manner that expressed pleasure at the progress IBP was making with the SEC, but reserved judgment on whether any remaining issues would have an effect on the Merger.

On March 20, 2001, IBP released its fourth quarter 2000 earnings and its full year 2000 earnings. The results reflected a charge to goodwill of $60 million on account of DFG, a figure that IBP asserts is lower than its earlier disclosures suggested would be the case. IBP noted that this charge constituted less than 3% of IBP's equity value, and that it had resolved all of its financial issues with the SEC. Tyson, however, stresses that the disclosure revealed a decline in IBP's net earnings of 57.5% from 1999 levels.

According to IBP, Tyson used the March disclosures as an opportunity to retrade the deal price. IBP asserts that Tyson's CEO, John Tyson, told IBP's President, Richard Bond, that the charges had reduced IBP's value by $1.00 to $1.25 a share. Bond disagreed and asked John Tyson whether IBP should continue to provide Tyson with confidential information in aid of merger planning. IBP claims that John Tyson said that IBP and Tyson should continue to proceed "full speed ahead" on the tasks necessary to consummate the combination.

Without prior notice to IBP, however, Tyson issued a press release at the end of the market trading day on March 29, 2001 that included a letter from Tyson's General Counsel to IBP. The letter states as follows:

> On December 29, 2000, the Friday before final competitive negotiations resulting in the Merger Agreement, your counsel received comments from the Securities and Exchange Commission ("SEC") raising important issues concerning IBP's financial statements and reports filed with the SEC. As you know, we learned of the undisclosed SEC comments on January 10, 2001. Ultimately, IBP restated its financials and filings to address the SEC's issues and correct earlier misstatements. Unfortunately, we relied on that misleading information in determining to enter into the Merger Agreement. In addition, the delays and restatements resulting from these matters have created numerous breaches by IBP of representations, warranties, covenants and agreements contained in the Merger Agreement which cannot be cured.
>
> If our belief is proven wrong and the Merger Agreement is not rescinded, this letter will serve as Tyson's notice, pursuant to sections 11.01(f) and 12.01 of the Merger Agreement, of termination.[10]

[10] LBP Ex. B.

Shortly before the close of the business day in the courts of Washington County, Arkansas, Tyson filed a complaint (the "Original Complaint") against IBP in the Arkansas Court of Chancery. That complaint is described in more detail below.

During the entire period between January 1 and March 29, Tyson and IBP had been working full steam on the difficult integration issues posed in any merger of this magnitude. At the very time that Tyson announced its decision to abandon the Merger Agreement, consultants for the Merger parties were working at IBP headquarters on integration issues.

B. Tyson's Original Complaint

Tyson's Original Complaint in Arkansas alleges a count for fraud in the inducement and constructive fraud against IBP. The counts derive their essence from the same basic allegation, which is that IBP knew that its publicly reported financial statements and that other financial information it gave to IBP during due diligence were materially false and misleading. Rather than dispel the obvious misapprehensions under which Tyson was laboring, IBP supposedly allowed Tyson to enter into the Merger Agreement under false pretenses. Most particularly, Tyson's complaint notes IBP's failure to transmit the SEC comment letter to Tyson in a timely manner, and the consequence that Tyson inked the Merger Agreement without having seen that letter.

Although the Original Complaint contains a paragraph specifically referencing certain false representations of IBP that were contained in the Merger Agreement, that allegation does not manifest itself directly in the operative counts of the Original Complaint. Instead, both counts rely on the following allegations:

> 47. At meetings between IBP and Tyson between November 21, 2000 and the signing of the Merger Agreement, IBP provided extensive financial information to Tyson. IBP either knew this information regarding its financial condition was materially false and misleading when made, or acted recklessly. IBP intentionally concealed the existence and content of the SEC comment letter, which revealed IBP's fraudulent conduct, until after the Merger Agreement was signed.
>
> 48. Tyson and Lasso reasonably relied upon IBP's representations of its financial condition in entering into the Merger Agreement.[11]

[11] Original Complaint ¶¶ 47-48; *see also Id.* ¶¶ 52-53 (identical language).

It is therefore inarguable that the Original Complaint alleges that oral and written Evaluation Material covered by the confidentiality agreement was either false, misleading, or incomplete. Such allegations are strewn throughout the various paragraphs of the Original Complaint.[12]

[12] *See, e.g., Id.* ¶¶ 2, 3, 24, 26, 28-29, 31-32, 41, 43-45, 47-48, 52-53.

As relief for IBP's failures in this regard, Tyson sought rescission of the Merger Agreement, return of all monies paid by Tyson in connection with the Merger Agreement (including funds Tyson advanced to IBP to pay the Rawhide termination fee), and pre- and post-judgment interest.

C. IBP's Cross-claims

IBP was not well pleased by Tyson's surprise decision to pull out of the Merger Agreement and to sue IBP in Arkansas. It quickly reacted to Tyson's actions with claims of its own.

These claims were asserted in an answer and cross-claims that IBP filed in an action already pending in this court. That action was brought by shareholder plaintiffs who had originally attacked the Rawhide transaction as unfair. Once the auction involving Tyson and Smithfield was completed, the shareholder plaintiffs filed an amended complaint challenging the Merger Agreement with Tyson as unfair. The plaintiffs named Tyson as a defendant but never served them. For its part, IBP had moved to dismiss the shareholder action.

The cross-claims brought by IBP sought a declaration that Tyson had no legal right to terminate or rescind the Merger Agreement, and an order of specific performance requiring Tyson to consummate the transactions required by the Merger Agreement.

The cross-claims were filed with this court at 12:41 p.m. on March 30, 2001, fewer than five business hours after Tyson filed its Original Complaint and after Tyson first informed IBP that it was terminating the Merger Agreement.

In accordance with traditional practice in this court, IBP sought a conference with the court to set an expedited schedule. Counsel for Tyson were informed of the conference, appeared and participated without objection, and assented to the scheduling of a May 14 trial date, subject to Tyson's intention to file a motion to dismiss or stay the counter claims in favor of the Arkansas case.

D. Tyson's Amended Complaint

On April 5, 2001, Tyson amended the Original Complaint. The "Amended Complaint" for the first time pled a specific declaratory judgment count seeking, among other things, rescission of the Merger Agreement and other relief on the ground that IBP had breached its contractual representations and warranties.

The Amended Complaint was virtually identical to the Original Complaint except insofar as it contained this new count and a number of new paragraphs and sentences addressing IBP's alleged breaches of its contractual obligations. For example, paragraph one of the Amended Complaint contained a new sentence stating: "Additionally, Tyson and Lasso seek a declaratory judgment that IBP is in breach of representations and warranties made expressly in the Merger Agreement and that Tyson has validly terminated the Merger Agreement in the event that rescission is unavailable." The Amended Complaint also contained a new section headed "IBP's Breach of Representations and Warranties" that included six paragraphs not in the Original Complaint.

III. Legal Analysis of Tyson's Motion To Dismiss or Stay

Tyson seeks dismissal or a stay of this action on two alternative, but related grounds. As an initial matter, Tyson argues that its Arkansas action is a first-filed action that must given deference under the teaching of *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co*.[13] That case teaches that:

13 Del. Supr., 263 A.2d 281 (1970).

> [A] Delaware action will not be stayed as a matter of right by reason of a prior action pending in another jurisdiction involving the same parties and the same issues; that such stay may be warranted, however, by facts and circumstances sufficient to move the discretion of the Court; that such discretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues; that, as a general rule, litigation should be confined to the forum in which it is first commenced, and a defendant should not be permitted to defeat the plaintiffs choice of forum in a pending suit by commencing litigation involving the same cause of action in another jurisdiction of its own choosing; that these concepts are impelled by considerations of comity and necessities of an orderly and efficient administration of justice.[14]

14 *Id*. at 283.

Tyson contends that it won the race to the courthouse fair and square, and put the dispute between itself and IBP before a court capable of doing complete and prompt justice. Thus, this court should defer to its choice of forum.

Alternatively, Tyson argues that this action should be stayed under a traditional forum *non conveniens* ("FNC") analysis. It asserts that the relevant factors weigh in favor of Arkansas as the forum for the parties' dispute.

Under Delaware law, the question of whether the Arkansas action is a first-filed action has significance. Delaware courts are highly deferential to a plaintiffs choice of forum and respectful of the courts of its sister states. As a result, Delaware courts will only refuse to stay a later-filed Delaware in a "rare case."[15] Where the first-filed doctrine is not implicated, however, the trial court has the discretion to grant or deny the stay based on a reasoned application of the forum *non conveniens* factors.

15 *Azurix Corp; v. Synagro Technologies, Inc*., Del. Ch., C.A. No. 17509, 2000 Del. Ch. LEXIS 25, at *13, Steele, V.C. (Feb. 3, 2000) (*quoting Chrysler First Business Credit Corp. v. 1500 Locust L.P*., Del. Supr., 669 A.2d 104, 107 (1995).

A. Is Tyson's Arkansas Action First Filed?

In one easy sense, it is quite obvious that Tyson's action is the first filed one: it was filed first, by a margin of four to five business hours.[16] Contrary to Tyson's arguments, however, the *McWane* doctrine does not denude a trial court of all discretion simply based on the fact that one party won a filing race in a photo-finish. Rather, the Delaware courts have recognized that there are situations where actions should be considered to have been filed contemporaneously.

16 IBP has not pressed the argument that its cross-claims relate back to the filing of the shareholders' amended complaint, which the shareholder plaintiffs did not bother to serve on Tyson until after IBP's cross-claims were filed. See *In re Delta and Pine Land Company Shareholders Litigation*, Del. Ch., Cons. C.A. No. 17707, mem. op., Chandler, C. (July 17, 2000) (when a defendant to shareholders' suit alleging that a merger agreement was unfair filed a counter-claim seeking a declaration that it validly walked away from the agreement, that counter-claim did not relate back so as to trump a prior-filed action by the defendant's scorned merger partner seeking damages for breach of the merger agreement); *Joyce v. Cuccia*, Del. Ch., C.A. No. 14953, mem. op. at 8, Jacobs, V.C. (July 24, 1996 rev. Aug. 6, 1996) (refusing to accord first-filed treatment to a complaint that was never served on defendant until defendant had filed its own suit).

This case presents such a situation. As a practical matter, Tyson and IBP filed hours apart. Tyson won the race to the courthouse because it did not give its contractual partner any prior notice of termination.[17] Tyson did so at a time when it was otherwise acting as if the Merger process was ongoing. There is nothing inherently wrong with this tactic in the rough and tumble commercial world, but those who use it should not expect an insunnountable advantage if their scorned partner is able to file an action within five business hours. In the normal course of things, one might have expected Tyson to issue a notice of termination and see whether IBP sued it. Although Tyson has an affirmative claim to recover the Rawhide termination fee, this is a dispute in which IBP is at least as much of a natural plaintiff as Tyson.

17 *Service Corporation, Int'l v. The Loewen Group Inc*., 1996 U.S. Dist. LEXIS 19884, at *7-*8, Rainey, J. (Nov. 27, 1996) (where party filed suit before it gave notice to its adversary of action that would have likely led the adversary to sue, the court did not accord the party's filing first| filed status because its adversary was at an unfair disadvantage by having "nothing yet of which to complain" at the time the preemptive suit was filed).

In a similar situation, when commercial parties raced to the courthouse after a standstill in connection with a merger negotiation expired, this court decided that actions filed on a Friday afternoon and on the succeeding Monday morning were contemporaneously filed, stating:

> 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. Early the following Monday, Synagro filed the Texas Action. The parties filed only scant minutes apart, if one excluded the time the respective court officers 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. Support for my finding is borne out of this Court's desire to avoid rewarding the winner of a race to the courthouse.
>
> 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 plaintiff's choice of forum.[18]

18 *Azurix* 2000 Del. Ch. LEXIS 25, at *10-*12 (citations and quotations omitted). Although case law involving motions to dismiss or stay actions because of other pending actions are heavily fact dependent, the following cases stand generally for the proposition that courts will not give first filed status to actions filed in a trivially faster manner, especially where the first-filing party rushed into court without giving prior notice of its decision to eschew a non-litigious resolution to the problem facing the parties. *Friedman v. Alcatel Alsthom*, Del. Ch., 752 A.2d 544, 552 (1999); *Texas Instruments, Inc. v. Cyrix Corp*., Del. Ch., 1994 WL 96983, at *3-*4, Jacobs, V.C. (Mar. 22, 1994); *Williams Gas Supply Co. v. Apache Corp*., Del. Super., 1991 Del. Super. LEXIS 48, at *4-*5, Babiarz, J. (Feb. 12, 1991), *aff'd*, Del. Supr., 594 A.2d 34 (1991); *Playtex, Inc. v. Columbia Casualty Co*., Del. Super., 1989 Del. Super. LEXIS 179, at *11-*12, Del Pesco, J. (Apr. 25, 1989); *Service Corporation*, 1996 U.S. Dist. LEXIS 19884, at *7-*8.

That reasoning applies with full force here. Had Tyson unleashed its surprise attack on the morning of March 29, rather than the end of the business day, I have no doubt that IBP's complaint would have been filed in the same business day. As it was, Tyson denied IBP this opportunity, and IBP had to file the next business day, but within five business hours of IBP's filing. To call Tyson's action a "prior pending" one and thereby avoid a genuine inquiry into where the parties' dispute should be heard would sacrifice reason for the sake of a bright-

line rule of questionable efficiency and justice.[19] F or this very reason, the "kind of jockeying for position" that Tyson engaged in "has been an important factor in Delaware decisions which have denied "first-filed' status to such suits."[20]

19 The fact that the court treats these actions as contemporaneously filed does not mean that the first time-stamp should lose all relevance. In close cases where the issue of convenience is in equipoise, it makes sense as a matter of comity to regard the first time-stamp factor as a tipping one in a forum *non conveniens analysis*. This approach has the virtue of providing a simple way for courts to avoid being drawn into unseemly forum shopping debates between litigants. But what has troubled trial courts is the notion that a timing advantage of hours somehow divests a judge of the ability to make a reasoned decision that the action with the second time-stamp should proceed because it was filed in a forum that has distinct advantages in terms of convenience or its ability to do complete justice. Cases like these fall along a continuum and not into neat categories, and trial courts should have discretion to deal with their nuances in a proportionate way.

20 *Williams Gas Supply Co*., 1991 Del. Super. LEXIS 48, at *5.

Tyson's inconsequential timing advantage is not the primary reason the application of *McWane* is inappropriate in this case, however. As was previously shown, Tyson's Original Complaint pled two counts, both of which implicated the exclusive forum selection provision in the confidentiality agreement. That is, Tyson's Original Complaint involved only claims that, by contract, had to be asserted in the courts of this State. In this sense, then, it was IBP that first-filed in a court that could do complete justice over the parties' dispute.

To address that issue, Tyson amended the Original Complaint to state a count directly asserting claims under the Merger Agreement, and, in particularly arguing that IBP's had made false representations and warranties in that Agreement. Nonetheless, Tyson's Amended Complaint continues to allege counts within easy reach of the forum selection clause. In an attempt to get around this provision, Tyson argues that the confidentiality agreement shrank in importance after the Merger Agreement was executed. Although Tyson admits that the confidentiality agreement continues in full force and effect per the terms of the Merger Agreement itself, it claims that the only purpose of this continued existence is to permit the confidentiality agreement to govern claims regarding the continued confidentiality and use of the information provided to Tyson in due diligence.

But that reading of the confidentiality agreement guts an obvious and important purpose of that agreement, which emerges from its plain language. The confidentiality agreement was expressly designed to protect IBP against claims that Tyson was injured by incomplete or inaccurate information provided during due diligence, except to the extent that the information formed the basis for a representation that was later included in the Merger Agreement. The confidentiality agreement further protects IBP by unambiguously requiring Tyson to bring any claims arising out of the inadequacy of the "Evaluation Material" in the courts of Delaware under Delaware law.

Tyson has not argued that the forum selection clause in the confidentiality agreement was procured by fraud, and its arguments that its claims do not implicate the clause are refuted by its own pleadings in Arkansas. At the very least, therefore, the forum selection clause bars Tyson from pressing a majority of its claims in Arkansas.[21] As a theoretical matter, the Arkansas court could try to hear aspects of Tyson's claims, but in doing so it would undertake an exercise fraught with the danger that it was intruding on the domain accorded to this state's courts by the forum selection clause. In deciding that certain aspects of Tyson's claims fell outside the confidentiality agreement, the Arkansas court would thereby be required to interpret the language of that agreement, thus performing an exercise that the parties agreed would be done by the courts of this state. To be concrete, Tyson's ability to press fraudulent inducement and tort claims based on the Merger negotiation

process is dependent on the effect to be given to the confidentiality agreement's terms that purport to limit IBP's liability for any incomplete or inaccurate information communicated about IBP's operations during due diligence.[22] IBP bargained for the right to have such decisions made here; at the very least, such questions "relate to" the confidentiality agreement.[23] Therefore, the Arkansas court cannot do complete justice in this case.

21 *Chaplake Holdings, Ltd. v. Chrysler Corp*., Del. Super., 1995 Del. Super. LEXIS 463, at *17-*18, Babiarz, J. (Aug. 11, 1995)("forum selection clauses are 'prima facie valid' and should be 'specifically' enforced unless the resisting party 'could clearly show that enforcement would be unreasonable and unjust, or that the clause is invalid for reasons such as fraud or overreaching'") (*quoting M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 15 (1972)).

22 As IBP points out, Tyson's Original Complaint raises money damages claims that may be barred by a combination of the confidentiality agreement and § 11.02 of the Merger Agreement. Section 11.02 states that if a party terminates the Merger Agreement "no party shall under any circumstances have any monetary liability to any other party based upon a breach of any representation or warranty contained herein."

23 *Elf Atochem*, 727 A.2d at 294 (reading the language "arising out of' and "relating to" in a forum selection clause in an LLC agreement broadly).

For all these reasons, I conclude that the Arkansas action is not one that triggers the heightened deference required by *McWane*.

B. Should The Delaware Action Be Stayed On Grounds of Forum Non Conveniens?

The preceding analysis foreshadows my consideration of the forum *non conveniens* question. To prevail on pure FNC grounds, Tyson must convince me that, on balance, the relevant "forum non conveniens factors warrant the grant of a stay."[24] It has not done so.

24 *HFTP Investments, LLC v. ARIAD Pharmaceuticals, Inc*., Del. Ch., 752 A.2d 115, 120 (1999). The factors Delaware courts use to analyze questions like this are: "(I) the relative ease of access to proof, (2) the availability of compulsory process for witnesses, (3) the possibility of the view of the premises, (4) whether the controversy is dependent upon the application of Delaware law which the courts of this state more properly should decide than those of another jurisdiction, (5) the pendency or non-pendency of a similar action or actions in another jurisdiction, and (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive." *Id*. at 122-23; *Taylor v. LSI Logic Corp*., Del. Supr., 689 A.2d 1196, 1198-99 (1997).

While it is true that Arkansas will be more convenient for Tyson's witnesses, that is not a substantial factor. Depositions can be scheduled in a manner convenient to witnesses, and business travel is expected of top corporate executives at firms like Tyson. From the record, it appears that very little, if any, of the negotiations over the Merger Agreement occurred in Arkansas. Most, if not all, of the relevant activity occurred in South Dakota, where IBP's headquarters are located, or in New York City, where the parties' outside financial and legal advisors operated.[25] As a consequence, Arkansas presents little advantage from an evidence-gathering standpoint. It is just as easy, given modern litigation practice, to gather information and compel testimony in the Delaware action as it is in the Arkansas action. In this regard, it is notable that both Tyson and IBP are Delaware citizens. Indeed, its Delaware lawyers appear to be playing a lead role in the Arkansas Action. Tyson cannot, with a straight face, complain about the inconvenience of being sued here.[26]

25 Because of this factor and because it claims to have no presence in Arkansas, LBP argues that it is not subject to the personal jurisdiction of the Arkansas courts. I need not address this issue.

26 Tyson itself has litigated successfully as a plaintiff in this court. *See, e.g., In re Holly Farms Shareholders Litig.*, Del. Ch., 1998 Del. Ch. LEXIS 164, Hartnett, V.C. (Dec. 30, 1988) (granting preliminary injunction striking lock-ups, termination fees, and reimbursement provisions that impeded Tyson's ability to fairly compete in an auction for Holly Farms). Furthermore, this court has stated that as a normal matter:

> No Delaware corporation can, absent unusual circumstances, claim surprise or inconvenience of litigating against another Delaware corporation in the state of incorporation of both parties. As a result, how could either party credibly claim that practical considerations of economy or efficiency should prevent them from having to litigate issues arising from an agreement between them in their home state of incorporation?

This is especially so given the role that Delaware plays in this dispute. As noted, the confidentiality agreement is governed by Delaware law and the first two counts that Tyson pleads in Arkansas fall within the scope of that agreement's exclusive forum provision.[27] The agreement under which Tyson advanced the Rawhide termination fee is also governed by Delaware law, and Tyson is seeking to recover that fee. And though it is true that the Merger Agreement is governed by New York law as to its contractual terms, that factor does not render the Arkansas courts a preferable forum to Delaware. Moreover, the Merger Agreement is governed by Delaware law as to corporation law issues, because of all of the parties to the Merger Agreement have chosen Delaware as their state of incorporation. In noting that Delaware law governs many of the issues between the parties, I do not mean to imply in any way that the Arkansas courts would not faithfully and expertly apply our law. I am confident that they would.[28] Rather, I simply note that Tyson does not face prejudice by the procession of this suit here.

27 Tyson contends that its first two claims in the Arkansas action are governed by Arkansas law. It bases this assertion on cursory allegations that that state is "where much of the relevant activity occurred and where Tyson was injured . . ." Tyson Op. Br. at 16. Even if this is true, Tyson's tort claims could still be precluded by the confidentiality agreement; if not precluded, they could be governed by Delaware law as a result of that agreement; and, in any event, must be tried here as a result of that agreement's forum selection clause. As a theoretical matter, it is also not immediately apparent why Tyson, a large publicly traded corporation with operations and stockholders spread throughout the nation, is less injured here — in its state of incorporation — than it is in Arkansas — home of its headquarters.

28 Delaware courts regularly defer to the courts of their sister states, as just a small sampling of cases indicates. *Azurix*, 2000 Del. Ch. LEXIS 25 (deferring to a Texas action that was filed hours after a Delaware suit); *Simon*, 2000 Del. Ch. LEXIS 150 (dismissing Delaware action in reliance on exclusive forum clause providing for dispute to be heard in Nevada); *Dura*, 713 A.2d 925 (deferring to Alabama action that was first-filed by a few days); *Texas Instruments*, 1994 Del. Ch. LEXIS 31 (deferring to later filed Texas action); *Williams Gas Supply*, 1991 Del. Super. LEXIS 48 (dismissing Delaware action in favor of Colorado action filed two weeks later than Delaware action); *see also IM2 Merchandising Manufacturing, Inc. v. Tirex Corp.*, Del. Ch., 2000 Del. Ch. LEXIS 156, Strine, V.C. (Nov. 2, 2000) (dismissing Delaware action when no prior action was pending on FNC grounds, and indicating that case should proceed in Quebec, Canada).

As a practical matter, the fact that Tyson's claims are so intertwined with the confidentiality agreement makes this forum decisively advantageous. This court has the jurisdictional authority to hear all of the claims between the parties; the Arkansas courts do not. Proceeding here thus promotes judicial economy and litigative efficiency for the parties.

For all these reasons, I conclude that this action should not be stayed on forum *non conveniens* grounds.

IV. Conclusion

Tyson's motion to dismiss or stay is hereby DENIED. IT IS SO ORDERED.

This case presents a factual scenario far different from that which existed in *Dura Pharmaceuticals, Inc. v. Scandipharm, Inc*., Del. Ch., 713 A.2d 925 (1998), a case cited by Tyson. In *Dura*, Dura had terminated a merger agreement on November 29, 1997. On January 16, 1998, Scandipharm sued Dura to enforce the merger agreement in Alabama. Dura reacted with a suit in Delaware filed within a few business days. As Vice Chancellor Lamb noted in giving Scandipharm's Alabama suit first-filed status, "[t]here was "no race to the courthouse' . . . .On the contrary, both parties had been free to file suit for several weeks." *Id*. at 929. That is not true here because Tyson filed before giving IBP the termination notice that would have given IBP reason to sue. Tyson's reason for doing so was obvious: to declare itself the winner of a race before IBP knew there was a reason to run.

Delaware courts have not hesitated to enforce forum selection clauses that operate to divest the courts of this State of the power they would otherwise have to hear a dispute. *See, e.g., Elf Atochem North Am., Inc. v. Jaffari*, Del. Supr., 727 A.2d 286, 292-96 (1999) (affirming dismissal of an action on grounds that a Delaware Limited Liability Company had, by the LLC agreement, bound its members to resolve all their disputes in arbitration proceedings in California); *Simon v. Navelher, Series Fund*, Del. Ch., 2000 Del. Ch. LEXIS 150, Strine, V.C. (Oct. 19, 2000) (dismissing an indemnification claim because a contract required the claim to be brought in the courts of Reno, Nevada). The courts of Arkansas are similarly respectful of forum selection clauses:

> We cannot refuse to enforce such a clause, which we have concluded is fair and reasonable and which we believe meets the due process test for the exercise of judicial jurisdiction. To do otherwise would constitute a mere pretext founded solely on the forum state's preference for its own judicial system and its own substantive law.
>
> Accordingly, we conclude that the express agreement and intent of the parties in a choice of forum clause should be sustained even when the judicial jurisdiction over the agreement is conferred upon a foreign state's forum.

Nelms v. Morgan Portable Bldg. Corp., 808 S.W.2d 314, 318 (Ark. 1991).

Asten v. Wanger, Del. Ch., 1997 WL 634330, at *1, Steele, V.C. (Oct. 3, 1997).