

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TSANG MUN TING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N14C-12-067 WCC
	)	
SILVER DRAGON RESOURCES,	)	
INC., TRAVELLERS	)	
INTERNATIONAL, INC.,	)	
and MARC HAZOUT,	)	
	)	
Defendants.	)	

Submitted: February 18, 2015

Decided: June 3, 2015

**Defendant Travellers International, Inc.’s Motion to Dismiss  
for Lack of Personal Jurisdiction is GRANTED.**

**Defendant Marc Hazout’s Motion to Dismiss  
for Lack of Personal Jurisdiction is DENIED.**

**OPINION**

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**CARPENTER, J.**

Before this Court is Defendants Travellers International, Inc. (“Travellers”) and Marc Hazout’s (“Hazout”) Motion to Dismiss for Lack of Personal Jurisdiction. For the foregoing reasons, Travellers’ Motion is hereby **GRANTED** and Hazout’s Motion is **DENIED**.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In the Spring of 2013, Plaintiff Tsang Mun Ying (“Plaintiff”) as part of a group of affiliated investors (“Investors”) entered into negotiations with Defendant Silver Dragon (“Silver Dragon”) to acquire operating control of the Company by appointing a new slate of directors to replace all but one of the directors on Silver Dragon’s then current board.<sup>1</sup> In exchange, the Investors would provide loans to Silver Dragon totaling \$3,417,265. Towards the end of December 2013, the terms of the negotiations were put into a written agreement (“Agreement”) to be executed by the Investors and the existing board of Silver Dragon. This Agreement contained choice of law and choice of forum provisions designating application of Delaware law and dictating that any action relating to the Agreement would be brought in Delaware.<sup>2</sup>

Throughout December, Hazout; the Director, President, CEO and Principal Financial and Accounting Officer for Silver Dragon, made representations to the

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<sup>1</sup> See Complaint at ¶ 18.

<sup>2</sup> See *Id.* at ¶¶ 19-21.

Investors, including Plaintiff, that the Agreement would be signed by the resigning directors, would be delivered to them within days, and that Silver Dragon's board would resign on December 31, 2013.<sup>3</sup> On December 30, 2013, in reliance upon representations that the executed documents would be delivered the next day, Plaintiff made a wire transfer to Silver Dragon in the amount of \$1,014,140.<sup>4</sup> Shortly after receiving the funds, counsel for Silver Dragon wrote to the Investors indicating that they were waiting on one more signature, but in the meantime attached the signatures of three of the four directors, including Hazout.<sup>5</sup>

Unfortunately, the Agreement was never completed because one of Silver Dragon's directors refused to execute the Agreement.<sup>6</sup> However, the Complaint alleges that despite repeated written demands for the return of the funds that had been advanced, Defendants refuse to return payment to Plaintiff. Plaintiff asserts that the funds were used to pay various debts of Silver Dragon, including approximately \$750,000 used to pay Travellers, whose President and sole shareholder is Hazout.

Plaintiff asserts in Counts I, II and III of the Complaint, that Defendants Silver Dragon, Travellers and Hazout were unjustly enriched, committed fraud,

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<sup>3</sup> See *Id.* at ¶ 26.

<sup>4</sup> See *Id.* at ¶ 27.

<sup>5</sup> See *Id.* at ¶¶ 29-30.

<sup>6</sup> See *Id.* at ¶ 31.

and made a fraudulent transfer in violation of 6 *Del. C.* § 1304. Travellers and Hazout have moved to dismiss these claims pursuant to Superior Court Rule 12(b)(6) for lack of personal jurisdiction.

Silver Dragon is a publicly traded company incorporated in Delaware with its principal place of business in Toronto, Canada. Travellers is a private investment banking company incorporated in Ontario, Canada, with its principal place of business in Toronto, Canada. Travellers is owned and controlled by a single stockholder, Hazout, an individual residing in Toronto, Canada who also serves as Director, President, CEO and Principal Financial and Accounting Officer for Silver Dragon.<sup>7</sup>

### **STANDARD OF REVIEW**

On a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), the plaintiff is obligated to establish a prima facie case, that personal jurisdiction is sound.<sup>8</sup> “Although the plaintiff must plead specific facts and cannot rely on mere conclusory assertions, the factual record is read in the light most favorable to the plaintiff.”<sup>9</sup> “There are two legal questions to be answered in considering a motion under Rule 12(b)(2)...whether there is a statutory basis for

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<sup>7</sup> See *Id.* at ¶¶ 14-15.

<sup>8</sup> See *In re USACafes*, 600 A.2d 43, 47 (Del. Ch. 1991).

<sup>9</sup> *Mobile Diagnostic Group Holdings, LLC v. Suer*, 972 A.2d 799, 802 (Del. Ch. 2009).

serving the defendant [and] whether this court's exercise of personal jurisdiction over the defendants is consistent with the Due Process Clause."<sup>10</sup>

## **DISCUSSION**

Plaintiff asserts jurisdiction is proper because Hazout consented to jurisdiction in Delaware by signing the Agreement containing a mandatory forum selection clause. It is undisputed that Hazout, along with two of the other three directors, signed the Agreement providing for the resignations of the four directors in exchange for roughly \$3.4 million to cover the debts of Silver Dragon. It is also clear that a fully executed Agreement was never completed because one of the directors refused to sign. While the Court is sympathetic to the Plaintiff's unfortunate situation, it simply finds the Plaintiff's arguments attempting to enforce the Agreement unconvincing. The deal here was built upon the agreement of Silver Dragon's directors giving up their seats on the Board, and once one of them balked at that requirement, the deal was dead in spite of the other Board members' agreement. There is nothing in the Agreement that allows for the bifurcation argued by the Plaintiff and to suggest otherwise is either simply a desperate attempt to save the deal, or a created premise to attempt to gain jurisdiction. In spite of counsel's efforts, at times they cannot save the unwise

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<sup>10</sup> *Sample v. Morgan*, 935 A.2d 1046, 1056 (Del. Ch. 2007) (citing *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 438 (Del. 2005)).

decisions of the client to make partial payment before obtaining the executed Agreement. It appears Counsel recognized this situation by failing to assert in the Complaint that a binding contract existed that would support a breach of contract claim. The Court agrees. Thus the Court will focus its analysis on 10 *Del. C.* § 3114, and Delaware’s long arm statute, 10 *Del. C.* § 3104.

Plaintiff also asserts that jurisdiction over Travellers and Hazout is proper pursuant to Delaware’s long arm statute, 10 *Del.C.* § 3104(c)(1). Under this statute, Delaware courts can exercise personal jurisdiction over a defendant for a claim that “arises from” a “jurisdictional act” enumerated in the statute.<sup>11</sup> Section 3104(c)(1) gives this Court personal jurisdiction over any nonresident who “transacts any business or performs any character of work or service in the State.”<sup>12</sup> “In order for this Court to exercise jurisdiction under 3104(c)(1) ‘some act must actually occur in Delaware.’”<sup>13</sup>

Plaintiff contends that jurisdiction over Travellers and Hazout is proper because Hazout’s control over Silver Dragon allowed him to misappropriate the funds Plaintiff provided to Silver Dragon, a Delaware corporation, and direct the funds to Travellers, a creditor of Silver Dragon which Hazout owns. Plaintiff does

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<sup>11</sup> *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at \*8 (Del.Ch. July 14, 2008).

<sup>12</sup> 10 *Del. C.* § 3104(c)(1).

<sup>13</sup> *Mobile Diagnostic Group*, 972 A.2d at 804 (citing *Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939, at \*17 (Del. Super. Jan. 17, 2002)).

not allege that Hazout signed the contract in Delaware, participated in negotiations in Delaware, nor that he committed any act in Delaware. Furthermore, the fact that Hazout signed an Agreement which contained a Delaware choice of law provision is not sufficient to “constitute a transaction of business by [the Defendants] in Delaware within the meaning of § 3104(c)(1).”<sup>14</sup>

Thus, this Court finds that the Plaintiff has not presented sufficient facts to establish personal jurisdiction over Travellers or Hazout under 10 *Del. C.* § 3104(c). Unfortunately, the alleged control over and misappropriation of funds of a Delaware corporation, without allegations of actual conduct in Delaware is insufficient to establish jurisdiction under Delaware’s long arm statute. Because Travellers and Hazout did not have any contacts in Delaware, the Plaintiff cannot establish jurisdiction under Delaware’s long arm statute. Therefore, this Court finds that Travellers and Hazout are not subject to personal jurisdiction pursuant to 10 *Del. C.* § 3104(c)(1).

Plaintiff also asserts personal jurisdiction over Hazout pursuant to 10 *Del. C.* § 3114, which provides for the service of process on non-resident directors:

in all civil actions or proceedings brought in this State, by or on behalf of, or *against such corporation*, in which such director, trustee or member *is a necessary or proper party*, or in any action or proceeding against such director, trustee or member for violation of his duty in such capacity....<sup>15</sup>

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<sup>14</sup> *Mobile Diagnostic Group*, 972 A.2d at 805.

<sup>15</sup> 10 *Del. C.* § 3114 (*emphasis added*).

In addressing whether a defendant has been lawfully subjected to the jurisdiction of this Court, the Court must determine the constitutionality of requiring the defendant to defend that claim in this jurisdiction, and whether a statute of this state authorizes assertion of such power.<sup>16</sup> For the reasons that follow, I conclude that there is a constitutionally proper basis to subject Hazout to the jurisdiction of this Court.

“The constitutional standard for determining whether a state may exercise judicial power over a person is fairness and substantial justice.”<sup>17</sup> Central to the particularized inquiry into the fairness of asserting jurisdiction, are the “purposive actions of the would-be defendant and the reasonable expectation of one in his position.”<sup>18</sup> “Thus, the court asks whether it should have been reasonably anticipated by such a person that his or her actions might result in the forum state asserting personal jurisdiction over him in order to adjudicate disputes arising from those actions.”<sup>19</sup> “A number of factors may go into this decision. The purposeful acts of defendant are the focus of attention but those acts need not occur within the jurisdiction, so long as they create some substantial relationship with the forum

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<sup>16</sup> See *In re USACafes*, 600 A.2d at 50.

<sup>17</sup> *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>18</sup> *In re USACafes*, 600 A.2d at 50.

<sup>19</sup> *Id.* at 50-51 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297).

jurisdiction.”<sup>20</sup> The Supreme Court of the United States has held that when a person purposefully acts to create a relationship, “even of some minimal kind, with the forum state, then ‘the forum state’s interest in adjudicating the dispute’ should be given weight in determining if [] exercise of jurisdiction would comport with fundamental notions of fair play and substantial justice.”<sup>21</sup>

It is true that earlier cases of Delaware courts have implied that it “would be unconstitutional for Delaware to attempt to compel the appearance of directors here to litigate any claims other than claims for breach of their fiduciary duty to the corporation....”<sup>22</sup> However, this Court agrees with Chancellor Allen that it is not an exclusive test. The constitutional test set forth in the cases decided by the Supreme Court of the United States, requires the application of practical and common sense judgment in balancing the interests of the incorporating state and the fairness to the defendant under all of the particular circumstances.<sup>23</sup>

Here, “a realistic evaluation of the relationship” Hazout has established with Delaware, requires the conclusion that it is in keeping with traditional notions of fair play and substantial justice to require him to defend these claims in this

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<sup>20</sup> *In re USACafes*, 600 A.2d at 51 (citing *Burger King*, 471 U.S. 462, 476(1985)).

<sup>21</sup> *In re USACafes*, 600 A.2d at 51 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292).

<sup>22</sup> *In re USACafes*, 600 A.2d at 52 (citing *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263 (Del. Super. 1982); *Hana Ranch, Inc. v. Lent*, 424 A.2d 28 (Del. Ch. 1980)).

<sup>23</sup> See *In re USACafes*, 600 A.2d at 52.

jurisdiction.<sup>24</sup> In assuming his position as a director of a Delaware corporation, Hazout accepted certain duties under Delaware law and this State has a public interest in enforcing these duties. The State is “obliged to govern the exercise of that power insofar as the issues of corporate power and fiduciary obligation are concerned.”<sup>25</sup> The wrongs here are not tort or contract claims unrelated to the internal affairs of a Delaware corporation, instead these claims involve the misuse of Hazout’s position as a director of a Delaware corporation to commit fraud and a fraudulent transfer. Where a Defendant misuses his position within a Delaware corporation to commit fraud adverse to the corporation or others, this Court is of the opinion that Delaware courts have an obligation to govern those claims. Furthermore, the Court finds it is in keeping with traditional notions of fairness and substantial justice to require those who have chosen to serve as directors of a Delaware corporation to defend allegations of fraud that allegedly occurred in their management of the corporation.<sup>26</sup>

Having determined that the Court may constitutionally exercise jurisdiction over Hazout on these claims, the Court must next decide whether the director’s consent statute, 10 *Del. C.* § 3114, permits service of process on him for such

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (citing *Shaffer v. Heitner*, 433 U.S. 186, 222–24 (1977) (Brennan J., concurring in part and dissenting in part)).

claims. Section 3114 provides that “accepting election or appointment to a directorship of a Delaware...is a consent to jurisdiction in suits relating to the defendant's capacity as director.”<sup>27</sup>

The Supreme Court of Delaware has held where a defendant accepted “their directorship[] with explicit statutory notice, via § 3114, that they could be haled into the Delaware Courts to answer for alleged breaches of the duties imposed on them by the very laws which empowered them to act in their corporate capacities,” jurisdiction is proper.<sup>28</sup> As the Court held in *Armstrong v. Pomerance*, “by purposefully availing [himself] of the privilege of becoming [a] director of a Delaware corporation, [Defendant] has thereby accepted significant benefits and protections under the laws of this State” and as such, requiring him to “impliedly consent to the assertion of Delaware in personam jurisdiction [] in actions alleging breach of [his] fiduciary obligations [] does not seem unreasonable, at least so long as the consent requirement serves a legitimate State purpose.”<sup>29</sup>

Here, there is no dispute that Hazout was a director of a Delaware corporation and thus consented to service of process under § 3114. However, what is disputed is whether § 3114 can be used to obtain jurisdiction over directors for

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<sup>27</sup> *Armstrong v. Pomerance*, 423 A.2d 174, 175 (Del. 1980).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

claims other than for breach of fiduciary duty. Although the Court agrees that Delaware courts have attempted to narrow the scope of § 3114 only to claims of a fiduciary nature, Delaware courts have also held that § 3114 applies to fraud claims that are sufficiently related and “predicated on the same nucleus of facts” as a fiduciary duty claim.<sup>30</sup> Although no fiduciary duty claims were alleged here, it is clear to the Court that the alleged misconduct would be adverse to Hazout’s fiduciary duty to Silver Dragon. It is alleged that Hazout used his position as director of a Delaware corporation to commit fraud by transferring approximately \$750,000 of a payment made by Plaintiff to Silver Dragon, to a creditor of the company which is owned by Hazout. Hazout acted in his corporate capacity as Silver Dragon’s Director, President, CEO and Principal Financial and Accounting Officer when he transferred the money to his company, Travellers. If proven, that conduct would be in contradiction to his obligations as a director of a Delaware corporation and traditional notions of justice and fair play require the Court to hold Hazout accountable for misusing his position. Therefore, the Court finds jurisdiction over Hazout is viable and proper under 10 *Del. C.* § 3114(b).

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<sup>30</sup> *Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at \*11 (Del. Ch. 2006) (citing *Hovde Acquisition, LLC v. Thomas*, 2002 WL 1271681, at \*4 n .16 (Del. Ch. 2002); *Infinity Investors Ltd. v. Takefman*, 2000 WL 130622, at \*6 (Del.Ch. 2000)).

## CONCLUSION

For the reasons set forth in this Opinion, the Court finds no personal jurisdiction is established against Travellers International Inc., and therefore the Motion to Dismiss is **GRANTED**. However, the Court does find personal jurisdiction over Hazout and the Motion to Dismiss him from the litigation is **DENIED**.

**IT IS SO ORDERED.**

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.